

TRUST AND ESTATE LITIGATION

update



Welcome to Schiff Hardin's first Trust and Estate Litigation Update. In this and future newsletters, we will identify and discuss important and timely issues in this specialized area. We welcome your feedback, and we welcome suggestions of topics that you would like to see addressed. If we can provide further insights, please do not hesitate to contact us.

Jury Trial Unavailable for Breach of Fiduciary Duty Claim Against Trustee

In a case handled at the trial and appellate levels by Schiff Hardin, the Illinois Appellate Court has ruled that there is no constitutional right to a jury trial for breach of fiduciary duty claims against a trustee for breach of trust, even when the only relief sought is money damages.

In *Bank One, N.A. v. Borse*, the trustee sought approval of its trust accounts, and two of the trust beneficiaries responded by asserting multiple claims for breach of fiduciary duty. The beneficiaries contended that the trustee had failed properly to manage trust assets and failed to deal fairly with the trust's beneficiaries.

One of the primary trust assets was Borse Industries, Inc., a privately held business founded by the decedent/settlor. The trustee managed the business for several years after the decedent's death before selling it. The beneficiaries asserted that the trustee breached its fiduciary duty by mismanaging Borse Industries and in other respects. They sought money damages as compensation for the diminution in value of their shares of the trust assets that allegedly resulted from the trustee's breach of duty.

The beneficiaries' claims were accompanied by a jury demand. The trustee moved to strike that demand, and the trial court granted the motion. The case was then tried before Judge Edward Duncan in DuPage County. After hearing testimony from 21 witnesses over 9 days of trial, Judge Duncan found that the trustee had not breached its fiduciary duty and entered judgment in the trustee's favor on every one of more than a dozen charges of fiduciary breach. One of the two beneficiaries appealed.

The Illinois Appellate Court affirmed. *Bank One, N.A. v. Borse*, 351 Ill. App. 3d 482, 812 N.E.2d 1021 (2d Dist. 2004). With respect to the jury trial issue, the Court explained that whether

a plaintiff has the right to a jury trial under the Illinois Constitution depends not on whether the claim seeks money damages (as the beneficiary contended), but on whether the cause of action carried a jury trial right under English common law at the time the Illinois Constitution was originally adopted. At common law, "actions brought against a trustee by beneficiaries seeking damages resulting from the trustee's breach of trust could be heard only in a court of equity," and equitable claims were tried without a jury. Although "modern courts have been more willing to permit beneficiaries to pursue actions at law for certain types of breaches of trust," Illinois courts "must not focus on the nature of the remedy sought by the litigant in determining whether the right to a jury trial attaches." The Second District held that there is no right to a jury trial in a suit against a trustee for breach of trust because the governance of trusts historically was the province of equity.

The beneficiary petitioned for leave to appeal to the Illinois Supreme Court, contending that the Second District's opinion effectively eliminated the right to a jury trial in any case alleging a breach of fiduciary duty. Although the Second District's opinion could be read to support the beneficiary's contention, we argued that the opinion presented no opportunity for the Supreme Court to weigh in on the contours of the right to a jury trial in all non-trust fiduciary breach cases.

The beneficiary's petition for leave to appeal to the Illinois Supreme Court was denied, so the Appellate Court's decision stands as precedent on this important issue. We would be pleased to discuss the case with you.

Schiff Hardin lawyers **Barry Alberts**, **Dave Hodgman**, and **Frank Morrissey** represented the trustee in this litigation.

Who We Are and What We Do

Trust and estate litigation requires two distinct sets of skills. Because these disputes involve trusts and wills and often have tax implications, it is essential to be able to draw upon the substantive knowledge of an attorney whose practice focuses on trust and estate work. And because they involve actual or threatened lawsuits, these matters demand a trial lawyer's strategic judgment and ability to present a case to a judge or jury.

We have found that applying our combined expertise in these disciplines produces the best results for our clients, so we staff our trust and estate litigation matters with attorneys from both our Estate Planning and Administration Group and our Litigation Group.

Our clients also benefit from our significant bank regulatory group, whom we consult in some instances when regulatory issues arise.

Below are brief profiles of some of our attorneys with significant experience in trust and estate litigation.



Thomas W. Abendroth is a partner who concentrates his practice in the fields of estate planning, federal transfer taxation, and estate and trust administration. His practice encompasses all phases of wealth preservation and transmittal, ranging from the preparation of wills and trusts to the implementation of multifaceted transactions that reorganize business holdings in order to minimize transfer taxes. Mr. Abendroth also advises banks and trust companies on fiduciary law and charitable issues. He has extensive trust and estate litigation experience, representing both beneficiaries and fiduciaries.



