NAVIGATING THE TRUSTEE’S DUTY TO DISCLOSE

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I. FIDUCIARY RISK AND THE DUTY TO DISCLOSE.

A. The trustee’s fiduciary obligations include the trustee’s duty to disclose information to the trust beneficiaries. The scope of that duty will be defined by the terms of the governing instrument and applicable law.

B. Attempts to provide uniformity to state laws concerning the duty to disclose have been largely unsuccessful, increasing the burden on trustees attempting to define the scope of their obligations with respect to disclosure of information.

C. Generally speaking, a trustee who acts in good faith in carrying out his fiduciary duties will not be liable to the beneficiaries for losses to the trust. Historically, open disclosure of information to beneficiaries has been viewed as indicia of a trustee acting in good faith.

D. Depending on state law, disclosure of information may commence the running of the statute of limitations on a surcharge action against the trustee.

E. A trust agreement that restricts a trustee’s ability to disclose information may also prevent the trustee from taking advantage of risk management tools under the Uniform Trust Code (UTC) (where enacted) and other state laws, which include:

   1. Entering into binding nonjudicial settlement agreements with trust beneficiaries.

   2. Shortening the statute of limitations on trust contests.

   3. Limiting a beneficiary’s right to object to a terminating distribution.

   4. Obtaining beneficiary consents, releases, and ratifications.
5. Shortening the statute of limitations on surcharge actions against the trustee.

II. CONTENTS, TIMING AND DELIVERY OF DISCLOSURE.

A. The specific information that must or should be disclosed to beneficiaries will vary depending on:
   1. The terms of the governing instrument and the grantor’s intent.
   2. Applicable law.
   3. The nature of the beneficiary’s interest.
   4. The age, capacity, and sophistication of the beneficiary.
   5. The nature of the trust assets and transactions.
   6. The identity and capacity of the trustee.
   7. The size and complexity of the trust.
   8. Beneficiary requests.

B. Depending on consideration of these and other factors, disclosure to beneficiaries may include any or all of the following:
   1. A full copy of the trust governing instrument, including schedules.
   2. The name and contact information of all trustees, and their acceptance of fiduciary duties.
   3. The death of the settlor and the date on which the trust became irrevocable.
   5. Identification of trust assets and investments and their market values.
   7. Identification of all liabilities and costs.
   8. Accounting of receipts and disbursements.
  10. Standards for distributions.
  11. Restrictions on trust investment policy.
  12. Tax objectives of the trust.
  13. Beneficiary powers as to removal of trustees.
15. Identification of trust counsel.
16. Trustee actions relevant to the beneficiary's interests.
17. Additional information reasonably requested by the beneficiary.


1. Mrs. Fletcher executed a revocable trust agreement with herself as trustee. The trust agreement called, in part, for the creation of three $50,000 trusts, one each for the benefit of her son, James, and her grandchildren Andrew and Emily. She named her other son Henry and F&M Bank as her successors as trustee under the trust agreement. Mrs. Fletcher died in 1994, and the successor trustees established the three separate $50,000 trusts. In 1995, James sued the successor trustees for full copies of all trusts created by Mrs. Fletcher (beyond the pages of the revocable trust agreement which related to his separate trust—which had been provided by the successor trustees).

2. The successor trustees demurred to James' complaint on the basis that James had received the terms of the trust agreement and accountings related to his separate trust, and denied that he was entitled to the remainder of the information sought. The trial court concluded that James was entitled to a full copy of all trust instruments referred to in the complaint.

3. On appeal, the Virginia Supreme Court found that the record failed to establish that Mrs. Fletcher restricted the disclosure of the entire trust agreement to the beneficiaries, and noted that the trust agreement was silent on the matter. The Court affirmed the trial court and noted as follows:

   The information not disclosed may have a material bearing on the administration of the Trust Agreement insofar as the beneficiary is concerned. For example without access to the Trust Agreement (even though there are numerous separate trusts established), the beneficiary has no basis upon which he can intelligently scrutinize the Trustees' investment decisions made with respect to the assets revealed on Schedule “A”. The beneficiary is unable to evaluate whether the Trustees are discharging their duty to use “reasonable care and skill to make the trust property productive”. Also, the beneficiary is entitled to review the trust documents in their entirety in order to assure the Trustees are discharging their duty to deal impartially with all the beneficiaries within the restrictions and conditions imposed by the Trust Agreement.
D. The timing of disclosure may be imposed by state law, or may be driven by the trustee’s desire to take advantage of tools under the UTC or other state laws. More frequent disclosures may be preferable for various reasons, including beneficiary relations reasons.

E. Monitoring the trust and the beneficiaries can alert the trustee to events that may modify the trustee’s duties or give rise to new duties or new notice recipients, such as:
   1. The death of the grantor.
   2. The death of the grantor’s spouse.
   3. The birth or death of beneficiaries.
   4. The birthdays of beneficiaries.
   5. Other triggering events under governing instruments.
   7. Significant law changes.

F. Method of the delivery of the disclosure is the subject of debate. Does electronic delivery, e.g. by e-mail, constitute proper delivery? What if the beneficiary is alerted by e-mail that a statement is available, but is required to actively log-on to a secure website to retrieve the statement?
   1. Some states require that certain disclosures be sent by non-electronic mail. See e.g. Sec. 813(b) of the Massachusetts Uniform Trust Code which provides: “Within 30 days after acceptance of the trust or the trust becomes irrevocable, whichever is later, the trustee shall inform, in writing, the qualified beneficiaries of the trustee’s name and address. The information shall be delivered or sent by ordinary first class mail.”
   2. It is not entirely clear whether making an account statement available on line would constitute “delivery” of an accounting in order to begin the running of a relevant statute of limitations period. Some state bars are considering making this clear by providing some protections for beneficiaries, including (i) ensuring that the statements remain on line for a certain period of time, (ii) an e-mail must be sent to a beneficiary when the statement becomes available and the email must contain appropriate information to advise the beneficiary of his rights, and (iii) there must be some monitoring to ensure that the e-mail addresses of beneficiaries are current.

III. DEFINING THE DUTY TO DISCLOSE AT COMMON LAW.

A. Section 173 of the Restatement 2nd of Trusts: The trustee is under a duty to the beneficiary to give him upon his request at reasonable times
complete and accurate information as to the nature and amount of the trust property, and to permit him or a person duly authorized by him to inspect the subject matter of the trust and the accounts and vouchers and other documents relating to the trust.

B. Comments to Section 173:

1. **Duty to permit examination by accountant.** The trustee is under a duty to permit an accountant to examine the trust securities, accounts, vouchers and other documents if the beneficiary so requests.

2. **What need not be communicated.** The trustee is privileged to refrain from communicating to the beneficiary information acquired by the trustee at his own expense and for his own protection. Thus, he is privileged to refrain from communicating to the beneficiary opinions of counsel obtained by him at his own expense and for his own protection.

3. **Terms of the trust.** Although the terms of the trust may regulate the amount of information which the trustee must give and the frequency with which it must be given, the beneficiary is always entitled to such information as is reasonably necessary to enable him to enforce his rights under the trust or to prevent or redress a breach of trust.

4. **Duty in the absence of a request by the beneficiary.** Ordinarily the trustee is not under a duty to the beneficiary to furnish information to him in the absence of a request for such information. As to his duty to render accounts, see § 172. In dealing with the beneficiary on the trustee’s own account, however, he is under a duty to communicate to the beneficiary all material facts in connection with the transaction which the trustee knows or should know. See § 170(2). Even if the trustee is not dealing with the beneficiary on the trustee’s own account, he is under a duty to communicate to the beneficiary material facts affecting the interest of the beneficiary which he knows the beneficiary does not know and which the beneficiary needs to know for his protection in dealing with a third person with respect to his interest. Thus, if the beneficiary is about to sell his interest under the trust to a third person and the trustee knows that the beneficiary is ignorant of facts known to the trustee which make the interest of the beneficiary much more valuable than the beneficiary believes it to be the trustee is under a duty to the beneficiary to inform him of such facts.
C. **Section 82 of the Restatement (Third) of Trusts:**

1. Except as provided in § 74 (revocable trusts) or as permissibly modified by the terms of the trust, a trustee has a duty:
   a. promptly to inform fairly representative beneficiaries of the existence of the trust, of their status as beneficiaries and their right to obtain further information, and of basic information concerning the trusteeship;
   b. to inform beneficiaries of significant changes in their beneficiary status; and
   c. to keep fairly representative beneficiaries reasonably informed of changes involving the trusteeship and about other significant developments concerning the trust and its administration, particularly material information needed by beneficiaries for the protection of their interests.

2. Except as provided in § 74 or as permissibly modified by the terms of the trust, a trustee also ordinarily has a duty promptly to respond to the request of any beneficiary for information concerning the trust and its administration, and to permit beneficiaries on a reasonable basis to inspect trust documents, records, and property holdings.

D. **Section 83 of the Restatement (Third) of Trusts:** A trustee has a duty to maintain clear, complete, and accurate books and records regarding the trust property and the administration of the trust, and, at reasonable intervals on request, to provide beneficiaries with reports or accountings.

E. **Scott on Trusts, Section 173:** The trustee is under a duty to the beneficiaries to give them on their request at reasonable times complete and accurate information as to the administration of the trust. The beneficiaries are entitled to know what the trust property is and how the trustee has dealt with it. They are entitled to examine the trust property and the accounts and vouchers and other documents relating to the trust and its administration. Where a trust is created for several beneficiaries, each of them is entitled to information as to the trust. Where the trust is created in favor of successive beneficiaries, a beneficiary who has a future interest under the trust, as well as a beneficiary who is presently entitled to receive income, is entitled to such information, whether his interest is vested or contingent. A beneficiary is entitled to inspect opinions of counsel procured by the trustee to guide him in the administration of the trust. It is held, however, that where there is a conflict of interest between the trustee and the beneficiaries and the trustee procures an opinion of counsel for
his own protection, the beneficiaries are not entitled to inspect the opinion. Thus, in *Talbot v. Marshfield* the trustees took the opinion of counsel as to whether they were justified in making an advance to some of the beneficiaries, and thereafter when a suit had been instituted against them to restrain them from making such advances, they took a second opinion as to their defense in the suit. Some of the beneficiaries brought a proceeding to compel the trustees to permit them to inspect the opinions of counsel. The court held that the beneficiaries were entitled to inspect the first opinion but not the second. The first opinion was taken to guide the trustees in the administration of the trust and the expense of obtaining the opinion was payable out of the trust estate, and all the beneficiaries were therefore entitled to see it. On the other hand, the second opinion was obtained by the trustees to guide them in their defense of the suit that had been brought, and the expense of procuring the opinion can be charged against the estate only if it ultimately appears that *it is properly chargeable against the estate.*

**IV. DEFINING THE DUTY BY STATUTE**

**A. THE UNIFORM TRUST CODE.**

1. The Uniform Trust Code (“UTC”) is a codification of the law of trusts prepared by The National Conference of Commissioners on Uniform State Laws (“NCCUSL”). The goal of the UTC is uniformity of trust law across the country.

2. The UTC, with state variations, has thus far been enacted in 26 U.S. jurisdictions: Alabama, Arizona, Arkansas, District of Columbia, Florida, Kansas, Maine, Massachusetts, Michigan, Missouri, Montana, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia, West Virginia, and Wyoming.
   a. The UTC has been introduced as a bill for enactment in New Jersey.

3. The UTC imposes several distinct duties to provide information to beneficiaries, all of which are located in Section 813 (Duty to Inform and Report).

4. The concept of the “qualified beneficiary” is important to understanding Section 813. Section 103 of the UTC defines “qualified beneficiary” as a beneficiary who, on the date the beneficiary’s qualification is determined:
   a. is a distributee or permissible distributee of trust income or principal;
b. would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in subparagraph (a) terminated on that date without causing the trust to terminate; or

c. would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

5. **Duties.** UTC section 813 imposes several distinct duties on trustees:

a. **813(a) (Duty to Keep Reasonably Informed):** A trustee shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests.

b. **813(a) (Duty to Respond to Requests for Information):** Unless unreasonable under the circumstances, a trustee shall promptly respond to a beneficiary's request for information related to the administration of the trust.

c. **813(b)(1) (Duty to Provide a Copy of the Trust Instrument):** A trustee...upon request of a beneficiary, shall promptly furnish to the beneficiary a copy of the trust instrument.

d. **813(b)(2) (Duty to Notify of Acceptance of Trusteeship):** A trustee...within 60 days after accepting a trusteeship, shall notify the qualified beneficiaries of the acceptance and of the trustee's name, address, and telephone number.

e. **813(b)(3) (Duty to Notify of Trust Existence and Beneficiary Rights):** A trustee...within 60 days after the date the trustee acquires knowledge of the creation of an irrevocable trust, or the date the trustee acquires knowledge that a formerly revocable trust has become irrevocable, whether by the death of the settlor or otherwise, shall notify the qualified beneficiaries of the trust's existence, of the identity of the settlor or settlors, of the right to request a copy of the trust instrument, and of the right to a trustee's report as provided in subsection (c).

f. **813(b)(4) (Duty to Notify of Change in Compensation):** A trustee...shall notify the qualified beneficiaries in advance of any change in the method or rate of the trustee's compensation.
g. **813(c) (Duty to Provide Reports):** A trustee shall send to the distributees or permissible distributees of trust income or principal, and to other qualified or nonqualified beneficiaries who request it, at least annually and at the termination of the trust, a report of the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee’s compensation, a listing of the trust assets and, if feasible, their respective market values. Upon a vacancy in a trusteeship, unless a co-trustee remains in office, a report must be sent to the qualified beneficiaries by the former trustee. A personal representative, [conservator], or [guardian] may send the qualified beneficiaries a report on behalf of a deceased or incapacitated trustee.

6. **Under UTC section 813(d),** a beneficiary may (a) waive the right to any information under section 813, and (b) withdraw a waiver previously given.

7. **Under UTC section 813(e), subsections 813(b)(2) (notice of acceptance of trusteeship) and 813(b)(3) (notice of trust existence and beneficiary rights to request) do not apply to a trustee who accepts a trusteeship before the date the UTC is enacted, to an irrevocable trust created before date of enactment, or to a revocable trust that becomes irrevocable before the date of enactment.

8. **Comments.** The NCCUSL commentary to section 813 is extensive, and reflects the controversy and ongoing policy debate concerning the duty to disclose.

The duty to keep the beneficiaries reasonably informed of the administration of the trust is a fundamental duty of a trustee. This duty, which is stated in subsection (a), is derived from Section 7-303(a) of the Uniform Probate Code, which was approved in 1969 and which has been enacted in about a third of the states. This provision of the UPC has also been enacted in states that have not otherwise enacted the Uniform Probate Code. See, e.g., Cal. Prob. Code. Sections 16060-16061. Unlike the cited provision of the UPC, subsection (a) of this section limits the duty to keep the beneficiaries informed to the qualified beneficiaries. For the definition of qualified beneficiary, see Section 103(13). The result of this limitation is that the information need not be furnished to beneficiaries with remote remainder interests unless they have made a request to the trustee.
For the extent to which a settlor may waive the requirements of this section in the terms of the trust, see Section 105(b)(8)-(9).

Subsection (a) requires that the trustee keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests. This may include a duty to communicate to a qualified beneficiary information about the administration of the trust that is reasonably necessary to enable the beneficiary to enforce the beneficiary’s rights and to prevent or redress a breach of trust. See Restatement (Second) of Trusts Section 173 cmt. c (1959). With respect to the permissible distributees, the duty articulated in subsection (a) would ordinarily be satisfied by providing the beneficiary with a copy of the annual report mandated by subsection (c). Otherwise, the trustee is not ordinarily under a duty to furnish information to a beneficiary in the absence of a specific request for the information. See Restatement (Second) of Trusts Section 173 cmt. d (1959). However, special circumstances may require that the trustee take affirmative steps to provide additional information. For example, if the trustee is dealing with the beneficiary on the trustee’s own account, the trustee must communicate material facts relating to the transaction that the trustee knows or should know. See Restatement (Second) of Trusts Section 173 cmt. D (1959). Furthermore, to enable the beneficiaries to take action to protect their interests, the trustee may be required to provide advance notice of transactions involving real estate, closely held business interests, and other assets that are difficult to value or to replace. See In re Green Charitable Trust, 431 N.W. 2d 492 (Mich. Ct. App. 1988); Allard v. Pacific National Bank, 663 P.2d 104 (Wash. 1983). The trustee is justified in not providing such advance disclosure if disclosure is forbidden by other law, as under federal securities laws, or if disclosure would be seriously detrimental to the interests of the beneficiaries, for example, when disclosure would cause the loss of the only serious buyer.

Subsection (a) also requires that the trustee promptly respond to the request of any beneficiary, whether qualified or not, for information related to the administration of the trust. Performance is excused only if compliance is unreasonable under the circumstances. Within the bounds of the reasonableness limit, this provision allows the beneficiary
to determine what information is relevant to protect the beneficiary's interest. Should a beneficiary so request, subsection (b)(1) also requires the trustee to furnish the beneficiary with a complete copy of the trust instrument and not merely with those portions the trustee deems relevant to the beneficiary's interest. For a case reaching the same result, see *Fletcher v. Fletcher*, 480 S.E. 2d 488 (Va. Ct. App. 1997). Subsection (b)(1) is more expansive Section 7-303(b) of the Uniform Probate Code, 149 which provides that “[u]pon reasonable request, the trustee shall provide the beneficiary with a copy of the terms of the trust which describe or affect his interest. . . .” …

To enable beneficiaries to protect their interests effectively, it is essential that they know the identity of the trustee. Subsection (b)(2) requires that a trustee inform the qualified beneficiaries within 60 days of the trustee’s acceptance of office and of the trustee’s name, address and telephone number. Similar to the obligation imposed on a personal representative following admission of the will to probate, subsection (b)(3) requires the trustee of a revocable trust to inform the qualified beneficiaries of the trust’s existence within 60 days after the settlor’s death. These two duties can overlap. If the death of the settlor happens also to be the occasion for the appointment of a successor trustee, the new trustee of the formerly revocable trust would need to inform the qualified beneficiaries both of the trustee’s acceptance and of the trust’s existence.

Subsection (b)(4) deals with the sensitive issue of changes, usually increases, in trustee compensation. Changes can include changes in a periodic base fee, rate of percentage compensation, hourly rate, termination fee, or transaction charge. Regarding the standard for setting trustee compensation, see Section 708 and Comment.

Subsection (c) requires the trustee to furnish the current beneficiaries and other beneficiaries who request it with a copy of a trustee’s report at least annually and upon termination of the trust. Unless a co-trustee remains in office, the former trustee also must provide a report to all of the qualified beneficiaries upon the trustee’s resignation or removal. If the vacancy occurred because of the former trustee’s death or adjudication of incapacity, a report may, but need not be provided by the former trustee’s personal representative, conservator, or guardian.
The Uniform Trust Code employs the term “report” instead of “accounting” in order to negate any inference that the report must be prepared in any particular format or with a high degree of formality. The reporting requirement might even be satisfied by providing the beneficiaries with copies of the trust’s income tax returns and monthly brokerage account statements if the information on those returns and statements is complete and sufficiently clear. The key factor is not the format chosen but whether the report provides the beneficiaries with the information necessary to protect their interests. For model account forms, together with practical advice on how to prepare reports, see Robert Whitman, Fiduciary Accounting Guide (2d ed. 1998).

Subsection (d) allows trustee reports and other required information to be waived by a beneficiary. A beneficiary may also withdraw a consent. However, a waiver of a trustee’s report or other information does not relieve the trustee from accountability and potential liability for matters that the report or other information would have disclosed.

Subsection (e), which was added to the Code in 2004, is discussed in 2004 Amendment below.

2004 Amendment. Subsection (b)(2) and (b)(3) require that certain notices be sent by the trustee to the qualified beneficiaries within 60 days of the trustee’s acceptance of office, or within 60 days after the creation of an irrevocable trust or the date a revocable trust becomes irrevocable. Subsection (e) is added to make clear the drafting committee’s intent that these requirements are not to be retroactively applied to trustee acceptances of office occurring prior to the effective date of the Code and to trusts which have become irrevocable prior to the effective date.

