Delaware Banker

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Mortgage Refinancing: Look Before You Leap-Frog

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View from the Chair

by
Rodger Levenson
Executive Vice President & CFO
WSFS Bank

Chairman
Delaware Bankers Association

It's great to be the best, but as Satchel Paige once said: "Don't look back. Something might be gaining on you."

For a small state, our association represents a diverse collection of institutions including: community banks, retail banks, credit card banks, and trust companies. It's that last group I'd like to talk about now.

The Delaware Bankers Association has just completed their tenth annual Delaware Trust Conference. The first conference met in November of 2006 when approximately 200 trust professionals gathered in the duBarry Room of the Hotel du Pont. Each year since then the event has grown, both in the number of attendees and in the reputation as a premiere conference in the trust field. Over the years we've moved to larger rooms at the Hotel, and finally, this year we moved to the Chase Center to accommodate the demand. While we're delighted with the efforts of our planning committee and our staff in putting together such a great event, the driving force behind it all is the Delaware trust product.

There are numerous elements that make Delaware trusts so attractive. First, there is the Delaware Court of Chancery. The State's Chancery Court is the preeminent forum for the determination of trust disputes. It is a court of equity with over 250 years of case law, and it has exclusive jurisdiction over all matters of Delaware trust administration and interpretation.

Next there is the state's trust legislation that has been described as both proactive and forward thinking. Delaware's trust legislation keeps grantor's intent at the forefront. The First State was also among the first states to pass such innovations as dynasty trusts, asset protection legislation, directed trust legislation, virtual representation, total return trusts and most recently the recognition of tenancy by the entireties property in trust.

Delaware also offers tax advantages, confidentiality, creditor protection, silent trusts, and our decanting statute. Indeed, Delaware has set the standard and is the leader in trusts. It's great to be the best, but as Satchel Paige once said: "Don't look back. Something might be gaining on you." Not surprisingly, Delaware's trusts innovations have many imitators.

So rather than look back we need to keep our focus in front of us to stay in the front of the pack. To do this Delaware's trust industry must keep on doing what it's been doing. That means continuing to enact progressive trust legislation. It also involves continuing to attract and engage qualified trust professionals.

The DBA is also providing additional support. Our first effort was the recently completed five-part series: Foundations of Delaware Trusts. This well-received course provided key information for entry-level trust employees.

Even more exciting is the association's partnership with the University of Delaware to create an accredited minor in Trust and Wealth Management. Such a program would create a pipeline of experienced candidates for employment by trust companies and law firms in Delaware. This would help lower the recruiting and training costs to those organizations, while creating a larger talent pool from which to draw. In addition, the Trust and Wealth Management minor would increase awareness nationwide about the superiority of the Delaware trust product.

To make this program a reality our partners at the UofD are looking for both financial and expertise commitments from the trust industry. The Delaware Bankers Association Financial Education Alliance is coordinating this effort and we've received some encouraging preliminary support, though more is still needed.

I am confident that the DBA members and associate members will support these efforts to keep Delaware's trust industry the best in the country.

President's Report

by
Sarah A. Long
President, CEO & Treasurer
Delaware Bankers Association

"This year's Delaware Trust Conference, Vintage Wealth Planning… Aged to Perfection, invited attendees to savor the unique Delaware trust experience. "

It takes a unique blend of circumstances to produce the perfect wine. It requires good soil with the right minerals, the finest grapes, just the right amount of sunshine and rain, the right climate, and of course skill in managing these factors. All these variables in the right combination are needed to coax the highest level of quality into the finished product. France, Italy, Spain, and many other regions are renowned for combining these elements to produce unique and famous vintages.

In the area of wealth management it takes similar circumstances to produce quality trust products. The right legislative climate, attention to detail in drafting and updating trust laws, skilled professionals to guide clients and manage assets with prudence and wisdom. As in any precise process that combines art with science, as in the creation of a fine wine or a unique trust product, challenges can only be met by employing the skills of seasoned vintners. When blended together they create the Delaware Advantage.

This year's Delaware Trust Conference, Vintage Wealth Planning…Aged to Perfection, invited attendees to savor the unique Delaware trust experience. By all accounts, the 10th annual Delaware Trust Conference featured an award winning blend of sponsors, speakers, panelists, exhibitors and attendees.

A fundamental decision in designing and creating a vineyard is the choice of site. Factors such as climate, proximity to markets, labor supply, availability of water, and all other aspects must be considered. This also applies to venue selection. For the first time, this year's conference was held at the spacious Chase Center on the Riverfront, complete with exhibitor hall. Although a change from past years, a record number of attendees were able to experience vintage wealth planning. And, just like a well-stocked wine cellar has a diverse selection of grape varieties, the exhibitors perfectly complemented the panel presentations to provide a variety of wealth management options and solutions.