Barry S. Alberts is a partner who has been involved in a wide range of litigation matters in both federal and state courts, as well as in proceedings before state administrative tribunals and private arbitrations. This includes a focus in representing clients in trust and will contests and breach of fiduciary duty disputes, as well as cases related to insurance coverage, trade secrets, breach of contract, and business torts. Mr. Alberts has frequently been a featured participant at programs concerning legal ethics and attorney professional responsibility, as well as at programs presented by the American Bar Association concerning trial techniques and trial evidence.



Scott Bieber is a partner who concentrates his practice in the areas of family wealth preservation, federal transfer taxation, and family business planning. Mr. Bieber has represented and counseled individuals in connection with their personal estate planning and owners of closely held businesses in connection with the succession of their business and related issues. He also has represented trustees in connection with the administration of trusts, and represented taxpayers and their executors in gift and estate tax audits. He also has advised public and private charitable organizations.



David C. Blickenstaff is a partner who has extensive experience representing corporate and individual fiduciaries and beneficiaries in disputes involving such issues as trust construction, total return trusts, citations to recover assets, competency, fiduciary's and attorneys' fees, "no contest" clauses, personal jurisdiction in trust and probate proceedings, standing, and claims of undue influence. He has had substantial involvement in more than two dozen trust and estate cases at the trial level and on appeal. In 2004, Mr. Blickenstaff successfully tried an estate dispute in

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DuPage County concerning the decedent's designation of beneficiaries for his IRAs. He has also spoken and written on trust and estate litigation issues.



David R. Hodgman leads Schiff Hardin's Estate Planning and Administration Group and also serves on our firm's Executive Committee. He has represented numerous corporate and individual fiduciaries with respect to federal and state income and estate tax disputes as well as other, non-tax matters including

fiduciary liability litigation. A significant amount of his work involves estate, gift and income tax planning for families and individuals including tax planning for closely held family businesses and distributions under IRAs and company retirement plans.



Kim A. Kamin is an associate whose practice involves virtually all aspects of trust and estate planning, trust and estate administration, and related litigation. She advises individuals, families, and closely held businesses in wealth preservation and succession planning issues. Ms. Kamin works with banks and trust

companies as outside counsel for guardianship and decedents' estate administration, as well as for trust construction, trust accounting, and custodian interpleader cases.



Roger Pascal leads our General Litigation Practice Group. He concentrates his practice in complex and multiparty litigation involving trusts and estates, intellectual property, antitrust, and other commercial litigation. Mr. Pascal has tried and argued cases in the federal and state courts, both at the trial

and appellate levels, including the United States Supreme Court. In 2000, he defended a will contest in a three-day jury trial before Judge James Kennedy of the Circuit Court of Cook County.



Samantha C. Norris is an associate who concentrates her practice in litigation. This includes a focus on a wide variety of trust and estate litigation, particularly with respect to the representation of fiduciaries.



Peter L. Rossiter is a member of Schiff Hardin's Financial Institutions and Corporate and Securities Groups, and his experience is of particular value to our bank clients. He previously was with Schiff Hardin from 1976 to 1992. From 1992 to 2000, he served as General Counsel of The Northern Trust

Corporation, where he led a 30+ lawyer legal department to support Northern's private banking, trust, institutional, and investment management businesses worldwide. In 2000, Mr. Rossiter became President of Northern's Corporate and Institutional Services unit, which manages relationships with the institutional investors Northern serves around the globe. In 2003, he designed, organized, and became the head of Northern's Corporate Risk Management Group. He returned to our firm in 2004 and regularly advises bank and trust clients.

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Did you know...

... that a decedent's decision to change the beneficiary of a life insurance policy, individual retirement account, or other similar account may be effective even if the decedent did not sign the change of beneficiary form or comply with all the technical requirements for a change? In *Dooley v. James A. Dooley & Associates Employees Retirement Plan*, 92 Ill. 2d 476 (1982), the Illinois Supreme Court ruled that a change of beneficiary is effective as long as the decedent substantially complied with the requirements. The court explained that "[s]ubstantial compliance requires (a) a clear expression of the insured's intention to change beneficiaries, plus (b) his concrete attempt to carry out his intention as far as was reasonably in his power." *Id.* at 486.

In July 2004, Schiff Hardin attorneys **David C. Blickenstaff** and **Samantha C. Norris** successfully tried a "substantial compliance" case in DuPage County in which our client, a charitable foundation, was found to have been the proper beneficiary of the decedent's IRAs even though the change of beneficiary forms had not been signed and had been only partially completed. *Estate of Hodges*, No. 01 P 15. The decedent had expressed his intention to make the change, had reiterated his intention to complete the forms on the day before he died, and had made arrangements for his personal assistant to help him finalize the paperwork but died before she returned from a vacation. The case is currently on appeal.

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