9. Default vs. Mandatory Rules. Section 105 of the NCCUSL version of the UTC provides that the most of the UTC are default rules in the absence of provisions in the governing instrument. Section 105 includes optional provisions for enacting jurisdictions as to whether the disclosure provisions of the UTC may be overridden by the terms of the governing instrument:

a. Except as otherwise provided in the terms of the trust, this [Code] governs the duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficiary.

b. The terms of a trust prevail over any provision of this [Code] except...
[(8) the duty under Section 813(b)(2) and (3) to notify qualified beneficiaries of an irrevocable trust who have attained 25 years of age of the existence of the trust, of the identity of the trustee, and of their right to request trustee's reports;]

[(9) the duty under Section 813(a) to respond to the request of a [qualified] beneficiary of an irrevocable trust for trustee's reports and other information reasonably related to the administration of a trust;]

c. The relevant NCCUSL comments to Section 105 are instructive and fully frame the competing policy arguments, the NCCUSL recommendation for balancing those positions, and NCCUSL’s recognition that states will vary on their approach to the duty to disclose:

Section 813 imposes a general obligation to keep the beneficiaries informed as well as several specific notice requirements. Subsections (b)(8) and (b)(9), which were placed in brackets and made optional provisions by a 2004 amendment, specify limits on the settlor’s ability to waive these information requirements. With respect to beneficiaries age 25 or older, a settlor may dispense with all of the requirements of Section 813 except for the duties to inform the beneficiaries of the existence of the trust, of the identity of the trustee, and to provide a beneficiary upon request with such reports as the trustee may have prepared. Among the specific requirements that a settlor may waive include the duty to provide a beneficiary upon request with a copy of the trust instrument (Section 813(b)(1)), and the requirement that the trustee provide annual reports to the qualified beneficiaries (Section 813(c)). The furnishing of a copy of the entire trust instrument and preparation of annual reports may be required in a particular case, however, if such information is requested by a beneficiary and is reasonably related to the trust’s administration.

Responding to the desire of some settlors that younger beneficiaries not know of the trust’s bounty until they have reached an age of maturity and self-sufficiency, subsection (b)(8) allows a settlor to provide that the trustee need not even inform beneficiaries under age 25 of the existence of the trust. However, pursuant to
subsection (b)(9), if the younger beneficiary learns of the trust and requests information, the trustee must respond. More generally, subsection (b)(9) prohibits a settlor from overriding the right provided to a beneficiary in Section 813(a) to request from the trustee of an irrevocable trust copies of trustee reports and other information reasonably related to the trust’s administration.

During the drafting of the Uniform Trust Code, the drafting committee discussed and rejected a proposal that the ability of the settlor to waive required notice be based on the nature of the beneficiaries’ interest and not on the beneficiaries’ age. Advocates of this alternative approach concluded that a settlor should be able to waive required notices to the remainder beneficiaries, regardless of their age. Enacting jurisdictions preferring this alternative should substitute the language “adult and current or permissible distributees of trust income or principal” for the reference to “qualified beneficiaries” in subsection (b)(8). They should also delete the reference to beneficiaries “who have attained the age of 25 years.”

Waiver by a settlor of the trustee’s duty to keep the beneficiaries informed of the trust’s administration does not otherwise affect the trustee’s duties. The trustee remains accountable to the beneficiaries for the trustee’s actions.

Neither subsection (b)(8) nor (b)(9) apply to revocable trusts. The settlor of a revocable trust may waive all reporting to the beneficiaries, even in the event the settlor loses capacity. If the settlor is silent about the subject, reporting to the beneficiaries will be required upon the settlor’s loss of capacity. See Section 603.

2001 Amendment. By amendment in 2001, subsections (b) (3), (8) and (9) were revised. The language in subsection (b)(3) “that the trust have a purpose that is lawful, not contrary to public policy, and possible to achieve” is new. This addition clarifies that the settlor may not waive this common law requirement, which is codified in the Code at Section 404.
Subsections (b)(8) and (9) formerly provided:

(8) the duty to notify the qualified beneficiaries of an irrevocable trust who have attained 25 years of age of the existence of the trust, and of their right to request trustee’s reports and other information reasonably related to the administration of the trust;

(9) the duty to respond to the request of a beneficiary of an irrevocable trust for trustee’s reports and other information reasonably related to the administration of a trust.

The amendment clarifies that the information requirements not subject to waiver are requirements specified in Section 813 of the Code.

2003 Amendment. By amendment in 2003, subsection (b)(8) was revised. Under the previous provision, as amended in 2001, the presence of two “excepts” in the same sentence, the first in the introductory language to subsection (b) and the second at the beginning of subsection (b)(8), has caused considerable confusion. The revision eliminates the second “except” in (b)(8) without changing the meaning of the provision.

2004 Amendment. Sections 105(b)(8) and 105(b)(9) address the extent to which a settlor may waive trustee notices and other disclosures to beneficiaries that would otherwise be required under the Code. These subsections have generated more discussion in jurisdictions considering enactment of the UTC than have any other provisions of the Code. A majority of the enacting jurisdictions have modified these provisions but not in a consistent way. This lack of agreement and resulting variety of approaches is expected to continue as additional states enact the Code.

Placing these sections in brackets signals that uniformity is not expected. States may elect to enact these provisions without change, delete these provisions, or enact them with modifications. In Section 105(b)(9), an internal bracket has been added to make clear that an enacting jurisdiction may limit to the qualified beneficiaries the obligation to respond to a beneficiary’s request for information.
The placing of these provisions in brackets does not mean that the Drafting Committee recommends that an enacting jurisdiction delete Sections 105(b)(8) and 105(b)(9). The Committee continues to believe that Sections 105(b)(8) and (b)(9), enacted as is, represent the best balance of competing policy considerations. Rather, the provisions were placed in brackets out of a recognition that there is a lack of consensus on the extent to which a settlor ought to be able to waive reporting to beneficiaries, and that there is little chance that the states will enact Sections 105(b)(8) and (b)(9) with any uniformity.

The policy debate is succinctly stated in Joseph Kartiganer & Raymond H. Young, The UTC: Help for Beneficiaries and Their Attorneys, Prob. & Prop., Mar./April 2003, at 18, 20:

> The beneficiaries’ rights to information and reports are among the most important provisions in the UTC. They also are among the provisions that have attracted the most attention. The UTC provisions reflect a compromise position between opposing viewpoints.

Objections raised to beneficiaries’ rights to information include the wishes of some settlors who believe that knowledge of trust benefits would not be good for younger beneficiaries, encouraging them to take up a life of ease rather than work and be productive citizens. Sometimes trustees themselves desire secrecy and freedom from interference by beneficiaries.

The policy arguments on the other side are: that the essence of the trust relationship is accounting to the beneficiaries; that it is wise administration to account and inform beneficiaries, to avoid the greater danger of the beneficiary learning of a breach or possible breach long after the event; and that there are practical difficulties with secrecy (for example, the trustee must tell a child that he or she is not eligible for financial aid at college because the trust will pay, and must determine whether to accumulate income at high income tax rates or pay it out for inclusion in the
beneficiary’s own return). Furthermore, there is the practical advantage of a one-year statute of limitations when the beneficiary is informed of the trust transactions and advised of the bar if no claim is made within the year. UTC §§ 1005. In the absence of notice, the trustee is exposed to liability until five years after the trustee ceases to serve, the interests of beneficiaries end, or the trust terminates. UTC §§ 1005(c)

10. **Theme and Variations.** As shown attached as **APPENDIX A**, there are wide variations in the approaches of the UTC enacting jurisdictions concerning the duty to disclose.

**B. SECTION 7-303 OF THE UNIFORM PROBATE CODE.**

1. **Section 7-303 of the Uniform Probate Code:** The trustee shall keep the beneficiaries of the trust reasonably informed of the trust and its administration. In addition:
   a. Within 30 days after his acceptance of the trust, the trustee shall inform in writing the current beneficiaries and if possible, one or more persons who under Section 1-403 may represent beneficiaries with future interests, of the Court in which the trust is registered and of his name and address.
   b. Upon reasonable request, the trustee shall provide the beneficiary with a copy of the terms of the trust which describe or affect his interest and with relevant information about the assets of the trust and the particulars relating to the administration.
   c. Upon reasonable request, a beneficiary is entitled to a statement of the accounts of the trust annually and on termination of the trust or change of the trustee.

**C. SECTION 4-213 OF THE UNIFORM TRUST ACT.**

1. **Section 4-213 of the Uniform Trust Act:**
   a. Subject to the rights of the settlor of a revocable trust under Section 3-103, a trustee shall keep the beneficiaries of the trust reasonably informed about the administration of the trust, and unless unreasonable under the circumstances, shall promptly respond to a beneficiary’s request for information.
   b. On request of a beneficiary, a trustee shall promptly provide the beneficiary with a copy of the trust instrument.
Within [30] days after accepting the trusteeship, the trustee shall inform the beneficiaries of the acceptance. Within [30] days after the death of the settlor of a revocable trust, the trustee shall inform the beneficiaries of their respective interests in the trust.

d. A trustee shall inform the beneficiaries in advance of any change in the method or rate of the trustee’s compensation. A trustee shall also inform the beneficiaries in advance of a transaction affecting trust property that comprises a significant portion of the value of the trust and whose fair market value is not readily ascertainable.

e. A trustee shall prepare and send to the beneficiaries a report of the trust property, liabilities, receipts, and disbursements at least annually, at the termination of the trust, and upon a change of a trustee. A report on behalf of a former trustee must be prepared by the former trustee, or if the trustee’s appointment terminated by reason of death or incapacity, by the former trustee’s personal representative, conservator, or guardian.

f. Copies of trustee reports, and other information required to be provided under subsections (b)-(e) shall be sent to:

i. the qualified beneficiaries; and

ii. each beneficiary who has delivered to the trustee or other fiduciary a written request for a copy of the report or other information.

g. A beneficiary, by a written consent, may waive the right to a trustee’s report or other information otherwise required to be provided under this section. Except as to a trustee’s report or other information required to be furnished to a beneficiary who is also a settlor, the requirements of this section may not be waived by the terms of the trust.

D. NEW YORK.

1. There do not appear to be any New York cases addressing a trustee’s duty to inform or report to a beneficiary when not governed by statute.

2. In order to receive annual income commissions, trustee must furnish “annually as of a date no more than 30 days prior to the end of the trust year selected by the trustee, to each beneficiary currently receiving income, and to any other beneficiary interested in the income and to any person interested in the
principal of the trust who shall make a demand therefor, a statement showing the principal assets on hand on that date, and at least annually or more frequently if the trustee so elects, a statement showing all [its] receipts of income and principal during the period with respect to which the statement is rendered including the amount of any commissions retained and the basis upon which the commissions were computed.”  NY SCPA 2309(4).

3. A proceeding may be brought by a beneficiary to compel a trustee to “supply information concerning the assets or affairs of an estate relevant to the interest of the petitioner when the fiduciary has failed after request made upon him in writing therefor.”  NY SCPA 2102(1).

E. ILLINOIS.

1. Illinois law provides that the trustee owes “the highest duty to his beneficiary to fully and completely disclose all material facts relating to dealings with the trust.” The concept dates back to 1942 common law and is regularly cited in judicial opinions, such as Regnery v. Meyers, 679 N.E.2d 74 (Ill. App. Ct. 1997). Illinois statutes specify that “[e]very trustee at least annually shall furnish to the beneficiaries then entitled to receive or receiving the income from the trust estate, or if none, then those beneficiaries eligible to have the benefit of income from the trust estate a current account showing the receipts, disbursements and inventory of the trust estate.” 706 ILCS 5/11(a).

2. While the statute requires the trustee to render accountings only to current beneficiaries, Illinois case establishes a right in vested remaindermen to compel an accounting. See Bullis v. DuPage Trust Co., 72 Ill.App.3d (1979). A vested remainderman is entitled to such information as would be reasonably necessary to enable him to “enforce his rights under the trust or to prevent or redress a breach of trust.” See Wallace v. Malooly, 4 Ill. 2d 86, 95 (1954).

F. CALIFORNIA.

1. Generally in California, under Prob. Code Section 16060, Trustees have a duty to keep beneficiaries of an irrevocable trust informed (following UPC). The Law Revision Commission Comments explain that the trustee must communicate information reasonably necessary to enable the beneficiary to enforce his or her rights under the trust or redress a breach of trust. This duty is independent of the duty to account under Probate Code §16062 and cannot be waived by a trust
instrument or a beneficiary. The duty also applies to contingent remainder beneficiaries under Probate Code §24.

2. Under Prob. Code Sec. 16060.7 on the request of the beneficiary a trustee is required to provide the terms of the trust to the beneficiary (there is an exception for certain beneficiaries of revocable trusts under Prob. Code Sec. 16069). Under Prob. Code Sec. 16061, on reasonable request by a beneficiary, the trustee shall report to the beneficiary by providing requested information to the beneficiary relating to the administration of the trust relevant to the beneficiary's interest. A settlor may not waive these obligations of the trustee. Prob. Code Sec. 16068.

3. Other statutes address when and under which circumstances trustees have a duty to (i) provide a copy of the terms of an irrevocable trust, (ii) serve a notice of changes, and (iii) account to the beneficiaries. Prob. Code Sec. 16060 et seq.

G. TEXAS.


2. Furthermore, the Texas Trust Code limits the ability to override the common law duty to inform beneficiaries who are at least 25 years of age. Section 111.0035(c) of the Texas Trust Code says that the terms of a trust cannot limit any common law duty to keep a beneficiary informed who is 25 years old or older, if the beneficiary is entitled or permitted to receive current distributions, or if the beneficiary would receive a distribution if the trust terminated.

3. In 2000, the Texas Legislature added section 113.060 of the Trust Code, which imposed an affirmative duty on trustees to keep beneficiaries reasonably informed concerning the administration of the trust and material facts necessary for the beneficiaries to protect their interests. There was confusion as to the application of this section and, as a result, in 2007, the legislature repealed section 113.060.

H. GEORGIA.

1. O.C.G.A. § 53-12-7(a) (2012). When trust and chapter conflict. The effect of the provisions of this chapter may be varied by the trust instrument except...[exceptions do not address trustee disclosure].

(a) Within 60 days after the date of creation of an irrevocable trust or of the date on which a revocable trust becomes irrevocable, the trustee shall notify the qualified beneficiaries of the trust of the existence of the trust and the name and mailing address of the trustee. In full satisfaction of this obligation, the trustee may deliver the notice to the guardian or conservator of any beneficiary who is not sui juris.

(b) All irrevocable trusts in existence on July 1, 2010, shall be deemed to have waived this provision unless the trust instrument says otherwise.

3. O.C.G.A. § 53-12-243. Duty to provide reports and accounts.

(a) On reasonable request by any qualified beneficiary or the guardian or conservator of a qualified beneficiary who is not sui juris, the trustee shall provide the qualified beneficiary with a report of information, to the extent relevant to that beneficiary's interest, about the assets, liabilities, receipts, and disbursements of the trust, the acts of the trustee, and the particulars relating to the administration of the trust, including the trust provisions that describe or affect such beneficiary's interest.

(b) (1) A trustee shall account at least annually, at the termination of the trust, and upon a change of trustees to each qualified beneficiary of an irrevocable trust to whom income is required or authorized in the trustee's discretion to be distributed currently, and to any person who may revoke the trust. At the termination of the trust, the trustee shall also account to each remainder beneficiary. Upon a change of trustees, the trustee shall also account to the successor trustee. In full satisfaction of this obligation, the trustee may deliver the accounting to the guardian or conservator of any qualified beneficiary who is not sui juris.

(2) An accounting furnished to a qualified beneficiary pursuant to paragraph (1) of this subsection shall contain a statement of receipts and disbursements of principal and income that have occurred during the last complete fiscal year of the trust or since the last accounting to that beneficiary and a statement of the assets and liabilities of the trust as of the end of the accounting period.

(c) A trustee shall not be required to report information or account to a qualified beneficiary who has waived in writing the
right to a report or accounting and has not withdrawn that waiver.

(d) Subsections (a) and (b) of this Code section shall not apply to the extent that the terms of the trust provide otherwise or the settlor of the trust directs otherwise in a writing delivered to the trustee.

(e) Nothing in this Code section shall affect the power of a court to require or excuse an accounting.

V. RECENT CASES.

A. *Bright v. Bashekimoglu*, Record No. CL10-7348 (Virginia Supreme Court 2012). Virginia Supreme Court enforces trust terms that override the trustee’s duty to disclose under the UTC.

1. In 2008, Melih Bashekimoglu created a revocable trust with himself and his wife as co-trustees. The trust terms provide as follows with respect to disclosure of trust information to the beneficiaries:

   During any period that I am alive but incapacitated, and after my death, my Trustee will deliver any notice, information, or reports which would be otherwise required to be delivered to me or a Qualified Beneficiary to a person designated by my Trustee. To preserve my privacy and the privacy of Qualified Beneficiaries under my trust agreement, while I am alive I request that my Trustee not provide any copies of my trust agreement or any other information which may otherwise be required to be distributed to any beneficiary under Virginia law to any beneficiary to whom the information is not directly relevant. The designated person may, in his or her sole discretion, and without waiver, distribute copies of all or any part of my trust agreement or other relevant information about my trust to one or more Qualified Beneficiaries or other interested parties during any period that I am incapacitated.

2. Melih died in 2009. Under the trust terms, his wife and two of his children were named as trust beneficiaries. A third child, Suzan Bright, was a contingent beneficiary and only entitled to distributions in the event her mother and two siblings predecease her. Before and after Melih’s death, Suzan repeatedly requested information about the trust from her mother but was denied.

3. In 2010, Suzan sued her mother as sole trustee for information about the trust. The trial court denied claim and she appealed.
On appeal, the Virginia Supreme Court affirmed the trial court and denied Suzan information about the trust on the grounds that: (1) Suzan’s counsel conceded that she is a nonqualified beneficiary; (2) the trust terms modified the requirements of the Virginia Uniform Trust Code; (3) the trust terms modified the UTC rule that a nonqualified beneficiary may request information, and gave the trustee the discretion to decide whether to distribute the information, and therefore Suzan is not entitled to the information.


1. In 1992, Lawrence Wilson Jr. created two irrevocable trusts with Lawrence Wilson Sr. as trustee. The terms of both trusts provided that the trustee would not be required to file accountings with any court or any beneficiary. In 2007, the beneficiaries of the trusts sued the trustee and the settler alleging breach of fiduciary duty with respect to the trustee allowing the settler to take control of the trust and invest the trust assets in the settlor’s speculative personal business ventures resulting in considerable losses, and for the failure to distribute trust income as required. The beneficiaries also asked the court to compel the trustee to account.

2. In response to the beneficiaries’ discovery requests seeking information about the trusts, the trustee moved for a protective order asserting that the terms of the trust provided that the trustee was not required to account to the beneficiaries. The trial court issued the protective order on the basis that (1) under North Carolina’s version of the Uniform Trust Code, there are no mandatory disclosure obligations, meaning that the settler of a trust may override the requirement that a trustee disclose information to the beneficiaries, (2) the settler of these trusts did precisely this, and (3) therefore, the beneficiaries were not entitled to discovery concerning the trusts. Because the beneficiaries admitted they could not support their surcharge claims without the requested discovery, the trial court granted summary judgment in favor of the settler and trustee.

3. On appeal, the North Carolina Court of Appeals reversed, noting that North Carolina’s Uniform Trust Code imposed a mandatory duty on the trustee to act in good faith, and that the trust terms cannot prevail over the power of the court to act in the interests of justice. The court stated that the powers of the court clearly include the power to compel discovery where necessary to enforce the beneficiary’s rights under the trust or to prevent or redress a breach of trust, regardless of the terms of the trust.
The court held that the trial erred by relying on the non-binding commentary to the North Carolina Uniform Trust Code, and applied the rule in *Taylor v. NationsBank*, 125 N.C. App. 515 (1997) that a trustee may not withhold from a beneficiary information that is reasonably necessary to allow a beneficiary to enforce his rights notwithstanding the trust terms, even though the rule in *Taylor* was derived from the Restatement (Second) of Trusts and not the Uniform Trust Code, and *Taylor* was decided prior to the enactment of the North Carolina Uniform Trust Code. One judge issued a dissenting opinion.

