Title

Representing a trustee who is also a beneficiary, but not the only beneficiary

Text

In *Janus as a Client: Ethical Obligations When Your Client Plays Two Roles in One Fiduciary Estate*, 44 ACTEC L. J. 223 (Summer 2019), it is suggested that there are only three possible answers to the question of whether one attorney may ethically represent a trustee (hereinafter "the client") who is also a beneficiary, but not the only beneficiary: (1) the client must have separate representation for each conflicting role; (2) the client is one person and therefore may be represented by one attorney in all roles; and (3) the lawyer can represent the client in all roles, unless there is an actual conflict that limits the lawyer's ability to represent the client competently and diligently. But isn't there a fourth ethically-acceptable option, namely that the client may be represented by one attorney in all roles, conflict or no conflict, provided the *other beneficiaries* are represented by independent counsel? That having been said, the Uniform Trust Code's §1005(c) "ultimate repose" feature can land counsel in a conflict that is unresolvable even by resort to the fourth option. This is a topic that is taken up in §7.1.3 of *Loring and Rounds: A Trustee's Handbook* (2020), the relevant portions of which are set forth in the Appendix below.

Appendix

The following is an excerpt from §7.1.3 of *Loring and Rounds: A Trustee's Handbook* (2020):

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The Uniform Trust Code's statute of ultimate repose. The UTC, too, opts for expediency over principle when it comes to predecessor-trustee liability. Under the UTC, specifically §1005(c), 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 the removal, resignation, or death[156] of the trustee; the termination of the beneficiary's interest in the trust; or the termination of the trust. Michigan's version of Section §1005(c), specifically Mich. Comp. Laws §700.7905(3), is an affirmative defense that is deemed waived if not affirmatively pled.[157] The five-year limitation period, which is intended to provide some ultimate repose for actions against a trustee,[158] may or may not cover fraudulent acts on the part of the trustee, the drafters of the UTC having preferred "to leave that question to … [laws that deal with fraudulent acts generally]…."[159] If §1005(c) is subject to a fraud exception, then possibly it would be subject to a constructive fraud exception as well. Constructive fraud is taken up generally in §8.15.60 of this handbook. (England does have a fraud exception to its six-year statute of limitations applicable to any "action by a beneficiary to recover trust

[156]"If a trusteeship terminates by reason of death, a claim against the trustee's estate for breach of fiduciary duty would, like other claims against the trustee's estate, be barred by a probate creditor's claim statute even though … [the five-year statutory period]… had not yet expired." UTC §1005 cmt.

[157]*See In re* Beverly J. LaForest Living Trust, No. 323296, 2016 Mich. App. LEXIS 3 (Jan. 5, 2016) (unpublished).

[158]UTC §1005 cmt.

[159]UTC §1005 cmt.

property or in respect of any breach of trust."[160]) The trust-reformation action, a topic that is taken up in §8.15.22 of this handbook, also would not be subject to the UTC's ultimate repose provisions, it not being an action against the trustee for a breach of his trust.[161]

A nasty trap for the unwary trust counsel. UTC §1005(c) provides that under certain circumstances a trust beneficiary has only five years to bring a breach-of-trust action against the trustee *even should the beneficiary lack actual or constructive notice of the breach*. Assume four years have run since a breach of trust has occurred. The trustee and the beneficiary are clueless about it. One more year and the trustee is off the hook. Trust counsel, on the other hand, becomes aware of the breach. Now two potentially conflicting fiduciary duties must be rationalized: (1) representing the trustee, *qua* trustee, and (2) representing the trustee personally. If counsel informs the trustee of the breach and the trustee takes no action to remedy it, the trustee's fraudulent inaction may toll the running of the statute. On the other hand, if counsel keeps quiet, the five-year period will expire and the trustee will be personally off the hook, unless counsel's knowledge can be imputed to the trustee under agency principles. Still, the trustee will have breached virtually the entire panoply of fiduciary duties that had been owed to the beneficiary, duties that are the subject of Chapter 6 of this handbook. What if counsel's intentional silence is later construed as a knowing *participation* in those breaches? While trustees may have the benefit of the ultimate-repose defense, presumably their agents will not. What is the ethical trust counsel to do in such a situation?