The creation of a unique vintage of wine takes place out of sight of most consumers. Indeed, sometimes even the wine connoisseur is not privy to the care and skill taken in crafting a fine product. Sommeliers or wine stewards are trained and knowledgeable professionals who specialize in all aspects of wine service. Like Master Sommeliers, the Delaware Trust Conference Committee led by Committee Chair Cindy Brown paired over fifty of the nation's top trust, legal and wealth management professionals in various panels to highlight many of the unique, time-tested advantages provided by the Delaware product. Each panel brought together subject matter expertise to share the latest information on Delaware Trusts, much in the same way a wine steward uses training and skill to successfully pair wine and food.

Producing a classic vintage is an art. While the science behind running a winery requires investors. It is a wise connoisseur who knows where to invest for maximum return. Connoisseurs each in their own right, we thank all of our sponsors for investing in this year's Trust Conference. With their generous support, all things were possible.

Last but not least, please join me in a toast of thanks to Greg Koseluk, Margaret Cregan and Renee Rau, the DBA Master Vintners who spent countless hours growing, harvesting, pressing, crushing, fermenting, aging and bottling to deliver the 2015 Delaware Trust Conference… Aged to Perfection.

Cheers!

What's New at the DBA

New Associate Member

GTM Risk Management, LLC
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GTM Risk Management works exclusively with banks and financial services clients to help minimize burdens and develop controls that address the ever-changing laws, regulations, and requirements that impact their organizations. Their services include: risk assessment; financial, operational, compliance and information technology audits; IT audit and security assessments; BSA/AML audits; process reviews of business units or functional areas; Sarbanes Oxley compliance assistance; information technology consulting; and, internal and external penetration reviews.

Foundations of Delaware Trusts

Daniel Hawyard and David Diamond

Over 40 professionals attended the DBA's new series specifically designed for entry-level trust employees. Foundations of Delaware Trusts was held on five consecutive Wednesdays in September and October at the University & Whist Club in Wilmington. The sessions included: Reading and Interpreting a Trust Document (Instructors: Daniel Hayward, Esq., Director, Gordon, Fournaris & Mammarella, P.A.; and David Diamond, Esq., National Trust Specialist, The Northern Trust Company); Basic Income, Estate, Gift and GST Tax (Instructors: Matthew P. D'Emilio, Esq., Director, Cooch & Taylor, P.A.; and, Jenna L. Boccetti, Vice President, JPMorgan Trust Company of Delaware); Discretionary Decision-Making (Instructors: Cynthia D.M. Brown, President, Commonwealth Trust Company; and, Todd A. Flubacher, Esq., Partner, Morris, Nichols, Arsht & Tunnell LLP); Division of Labor in Trust Administration (Instructors: Anne Schumeyer, CTFA, Vice President, PNC Delaware Trust Company; and, Lynn Welch Watson, CFP, EA, VP, Senior Trust Officer, Brown Brothers Harriman Trust Company of Delaware); and, BSA and PATRIOT Act Best Practices (Instructors: Mark V. Purpura, Esq., Director, Richards Layton & Finger, PA; Jamie McGinley, VP - Trust Administration, Commonwealth Trust Company; and, Matthew Rosin, Esq., VP - Legal Affairs, Commonwealth Trust Company).

FDIC Directors College

The Delaware Bankers Association Financial Education Alliance presented the 2015 FDIC Directors' College, October 1st at the Rusty Rudder in Dewey Beach, Delaware. The FDIC Directors' College featured an interactive program that provides ongoing education on current topics of bank supervision to bank directors, senior officers, corporate secretaries, and board advisors. The course is designed to help directors and trustees, both new and experienced, stay abreast of the ever-changing regulatory environment. Sessions included: Real Estate Appraisals; Fraud and Internal Controls; Consumer Protection; and, Interest Rates and Liquidity.

Mid-Atlantic Cybersecurity Conference

DBA President, Sarah Long, introduces a speaker

The Delaware Bankers Association, in conjunction with the Maryland, Pennsylvania, and Virginia Bankers Association, presented the Mid-Atlantic Executive Cyber-Security Conference, October 29th at the National Institute of Standards and Technology, Gaithersburg, Maryland. The conference addressed the emerging threat to banks with the increasing integration of banking and advancing technologies.