C. *Abbott v. Brennemann*, 288 Neb. 389 (2014). Trustees breached duties by failing to maintain trust records, and Form K-1s are not adequate disclosure under pre-UTC law or the UTC, but breach was harmless where trust was otherwise properly administered.

1. Upon his death in 1976, Rolf Brennemann created a trust under his will to hold a 42% interest in a company holding ranch property, with his three children Edward, Mamie, and Bill as trustees (and each of their oldest sons as their named successors). The trust provided income to Rolf’s wife, Bessie, for her life, followed by income to his children for life, and then after the deaths of all three children the distribution of the remainder to Rolf’s grandchildren outright.

2. In 1982, Edward died and his son John became a co-trustee. In 1986, because the company was not providing income to support Bessie, the trustees petitioned the court for approval to vote the stock in favor of selling the ranch to John. The court approved the sale, the sales price, and the terms, which included purchase of the ranch by installment payments with a 10% interest rate. In 1996, the parties to the sale agreed to extend the original purchase agreement for 10 years at a slightly lower 8% interest rate.

3. Bessie died in 1998 and income passed to the children or their issue. In 2002, Bill died and his children, including daughter Kim, became beneficiaries and Bill’s son became co-trustee. In 2006, with all installment payments made, the bank conveyed the ranch to John.

4. In 2009, the trust accountant proposed terminating the trust which had only $75,000, and Kim sued the trustees for an accounting because she believed the trust should have more assets. The trustees accounted for 2002-2010. Kim then sued the trustees for breach of duty to maintain trust records, inform the beneficiaries, and lack of good faith. Kim had received Form K-1s after becoming a beneficiary. The trustees testified that
the trust was properly administered, but records before 2002 were lost or had been destroyed by the various banks and accounting firms involved, or could not be located. Kim’s expert testified that the trust should have more money, but the trust’s accountant pointed out flaws in Kim’s expert’s analysis and testified that the beneficiaries had not been harmed by the trust administration.

5. The trial court rejected Kim’s claims and the Court of Appeals affirmed on the grounds that: (1) there is a presumption that a trustee has acted in good faith, and the burden of proof is on the one questioning the trustee; (2) Kim did not meet her burden of proof; (3) any alleged breach was harmless; (4) before the enactment of the UTC, the providing of a Form K-1 was adequate to meet the trustee’s disclosure obligations (but not after UTC enactment); (5) while after the enactment of the UTC the Form K-1 was not adequate disclosure, any breach was cured by the subsequent accounting and was therefore harmless; (6) the trial court did not abuse its discretion by refusing Kim’s request for attorneys fees.

6. On further appeal, the Nebraska Supreme Court largely affirmed the Court of Appeals decision, and held that: (1) any presumption of correctness of the trustees' actions disappeared once the trustee failed to maintain trust records, and all doubts about the trustees’ actions are to be resolved against the trustees in those circumstances; (2) however, there is no error in the Court of Appeals' general observation that a trustee’s actions are presumed correct and that the beneficiary has the burden of proving breach of trust; (3) under pre-UTC law (and under the UTC), the providing of a Form K-1 is not adequate trustee disclosure, and the Court of Appeals erred by holding otherwise; (4) while the trustees' conduct was below standards regarding record keeping, the breach was harmless as the evidence shows that the trust was properly managed; (5) while certain investments lost money during the 2008 economic downturn, there was no allegation that the investment in the funds was irresponsible, and Kim’s own expert testified it was reasonable at the time; (6) the Nebraska UTC provides for attorneys fees awards as justice and equity require, and the trial court erred in failing to apply this standard in rejecting Kim’s fee claim where the trustees breached their duty to maintain records and Kim was forced to litigate the issue and prevailed, and this issues should be remanded to the trial court for application of the UTC standard on fees.

1. Michael Miness created an irrevocable insurance trust in 1988 for the benefit of his spouse and descendants, with two non-beneficiary co-trustees. One of the trustees resigned in 2009. The settlor’s children petitioned to compel the resigning co-trustee to account for his actions as trustee. The resigning trustee refused to account based on trust terms that provided that during the life of the settlor the trustee would account only to the settlor.

2. Because of their pecuniary interest in the trust, and the fact that the statute of limitations on their claims against the resigning co-trustee could expire while the settlor was still alive, the court ordered the resigning co-trustee to account notwithstanding the trust terms.


1. In 2005, Mary Schwartz created a trust for the benefit of her two daughters, Danita Christie and Paulette Kimball, and named Christie as the sole trustee. Schwartz died in 2008. In 2009, a dispute between Kimball and Christie arose over whether certain real property located in Camarillo, California, was trust property. Kimball filed a petition in the superior court to compel an accounting, and the court ordered Christie to file a formal trust accounting. Christie appealed, arguing that Kimball was not a beneficiary with standing to request an accounting.

2. The Court of Appeal of California affirmed the trial court on the grounds that: (1) pursuant to the California Probate Code, a court’s order that a trustee produce an account or report of the trustee’s acts is not appealable; (2) regardless of whether Kimball had standing to request an accounting, the court had the authority to compel an accounting *sua sponte*; (3) where an accounting is necessary to determine the status of trust assets, the court may order one on its own accord pursuant to the court’s duty to supervise the trust administration; (4) in this case there were substantial reasons for the court to seek to review the trustee’s actions, including claims by Kimball that Christie had removed $129,000 from the trust account and statements by Christie that the trust assets had been depleted; and (5) therefore, the court could reasonably conclude that an
accounting was necessary to track trust assets and it was appropriate for the court to order an accounting.

F. **Zimmerman v. Patricia E. Zirpolo Trust**, 2012 Ohio 364 (Ohio Ct. App., 2012). Trustee is required under the UTC to provide trust information to the minor beneficiaries’ parent as their representative where there is no conflict of interest.


2. In 2009, on behalf of her minor children, Zimmerman requested that the trustee provide her with a copy of the trust instrument and a report of trust assets and distributions. Milano refused because the trust terms instructed the trustee not to provide information regarding the trust or its proceeds to the beneficiaries until the beneficiaries reach age 35 and were entitled to receive the trust assets.

3. Zimmerman sued, seeking a copy of the trust instrument and an accounting. The trial court denied Zimmerman’s request on the grounds that the settlor’s intent regarding disclosure should control and that Zimmerman, as a former beneficiary, was not a proper party to request a copy of the trust instrument and an accounting because she had a conflict of interest with respect to her children. Zimmerman appealed.

4. On appeal, the Court of Appeals of Ohio reversed the trial court and held that Zimmerman, on behalf of her children, was entitled to a copy of the trust instrument and an accounting on the grounds that: (1) under Ohio’s version of the Uniform Trust Code, a parent may represent a minor beneficiary to the extent that no conflict of interest exists; (2) although Zimmerman was a former trust beneficiary, she did not challenge her removal as a beneficiary; (3) because Zimmerman filed her complaint solely in her representative capacity on behalf of her children and did not challenge her removal as a beneficiary, no conflict of interest existed and Zimmerman would be allowed to represent her minor children; (4) a settlor’s intent controls unless such intent is contrary to law; (5) the settlor's intent was contrary to the Ohio UTC’s provisions requiring a trustee to furnish to a beneficiary upon request a copy of the trust instrument and to keep the current beneficiaries reasonably informed; (5) the statute takes precedence over the settlor’s intent and therefore the trustee had the duty to provide the requested documents to the

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beneficiaries, or, in this case, Zimmerman, as their representative.

G. **Whitman v. Whitman, 2012 Ohio 405, 2012 Ohio App. LEXIS 366 (Feb. 6, 2012).** Ohio Court of Appeals affirms imposition of a jail sentence, in a civil contempt proceeding, on an attorney father serving as fiduciary for accounts and trusts for son’s benefit for repeated failure to provide an adequate accounting in compliance with the trial court’s order.

1. Between 1984 and 1994, Jeffrey Whitman, a licensed Ohio attorney, established several custodial accounts for the benefit of his son, Justin, under the Uniform Gift to Minors Act (UGMA) and Uniform Transfer to Minors Act (UTMA). He also established three trusts for Justin’s benefit: a “College Fund Trust,” a “Revocable Trust” and a “Grandfather Trust.” The College Fund Trust contained custodial funds belonging to Justin. The Revocable Trust allegedly contained Jeffrey’s personal money. The Grandfather Trust was established pursuant to the will of Jeffrey’s father. Jeffrey served as fiduciary for all these accounts and trusts.

2. In 2007, Justin filed a petition for an accounting of the custodial accounts and the trusts, alleging that Jeffrey had failed or refused to provide an accounting upon request. On July 21, 2008, in a hearing on Justin’s petition, the trial court held that Justin was entitled to an accounting on all the above accounts and trusts. The trial court gave Jeffrey 30 days to file an accounting of the College Fund Trust and 60 days to file an accounting of the other accounts and trusts. In its docket entry describing the order, the court stated that Jeffrey’s accounting must comply with the definition of an “accounting” as applied “in terms of a fiduciary accounting in probate court.”

3. On September 16, 2008, well past the 30-day deadline regarding the College Fund Trust, Justin filed a motion for contempt, alleging that Jeffrey failed to comply with the previous order. On September 19, 2008, Jeffrey filed a two-page document, along with more than 40 pages of supporting documents, as the accounting of all the accounts and trusts. Jeffrey’s filing provided no information about the UGMA/UTMA custodial accounts and consisted of financial statements, letters from the financial entities that issued the statements and a two-page list of disbursements prepared and signed by Jeffrey. On November 4, 2008, Justin supplemented his motion for contempt with a motion to strike the accounting and requested an investigation.
4. At a November 7, 2008, hearing on Justin’s motion for contempt, Jeffrey admitted that his accounting was inadequate. The trial court gave Jeffrey two weeks to submit an appropriate accounting. On November 26, more than two weeks after the November 7 hearing, Jeffrey filed a second accounting in which he provided more detail for each account, including beginning and ending balances, but again omitted the UGMA/UTMA accounts, claiming that he had no records prior to 2000 for those accounts and that the account funds had been rolled into the College Fund Trust.

5. The trial court held two hearings on Justin’s motion for contempt. Through evidence presented during the hearings, it became clear that Jeffrey had made several withdrawals from the College Fund Trust that were not included in his accountings to the court. Jeffrey also represented to the court that the Revocable Trust contained only his personal funds and that he was entitled to revoke it at any time. The trial court found that Jeffrey’s accounting of the Grandfather Trust was sufficient, and that Jeffrey had sufficiently purged his contempt with respect to the Revocable Trust, but that Jeffrey failed to properly account for College Fund Trust and the UGMA/UTMA accounts.

6. The trial court held Jeffrey in civil contempt and appointed a forensic accountant to conduct an investigation into the College Fund Trust and the UGMA/UTMA accounts. The trial court ordered Jeffrey to cooperate with the forensic accountant and explicitly warned Jeffrey that further noncompliance could result in jail time.

7. On February 22, 2010, the forensic accountant filed her report with the court. She found that the College Fund Trust consisted of the funds from the UGMA/UTMA accounts and that approximately half of the funds were transferred out of the trust. She could not determine the purpose of those transfers, and Jeffrey provided no explanation. In examining the UGMA/UTMA accounts, the accountant determined that $65,085 had been transferred into the Revocable Trust and that this amount was the largest sum of funds deposited in that trust, so she also conducted an accounting of that trust. The accountant also determined that two W-2s had been issued to Justin by Jeffrey’s business, reflecting income paid to Justin as an employee. Jeffrey admitted that Justin never worked for his business.

8. After reviewing the evidence, the trial court held Jeffrey in civil contempt for failing to account for the UGMA/UTMA accounts and the College Fund Trust. The trial court withdrew its finding
that Jeffrey purged himself of contempt regarding the Revocable Trust and found him in contempt for failure to account for the funds in that trust. The trial court ordered Jeffrey to pay the accountant’s fees and sentenced him to serve three days in jail. The trial court awarded Justin the remaining funds in the College Fund Trust and the Revocable Trust. The trial court also awarded Justin $104,128.57 in attorney fees.

9. Jeffrey appealed, asserting three assignments of error. In his first assignment, he claimed that the trial court erred in finding him in civil contempt because no principal was missing from the funds at issue and all the funds were identifiable and traceable. The Ohio Court of Appeals noted that the underlying controversy centered around Jeffrey’s failure to provide an accounting upon request and not the issue of misappropriation of funds, which Justin did not pursue. The facts raised by Jeffrey - that no principal was missing and all funds were identifiable and traceable - were irrelevant to the trial court’s finding of contempt for failure to provide an adequate accounting. The appellate court noted that the trial court gave Jeffrey multiple opportunities to comply with its order for an appropriate accounting, that Jeffrey failed to cooperate with the accountant as ordered and that Jeffrey misrepresented to the trial court the source of the funds in the Revocable Trust. The appellate court overruled Jeffrey’s first assignment.

10. In his second assignment of error, Jeffrey claimed that the trial court abused its discretion in sentencing him to jail, claiming that his jail sentence was a criminal contempt sanction not available for a finding of civil contempt. The appellate court noted that the Ohio statute for civil contempt expressly permits imprisonment for up to 30 days, that the trial court gave Jeffrey an opportunity to cooperate and comply with the court’s order and that the trial court expressly warned Jeffrey that further noncompliance could result in jail time. The appellate court upheld the civil contempt finding and the jail sentence and overruled Jeffrey’s second assignment.

11. In his third assignment of error, Jeffrey claimed that Justin was not the correct party to be awarded fees, that the trial court awarded fees for an incorrect period of representation and that the trial court’s award of fees violated the local rules of court. The appellate court found that Justin was the correct party, having personally signed the fee agreement with his attorneys. The court also noted that Justin’s attorneys presented detailed information documenting their representation of Justin and that Jeffrey’s failure to cooperate was the primary cause of the fees.
The court dismissed as irrelevant the local rule of court cited by Jeffrey and overruled his third assignment.


1. Under his will, Otto Stasi created a trust that provided for several regular enumerated distributions of trust income and then directed that any excess income be paid at least annually in unequal shares among six individual beneficiaries.

2. One of the beneficiaries, Carol, was also named as trustee of the trust. Another beneficiary, Lisa, sued the trustee to compel an accounting and alleging breach of fiduciary duty. The trustee moved for summary judgment alleging that the trust did not earn income in excess of the required enumerated disbursements. The trial court granted summary judgment for the trustee.

3. The beneficiary appealed and the Illinois Court of Appeals reversed on the grounds that: (1) a trustee must furnish a current account to the beneficiaries then entitled to receive trust income; (2) Lisa was entitled to receive a distribution of income in any year where the trust income exceeded the required distributions, even if there is no actual income distributed to her in any year; and (3) Lisa would be unable to enforce her rights as beneficiary if she did not receive an accounting of the trust’s receipts, disbursements, and holdings.


1. Alice Gustafson ("Alice") established a trust in 1976. In 1998, Alice filed for divorce from her husband, but they reconciled and she dismissed the divorce proceedings. Alice amended her trust in 2000 to make her husband a trustee and also purportedly a partial co-settlor of the trust for all of the assets other than the "Article 5" portion of the trust. Alice died in 2003, leaving her husband as trustee.

2. In 2003, the husband's attorney sent Patricia Welch a check for $50,000 drawn on the trust's account, which was accompanied by a letter informing Patricia that she was one of the contingent trust beneficiaries and that the husband as trustee was making an advance payment to Patricia and would be doing so annually until the future legacy was fully paid.

3. Patricia sought additional information about the trust, but was denied a copy of the trust instrument. She then sued in 2003, seeking an accounting, a copy of the trust instrument, removal of the trustee, and for sanctions. The probate court denied her claims, and she appealed.
4. On appeal, the Michigan Court of Appeals reversed the probate court, and found that Patricia was entitled to a copy of the trust instrument and an accounting, on the basis that (1) the settlor had not overridden the disclosure obligations in the trust agreement, (2) the trust was irrevocable because Alice was deceased and the husband was not a settlor of the Article 5 portion of the trust that was at issue in the case, and (3) Patricia was a current beneficiary of the trust because the trustee had already made a distribution to her from the trust.

5. The Court of Appeals also ordered the trial court on remand (with a new probate judge) to remove the trustee for failing to disclose information to Patricia. Because the Court of Appeals did not have a copy of the trust instrument in the record, the Court of Appeals remanded with respect to Patricia's other claims including a claim for surcharge.

Accounting Firm Not Liable for Trustee’s Failure to Maintain Records and Account.

1. In 1973, Stephen Barberino, Sr. established two trusts for the principal benefit of his daughter, Taylor. Taylor sued the successor trustee, Ann Hall, alleging that Hall had engaged in conduct detrimental to the trust’s pecuniary interest and refused to turn over historical trust information. Taylor also sued an accounting firm alleging that Stephen Barberino, who was an employee of the accounting firm and Taylor’s brother, had usurped control of the trusts in the early 1980s and falsely held himself out as trustee, engaged in conduct that was detrimental to the trusts, and failed to accurately maintain trust records and account.

2. The accounting firm moved for summary judgment for lack of evidence that the firm was engaged by the trusts to maintain trust records or account for the trust. Rather, the accounting firm had prepared trust tax returns based on information furnished by its clients. In support of its motion, the firm submitted affidavits of employees. The court granted summary judgment for the accounting firm because Taylor failed to provide an evidentiary foundation to substantiate her allegation that the accounting firm was responsible for regularly maintaining records and accounting for financial activities of the trust.

K. **In re Helen D. Ewbank Trust, 2007 Mich. App. LEXIS 656 (March 8, 2007).**
1. In this case, the Michigan Court of Appeals reversed the dismissal of surcharge claims against trustees on the basis that trustees owed fiduciary duties to contingent beneficiaries regardless of whether the contingent beneficiaries were entitled to receive information from the trustees.

2. After the death of the income beneficiary, the remainder beneficiaries of two trusts brought an action to surcharge the trustees for improper investments since 1977 (including failure to sell Eagle-Picher stock during the company's involvement in asbestos litigation), and to compel an accounting for actions from 1977 forward. The trial court dismissed the beneficiaries' claims for actions prior to 1992 on the basis that before 1992 (when the Michigan Court of Appeals rendered its decision in In re Childress Trust imposing a duty to provide information to remaindermen) trustees were not required to provide information to contingent remaindermen, and if no information was owed, the trustees could not be surcharged by the remaindermen for any breach of duty prior to 1992.

3. The Michigan Court of Appeals reversed the trial court, holding that “a trustee's fiduciary duties are not swept away simply because there is no obligation to provide account reports to beneficiaries. Although a trust agreement may relieve a trustee's duty to account to beneficiaries, it cannot relieve the duty to account to the probate court”. In its reversal of the trial court, the Court of Appeals noted that the trial court could have considered whether the beneficiaries' claims were barred by the doctrine of laches and the running of the statute of limitations (including deemed notice to the beneficiaries by the doctrine of virtual representation).

VI. REVOCABLE TRUSTS.

A. Section 603(a) of the UTC. While a trust is revocable [and the settlor has capacity to revoke the trust], rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor.

B. Comments to UTC 603(a).

This section recognizes that the settlor of a revocable trust is in control of the trust and should have the right to enforce the trust. Pursuant to this section, the duty under Section 813 to inform and report to beneficiaries is owed to the settlor of a revocable trust as long as the settlor has capacity.