One court has proffered the following advice: When a trustee is faced with a personal-fiduciary conflict, "the trustee can mitigate or avoid the problem by retaining and paying out of his own funds separate counsel for legal advice that is personal in nature."[162] But how exactly is trust counsel to get the trustee to retain at his own expense separate personal counsel without causing a fraud-based tolling of the running of the statute and/or without trust counsel, himself, ending up constructively participating in the breach of trust? Perhaps the only way out of the cul-de-sac is the *deus ex machina* of a repeal of §1005(c). Under default laches doctrine, trust counsel would no longer be conflicted in that the trustee would be personally benefited by a full disclosure of the breach *to the beneficiary*. This is because full disclosure would trigger a start of the running of any statute of limitations that might be applicable to such a breach of fiduciary duty or, in the absence of such a statute, a start of the running of the "reasonable" laches period in which a fully informed trust beneficiary would have to bring suit against the trustee for a breach of trust. To summarize, in the case of laches as tweaked by a traditional statute of limitations, say of one, two or three years, there was no incentive for trust counsel, whose fiduciary duties ran primarily to the trustee, to keep the trustee in the dark. The incentive was one of full and timely disclosure. The UTC's ultimate-repose feature has brought with it into our trust jurisprudence a perverse counter-incentive, a counter-incentive that now needs to be somehow corralled. One commentator on ethical lawyering is floating a general proposal that might at least eliminate our §1005(c) fraud-disclosure conundrum, though in a given situation the fall-out from the cure would most likely be worse than the disease. He proposes that each state "adopt a rule" along the lines of the following: "A lawyer, to the extent the lawyer reasonably believes necessary, may reveal information relating to the representation of a client to inform a tribunal or a beneficiary about any material breach of fiduciary responsibility when the client is serving as a fiduciary such as a guardian, personal representative, trustee, or receiver."[163]

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[160]Limitation Act 1980 §21(1)(a) [Eng.].

[161]*Cf. In re* Admin. of C.H. Young Revocable Living Trust, 751 N.W.2d 715 (S.D. 2008) (trust reformation action in which laches, not statute of limitations, was "dispositive").

[162]*See* Stewart v. Kono, No. B234722, 2012 WL 4427096 (Cal. Ct. App. Sept. 26, 2012) (unpublished).

[163]Kennedy Lee, *Representing the Fiduciary: To Whom Does The Attorney Owe Duties?*, 37 ACTEC L.J. 469, 492 (Winter 2011).

End-running the UTC's ultimate-repose feature. Does the running of the UTC §1005(c) statute of ultimate repose shut the door once and for all on all claims against the trustee arising out of his maladministration of the trust? Maybe not: Let us assume that the trustee innocently or negligently makes off with the trust property in violation of the terms of the trust. The beneficiary neither knew nor should have known of the trustee's personal enrichment at trust expense. Five years elapse such that the beneficiary under §1005(c) is foreclosed from bringing a *breach of trust* action against the trustee. In this particular situation, however, the beneficiary may well have another arrow in his quiver, namely, an equitable action against the trustee not for his breach of trust but for the equitable wrong of his unjust enrichment. The equitable action of restitution for unjust enrichment is taken up generally in §7.2.3.3 of this handbook. The equitable wrong of unjust enrichment itself is taken up generally in §8.15.78 of this handbook. Presumably, the trustee was not only unjustly enriched by the trust property but also by any compensation he took for "services" performed during the period of maladministration.[164]

The Georgia Trust Code lacks a comparable ultimate-repose feature. Taking a page from traditional laches doctrine it provides that "[i]f the beneficiary has not received a report which adequately discloses the existence of a claim against the trustee for a breach of trust, such claim shall be barred as to that beneficiary unless a proceeding to assert such claim is commenced within six years after the beneficiary discovered, or reasonably should have discovered, the subject of such claim."[165] Thus, the trustee's fraudulent concealment will toll the limitation period.[166]

[164]*See generally* Charles E. Rounds, Jr., *Chinks in the Armor: Three Exceptions to the Uniform Trust Code's 5-Year Ultimate Repose Provision Suggest that a Trustee May Not Be Home Free from Liability*, Trusts & Estates (Nov. 19, 2013), *available* at <http://wealthmanagement.com/estate-planning/chinks-armor > (last accessed Aug. 18, 2018).

[165]Ga. Code Ann. §53-12-307(a).

[166]*See, e.g.*, Smith v. SunTrust Bank, 325 Ga. App. 531, 754 S.E.2d 117 (2014).