No "Leap-Frog" in Refinancing

Delaware Supreme Court Embraces Delaware's Pure Race Priority Status

by
Sara T. Toner and Stephen V. Torok
Richards, Layton & Finger, PA

A recent Delaware Supreme Court opinion reinforced Delaware's "pure race" approach to lien status in the context of mortgage refinancing transactions. In *Eastern Savings Bank, FSB v. CACH, LLC*, CA No. N13A-09-008 (Sept. 28, 2015), the Delaware Supreme Court held that the doctrine of equitable subrogation (see discussion below) does not apply to a mortgage refinancing absent other equitable circumstances. In other words, lenders that provide funds to refinance existing mortgage liens will have to rely upon their record status in the Recorder of Deeds Office; they cannot step into the shoes of the existing lienholder that is being taken out of the transaction and enjoy the lien priority of such existing lender's mortgage lien. So, what is the takeaway for mortgage lenders? Given the holding in *Eastern Savings Bank*, second mortgage lenders—indeed, all mortgage lenders—should require a policy of lender's title insurance, dated as of the date of closing, with particular emphasis on having the title insurance company cover any gap between signing and recording. And while no standardized forms of mortgage lender due diligence checklists are used throughout the state, the opinion also demonstrates the value to mortgage lenders of establishing best practices such as using a mortgage lender's closing checklist to guide it through the closing practice, as discussed more fully below.

As stated in *Eastern Savings Bank*, Delaware is a "pure race" state, meaning that lien priority is determined exclusively by the time of recording.[1] In the "pure race" to file, the stakes are high: the first to record wins, no matter what. Creditors are therefore incentivized to act quickly in recording their liens. Any delays in filing could result in huge losses to a creditor in the event of foreclosure. With respect to mortgage liens (excluding seller take-back mortgage financing, for which special rules apply), in Delaware "[t]he rule is first in time, first in right."[2] The fact that a lienholder knows of the potential for another lien that has not yet been filed is irrelevant. Delaware courts will only consider such "notice" knowledge in determining priority where it is impossible to determine who in fact was the first to record.[3]

To prevent such harsh results, courts across the country have adopted equitable principles that provide reprieve for some lenders under the pure race and other statutes. One such principle is the doctrine of equitable subrogation. Under the doctrine, "[o]ne who fully performs an obligation of another, secured by a mortgage, becomes by subrogation the owner of the obligation of the mortgage to the extent necessary to prevent unjust enrichment."[4] As an analogy, it is helpful to think of subrogation as "substitution." The new lender "steps into the shoes" of the former creditor and takes that creditor's priority lien position. The doctrine "acts as an exception to … recording statutes and enables a later-filed lienholder to leap-frog over an intervening lien-holder."[5]

"Leap-Frog" in the Pure Race: Equitable Subrogation in Delaware

Delaware courts have recognized the doctrine of equitable subrogation for over a century, such as in connection with payment and performance bonds, but until the *Eastern Savings Bank* opinion, the courts had not applied the doctrine in the context of a mortgage loan refinancing, and case law addressing the matter in Delaware had been sparse.[6] The Court of Chancery enumerates five elements required for a claim of equitable subrogation:

> (1) payment must have been made by the subrogee to protect his or her own interest; (2) the subrogee must not have acted as a volunteer; (3) the debt paid must have been one for which the subrogee was not primarily liable; (4) the entire debt must have been paid; and (5) subrogation must not work any injustice to the rights of others.[7]

Eastern Savings Bank: Equitable Subrogation Does Not Apply to Refinancing Mortgage Lender Absent Equitable Circumstances

The controversy in *Eastern Savings Bank* began in 2006, when a borrower defaulted on a car loan. Creditor CACH, LLC obtained a judgment against the borrower in the amount of $16,000 on December 7, 2006, and transferred its judgment to the Superior Court on December 21, 2006. The judgment became a judgment lien on the borrower's New Castle County property on that latter date. Two days prior, on December 19, 2006, the borrower closed a residential mortgage loan refinancing with Eastern Savings Bank and executed a mortgage for $168,000. The borrower used the loan proceeds to discharge five debts and their respective liens, including two mortgages (the earliest of which was from 1999). It did not discharge CACH's debt. All five discharged liens, which totaled approximately $148,500, had been recorded prior to CACH's lien. Eastern Savings then recorded its mortgage on December 29, 2006. Satisfactions of the prior mortgages were recorded in the beginning of 2007.