If the settlor loses capacity, subsection (a) no longer applies, with the consequence that the rights of the beneficiaries are no longer
subject to the settlor's control. The beneficiaries are then entitled to request information concerning the trust and the trustee must provide the beneficiaries with annual trustee reports and whatever other information may be required under Section 813. However, because this section may be freely overridden in the terms of the trust, a settlor is free to deny the beneficiaries these rights, even to the point of directing the trustee not to inform them of the existence of the trust. Also, should an incapacitated settlor later regain capacity, the beneficiaries’ rights will again be subject to the settlor’s control.

Typically, the settlor of a revocable trust will also be the sole or primary beneficiary of the trust, and the settlor has control over whether to take action against a trustee for breach of trust. Upon the settlor’s incapacity, any right of action the settlor-trustee may have against the trustee for breach of trust occurring while the settlor had capacity will pass to the settlor’s agent or conservator, who would succeed to the settlor’s right to have property restored to the trust. Following the death or incapacity of the settlor, the beneficiaries would have a right to maintain an action against a trustee for breach of trust. However, with respect to actions occurring prior to the settlor’s death or incapacity, an action by the beneficiaries could be barred by the settlor’s consent or by other events such as approval of the action by a successor trustee. For the requirements of a consent, see Section 1009.

Subsection (b) makes clear that a holder of a power of withdrawal has the same powers over the trust as the settlor of a revocable trust. Equal treatment is warranted due to the holder’s equivalent power to control the trust. For the definition of power of withdrawal, see Section 103(11).

C. Section 74 of the Restatement 3rd of Trusts (Effect of Settlor’s Power to Revoke Trust). While a trust is revocable by the settlor and the settlor has capacity to act...the trustee...has a duty to comply with a direction of the settlor even though the direction is contrary to the terms of the trust or the trustee’s normal fiduciary duties, if the direction is communicated to the trustee in writing in a manner by which the settlor could properly amend or revoke the trust; and may comply with a direction or act in reliance on an authorization of the settlor although the direction or authorization is contrary to the terms of the trust or the trustee’s normal fiduciary duties, even if the direction or authorization is not manifested in a manner by which the settlor could properly amend or revoke the trust.

D. Comments on Section 74. The Comments on Subsection (1) make clear the rationale for this provision: “Because the settlor who holds a
power of revocation has full authority to revoke or amend the trust, the settlor can properly extinguish or modify the rights and interests of any and all of the beneficiaries. This comprehensive power to modify the terms of the trust also enables the settlor, without actually amending the trust, to bind all beneficiaries…” The Comments go on to state that while the settlor has capacity, that the trustee owes all duties of reporting information and accounting for trust assets to the settlor. And conversely, during that time, the trustee should not provide “reports, accountings, or other information concerning the terms of administration of the trust” to presumptive remainder or contingent beneficiaries or third parties without the express consent of the settlor, either through the terms of the governing instrument or similar means.

E. Recent Cases.

1. **Fulp v. Gilliland, No. 41S01-1306-TR-426 (Indiana Supreme Court, November 22, 2013)**. In a case of first impression in Indiana, court holds that settlor, as trustee of revocable trust, only owes fiduciary duty to herself and not to remainder beneficiaries, and may sell trust assets for any price she desires without breaching any duty to the remainder beneficiaries.

   a. Ruth Fulp placed her family farm into the name of her revocable trust with herself as trustee. The trust provided for Ruth during her lifetime and thereafter for distribution of the assets to her three children. She then moved into a Masonic home and approved her oldest child Harold, Jr. about buying the farm. He offered to buy the farm for the same price per acre paid by his sister Nancy’s daughter when she purchased another portion from Ruth. Harold warned her that the sales price of $450,000 was less than the appraised value of over $1 million, but Ruth agreed to sell saying “what I did for one I can do for the other”.

   b. Ruth signed a purchase agreement. Nancy then objected saying she “wanted her share”. Before the sale closed, Ruth resigned as trustee, Nancy became successor trustee, and Nancy refused to honor the contract. Harold sought specific performance of the contract and claimed that Nancy tortiously interfered with the contract.

   c. The trial court denied specific performance finding that Ruth breached her fiduciary duties to the children as remainder beneficiaries, and that Harold breached his fiduciary duties as beneficiary by participating in the sale. Harold appealed, and the Court of Appeals held that: (1) Ruth sold the farm as settlor, and the purchase agreement
was an amendment to the trust; and (2) Nancy did not tortiously interfere with the contract. Nancy appealed.

a. On appeal, the Indiana Supreme Court granted Harold specific performance on the sale of the property on the grounds that: (1) under general trust law and the Uniform Trust Code, while a trust is revocable the trustee’s duties are owed exclusively to the settlor; (2) the trust terms express Ruth’s intent that she would only owe duties as trustee to herself, by reserving for herself the power to revoke the trust and by stating that the trust is for her own use and benefit during her lifetime; (3) if Ruth owed duties to the remainder beneficiaries the trust would essentially become irrevocable, which would be contrary to Ruth’s clear intent; (4) Ruth owed no duties to the remainder beneficiaries under the trust terms; (5) the Indiana Uniform Trust Code also provides that Ruth owes no duties to the remainder beneficiaries while the trust is revocable and she has capacity to revoke the trust, and that provision applies to the trust since application of the provision would not adversely any rights of the beneficiaries because their rights are subject to Ruth’s power of revocation; (6) under both the trust terms and Indiana law, Ruth owed no duties to the remainder beneficiaries while the trust was revocable, held title to the farm as trustee, and signed the contract in that capacity; (7) the purchase agreement was not a trust amendment; and (8) the denial of specific performance of the contract was an abuse of discretion.


a. In 2002, William Giraldin established a revocable family trust naming one of his sons, Tim, as trustee. The trust provided for the distribution of net income and discretionary principal to William during his lifetime, and thereafter for the creation of a trust for the benefit of William’s wife, with the remainder passing at her death equally to William’s four children from a prior marriage, his wife’s three children from a prior marriage, and their twin sons, Tim and Patrick. William reserved the right to revoke or amend the trust in writing. William also
executed a will leaving his separate property and his share of all community property to his trust, with Tim as executor.

b. Thereafter, William invested $4 million in Tim’s company, SafeTzone, through payments to the company from February of 2002 through May of 2003. After the final payment, the company issued stock to William that he then transferred to his trust. At the time of William’s death in 2005, the trust’s interest in the company was essentially worthless. Four of William’s children sued Tim as trustee for breach trust, and Mary petitioned to confirm her community interest in two homes and all of the remaining trust assets. The children objected to Mary’s petition arguing that all of the assets were in the trust, and because she accepted trust distributions she could not disavow the trust by claiming a community property interest.

c. The probate court held that Tim breached his duties as trustee by (1) directing the transfer of trust assets to the company to serve his own interests and (2) failing to preserve trust assets and consider the interests of the remainder beneficiaries when making investments. The court also found that William lacked the mental capacity to approve the investment in the company and that the transaction documents signed by William did not amount to a direction by William to make the investment. The probate court surcharged Tim in the amount of $4,376,044 for the investment in the company and another $625,619 for the other trust disbursements.

d. The probate court also rejected Mary’s petition on the grounds that the doctrine of spousal election applied to the trust, and by accepting benefits from the trust she lost her right to pursue community property rights. Tim and Mary both appealed.

e. On appeal, the California Court of Appeals reversed the surcharge against Tim on the grounds that: (1) Tim only owed duties to William during his lifetime and therefore the children lacked standing; (2) remainder beneficiaries have no enforceable property rights in a revocable trust until it becomes irrevocable; (3) the death of the settlor does not grant the remainder beneficiaries retroactive rights; (4) the children could not enforce any duties owed to William because the only beneficiary under the will was
the family trust and the claims were not for William’s benefit since William authorized the transaction; (5) William retained his rights to the trust since he was not adjudicated to be legally incompetent and did not restrict his own rights by making the trust irrevocable, and that included the right to do “financially risky or downright stupid things”; and (6) by acting as trustee, Tim had not agreed to act as a de facto conservator.

f. The court also reversed the decision dismissing Mary’s claims on the grounds that: (1) William only transferred his community share of property to the trust; (2) Mary’s share was never made subject to the trust; (3) there was no inconsistency between Mary’s claim and her acceptance of trust benefits; and (4) the probate court erred by holding Mary was forced to elect between her claim and the trust benefits.

g. The California Supreme Court granted the four children a limited on appeal on the following question:

When the settlor of a revocable inter vivos trust appoints, during his lifetime, someone other than himself to act as trustee, once the settlor dies and the trust becomes irrevocable, do the remainder beneficiaries have standing to sue the trustee for breaches of fiduciary duty committed during the period of revocability.

h. On appeal, the California Supreme Court (over done dissenting justice) reversed the Court of Appeals and found that the remainder beneficiaries have standing on the following grounds: (1) the California Probate Code does not address the issue directly; (2) standing is implicit in other provisions of the Code that (a) state that the remainder beneficiaries’ interest in a revocable trust is only postponed until after the settlor’s death and (b) exonerate a trustee of a revocable trust from liability where acting at the direction of the settlor (implicitly showing there could be liability where not acting at the settlor’s direction); (3) while not clear, the best reading of the Code on the trustee’s duty to account for a revocable trust is that the trustee must account to reminder beneficiaries for actions taken while the trust was revocable but not until after the settlor dies; (3) the Code grants a “beneficiary” statutory standing to petition the court concerning trust affairs or to determine its
existence, and does not distinguish revocable trusts; (4) no California court, and no other statute or case, has held there is no standing in this situation; (5) considered as a whole, the Code grants the beneficiaries standing to sue for actions of the trustee while the trust was revocable; (6) after the settlor has died and can no longer protect his own interests, the beneficiaries have standing to claim a violation of the trustee's duty to the settlor to the extent that violation harmed the beneficiaries' interests; (7) other causes of action, such as for elder financial abuse or a claim by the settlor's personal representative, do not purport to replace or preclude other causes of action and the standing of the personal representative is not exclusive; (8) beneficiaries do not need to go through the two-step process of moving to appoint a personal representative (or an independent one) and then having that personal representative sue, the beneficiaries may bring the actions directly; and (9) after the settlor's death, the beneficiaries have standing to assert a breach of the fiduciary duty the trustee owed to the settlor to the extent that breach harmed the beneficiaries.

i. The California Supreme Court expressed no view on the merits of the claims or whether they were barred by the statute of limitations or laches.

j. The dissenting justice would have affirmed the Court of Appeals on the grounds that only the settlor's personal representative can sue on behalf of the settlor.

k. On remand, the California Court of Appeals reversed the surcharge award against Tim and remanded the case to the trial court on the grounds that: (1) because the claims against Tim could not have been brought until after the settlor's death, and Tim did not provide any accountings until the litigation began, the claims against Tim were not barred by the statute of limitations or laches; (2) however, the trial court erred by excluding as hearsay testimony about William's mental state and intent, and those out of court statements by William should have been admitted under the "state of mind" exception to the hearsay rule.

3. **Matter of Trimble, 826 NW 2d 474 (2013).** Iowa Supreme Court holds that under the Iowa UTC a trustee only has to account to the settlor or her personal representative for period where trust was revocable, and attorneys' fees incurred by
trustee in defending against improper accounting action by remainder beneficiary are payable out of the trust.

a. In 1999, Mary Trimble created a revocable trust with herself as trustee that she amended several times before her death in 2009. The beneficiaries of the trust after her death were her 18 nieces and nephews. Shortly before her death, Mary amended the trust to name her niece as trustee to assist Mary with her affairs as her health declined.

b. After Mary’s death, one of the beneficiaries demanded an accounting of the trust since its inception. The trustee agreed to account for the period commencing on Mary’s death. The beneficiary amended her request to demand an accounting form the time the trustee took office, and the trustee declined her request. The beneficiary petitioned the court to compel the accounting. All of the other beneficiaries sided with the trustee in opposing the petition.

c. The probate court held that a beneficiary could request an accounting for a period during which the trust was revocable so long as the actual request was made after the trust was irrevocable, and ordered the trustee to account for the time period commencing upon the trustee’s appointment (even though the trust was still revocable by Mary at that point). The trustee ultimately complied with the court’s order compelling the accounting, but there were ultimately no substantial objections to the accounting other than objection to the trustee’s attorneys’ fees incurred in opposing the petition for an accounting. The probate court held that a prudent trustee would not have opposed the petition, and ordered the trustee to personally pay her own attorneys’ fees and also those of the beneficiary and the temporary administration that had been appointed for Mary’s estate. The trustee appealed.

d. On appeal, the Iowa Supreme Court reversed the trial court on the grounds that: (1) even though the trustee rendered the accounting, the issue of whether the accounting demand was proper was essential to the ruling on the fees and therefore was not moot on appeal; (2) under the UTC while a trust is revocable and the settlor is alive and competent, the trustee’s duties are owed exclusively to the settlor; (3) while the UTC is ambiguous
as to whether a beneficiary may seek the accounting after the death of the settlor for the period of revocability, the purposes of a revocable trust as an efficient probate alternative and as providing privacy, support interpreting the UTC as requiring the trustee to account only to the settlor or her personal representative; (4) requiring the trustee to account to the personal representative (while it may be cumbersome in some cases) alleviates the potential for abuse while preserving for the settlor the same level of privacy with regard to pre-death transactions that is normally accorded to persons using wills; (5) the settlor’s interest in privacy favors a bright line rule denying beneficiaries the right to an accounting for the period when the trust is revocable; (6) allowing beneficiaries to have an accounting for a time period during which the trustee owed a duty to someone else would open the door to beneficiary challenges to transactions that were beneficial to the settlor but not beneficial to future beneficiaries, such as the high costs of end-of-life care or an investment strategy that favors the settlor’s needs to the detriment of future beneficiaries; and (7) therefore a trustee who owes no accounting to beneficiaries while a trust is revocable should not face retroactive accounting duties for the same period upon the settlor’s death.

e. The Iowa Supreme Court also reversed the probate court’s orders on fees on the grounds that: (1) no Iowa case has required a trustee to personally pay a beneficiary’s fees without a finding of breach of duty, misuse of trust assets, fraud, or other malfeasance; (2) the “justice and equity” standard in the UTC fees provision should be applied after considering the reasonableness of the parties’ positions, whether the trustee unnecessarily prolonged the litigation, ability to bear the financial burden, the results of the litigation, and whether a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons; (3) the trustee prevailed and her position was reasonable, within her rights to withhold the accounting, and therefore acted without malfeasance; (4) the trustee’s delay in providing an accounting did not prolong the litigation to the extent requiring her to pay the fees; (5) in the absence of a breach of duty, the trustee’s personal ability to pay the fees is not relevant; (6) while there may have been pre-existing animosity between the trustee and the beneficiary, the trustee did not withhold the accounting
solely for this reason and the animosity between these sisters does not justify the trustee personally paying the fees; (7) there was no showing of fraud, abuse, or any malfeasance; and (8) therefore, the trustee’s attorneys’ fees and costs are to be paid out of the trust, and the beneficiary is to bear her own fees and costs.

4. *Pennell v. Alverson*, No. 1 CA-CV 10-0673 (September 18, 2012). Arizona court of appeals, applying Michigan law, holds that trustee does not owe duties to remainder beneficiaries while trust is revocable, but declines to address whether remainder beneficiaries can sue for alleged harm to settlor.

a. Cleo Hubbard created a trust in 1989 for her own benefit during her lifetime, with the remainder passing to her two daughters and six grandchildren. The trust limited distributions to one grandchild, Angella, until all of the beneficiaries first received $300,000. Cleo was the initial trustee, with Angella as named successor. In 1990, Cleo amended her trust to distribute after her death in equal shares, but charging Angella’s share with any unpaid debts to Cleo. The amendment also expressly reserved Cleo’s right to amend or revoke the trust. Cleo amended the trust again in 1993 to appoint Angella as co-trustee. Cleo died in 2002.

b. In 2003, Angella accounted for the trust, and also allowed an independent auditor to examine the trust records. The auditor found nothing unusual. Angella petitioned the court to approve her plan for distributing the trust assets and to approve her fees, and several beneficiaries objected and filed a complaint against Angella alleging breach of duty and seeking a declaration that the 1993 amendment was void and the removal of Angella as trustee.

c. Angella moved to dismiss the claims to the extent they were based on actions prior to Cleo’s death, and the court granted the motion on the grounds that, under an Arizona UTC statute, Angella owed no fiduciary duties to the other beneficiaries during Cleo’s lifetime. With respect to distributions made by Angella, the court found no breach of duty but ordered Angella to reimburse the trust for a tax benefit the trust would have had if the trust had retained certain stock. The court dismissed the balance of the various claims against Angella, and awarded her fiduciary compensation and her attorneys’ fees in
defending herself in the action. The beneficiaries appealed.

d. On appeal, the Arizona Court of Appeals affirmed the dismissal of any claims against the trustee based on a claimed duty owed to the beneficiaries while the trust was revocable, on the grounds that: (1) the trust terms provided that Michigan, and not Arizona law, would apply to the trust; (2) the trust terms granting the trustee broad fiduciary powers, with general references to the beneficiaries”, should not be read as creating duties owed to the beneficiaries while the trust was revocable; (3) while not directly stated in the original trust, it is clear that Cleo intended to reserve the right to revoke or amend the trust during her lifetime; (4) because reserved the right to revoke or amend the trust, Angella did not owe any fiduciary to duties to the remainder beneficiaries during Cleo’s lifetime; and (5) there is no Michigan authority for imposing duties owed to the remainder beneficiaries during Cleo’s lifetime.

e. With respect to the beneficiaries’ claims that they had standing to sue for breaches of duties owed to Cleo during her lifetime, the Court of Appeals vacated and remanded to the trial court on the grounds that the trial court had not stated in the record the basis for its decision to dismiss the claims.

f. With respect to the beneficiaries’ claims that Angella had breached her duty by distributing stock to herself (which carried out a capital loss to her) while distributing cash to the other beneficiaries, the Court of Appeals sustained the dismissal of the claims on the grounds that the beneficiaries offered no argument on appeal as to why the trial court’s dismissal was erroneous.

g. With respect to the trial court’s awarding of compensation and attorneys’ fees to Angella, the Court of Appeals vacated the trial court’s order and instructed the court to reconsider those issues at the conclusion of the litigation.


a. Peter Kesling and his children were the primary shareholders of TP Orthodontics, Inc. (TPO), a closely-held corporation organized under Subchapter S of the Internal Revenue Code. Peter’s son Andrew served as
president of TPO. TPO’s shareholder agreement provided that any proposed transfer to a person or entity that was not then a current shareholder of TPO was void unless the current shareholders were given a first right to purchase the shares to be transferred. An exception to this provision existed for transfers from a shareholder to his or her revocable trust for estate planning purposes so long as certain requirements were met.

b. In 2001, Andrew created a revocable trust naming himself as trustee and beneficiary, and transferred all of his shares of TPO to his revocable trust in accordance with the shareholder agreement. In 2004, tension developed between Peter and Andrew related to company matters. Andrew and Peter agreed that Andrew would purchase some of Peter’s shares of TPO such that Andrew would become a 51 percent and controlling shareholder of the company. The sale from Peter to Andrew was completed in June 2004.

c. In 2008, Andrew’s siblings filed a complaint in the Lake, Indiana Superior Court claiming that because Andrew had transferred his shares of TPO to his revocable trust in 2001, the 2004 sale from Peter to Andrew was a sale to a person other than a current shareholder that should have triggered the right of first purchase provisions of the shareholder agreement. The siblings asserted their rights, as the other shareholders, to purchase Peter’s shares. Peter asserted that the sale should be rescinded and the stock returned to him.

d. The trial court held that: (1) Andrew was not a shareholder from 2001 to 2004 because he had transferred his shares to the trustee of his revocable trust; (2) Andrew’s status as an existing shareholder was material to the transaction because of the terms of the shareholder agreement; (3) a mutual mistake of material fact existed between the parties with respect to Andrew’s status as an existing shareholder at the time of the transaction; and (4) therefore the transaction should be rescinded. Andrew appealed.

e. On appeal, the Court of Appeals of Indiana reversed the trial court on the grounds that: (1) because Andrew was the grantor, trustee, and lifetime beneficiary of the revocable trust he should be deemed to be a shareholder for purposes of the shareholder agreement at the time of
the 2004 sale; (2) for many state law and federal tax purposes, including creditor's rights and estate tax purposes, a revocable trust and its grantor are considered an inseparable single entity; and (3) although legal title to the TPO shares was held by the trustee, Andrew should be deemed an existing shareholder with respect to the 2004 sale because assets owned by a revocable trust should be treated as owned by the individual grantor and trustee.


   a. On January 29, 1987, Norma Jean Klein and her husband, Lloyd, created a joint revocable trust called the Klein Family Trust, and executed pour over wills. Norma and Lloyd served as co-trustees during their lives. Under the trust agreement, on the death of either spouse, the survivor as trustee was to divide the trust assets into three sub-trusts, two of which were to become irrevocable at the first spouse’s death. Norma’s son, Christopher, and Norma’s other children and stepchildren were named as remainder beneficiaries of the irrevocable sub-trusts. The trust agreement contained a no-contest clause. The trust agreement also specified a procedure for appointing successor trustees upon the death of either spouse, and designated Norma’s other son, Michael, as successor trustee.

   b. Lloyd died and Norma became sole trustee. Nine months later, Norma executed an asset allocation agreement providing for the funding of the three sub-trusts.

   c. In November of 2008, Christopher filed an application for safe harbor determination under California Probate Code former section 21320 whether his proposed petition constituted a contest to the trust. Christopher’s petition sought: (1) removal of Norma as trustee for cause; (2) a determination that the provisions designating Michael as successor trustee only applied to the original trust and not to the irrevocable sub-trusts, but that if the designation did apply to those trusts, a determination that Michael was unfit to serve and disqualified from serving as successor trustee; and (3) appointment of a professional fiduciary as successor trustee of the irrevocable sub-trusts.

   d. The trial court granted Christopher’s safe harbor petition on the grounds that the sub-trusts did not contain a no-
contest clause or incorporate the no-contest clause contained in the original trust by reference.

e. On appeal, the California Court of Appeals reversed the trial court and found that the intent that the no-contest clause apply to the sub-trusts was implicit in the trust document, noting that because the original trust was revocable, a contest was never a possibility during the joint lives of the settlors.

f. The court similarly rejected the argument that the successor trustee provisions did not apply to the sub-trusts, and refused to find that Michael was unfit to serve because of his lack of necessary education or his hostile attitude toward Christopher, noting the importance of the settlors’ choice of a trustee.

g. The court agreed that, assuming the claim was not frivolous, Christopher’s request to remove Norma for cause did not violate the no-contest clause because the trust contained no prohibition or provision at all on an action to remove an individual trustee for cause. The court noted that even if the no-contest clause at issue had specifically prohibited any action to remove a trustee, the provision would have been unenforceable because a trustee cannot hide behind a no-contest clause and commit breaches of fiduciary duty with impunity.


a. Dorothy H. Rautbord created a trust for her lifetime benefit, with the remainder distributable to her children including her sons, Daniel and Simon Siegel. The trust terms allowed the trustee in its sole discretion to pay so much of the income and principal as the trustee deemed necessary for Dorothy’s support, maintenance, health, comfort, or general welfare. Dorothy reserved the power to amend, modify, or revoke the trust and specifically excluded any attorney-in-fact from exercising her power. Dorothy appointed JP Morgan Chase Bank as trustee.

b. Dorothy also executed a power of attorney and named her daughter, Ms. Novak, as agent. Ms. Novak’s powers as agent included the power to make gifts to individuals or charitable organizations, provided the gifts were reasonably consistent with Dorothy’s pattern of giving or her estate plan, or were not in excess of the annual exclusion from federal gift tax. The power of attorney
specifically excluded any power to revoke, amend or withdraw principal from any trust where Dorothy reserved the power to amend or revoke the trust.

c. During Dorothy’s life, Ms. Novak made large withdrawals of principal from the trust by signing revocation letters, which the trustee approved. In addition, the trustee issued checks for numerous gifts and made large distributions for Dorothy’s general welfare.

d. Dorothy died in 2002, and thereafter the trustee filed a complaint for judicial settlement of its accountings and sought a discharge of its liability for its actions as trustee. Dorothy’s sons filed an answer and affirmative defenses, alleging that expenditures were not made for proper trust purposes. The trial court concluded that the issue whether expenditures were appropriate was a question of law to be determined by the court, and then proceeded to grant summary judgment in favor of the trustee based on its findings that: (1) gifts were permitted under the trust instrument; (2) the sons lacked standing to challenge any distributions made prior to Dorothy’s death because the trust was revocable; and (3) the sons had no present interest in the trust assets during Dorothy’s life.

e. On appeal, the Florida Court of Appeals remanded certain questions of fact which required more than a mere interpretation of the trust instrument, and found that the trial court had incorrectly treated the question of whether the withdrawals were appropriate and authorized as a question of standing. The court disagreed with the trial court’s interpretation of the trust instrument and the power of attorney, and found that: (1) the trust agreement gave no power to the trustee to make gifts or invade principal unless requested by Dorothy; (2) while the power of attorney gave Ms. Novak the power to make gifts, it did not provide for the invasion of trust principal for that purpose; and (3) the trust restricted the power of the trustees and imposed a duty to invade principal only for Dorothy’s support, maintenance, health, comfort, or general welfare.

f. The court noted that the trust had significant provisions to dispose of the trust property at Dorothy’s death to specific persons, demonstrating a purpose not only to benefit herself during her lifetime, but to benefit specific other persons, and that permitting the trustee to deplete the
trust principal by lavishing gifts on others would thwart this intent.

g. The court found the trustee’s reliance on the attorney-in-fact’s authority to make gifts as misplaced and remanded the issue for further factual determinations, based on the court’s view that: (1) the gifts were not within Dorothy’s pattern of giving and her estate plan (certain gifts were made to Ms. Novak’s employees and to persons Dorothy did not know); (2) Ms. Novak’s withdrawals of trust principal exceeded her authority and should never have been authorized by the trustee; and (3) the numerous gifts suggest that the power to gift was not exercised with Dorothy’s best interests in mind.

h. Turning to the objection to expenditures for Dorothy such as lavish birthday parties, airline tickets for friends, health expenses, pets, and similar items, the court rejected the trial court’s determination that the sole discretion granted the trustee under the trust instrument summarily enabled these expenditures, noting that under New York law even where the trustee had the sole discretion to determine the appropriateness of expenditures, the court should still determine the proper use of that discretion.

i. The court reversed the award of summary judgment in favor of the trustee, and remanded the case for further factual determinations by the trial court.


   a. In 1997, Stephen Gunther (Stephen) established a revocable trust with J. Barry Gunther (Barry) as initial trustee. In 2006, Stephen amended the trust to name himself as trustee and change the residuary beneficiary upon his death to his then living descendants, subject to a contingent trust for any beneficiary under the age of 25. Stephen died in 2009 survived by his wife, Angel Gunther, and their two minor children, Alton and Adam Gunther.

   b. One year after Stephen’s death, the beneficiaries sued Barry (by their mother as next friend) with respect to his actions as trustee during Stephen’s lifetime, and sought an accounting, enforcement of the trust, removal of the trustee, and surcharge of the trustee. The trial court entered summary judgment against the beneficiaries in
favor of the trustee finding that the trustee owed no duty to the beneficiaries prior to Stephen’s death and beneficiaries were not entitled to an accounting for transactions prior to that date. The beneficiaries appealed. On appeal the Court of Appeals of Missouri affirmed, applying the Missouri Uniform Trust Code and confirming that under the UTC the trustee (1) had no fiduciary relationship with the beneficiaries until the death of the settlor and thus the trustee had no duty to account to the beneficiaries before that date and (2) wed his duties exclusively to the settlor of the revocable trust prior to his death.


   a. Plaintiff Tindall filed civil conspiracy claims against three trusts. The claims were dismissed on summary judgment. In a motion for reconsideration, Tindall filed supplemental briefs on the issue of whether the trusts could be held liable for the alleged conspiratorial acts of their sole trustee, Dudley. The general rule, as stated by the court, is that a trust will not be held liable for the torts of its trustee unless the trust actually benefited from or was complicit in the alleged conspiracy. The court had explained in its previous opinions in the matter that Tindall would have to provide evidence of a specific benefit to the trusts, or the use of the trusts in furtherance of the alleged conspiracy, or knowledge of the conspiracy by the trust beneficiaries.

   b. Tindall attempted to identify additional evidence, which created a jury question on the issue of the trusts’ liability. She demonstrated that Dudley was the sole trustee and beneficiary of one of his revocable trusts and made several deposits and two key withdrawals from the trust. His revocable trust issued two checks to Dudley near the time of a mass auction and liquidation of business assets from H&S Homes, one of Dudley’s businesses, and Tindall challenged these transactions as fraudulent. The court noted that it was undisputed that the business assets were later re-purchased by other companies operated by Dudley. Tindall also alleged that the trusts were unjustly enriched because they retained value in Horton Industries stock and Dudley had complete control over Horton Industries. Tindall argued that the decision not to pay her
judgment would benefit the bottom line of Horton Industries, which benefit would then flow through to the trusts as the major shareholders of the company.

c. Dudley claimed that the withdrawals from his revocable trust were unrelated to the auctions of the H&S Homes business assets, and that they were payments on loans that he had made to his trust. Dudley also claimed that the trusts did not receive any benefits from Horton Industries or the liquidation of the assets.

d. As to two of the trusts that were family trusts established by Dudley’s parents, the court found that there was not sufficient evidence to establish liability on either of those trusts. The only evidence offered by Tindall was evidence that they generally benefitted from Horton Industries. Without other evidence of a benefit or of culpability, the court would not reconsider its grant of summary judgment in favor of the two family trusts.

e. With respect to Dudley’s revocable trust, the court vacated its summary judgment on the grounds that: (1) the financial interests of Dudley, his revocable trust, and Horton Industries were intertwined; (2) Dudley’s two withdrawals from his revocable trust were evidence of conspiratorial knowledge; (3) a jury could potentially find that it was “more than mere coincidence” that the withdrawals occurred at the time of the allegedly fraudulent asset purchases; and (4) Tindall had offered sufficient evidence to create a jury question on the issue of the revocable trust’s benefit from or complicity in the alleged conspiracy.


  a. Harry and Marion Malasky created a joint revocable trust; during their lifetimes, Harry and Marion served as trustees and were the primary beneficiaries. Harry’s children from his first marriage were the presumptive remainder beneficiaries. After Harry died, another individual served in his stead as successor trustee with Marion. The trustees brought an action to settle the accountings of the trust, including an accounting of the trust period during Harry’s life. His children challenged this accounting. During their lifetimes, Harry and Marion received all of the income of the trust and held an unequivocal power to amend or revoke the trust. The children’s interest was
only that of presumptive remainder beneficiaries. Because of this, the court held that the children were not entitled to accountings from the trustees for the term of the trust during which they held no pecuniary interest.


a. This Florida case decided under New York law (the same law as *Malasky*) reached a different result regarding pre-death withdrawals from revocable trust. In *Siegel*, a corporate Co-Trustee served with *Siegel* under his revocable trust. The court held that the remainder beneficiaries had standing to challenge certain withdrawals during the life of the settlor where those withdrawals were executed by the non-settlor, corporate trustee and the withdrawals were not approved by the settlor in a manner consistent with the formality of the execution of the original trust agreement.

VII. PRIVILEGES.

A. Attorney-Client Privilege in the Private Trust Context. An increasingly disputed issue, and one for which there is little certainty in the law, is the extent to which a trustee is entitled to the protections of the attorney-client privilege in his communications with his counsel related to a private trust.

B. Excerpt from UTC Section 813 Comments. The drafters of this Code decided to leave open for further consideration by the courts the extent to which a trustee may claim attorney-client privilege against a beneficiary seeking discovery of attorney-client communications between the trustee and the trustee’s attorney. The courts are split because of the important values that are in tension on this question. “The [attorney-client] privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer’s being fully informed by the client.” *Upjohn Co. v. United States*, 449 U.S. 383 (1981). On the other hand, subsection (a) of this section requires that a trustee keep the qualified beneficiaries reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests, which could include facts that the trustee has revealed only to the trustee’s attorney. There is authority for the view that the trustee is estopped from pleading attorney-client privilege in such circumstances. In the leading case, *Riggs National Bank v. Zimmer*, 355 A.2d 709, 713 (Del. Ch. 1976), the court reasoned that the beneficiary, not the trustee, is the attorney’s client: “As a representative for the beneficiaries of the trust which he is administering, the trustee is not the real client . . . .” This beneficiary-as-client theory has been criticized on the ground that it
conflicts with the trustee’s fiduciary duty to implement the intentions of the settlor, which are sometimes in tension with the wishes of one or more beneficiaries. See Louis H. Hamel, Jr., Trustee’s Privileged Counsel: A Rebuttal, 21 ACTEC Notes 156 (1995); Charles F. Gibbs & Cindy D. Hanson, The Fiduciary Exception to a Trustee’s Attorney/Client Privilege, 21 ACTEC Notes 236 (1995). Prominent decisions in California and Texas have refused to follow Delaware in recognizing an exception for the beneficiary against the trustee’s attorney-client privilege. Wells Fargo Bank v. Superior Court (Boltwood), 990 P.2d 591 (Cal. 2000); Huie v. De Shazo, 922 S.W. 2d 920 (Tex. 1996). The beneficiary-as-client theory continues to be applied to ERISA trusts. See, e.g., United States v. Mett, 178 F.3d 1058, 1062-64 (9th Cir. 1999). However, in a pension trust the beneficiaries are the settlors of their own trust because the trust is funded with their own earnings. Accordingly, in ERISA attorney-client cases “[t]here are no competing interests such as other stockholders or the intentions of the Settlor.” Gibbs & Hanson, 21 ACTEC Notes at 238. For further discussion of the attorney-client privilege and whether there is a duty to disclose to the beneficiaries, see ACTEC Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.2 (3d ed. 1999); Rust E. Reid et al., Privilege and Confidentiality Issues When a Lawyer Represents a Fiduciary, 30 Real Prop. Prob. & Tr. J. 541 (1996).

C. Legislative Enactments. Some state legislatures have acted to eliminate any fiduciary exception to the attorney-client privilege. The New York and Florida statutes provide a helpful model for other states that desire to ensure that their fiduciaries can obtain the candid advice of counsel in the carrying out of all of their duties.

1. New York. New York eliminated the fiduciary exception in the estate context through Section 4503 of the New York Civil Practice Law and Rules, which provides that “no beneficiary of the estate is, or shall be treated as, the client of the [personal representative’s] attorney solely by reason of his or her status as beneficiary”. That section also provides that the “existence of a fiduciary relationship between the personal representative and a beneficiary of an estate does not by itself give rise to any waiver of the [attorney-client] privilege.

2. Florida. In 2011, Florida amended its evidence code to provided that a communication between a lawyer and a client acting as a fiduciary is privileged and protected from disclosure under the statutory attorney-client privilege to the same extent as if the client were not acting as a fiduciary. Fl. Stat. 90.5021. Florida also amended its probate and trust codes to make it clear that the “real client” is the personal representative or trustee and not
the beneficiaries, and to provide a mechanism for giving beneficiaries notice that the fiduciaries can retain counsel and assert the attorney-client privilege. See Fl. Stat. 733.212; 736.0813.

D. Recent Cases.

   a. In this case, the United States Supreme Court considered whether the fiduciary exception applies to the United States as trustee for certain Apache Indian lands. The Jicarilla Apache Nation is an Indian tribe that occupies a large reservation in New Mexico. The land contains timber, gravel, and oil and gas reserves that are developed under statutes administered by the Department of the Interior, with proceeds by the United States in trust for the tribe under federal law. In 2002, the tribe sued the United States as trustee in the Court of Federal Claims alleging breach of trust and seeking money damages for alleged mismanagement of the trust assets. Six years of alternative dispute resolution failed to resolve the matter. While the United States turned over thousands of documents during that process, it withheld 226 potentially relevant documents in part because of its assertion of the attorney-client privilege.

   b. In 2008, the case was returned to the active document, and the United States continued to assert the attorney-client privilege for 155 of the withheld documents. The Court of Federal Claims reviewed those documents *in camera* and classified them into categories. For the documents the Court categorized as communications relating to the management of trust funds, the Court held that the documents fall within the fiduciary exception to the attorney-client privilege and that the trust relationship between the United States and the Indian tribes is sufficiently analogous to a common-law trust relationship that the exception should apply. Accordingly, the Court ordered the United States to turn over the documents.

   c. The United States petitioned the Court of Appeals for the Federal Circuit for a writ of mandamus directing the Court of Federal Claims to vacate its production order, and the Court of Appeals denied the petition holding that the fiduciary exception was properly applied to the United States as trustee. The Supreme Court granted certiorari.
d. In arguing *Jicarilla* before the Supreme Court, the United States actually *conceded* the existence of the fiduciary exception as part of the common law of trusts, despite its thin and conflicting treatment in the cases, and instead focused on its argument that the exception does not apply to the unique role of the United States as trustee for Indian trusts. The United States did not explain why it conceded the existence of the fiduciary exception, although it is reasonable to speculate that other government agencies may assert the exception in other contexts (i.e. ERISA litigation) and the United States might not want to undermine their position. The concession by the United States prevented the Supreme Court having to actually decide and rule on the merits of the fiduciary exception.

e. The oral argument revealed a number of important policy issues regarding the viability of the exception. Several of the justices expressed concern about the concession by the United States. Several questions asked by the Court suggested that the Court has concerns about the rationale and ramifications of the fiduciary exception. Chief Justice Roberts’s questions suggested that the fiduciary exception would deprive a trustee of frank legal advice. For example, the Chief Justice, noting that the exception could leave open the prospect that advice might be disclosed, asked whether that would result in “bland, mushy, hedging advice rather than direct candid advice”. He suggested that if the fiduciary’s counsel knows his advice may be discovered, the quality of the advice rendered might be impaired, potentially undermining the relationship between fiduciary and counsel.

f. During argument, the tribe’s counsel argued that a trustee concerned about personal liability can engage counsel and maintain the privilege, but a trustee seeking advice on asset management could not. The Chief Justice questioned the merits of such a distinction noting that there is “always a question of liability”.

g. As a consequence of the concession by the United States, the Supreme Court assumed for purposes of its analysis that the fiduciary exception exists as a feature of the common law of trusts and did not rule on this issue or on the merits of the exception, nor did it offer any meaningful analysis of the parameters or limitations of the exception.
h. Ultimately, the Court held that the assumed common law fiduciary exception to the attorney-client privilege does not apply to the general trust relationship between the United States and the tribe. The Court noted that although the United States’ management of the tribal trust bore some resemblance to a private trust, the United States’ obligations to the tribe are created by statute rather than common law, and the United States acts pursuant to its sovereign interest in the execution of federal law rather than as a private trustee. Further, the tribe was not the “real client” since the United States did not use trust funds to obtain the legal advice and the advice was sought in its sovereign capacity rather than as a private trustee. In addition, the Court held that the United States’ trust responsibilities were explicitly delineated by statute and did not include the common law disclosure sought by the tribe.

i. The Court noted that the United States exercises its carefully defined trust responsibilities in a sovereign capacity to implement national policy respecting Indian tribes, and held that the two features justifying the fiduciary exception - the beneficiary’s status as the real client and the trustee’s common-law duty to disclose information about the trust - are notably absent in the trust relationship Congress has established between the United States and the tribe. According to the Court, not every aspect of private trust law can properly govern the unique relationship of Indian tribes and the United States. The fiduciary exception to the attorney-client privilege ranks among those aspects inapplicable to the administration of Indian trusts by the United States.

2. Garvy v. Seyfarth Shaw LLP (No. 07-L-4924). In this post-\textit{Jicarilla} opinion, the Illinois Court of Appeals reviewed the lower court’s order compelling a law firm to turn over communications with its own internal and external counsel, related to a legal malpractice claim against the firm, to the client bringing the malpractice claim. In that case, the Illinois Court of Appeals noted that Illinois did not recognize the fiduciary exception. Acknowledging the survey of the law set forth in \textit{Jicarilla}, the Court held that it was not persuaded by other cases cited to create new Illinois law by recognizing the exception. The Court went to hold that even if the exception did apply in Illinois, it could not apply to the actual case since it was an adversarial proceeding not covered by the fiduciary exception.

a. The decedent’s son sued the co-executors for breach of fiduciary duty for allegedly overvaluing company stock by $3 million and incurring $2.8 million in additional estate taxes. The son sought to depose the co-executors’ attorney and subpoena documents to conduct the deposition. Objections were filed, and the co-executors then produced 3,800 pages of documents related to the valuation and estate taxes. The son moved to overrule the objections and the co-executors sought a protective order, claiming that the materials were discoverable based on the fiduciary exception to the attorney-client privilege and other grounds.

b. The court granted the co-executors a protective order on the grounds that:

   i. The dicta by the U.S. Supreme Court in *United States v. Jicarilla Apache Nation* (in which the court assumed, and did not rule upon, the existence of the exception at common law) did not alter the status of the common law on the fiduciary exception and also did not render the prior 2010 decision of Connecticut Judge Shapiro rejecting the fiduciary exception;

   ii. As recognized by the Supreme Court, other jurisdictions have a mixed pattern of recognition and rejection of the fiduciary exception;

   iii. It does not appear that the Supreme Court of Connecticut, if faced with the question, would adopt and recognize the fiduciary exception because of the state’s long-standing and strong public policy of protecting attorney-client communications to facilitate effective legal representation;

   iv. Any possible waiver by one co-executor did not waive the privilege for the other co-executor;

   v. Asserting the special defense of good faith reliance on the company valuation by Management Planning, Inc. did not implicitly waive the privilege; and
vi. The party asserting the privilege should submit a privilege log, and challenges will be handled by the court through *in camera* review.

d. *Hammerman v. Northern Trust Company*, No. 1 CA-CV 13-0260 (Arizona Court of Appeals, 2014). In a case of first impression, Arizona Court of Appeals holds that UTC and state law support adoption of the fiduciary exception to the attorney-client privilege, but reverses trial court for ordering disclosure of all communications to both beneficiary and successor trustee without determining whether advice was for trust administration and should be disclosed, or for self-defense that is not required to be disclosed, and for requiring disclosure merely because advice was paid for with trust funds and obtained from trust counsel.

i. The sole income beneficiary of trust disagreed with the decision of the corporate trustee to sell of a Phoenix warehouse held in a single member LLC held as trust asset. The beneficiary exercised her power to remove and replace the trustee before the sale closed.

ii. The beneficiary and the successor corporate trustee requested all trust files. The trustee turned over all of the files, other than 4% of the 1100 email related to the trust. The trustee asserted that those emails were privileged in that they were obtained in its corporate, rather than fiduciary capacity, and related to the threat of litigation by the beneficiary.

iii. The trial court ordered the trustee to turn over all of the emails on the grounds that the trustee (1) used the trust counsel for the advice and (2) paid for the advice out of the trust, and the trust has an absolute right to the advice it pays for. The trustee appealed.

iv. On appeal, the Court of Appeals recognized the fiduciary exception to the attorney-client privilege, but reversed the trial court and remanded the case on the following ground:

i. The beneficiary of a trust is not the “real client” of the legal advice obtained by the trustee. However, the trustee’s duty
to disclose under the Arizona UTC is consistent with the rationale for the fiduciary exception that the trustee’s disclosure obligation extends to legal advice related to the trust administration. Therefore, a component of the trustee’s disclosure duty under the Arizona UTC is a duty to disclose “legal consultations and advice obtained in the trustee’s fiduciary capacity concerning decisions or actions to be taken in the course of administering a trust”. A trustee cannot withhold material facts from a beneficiary simply because the trustee has communicated those facts to an attorney.

ii. Courts that have rejected the fiduciary exception were not constitutionally empowered to apply exception to the attorney-client privilege in the absence of legislative action, but Arizona courts have this power.

iii. The question of whether a trustee acted in a fiduciary capacity cannot be resolved simply by asking who paid for the advice. The trial court erred by holding that disclosure is required solely because the trust paid for the advice – the trust does not have an absolute right to information that it paid for.

iv. When a trustee seeks legal advice in its personal capacity for purposes of self-protection, there is no exception and the attorney-client privilege extends to the advice. The trial court erred by ordering the trustee to turn over legal advice without considering whether the advice was sought for self-protection. Privileged communications made in this personal capacity do not cease to be privileged merely because the trustee used trust funds to pay the attorney or because the same attorney also provided trust administration advice. If trust
funds are wrongly used, the correct remedy is a claim against the trustee, but the cost allocation issue does not affect ownership of the privilege.

v. Similarly, a successor trustee has a right to legal advice obtained by the prior trustee related to trust administration, but not personal advice such as advice related to self-protection. The trial court erred by holding that the successor trustee was entitled to all privileged communications by the prior trustee.

vi. The trial court must conduct an in camera review of the emails the trustee seeks to withhold to determine whether they are related to trust administration or its own interests such as self-protection.


a. Bob Tigani was the trustee of a 1986 trust for his own lifetime benefit, and also had the power to appoint the successor beneficiaries of the trust from a class including Bob’s sons, Chris and Bob Jr., and their descendants. In 2000, Bob exercised his power to name Chris as sole successor beneficiary of the trust. The trust was the majority shareholder of N.K.S. Distributors Inc. In litigation between Chris and the company, Chris moved to compel production of communications between Bob and his counsel concerning the trust. Bob’s counsel refused to produce document on the basis of attorney client privilege.

b. The Delaware Court of Chancery rejected Chris’s argument that under *Riggs National Bank v. Zimmer* a trustee must produce to a beneficiary all communications containing legal advice pertaining to the trust or the trustee’s performance of his duties. The court distinguished *Riggs* on the basis that in this case, Bob’s attorneys were advising Bob on problems with the company that Bob believed Chris was causing, and therefore the legal
services could not be deemed to be performed for Chris’s benefit. The court noted that nothing in the law provided justification for the beneficiary of a trust to receive privileged documents where, as in this case, the documents were prepared on behalf of a trustee in preparation for litigation between a successor beneficiary and the trustee. The court further distinguished *Riggs* on the basis that Chris’s interest in the trust was contingent and subject to Bob’s power, and therefore he was entitled to lesser rights than a primary beneficiary.


   a. The plaintiffs, beneficiaries of a trust, filed a petition against the bank trustee, seeking termination of the trust, alleging that trustee mismanaged the trust, causing losses of approximately $250,000, and alleging that the purpose of the trust was unlawful and imposed unreasonable restrictions on the trust property. The Court denied the plaintiffs’ petition and approved the trustee’s accounting and discharged the trustee.

   b. Thereafter, the plaintiffs filed a petition seeking an accounting specifically of the legal fees paid to the trustee’s attorney in connection with the prior litigation. The trustee responded that it had fully accounted to the plaintiffs and was discharged. The trustee submitted itemized statements from its legal counsel for the Court’s in camera review, and the Court approved the trustee’s payment of legal fees to its counsel.

   c. On appeal, the plaintiffs argued that they were entitled to the itemized invoices provided by the trustee’s counsel. The Court disagreed. Quoting from Section 173 of the Restatement (Second) of Trust, it recognized a beneficiary’s ordinary right information to “enforce his rights under the trust or to prevent or redress a breach of trust.” It nonetheless rejected demand for itemized legal invoices, noting that beneficiaries are not entitled to “unlimited access to all of the records of the trust” if the beneficiaries have “failed to articulate a need for the documents other than a vague need to prevent or redress a breach of trust.” The Court further noted that the “burden of proof is “upon those who question [the trustee’s] actions and seek to establish a breach of trust.” As the plaintiffs failed to specify any reason for their need
for the invoices other than simply stating that the trust was paying legal fees, the Court (applying a clear error standard on appeal) affirmed the decision of the trial court.


   a. In this action to challenge a will and remove an executor, the executor refused to provide discovery of his personal financial records (such as his individual tax returns, checks and bank statements). The beneficiaries also sought itemized legal invoices for legal fees incurred by the executor’s lawyer, apparently in connection with the administration of the estate, without court approval. The Beneficiaries had filed a petition to contest the will, but their removal claim was based on a host of issues, including the executor’s voting the estate’s majority interest in a close held company to make decisions for his own financial benefit, his failure to pay dividends during the litigation, payment of legal fees without court approval, and a failure to pursue a claim against a claim that a third party had financially exploited decedent.

   b. When the executor refused to provide the requested discovery, the trial court held the executor in contempt. The beneficiaries claimed they needed the executor’s personal financial records to demonstrate that the compensation he voted to approve for himself (in connection with the corporation owned by the estate) was not appropriate because he already had a full-time job and his compensation in that job would also show the fair market value of his services. The appellate court did not find “any logic” in these arguments. It noted that the executor’s compensation in his full-time job would be relevant only if he did the same time of work in his full time job as he did for the corporation (which was not the case). It found that these and other arguments for discovery were not sufficient, as the discovery sought was not “reasonably calculated to lead to admissible evidence.”

   c. The Appellate court, however, found merit in the request for discovery of itemized legal invoices. The Court rejected the executor’s claim that a summary statement of
the invoices was sufficient, noting that when a law firm submits itemized records, it does so to induce the client to pay the bill – the description of services provided “are the explanation and justification for the fee charged” (citing RPC 1.5). The court found that, for the same reasons, the beneficiaries and the court should have the right to review the itemized invoices to determine that the fees were appropriate. The court observed that the executor had paid the fees without court approval. He and his attorneys were “on notice” from case law that court approval was required before the fees were paid from the estate. Thus, the beneficiaries and the court would “need the billing statements for the same reason a client would need them: to confirm the reasonableness of the amount of attorneys fees charged.”

d. Significantly, the court then rejected a claim that the invoices were privileged, noting that the “executor has impliedly waived the attorney-client privilege with respect to the billing statements he paid with funds from the estate.” When he paid the attorney invoices from the estate, the executor “voluntarily injected into this case” the reasonableness of those fees as well as whether they were beneficial to the estate.”


a. In a contested accounting, the petitioner trustee moved for an order compelling the production of materials used by the objectants that were used to form their objections. The objectants’ attorney who specifically made the objections died before the motion was filed.

b. As the petitioner waited until after the objectant’s attorney died, the objectants were unable to identify what documents and information their attorney had relied upon in preparing the objections. The Court recognized that “no one can be certain if anything was ever committed to paper” and further that the Petitioner had “failed to show that there was a “substantial need” for the documents and that it would experience “undue hardship” if the privileged documents were not produced (a requirement under CPLR 3101(d)).
c. The petitioner further demanded that the objectants produce all correspondence and communications between the objectants and the trustee's representatives. The Court noted that it must be alleged “that the material sought has probative value and serve to narrow the controversy” and found that the petitioner’s papers were “devoid of any explanation as to how the papers sought suit that purpose.” Accordingly, it held that the petitioner’s request for a reviewed of privileged records, which spanned more than eight years and included communications that postdated the accounting period, was overly broad and onerous and denied the petitioner’s motion. The court’s decision focused on the “herculean” effort that would be required to prepare a privilege log that would then require an “exhaustive in camera review.” The Court was “unwilling to devote its precious time and resources to pore over a privilege log spanning eight years which presumably includes every piece of attorney work product, but also hundreds of internal emails and correspondence.”

Communications between client’s financial advisor and estate planning attorney protected by attorney-client privilege where advisor was acting as agent for client.

a. Muriel Perry amended her will in 2008 to make changes to certain specific bequests, but her new will inadvertently omitted her exercise of a power of appointment under her husband’s trust, which she intended to exercise and had exercised in the prior version of her will. The omission of the exercise of the power was not discovered until after her death in 2008.

b. Certain beneficiaries that were affected by the omission of the exercise of the power brought a malpractice action again the estate planning attorney. During the course of that litigation, the court directed the parties to seek information from Muriel’s financial advisor, JP Morgan.

c. The advisor objected to the production of communications with Muriel’s counsel about Muriel’s estate plan during Muriel’s lifetime on the grounds of attorney-client privilege. The court overruled objections to production based on the privilege, and ordered the issuance of a subpoena to the advisor. The advisor’s counsel advised that it could not produce some documents due to the
privilege, but the court overruled its objections and ordered the production. When the advisor refused, the court found the advisor in contempt and imposed a sanction of $100 to enable appellate review of the privilege issue.

d. On appeal, the Illinois Appellate Division reversed the trial court and held that communications between the advisor and Muriel’s counsel were protected by the attorney-client privilege on the grounds that: (1) the documents demonstrate that the advisor was acting as Muriel’s agent where it was communicating with her counsel about changes to her estate planning documents; (2) communications between an agent and the principal’s counsel during the principal’s lifetime are privileged as though the communications were directly between the principal and counsel; (3) after Muriel’s death, the agency terminated and communications with Muriel’s counsel are not protected by her privilege; (4) the privilege survives Muriel’s death (except in the case of a will contest, which is not applicable to this case), and there is no authority supporting the argument that the co-trustees of her estate have the right to waive the privilege; (5) therefore, communications between Muriel, her advisor as her agent, and her counsel remain privileged; and (6) the fact that the lawyer’s conduct was at issue in the case does not change the conclusion, because Muriel holds the privilege, not the attorney, and therefore the attorney cannot waive the privilege.

9. Zook v. Pesce, (Maryland Court of Appeals, May 16, 2014). Maryland Court of Appeals upholds the testamentary exception to the attorney-client privilege, but rules that petitioner failed to establish that the trial court’s error in denying her evidence under the exception was prejudicial to her.

b. Article Seven of the 2008 Living Trust specified that each of Eugene’s three children was to receive an equal one-third share of the trust’s remainder. However, while Respondent and Dennis were to receive their shares outright, Petitioner’s share was to be held in further trust for her.

c. Petitioner, as a self-represented litigant, filed an action in the Circuit Court for Prince George’s County, questioning the validity of the 2008 Living Trust. That action was liberally construed by the Court as an action to invalidate the trust due to Decedent’s purported lack of capacity and also as the purported product of undue influence.

d. During the proceeding, Petitioner requested access to a copy of the 2007 Living Trust. Mr. Downs, responding to Petitioner’s subpoena for records, asserted that the 2007 Living Trust was a privileged communication with his deceased client and asserted the attorney-client privilege on Eugene’s behalf as well as on the behalf of the trustee of that trust, Respondent. The Circuit Court honored the privilege and refused to allow Petitioner access to the 2007 Living Trust agreement or to allow any questions about its content. The Court also determined that there was insufficient evidence of Eugene’s lack of capacity or of undue influence and dismissed Petitioner’s complaint.

e. The Court of Special Appeals affirmed the Circuit Court’s decision and the Maryland Court of Appeals granted certiorari to consider whether the testamentary exception to the attorney-client privilege exists in Maryland and also whether the trial court erred by recognizing the applicability of the attorney-client privilege to the original living trust.

f. The Court of Appeals ruled that the testamentary exception to the attorney-client privilege does indeed exist in Maryland. The Court further ruled that the trial court erred by failing to require Mr. Downs to produce the 2007 Living Trust agreement. However, it noted that it is Petitioner’s burden to establish that this error was prejudicial and determined that Petitioner failed to establish this. The Court found that had the trial judge considered the terms of the 2007 Living Trust or evidence relating to its execution, the court would not have been persuaded to rule any differently. Petitioner could not establish lack of capacity as Petitioner had merely
produced evidence that Eugene was seriously ill with cancer when he executed the 2008 Living Trust. Moreover, Petitioner had produced no evidence, other than Eugene’s change in the terms of his Living Trust, to support a claim that Decedent was subject to undue influence. The Court noted that if it were to rule that a mere change in a will or trust is sufficient to create a prima facie case of undue influence or unsound mind, its decision would only induce more litigation and discourage people from making desired and appropriate revisions to their wills or trusts. Thus the Court ruled that Petitioner was not entitled to a new trial.

VIII. DISCLOSURE AS A FACTOR IN SURCHARGE LITIGATION.

A. *Smith v. SunTrust Bank*, A13A2256 (Georgia Court of Appeals, January 15, 2014). Line item on account statement reporting sale to straw man does not start statute of limitations on sale by trustee, but trustee’s detailed letter received by beneficiaries starts limitations period on income distributions.

1. Orr Fisher created a trust in 1969 for the benefit of his daughter Emily along with 17 other relatives and their descendants, with Emily, Spencer Linder, and a bank as co-trustees. The trust was funded with a 15% interest in Georgia commercial real estate under a 90-year ground lease, which now contains a large office park. In the trust terms, Orr expressed his precatory wish that the property not be sold, and prohibited the sale without his or his wife’s consent during their lifetimes.

2. The trust was divided into 3 subtrusts: one with 10% of the property paying income to Emily for life; another with a 60% interest that distributed income to the other beneficiaries; and a third trust (called “Trust C” which is at issue in the case) with a 30% interest that permitted income distributions to all of the beneficiaries combined as needed for maintenance, health, support, and education, after considering other resources. The trust terms required annual accountings. Upon termination of the trust at the end of the perpetuities term, the trust assets passed to the Fisher Foundation.

3. Orr died in 1969 just after creating the trust. In 1979, the trustees sold the property to Orr’s widow for the appraised value of $300,000 in a straw man transaction. She then immediately conveyed the property to Emily and her husband (the deeds were recorded within minutes of each other). The trust account statements for 1979 noted the sale to the widow, but did not mention the transfer to Emily. One beneficiary, Rob Smith,
testified he did not receive the statements and was unaware of the transaction. Other beneficiaries testified that their parents may have received the statements, but they were not aware of the sale transaction.

4. From 1969 until 1989, all of the income of Trust C was distributed to Emily (to the exclusion of the other beneficiaries), and without any application of the standards in the trust instrument. In 1989, a new trust officer for the corporate trustee attempted to require Emily to provide documentation of her need and other resources as a condition of receiving income, but capitulated when Emily refused and continued distributions. In 1990, the trust officer sent the Trust C beneficiaries a letter that recited how income distributions had been handled and would be handled unless another beneficiary expressed a need for income. All of the beneficiaries except Ron admitted they received the letter. In 1998, a new trust officer reviewed the income situation, called it a debacle, and noted it was best to leave the issue as it is.

5. The Trust C beneficiaries also testified that they did not receive statements for the trust and had not provided a copy of the trust instrument before the litigation.

6. In 2011, the trustees petitioned to terminate the trusts and distribute the trust assets to the current beneficiaries. In 2012, the beneficiaries sued the trustees for improper sale of the property and for improper distributions of income from Trust C. The trial court granted summary judgment for the trustees on the basis of the running of the statute of limitations on the claims.

7. On appeal, the court of appeals:

a. Reversed summary judgment on the claims related to the sale on the grounds that: (i) the account statement was not a “written report” that starts the limitations on the sale, where the incomplete information and lack of disclosure of the straw man transaction could allow a jury to find the disclosure was deceptive; (ii) there was evidence (viewed most favorably to the beneficiaries for summary judgment purposes), including the use of a straw man, that could allow a jury to find that the trustees fraudulently concealed the transaction, creating an issue of material fact on whether the limitations period had been tolled; and (iii) the evidence could allow a jury to find the trustees had breached their duties through the straw man transaction;
b. Reversed summary judgment on Rob Smith’s claims on the income distributions and accountings because he testified that he did not receive the trust instrument, accountings, or the trustee's letter about income distributions; and

c. Affirmed the summary judgment dismissing the claims of those beneficiaries that admitted to receiving the trustee’s 1990 letter about income distributions, other than claims brought within the 6 year limitations period.

B. **Beck, et. al. v. Mueller, 2014 Wisc. App. LEXIS 377** (Court of Appeals of Wisconsin, May 8, 2014). Wisconsin Court of Appeals rules that trust beneficiaries' claims against trustee were time-barred by the statute of limitations as the beneficiaries had notice of the trustee's actions and their claims thus accrued before the trustee filed his formal accounting.

1. Norma Beck died testate in 1984 leaving six separate, equally funded trusts for each of her six grandchildren. She named Gordon Mueller (“Mueller”) as trustee of the trusts and provided him with discretion to make income and principal distributions for the support, maintenance, and education of the beneficiaries. The will further provided for partial distributions of the trusts’ assets at the ages of 23, 28 and 35.

2. On December 12, 2011, the six beneficiaries brought a lawsuit against Mueller for intentional breach of his fiduciary duties and for intentional fraud. The beneficiaries alleged that Mueller had breached his duties by failing to file annual and final accountings; failing to make required distributions, including the final distributions when the beneficiaries attained age 35 (the youngest beneficiary had attained age 35 in 2007); failing to wind up the administration in a timely manner; failing to prudently invest the assets; and converting the assets for his own benefit. The beneficiaries also claimed that these actions constituted an intentional fraud on the beneficiaries.

3. Mueller asserted the affirmative defense that the claims were barred by the applicable statute of limitations (it was undisputed that a two year statute of limitations applied) and then moved for summary judgment. Thus the beneficiaries’ claims would have had to have accrued after December 11, 2009 to survive.

4. The beneficiaries, relying on the discovery rule, argued that their claims did not accrue until June 20, 2010 when each received a final accounting of his or her respective trust. They claimed that prior to this they had “neither knowledge of the extent or value of trust property, nor knowledge of whether they received the proper
amounts when funds were distributed from trust.” Alternatively, they argued that their claims were tolled from the time of first injury until Mueller was removed as trustee, which was less than two years before they filed their December 12, 2011 complaint.

5. The trial court denied Mueller’s summary judgment motion, and Mueller was granted leave to appeal. The Court of Appeals reversed the trial court’s decision and remanded the matter with directions.

6. On appeal, Mueller argued that the claims were time-barred and also that their claim of intentional fraud was not pled with particularity. Analyzing Wisconsin’s discovery rule, the Court concluded that a “reasonable person, exercising reasonable diligence, would have discovered his or her injuries with respect to his or her trust, which should have terminated between 1998 and April 2007, sometime prior to December 2009.”

7. The Court noted that Peter, the oldest grandchild, had personally received a copy of the Will upon Norma’s death in 1984 and that Peter acted as the remaining beneficiaries’ collective representative. Thus the remaining beneficiaries constructively received the Will, which provided the relevant terms regarding terminating distributions and the like.

8. The Court determined that it would not take a verified accounting for the beneficiaries to know that the trusts retained property years after they should have been fully distributed and terminated and noted that an injured party “does not need to have full and complete knowledge of everything necessary to carry out a lawsuit.” Thus the Court ruled that Mueller was entitled to summary judgment dismissing the beneficiaries’ complaint.

C. *Parris v. Regions Bank*, 2011 U.S. Dist. LEXIS 92167 (W.D. Tennessee, August 17, 2011). Court refuses to dismiss investment loss claims against trustee under the UTC statute of limitation because the disclosure letter provided no information about the fund, concealed the trustee’s relationship to the fund, and was not otherwise adequate to give rise to inquiry notice that would start the limitations period.

1. William Parris served as co-trustee of the Sara G. Parris Grantor Trust. Union Planters National Bank of Memphis served as co-trustee until it merged with Regions Bank in 2004, at which time Regions Bank became co-trustee with Parris.

2. Parris brought claims against Regions Bank for breach of trust, negligence, violation of the Prudent Investor Act, and violation of the Tennessee Consumer Protection Act, alleging that: (1)
Regions recommended that the trust invest in a “proprietary junk bond fund” called the Regions Morgan Keegan Inc. High Income Fund; (2) committed inappropriate self-dealing as part of its plan to increase the holdings of its trust customers in affiliated junk bond funds; (3) failed to disclose material facts including the fund’s risks and fees; and (4) invested 72% of the trust’s assets in the fund, and failed to diversify the investment or protect the trust assets despite problems with the fund (including holdings in subprime debt obligations) and other “storm warnings” about the volatility of the investments. Parris sought compensatory damages against Regions in the amount of $92,000 and punitive damages of $500,000.

3. Regions moved for summary judgment dismissing the claims, which the court rejected. The court held that summary judgment was not appropriate due to the running of the one-year statute of limitations under the Alabama Uniform Trust Code because Regions did not proffer evidence that would require a jury to conclude that Parris had inquiry notice of the claims against Regions more than one year before he brought the suit. The letter sent by Regions to Parris informing him of the investment in the fund, which Parris signed, provided few details about the fund, and stated only that the fund would earn more income than current trust investments. The court held that the letter alone was not adequate to justify summary judgment based on the running of the one-year limitations period where the letter provided no information about the fund, was sent on Union Planters and not Regions letterhead and thereby concealed Regions’ relationship to the fund, and was not otherwise adequate to give rise to inquiry notice that would start the limitations period.

4. In a footnote, the court commented that to the extent Regions relied on the trust account statements sent to Parris, Regions failed to explain how the statements could put Parris on inquiry notice about a possible claim for breach of trust. The court noted that while the trust account statements, combined with other facts not in the record, might show inquiry notice, the court could not reach such a conclusion based on the statements alone or the facts in the record at the summary judgment stage.

5. The court rejected Regions’ other arguments as follows: (1) the claims were not barred by ratification as a result of Parris’s acceptance of dividends from the fund, receipt of account statements, or approval of the initial purchase of the fund, because Regions could not conclusively show that Parris had all the facts necessary to form an opinion about the investment in
the fund; (2) the claims were not barred by consent, acquiescence, waiver, laches, or estoppel because Regions made only a conclusory argument without supporting factual evidence in the record; (3) the Consumer Protection Act claims were adequately pled by incorporating all of the factual allegations in the complaint by reference; and (4) Parris had standing to bring the claims against Regions Bank, notwithstanding the Probate Court of Jefferson County, Alabama’s appointment of a trustee ad litem to pursue claims on behalf of Regions’ trust accounts in various class actions pending before the court.

D. *Museum Associates v. Schiff, 2011 Cal. App. Unpub. LEXIS 1752 (March 10, 2011).* Investment claims against trustee not barred by the statute of limitations where disclosure letters lacked sufficient information to give rise to a duty on the part of beneficiary to inquire about claims, and therefore were not adequate to start the running of the statute of limitations period.

1. A charitable remainder annuity trust was created by court order in 1984. The CRAT paid a 6% annuity to Susan Cole for her lifetime with the remainder passing to the Los Angeles County Museum of Art (LACMA) for the purchase of Japanese and Chinese art. The trust was funded with approximately $1.3 million. Michael Schiff became successor trustee in 2001, at which time Susan was expected to live another 26 years.

2. Beginning in 2001, the trustee prepared annual letters to LACMA. The letters sent in 2001, 2002, and 2003 disclosed the value of the trust assets and described the trust assets generally. The 2002 and 2003 letters enclosed a management contract for the trust’s investment in “FMI LLC” and represented that the investment would provide 12.54% return. The 2004 letter informed LACMA that it was necessary to renegotiate the FMI investment by taking an assignment of a promissory note from DollarWorks, Inc. to the trust in the amount of $650,000, secured by 157,500 shares of DollarWorks stock.

3. In 2006, Susan renounced her interest in the trust. LACMA then sought information about the trust assets, and in 2007 petitioned for surcharge against the trustee for imprudent investment of the trust assets in FMI and DollarWorks. LACMA only received interest payments on the $650,000 promissory note until October 2007, and received less than $80,000 in total payments on the promissory note. The trial court surcharged the trustee in the amount of $532,701, plus prejudgment interest. The trial court rejected the trustee’s claim that his letters were sufficient to trigger the commencement of
the statute of limitations on LACMA’s claims. The trustee appealed.

4. On appeal, the California Court of Appeals affirmed the trial court and held that the letters lacked sufficient information to give rise to a duty on the part of LACMA to inquire about claims, and therefore were not adequate to start the running of the statute of limitations period.

E. Taplin v. Taplin, 88 So. 3d 344 (May 9, 2012). Appellate Court Reverses Summary Judgment for Trustees on Dismissal under UTC Shortened Limitations Period.

1. Sol M. Taplin created a trust during his lifetime for the benefit of his son Martin’s three children, Andrew, Jennifer, and Kristopher, with Martin and Moises Chorowski as co-trustees. Andrew sued the trustees alleging that they failed to properly account, withheld distributions, and for acts of self dealing. The trustees moved for summary judgment arguing that Andrew’s action was barred under the Florida Uniform Trust Code provisions that shorten the statute of limitations following certain disclosures, or alternatively by the four-year statute of limitations period for intentional torts. The trial court granted summary judgment and dismissed the lawsuit. Andrew appealed.

2. On appeal, the Florida Court of Appeal reversed the trial court on the grounds that: (1) the shortened limitations periods under the Florida Uniform Trust Code required that the beneficiary receive a report or account; (2) the petition alleged that Andrew had not received any account, and therefore the limitations period was not a proper basis for dismissal on summary judgment; and (3) the limitations period for intentional torts does not apply to actions by beneficiaries against trustees.

F. Cundall v. U.S. Bank, 122 Ohio St. 3d 188 (June 4, 2009).

1. In 1976, John Koons and his wife, Ethel, created a trust for their children and funded the trust with thousands of shares of stock in their family company, Central Investment Corporation (“CIC”), which owned a brewery and bottling companies. The Koonses appointed their son, Bud, as trustee. Bud also served as President and CEO of CIC. The trust was divided into two separate trusts, one for Bud’s children called Share A, and one for the children of Bud’s sister, Betty Cundall, called Share B.

2. The next year, Betty created her own trust for the benefit of herself, her spouse, and her children, and funded her trust with stock in a family holding company that held only CIC stock. Betty named a predecessor to U.S. Bank as trustee. U.S. Bank
served as trustee until 1996, and was also the commercial banker for CIC.

3. In 1983, Bud offered to buy all of the family's shares in CIC, including the shares held in Share B and the Cundall trust, at $155 per share, which the family refused. Around the same time, CIC purchased its own stock from another shareholder for $328 per share. Eventually, Bud purchased the CIC shares from Share B and the Cundall trust for $210 per share. The Cundall family members, as beneficiaries of Share B and the Cundall trust, signed releases at the time of the sale releasing Bud and U.S. Bank from any and all liability in connection with the sale.

4. Bud died in 2005. One of Betty Cundall’s children, Michael, alleged that after Bud’s death he discovered for the first time that CIC was sold for $400 million and as a result of Trust B having sold its CIC stock for a low price, Trust B was worth only $800,000 while Trust A (which was for the benefit of Bud’s family) was worth more than $30 million.

5. Michael was appointed as successor trustee of Trust B in November 2005, and four months later sued Bud’s estate, U.S. Bank, other trustees of related trusts, and more than 20 members of Bud’s family and the Cundall family. Michael’s claims were based on the allegations that (1) Bud breached his fiduciary duties as trustee by acquiring CIC shares through intimidation, coercion, and misrepresentation about the value of the shares and (2) U.S. Bank breached its fiduciary duties by enabling the sale and knowingly concealing the value of the CIC shares.

6. All of the defendants moved to dismiss the claims. U.S. Bank moved to dismiss based on the statute of limitations and the releases, and other defendants moved to dismiss on lack of jurisdiction and failure to tender back the consideration received in the sale before filing suits. The trial court granted the motions to dismiss.

7. On appeal, the First District Court of Appeals affirmed the dismissal of U.S. Bank on statute of limitations grounds, but rejected the application of the tender offer rule in a fiduciary context. The First District also found the releases “highly suspect” and concluded that in order for the releases to be valid the trustees had to meet the burden of showing that the trustees acted “with the utmost good faith and exercised the most scrupulous honesty toward the beneficiaries, placed the beneficiaries' interests before their own, did not use the advantage of their trustee positions to gain any benefit at the
beneficiaries' expense, and did not place themselves in a position in which their interests might have conflicted with their fiduciary obligations". The First District found that the claims against Bud and the other trustees were not barred by the statute of limitations.

8. On appeal, the Ohio Supreme Court found that all of the claims were barred by the statute of limitations because (1) the rule that the statute of limitations does not run until the trustee repudiates the trust only applies where the trustee’s action is “surreptitious or obscured and remains so until the trustee’s death or removal” and (2) where the beneficiary knows about the breach of duty, or by the exercise of reasonable skill could have learned of it, the statute of limitations begins to run at the time of the breach. The Court found that the beneficiaries knew or should have known about the alleged fraud and wrongdoing at the time of the sale of the CIC stock in 1984, and therefore the statute of limitations began to run at that time. Consequently, the Court held that all of the claims were time-barred.

G. *McNeil v. McNeil*, 798 A.2d 503 (2002). Illustration of how the duty to treat the beneficiaries equally may be forcefully applied in the context of the duty to disclose.

1. In 1959, Mr. McNeil established 5 trusts from the sale of his pharmaceutical company. Four of the trusts (the “Sibling Trusts”) were for the separate benefit of each Mr. McNeil’s four children.

2. The fifth trust was for the benefit of his wife, Lois (the “Lois Trust”). The Lois Trust provide for current discretionary distributions among Mr. McNeil descendants, their spouses, and his wife. All four trustees of the Lois Trust (three individual trustees and Wilmington Trust Company) were aware that all of Mr. McNeil’s descendants were current permissible distributees of the Lois Trust.

3. Mr. McNeil’s son, Hank, became estranged from his parents and siblings, and was shortchanged under his parents’ wills.

4. Hank sued the trustees of his separate trust for additional discretionary distributions, and that lawsuit was resolved in a separate suit.

5. Hank then sued the trustees of the Lois Trust on the basis that he was misled about his status as a current beneficiary.

6. The trial court found that:
a. The trustees of the Lois Trust continued Hank’s “outside status”, while Hank's siblings were made aware of information about the administration of the Lois Trust (largely through their participation in a family holding company).

b. The trustees resisted Hank’s efforts to learn information about the Lois Trust.

c. The trustees breached their fiduciary duty by failing to inform Hank about his status as a current beneficiary and favoring the other siblings.

7. The trial court ordered a 7.5 percent makeup distribution to Hank and his children, removed one of the trustees, and surcharged each of the trustees one-fifth of their commissions from 1987 to 1996.

8. On appeal, the Delaware Supreme Court affirmed most of the trial court’s decision, and held that:

   a. Mr. McNeil did not expressly relieve the trustees of the duty to disclose information.

   b. Hank’s attempts to obtain information should have put the trustees on notice that he did not know he was a current beneficiary of the Lois Trust.

   c. A trustee has a duty to inform beneficiaries of essential facts, and the status as a current beneficiary is an essential fact.

   d. The trustees wrongfully denied Hank information, and even misled Hank about his status as a beneficiary, whilst providing information with the other siblings (through the family holding company).

   e. Large distributions to Hank from his other trust is not a defense to the blatant failure to failure to inform Hank about his status as a beneficiary of the Lois Trust.


1. Ruth Lilly is the sole surviving grandchild of Eli Lilly, the founder of Eli Lilly & Company. In 1981, the probate court appointed National City Bank as conservator of Ruth’s estate.

2. In 2001, upon the petition of National City, the court directed National City to prepare a new estate plan for Ruth. National
City sought the new estate plan because of concerns that her existing documents would result in extensive post-death litigation and incur significant unnecessary taxes.

3. National City submitted a proposed new estate plan, and notice was given to Ruth and three charities named as beneficiaries under Ruth’s then existing documents, The Poetry Foundation, Lilly Endowment, Inc., and Americans for the Arts. All the parties were represented by counsel, were provided with copies of the proposed plan, and had the opportunity to object to the plan.

4. Under the plan, two charitable remainder annuity trusts were to be created, one for Ruth’s lifetime benefit and one for the benefit of Ruth’s nieces and nephews. Both CRATs named the three charities as remainder beneficiaries. National City was named as the trustee of both CRATs.

5. The trust instruments authorized National City to retain assets received in trust indefinitely and provided that “any investment made or retained by the trustee in good faith shall be proper despite any resulting risk or lack of diversification or marketability and although not of a kind considered by law suitable for trust investments.”

6. None of the parties or their counsel objected to these provisions of the trust agreements. In December 2001, the court approved the new estate plan.

7. The CRATs were funded in 2002 entirely with 3.8 million shares of Lilly stock. By March 2002, National City had drafted an investment policy for the CRATs, and by October 2002, National City had diversified out of most of the Lilly stock, which had declined significantly in value since the funding of the CRATs.

8. In November 2002, National City petitioned the probate court to approve its diversification of the Lilly stock. Two of the charities objected and counterclaimed to surcharge National City for damages arising out of its alleged delay in diversifying the stock. The probate court granted summary judgment in favor of National City.

9. On appeal, the Indiana Court of Appeals affirmed the granting of summary judgment in favor of National City on the basis of the exculpatory clause in the trust agreements. In its decision, the Court of Appeals noted that: (1) counsel for the charities did not object to the exculpatory clause during the proceedings to approve the trust agreements, (2) there was no evidence of self-dealing by National City, (3) there was no evidence that National
City benefited from the failure to diversify, (4) none of the parties ever sought to remove National City as trustee, (5) there was no evidence that National City abused its fiduciary relationship, (6) National City had no connection to the Lilly company, and (7) none of the parties alleged bad faith on the part of National City.


1. Emanuel Rosenfeld, the founder of Pep Boys, created a perpetual charitable trust in 1952. Mr. Rosenfeld’s son Lester, his daughter Rita, Lester’s son Robert, and Wachovia Bank (and its corporate predecessors) were serving as co-trustees. Lester worked for Pep Boys his entire life. He served as vice president of the company until his retirement and thereafter was a consultant to the company and a member of the board, eventually moving to emeritus status.

2. Rita began pressuring for the diversification of the Pep Boys stock in 1997. Around the same time, the bank attempted unsuccessfully to arrange a meeting with the co-trustees to discuss diversification. Rita and the bank favored the sale of the stock, and Lester and Robert opposed it.

3. Lester and Robert refused to participate in conference calls to discuss the sale. In September 1997, the bank sent a letter to the co-trustees expressing concern about the poor performance of the stock compared to the S&P 500 and recommended reducing the stock concentration to below 10 percent. Lester refused to consider a sale, despite information he received as a director about the company’s difficulties and declining performance. Notwithstanding his conflict as a member of the board, Lester refused to abstain on the issue of the sale of the stock and refused to sell the Pep Boys stock “at any time.”

4. In 1999, the bank again recommended diversification and requested that the co-trustees indemnify the bank with respect to the stock concentration. None of the co-trustees agreed to the indemnification. By a subsequent letter, the bank stated that it was imprudent for the trustees to hold the stock concentration. Lester responded to the bank’s letter by suggesting that the bank resign as co-trustee.

5. Lester testified at trial that he would only agree to invest the trust assets in Pep Boys stock (even though he invested his personal assets in several other stocks, and as trustee of other
trusts he had agreed to diversify concentrations of Pep Boys stock).

6. The bank continued to actively monitor the stock. Robert was only passively involved as co-trustee and refused to disagree with his father because of his concern about being disinherited.

7. Lester and Robert finally agreed to sell some of the stock in 2001, at which time the stock had significantly declined in value. The co-trustees were unable to agree on the investment of the sales proceeds, so the co-trustees held $3 million in cash.

8. In 2002, Rita sued the co-trustees seeking surcharge based on the failure to diversify the trust’s 100 percent concentration of Pep Boys stock. All three co-trustees moved for summary judgment. Summary judgment was granted in favor of Wachovia Bank. Lester and Robert’s motion for summary judgment was denied.

9. Following trial of the matter, the trial court found that Lester and Robert had breached their fiduciary duties as co-trustees for their refusal to work with Rita and the bank concerning trust investments. The court held that the stock retention clause did not protect Lester and Robert from liability because a majority of the co-trustees had not approved the retention of the stock. The trial court awarded damages against Lester and Robert in the amount of $593,546, calculated from the date that Rita and the bank voiced their objection to the retention of the stock. Despite challenges by Rita and the state attorney general, the trial court approved the reasonableness of the bank’s attorneys’ fees and surcharged Lester and Robert for all of the bank’s $425,507 in attorneys’ fees.

J. Hale v. Moore, 2005 CA 001895 (Kentucky Court of Appeals, January 4, 2008).

1. Claudia Sanders, widow of the late Colonel Sanders of Kentucky Fried Chicken fame, died in 1996 a resident of Shelby County, Kentucky, leaving a will, codicil, and revocable trust. The lawyer that drafted Mrs. Sanders' estate planning documents, Maria Fernandez, was named as executrix under the will and was appointed by the court to serve in that capacity without objection. Wachovia Bank was the trustee under Mrs. Sanders' revocable trust agreement.

2. The will provided for the payment of Mrs. Sanders' debts, costs, and taxes, a modest specific bequest to a church, and for the remaining assets to be distributed to the revocable trust. The trust which was governed under its terms by Pennsylvania law,
provided a "pour back" to the estate for the payment of debts, costs, and taxes, and for the distribution of the trust assets in twelve shares to various relatives, with the share set aside for Mrs. Sanders' deceased daughter to be distributed to two colleges.

3. Mrs. Sanders' assets included commercial and residential real property managed by a North Carolina corporation that she created. Upon Mrs. Sanders' death, Fernandez claimed to also have taken over as CEO of the corporation until its dissolution in 2003. Fernandez and her law firm, in the course of administering Mrs. Sanders' estate, also administered the estates of Mrs. Sanders' sister and son and charged the expenses to Mrs. Sanders' estate without authorization in Mrs. Sanders' will. There were no engagement letters for any of the work done by Fernandez or her firm.

4. In 1999, Wachovia Bank as trustee under Mrs. Sanders' trust agreement was prepared to distribute the trust assets, but the estate was not yet settled. Wachovia obtained an agreement of all beneficiaries to distribute the trust assets to Fernandez for distribution to the beneficiaries, to apply Pennsylvania law to the apportionment of estate taxes, and to discharge Wachovia from any further obligations as trustee.

5. On the federal and state estate tax returns for Mrs. Sanders' estate, Fernandez listed her executor's fee as $175,000. Fernandez billed only $7,227 of this to the probate estate. The remainder of the fee was billed to the trust ($50,000) and the corporation (over $110,000) for unspecified work, and Fernandez admitted doing only nominal work for these entities.

6. In 2000, some of the beneficiaries began expressing concerns about Fernandez's actions, and the fifth accounting was settled by the district court over the concerns of some beneficiaries. In 2004, five of the beneficiaries expressed concerns about Fernandez's fees, and filed exceptions to the sixth accounting with the district court objecting to the fees, objecting to the amount of the distributions to the two colleges (which were not reduced for a portion of estate taxes - unlike the shares for the individual beneficiaries which were reduced for taxes), and seeking an accounting.

7. Late in 2004, the district court held a hearing on the objections. Following the hearing and before a decision by the district court, the beneficiaries filed a new action in the circuit court against Fernandez. Fernandez moved to dismiss on jurisdictional
grounds, which the court ultimately granted and the beneficiaries appealed.

8. In January of 2005, the district court approved Fernandez’s sixth accounting, approving the fees paid to Fernandez as reasonable and approving the distributions to the charities on the basis that Pennsylvania law controlled the apportionment of taxes rather than Kentucky law. Pennsylvania law governed the trust, and did not apportion tax to the charities while Kentucky law governed the probate estate, and did apportion tax to the charities. The beneficiaries filed a motion to vacate the district court’s decision on jurisdictional grounds. The district court rejected the beneficiaries’ motion and approved the seventh and final accounting filed by Fernandez. The beneficiaries filed an appeal of the district court’s decision with the circuit court.

9. In January of 2006, the circuit court reversed the district court and ruled that the apportionment of taxes was governed by Kentucky law, that the releases signed by the beneficiaries were void because of the failure of Fernandez to provide the beneficiaries with material facts about the releases and tax apportionment, and the taxes should have been paid “off the top” with a corresponding reduction in the shares for the colleges. The circuit court also reversed the district court’s approval of the fees paid to Fernandez finding that Fernandez had charged an excessive fee, and remanded the case to the district court for further proceedings. Fernandez appealed.

10. The jurisdictional appeal and the appeal of the circuit court’s decision against Fernandez were consolidated. On appeal the Kentucky Court of Appeals approved the circuit court’s jurisdiction and voided any action of the district court after the filing of the complaint with the circuit court.

11. The Court of Appeals affirmed the circuit court’s application of Kentucky law to the apportionment of taxes on the basis of Kentucky being Mrs. Sanders’ domicile and the Court’s conclusion that nothing in the will evidenced intent by Mrs. Sanders to give the colleges special treatment. The Court of Appeals disregarded the release signed by the beneficiaries that provided for the application of Pennsylvania law, on the basis that the taxes were paid well before the release was signed, the beneficiaries were not fully apprised of the consequences of signing the releases by either Fernandez or Wachovia, and therefore the releases were suspect.

12. The Court of Appeals also affirmed the circuit court’s finding that Fernandez had charged an excessive fee on the basis that
Fernandez (1) based the fee on the value of the gross taxable estate rather than probate estate, contrary to the Kentucky statute, (2) took a fee far in excess of the fee allowed by statute without being able to explain why, (3) only performed ordinary and minimal tasks, (4) failed to provide an itemized bill for services, (5) outsourced most of the substantive work, (6) failed to disclose the fees paid out of the trust and the corporation to the district court, and failed to provide actual services to those entities, (7) served as both attorney and executor without permission in the will contrary to Kentucky law, and (8) improperly settled other estates and charged the costs to Mrs. Sanders' estate.


1. Alice Gustafson ("Alice") established a trust in 1976. In 1998, Alice filed for divorce from her husband, but they reconciled and she dismissed the divorce proceedings. Alice amended her trust in 2000 to make her husband a trustee and also purportedly a partial co-settlor of the trust for all of the assets other than the "Article 5" portion of the trust. Alice died in 2003, leaving her husband as trustee.

2. In 2003, the husband's attorney sent Patricia Welch a check for $50,000 drawn on the trust's account, which was accompanied by a letter informing Patricia that she was one of the contingent trust beneficiaries and that the husband as trustee was making an advance payment to Patricia and would be doing so annually until the future legacy was fully paid.

3. Patricia sought additional information about the trust, but was denied a copy of the trust instrument. She then sued in 2003, seeking an accounting, a copy of the trust instrument, removal of the trustee, and for sanctions. The probate court denied her claims, and she appealed.

4. On appeal, the Michigan Court of Appeals reversed the probate court, and found that Patricia was entitled to a copy of the trust instrument and an accounting, on the basis that (1) the settlor had not overridden the disclosure obligations in the trust agreement, (2) the trust was irrevocable because Alice was deceased and the husband was not a settlor of the Article 5 portion of the trust that was at issue in the case, and (3) Patricia was a current beneficiary of the trust because the trustee had already made a distribution to her from the trust.

5. The Court of Appeals also ordered the trial court on remand (with a new probate judge) to remove the trustee for failing to disclose information to Patricia. Because the Court of Appeals did not
have a copy of the trust instrument in the record, the Court of Appeals remanded with respect to Patricia's other claims including a claim for surcharge.


1. Pauline Hartman ("Mrs. Hartman") died testate in 1991. Under her will, she established separate trusts for her son and daughter. On the death of a child, the will directed that the trust assets revert to the other child, and thereafter to Mrs. Hartman's grandchildren. The son, the daughter, the daughter's child, and BB&T were named as co-trustees of the son's trust.

2. Each trust was funded with equal shares in two family entities, a limited partnership and a corporation. Both companies hold title to unimproved real estate, some of which generates rental income for the two entities. The daughter was general partner with control of the partnership. Although the assets held in the entities were valued at $14.5 million, the son's trust only distributed minimal income to the son (in 2005, the son received less than $19,000 from his trust).

3. The son sued the other co-trustees for failing to approve measures to increase the income payments, failing to disclose offers to the partnership to purchase some of the land at a price above its appraised value, and developing partnership land at partnership expense without the son's knowledge or consent. The son alleged that the actions of the co-trustees were taken to deprive the son of income and benefit the remaindermen, all of whom are the children of the daughter. The son sought removal of the co-trustees and surcharge in the amount of $800,000. The son also alleged failure to diversify the trust investments.

4. The co-trustees demurred, and argued that the trust terms permitted the co-trustees to maintain undiversified investments, they were relieved from complying with the Prudent Investor Act and the Principal and Income Act, the will authorized the co-trustees to provide the son with no income at all, and the trust assets could be maintained for the benefit of the remainder beneficiaries and at the expense of the son.

5. The court overruled the demurrer. The court concluded that the Prudent Investor Act and the Principal and Income Act apply to the son's trust, and that the son alleged sufficient facts to survive demurrer. The court noted that while neither Act specifically demands that a beneficiary be paid a "reasonable income", they do contemplate that beneficiaries will be impartially favored, and that trusts will be managed so as to
fulfill the intent of the testator, "which may in fact require that a reasonable net income be provided". The court also noted that the son was entitled to information to enable him to enforce his rights under the trust or to prevent or redress a breach of trust. The court notes that the other co-trustees may have breached their duties to the son to the extent they failed to provide the son with information about offers for partnership assets, and that while the will gives the trustees significant authority, the authority to act and the proper exercise of that authority are distinct considerations.

IX. QUIET TRUSTS AND DESIGNATED REPRESENTATIVES

A. QUIET TRUSTS – Delaware as an Preferred Jurisdiction

1. A “quiet trust” is a trust, which by its terms, expressly directs the trustee not to provide some or any information to a beneficiary or beneficiaries for a period of time, including even information about the existence of the trust and the beneficiaries’ rights under the trust.

2. This works in Delaware because of the state’s preference to give effect to grantor intent. But absent grantor intent, the law in Delaware requires disclosure to beneficiaries. See McNeil,

3. Settlor’s Intent is Paramount and Controls – 12 Del. C. §3303(a)
   a. “3303(a). Effect of provisions of instrument. Notwithstanding any other provision of this Code or other law, the terms of a governing instrument may expand, restrict, eliminate, or otherwise vary the rights and interests of beneficiaries, including, but not limited to, the right to be informed of the beneficiary's interest for a period of time, the grounds for removal of a fiduciary, the circumstances, if any, in which the fiduciary must diversify investments, and a fiduciary's powers, duties, standard of care, rights of indemnification and liability to persons whose interests arise from that instrument; provided, however, that nothing contained in this section shall be construed to permit the exculpation or indemnification of a fiduciary for the fiduciary's own willful misconduct or preclude a court of competent jurisdiction from removing a fiduciary on account of the fiduciary's willful misconduct. The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this section. It is the policy of this section to give maximum effect to the principle of
freedom of disposition and to the enforceability of governing instruments."

4. Quiet trust language should be carefully customized and limited to accomplish the settlor's desired result and should not be taken to extremes.
   a. As discussed elsewhere in this outline, there are good and practical reasons for providing information to a beneficiary.
   b. If a beneficiary (or someone on their behalf) is not aware of the existence of the trust and therefore cannot enforce the interest of the beneficiary, do you actually have a trust? How long can a trust be “quiet” and still be deemed a trust?
   c. If the trust will be quiet as to some but not all beneficiaries, the trust should address the duty of impartiality. Consider the addition of the role of a representative or protector (e.g. “Designated Representative”). This person could receive information to which a beneficiary would otherwise be entitled and could be empowered to enforce the interests of the beneficiary.

B. FLORIDA'S DESGINATED REPRESENTATIVE STATUTE.


   (1) If specifically nominated in the trust instrument, one or more persons may be designated to represent and bind a beneficiary and receive any notice, information, accounting, or report. The trust instrument may also authorize any person or persons, other than a trustee of the trust, to designate one or more persons to represent and bind a beneficiary and receive any notice, information, accounting, or report.

   (2) Except as otherwise provided in this code, a person designated, as provided in subsection (1) may not represent and bind a beneficiary while that person is serving as trustee.

   (3) Except as otherwise provided in this code, a person designated, as provided in subsection (1) may not represent and bind another beneficiary if the person designated also is a beneficiary, unless:

       (a) That person was named by the settlor; or
(b) That person is the beneficiary's spouse or a grandparent or descendant of a grandparent of the beneficiary or the beneficiary's spouse.

(4) No person designated, as provided in subsection (1), is liable to the beneficiary whose interests are represented, or to anyone claiming through that beneficiary, for any actions or omissions to act made in good faith.

2. **Sample Language**: “The Designated Representative of any beneficiary who is appointed pursuant to this Article (if any) shall have all of the authority, duties and obligations of a designated representative pursuant to Florida Statutes §736.0306, including but not limited to the authority to represent and bind the beneficiary, and the authority to receive any notice, information, accounting or report on behalf of the beneficiary. Accordingly, if a Designated Representative has been appointed to represent any beneficiary pursuant to this Article, the trustees shall provide all accountings, notices, reports, and information to the Designated Representative of the beneficiary, and the trustees shall not provide such accountings, notices, reports, and information to the beneficiary, except that the trustees may provide such accountings, notices, reports, and information to the beneficiary if (i) the trustees obtain the prior written consent of the Designated Representative, or (i) the trustees are required by law to provide such accountings, notices, reports, and information to the beneficiary.”

**X. MAKING EFFECTIVE USE OF UTC DISCLOSURES.**

**A. Tools of the UTC.** The UTC affords the trustees several tools for managing their fiduciary risk. Many of the most of significant of these are tied to adequate disclosures to trust beneficiaries. It is possible to craft disclosures to beneficiaries so as to take advantage of these tools.

**B. Nonjudicial Settlement Agreements (Section 111).**

1. **Who May Create.** Any interested persons may enter into a binding nonjudicial settlement agreement with respect to any matter involving a trust. For purposes of this section, “interested persons” means persons whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the court.

2. **Validity.** A nonjudicial settlement agreement is valid only to the extent it does not violate a material purpose of the trust and includes terms and conditions that could be properly approved by the court or other applicable law.
3. **Matters That May be Resolved.** Matters that may be resolved by a nonjudicial settlement agreement include: (a) the interpretation or construction of the terms of the trust; (b) the approval of a trustee’s report or accounting; (c) direction to a trustee to refrain from performing a particular act or the grant to a trustee of any necessary or desirable power; (d) the resignation or appointment of a trustee and the determination of a trustee’s compensation; (e) transfer of a trust’s principal place of administration; and (f) liability of a trustee for an action relating to the trust.

4. **Court Approval Upon Request.** Any interested person may request the court to approve a nonjudicial settlement agreement, to determine whether the representation of a party was adequate, and to determine whether the agreement contains terms and conditions the court could have properly approved by a court.

5. **Disclosure.** A nonjudicial settlement agreement is a contract between the trustee and beneficiaries. In order to ensure the validity of the contract, prudence requires that the parties to the contract have the essential information relevant to the subject matter of the contract. These facts are frequently included in the contract recitals for this purpose. If the trust agreement restricts the ability of the trustee to disclose information to the beneficiaries, the trustee may not be able to effectively enter into a binding nonjudicial settlement agreement.

C. **Shortening the Statute of Limitations on Trust Contests (Section 604).**

1. Section 604 of the UTC provides trustees with a mechanism for shortening the statute of limitations on suits to contest the validity of a trust.

2. Under section 604, a person may commence a judicial proceeding to contest the validity of a trust that was revocable at the settlor’s death within the earlier of: (a) 3 years after the settlor’s death or (b) 120 days after the trustee sent the person a copy of the trust instrument and a notice informing the person of the trust’s existence, of the trustee’s name and address, and of the time allowed for commencing a proceeding.

3. If the trust agreement restricts the ability of the trustee to disclose information to the beneficiaries, the trustee will not be able to take advantage of this mechanism and will be left with the 3 year period for a trust contest.

4. Most trust beneficiaries are unwilling to wait 3 years for distributions, and refunding agreements may be ineffective to
restore trust assets in the event of a successful challenge to the validity of the trust.

D. Notice of a Terminating Distribution (Section 817).

1. Section 817 of the UTC permits a trustee to reduce to 30 days a beneficiary’s right to object to distributions in partial or full termination of a trust.

2. Under section 817, upon termination or partial termination of a trust, the trustee may send to the beneficiaries a proposal for distribution. The right of any beneficiary to object to the proposed distribution terminates if the beneficiary does not notify the trustee of an objection within 30 days after the proposal was sent but only if the proposal informed the beneficiary of the right to object and of the time allowed for objection.

3. The protection afforded by this section of the UTC is limited to the matters disclosed to the beneficiary in the plan for distributions. The NCCUSL comments states as follows:

   The failure of a beneficiary to object to a plan of distribution pursuant to subsection (a) is not a release as provided in subsection (c) or Section 1009. A release requires an affirmative act by a beneficiary and is not accomplished upon a mere failure to object. Furthermore, a failure of a beneficiary to object does not preclude the beneficiary from bringing an action with respect to matters not disclosed in the proposal for distribution....Factors affecting the validity of a release include adequacy of disclosure, whether the beneficiary had a legal incapacity and was not represented under Article 3, and whether the trustee engaged in any improper conduct....

E. Consent, Release, and Ratification by the Beneficiary (Section 1009).

1. The UTC expressly relieves a trustee from liability to a beneficiary for a breach of trust if the beneficiary consented to the conduct constituting the breach, released the trustee from liability for the breach, or ratified the transaction constituting the breach. The relief from liability is predicated on the consent, release, or ratification not being induced by improper conduct and the beneficiary (or the beneficiary's representative) knowing the material facts relating to the breach. In obtaining consents and releases, it is most important that the trustee fully disclose all of the facts necessary for the consenting party to make an informed decision.
2. A consent, release, or affirmance may occur either before or after the approved conduct. This section requires an affirmative act by the beneficiary. A failure to object is not sufficient. A consent is binding on a consenting beneficiary although other beneficiaries have not consented. If the beneficiary's approval involves a self-dealing transaction, the approval is binding only if the transaction was fair and reasonable.

3. An approval by the settlor of a revocable trust or by the holder of a presently exercisable power of withdrawal binds all the beneficiaries. A beneficiary is also bound to the extent an approval is given by a person authorized to represent the beneficiary as provided in the representation sections.

F. **Shortening the Statute of Limitations on Surcharge Actions (Section 1005).**

   1. The statute of limitations section is one of the most important sections for purposes of reducing risk and liability to the trustee. The UTC clearly rewards trustees that provide full disclosure to all qualified beneficiaries with significant liability protection and reduction.

   2. The statute provides that a beneficiary may not commence a proceeding against a trustee for breach of trust more than one year after the date the beneficiary or a representative of the beneficiary was sent a report that adequately disclosed the existence of a potential claim for breach of trust and informed the beneficiary of the time allowed for commencing a proceeding.

   3. A report adequately discloses the existence of a potential claim for breach of trust if it provides sufficient information so that the beneficiary or representative knows of the potential claim or should have inquired into its existence. The one-year statute of limitations does not begin to run against a beneficiary who has waived the furnishing of a report or who has not otherwise been sent a report.

   4. If the one-year statute of limitations does not apply, a judicial proceeding by a beneficiary against a trustee for breach of trust must be commenced within five years after the first to occur of: (1) the removal, resignation, or death of the trustee; (2) the termination of the affected beneficiary’s interest in the trust; or (3) the termination of the trust.

   5. The one-year and five-year limitations periods under this section are not the only means for barring an action by a beneficiary. A beneficiary may be foreclosed by consent, release or ratification.
Claims may also be barred by principles such as estoppel and laches arising in equity under the common law of trusts.

6. The five-year limitations period is intended to provide some ultimate repose for actions against a trustee. While the five-year limitations period will normally begin to run on termination of the trust, it can also begin earlier. If a trustee leaves office prior to the termination of the trust, the limitations period for actions against that particular trustee begins to run on the date the trustee leaves office. If a beneficiary receives a final distribution prior to the date the trust terminates, the limitations period for actions by that particular beneficiary begins to run on the date of final distribution.