The housing bubble burst, the borrower defaulted, and, in August 2008, Eastern Savings Bank foreclosed on the mortgage. A Sheriff's Sale of the property yielded $133,000. The sheriff sent Eastern Savings Bank the entirety of the sale proceeds, less the costs of the sale. CACH requested payment from Eastern Savings Bank, arguing that since all prior liens had been extinguished, it was entitled to first priority in the proceeds from the sale; as after all, it recorded its judgment lien on December 21, 2006, eight days before Eastern Savings recorded its mortgage lien against the borrower's New Castle County property. Eastern Savings refused to pay CACH, and litigation ensued. The dispute eventually went to the Delaware Supreme Court, where it was determined that CACH had first priority. The case then made its way back to the Supreme Court specifically on reconsideration of the issue of whether the doctrine of equitable subrogation applied.

The Delaware Supreme Court concluded that Eastern Savings Bank was not entitled to protection under the doctrine of equitable subrogation. It rejected two prior cases cited by Eastern Savings Bank in which the Delaware Court of Chancery had allowed equitable subrogation in a mortgage loan context. The distinction the Court found was that in those cases, there had been equitable reasons to apply the doctrine (reasonable mistake or unjust enrichment); in this case, there was no such reason to allow Eastern Savings Bank to have priority.

First, the Court noted that if the mortgage had been timely recorded, with a proper bring-down title search, the lien priority fight "would have been avoided, or revealed, and addressed." The Court found that Eastern Savings Bank had an adequate remedy at law against the title insurer and therefore refused to "apply the doctrine of equitable subrogation to cure the failure of Eastern Savings' title insurer or settlement agent to ensure that Eastern Savings was placed in a first lien position before completing the settlement process."

Second, the Court found that applying subrogation in this context would "work … injustice to the rights of others." Eastern Savings Bank argued that CACH would not be disadvantaged by application of subrogation, because it would put the priority of CACH's judgment lien in no worse a position than it had been in before the application of subrogation. The Court held that this argument ignored the fact that the Eastern States loan actually diminished the debtor's equity from its lien position before that lien was incurred, as the debt incurred under the Eastern States loan exceeded the debts extinguished by the proceeds of that loan.

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Finally, the Court found that CACH did not bargain for its subordinate position. CACH was not an intervening lienholder that had agreed to be third or fourth in priority; it had received a judgment and properly recorded it. It would not receive an "unearned windfall" if it was paid back that judgment amount, because it had never agreed to be subordinate to a mortgage lien. It would simply receive the money that it was entitled to when it obtained its judgment.

The Lessons of Eastern Savings Bank for Mortgage Lenders Refinancing Existing Secured Liens

In the wake of *Eastern Savings Bank*, Delaware mortgage lenders involved in refinancing transactions of existing mortgage liens should proceed under the assumption that the payment of prior mortgages with the proceeds from their new loan will not result in the refinancing lender assuming the priority position of those paid mortgages. Absent equitable considerations to the contrary, a court will strictly follow Delaware's pure race recording statute. In most cases, a refinancing mortgage lender will have priority as of the date it records its new mortgage, and not before.

However, the implications of *Eastern Savings Bank* for refinancing lenders are not nearly as troubling as they appear. The initial decision of whether to provide a refinancing loan already requires review of previously existing liens on the property as disclosed through a thorough title search. Refinancing lenders should therefore ensure that their attorneys and title search companies are utilizing best practices throughout the course of the transaction. This is where outside counsel's loan closing mortgage checklist can serve as a significant tool to protect lenders.

A loan closing checklist helps the attorney, client, and borrower identify each due diligence task and the responsible party, and includes a description of the status of each such task. As a best practice, counsel's loan closing checklist should have a detailed title requirements section; this acts as one of many tools against lien priority fights between creditors. In particular, a bring-down search of liens within at least one day of closing helps ameliorate the result in *Eastern Savings Bank*. Should a search fail to spot and report that newly filed lien, as in the case of *Eastern Savings Bank*, requiring a lender's policy of title insurance, dated as of the closing, provides the lender with an indemnity policy insuring the bank when mistakes are made.

In Delaware, the review of title is considered to be the practice of law in the state and therefore exclusively performed by Delaware attorneys. Lien search or title search reports and abstracts are typically prepared by a title or abstracting company for review by the Delaware attorney. Title abstracters are usually, although not always, affiliated with a title insurance company. All title insurance in Delaware is issued through a Delaware attorney acting as either an issuing agent or an approved attorney for a title insurance company licensed to conduct business in Delaware. Standard forms of title insurance policies and endorsements promulgated by the American Land Title Association are approved for use in Delaware, and lenders typically require the borrower to provide title insurance acceptable to the lender at closing.

It is unclear from review of *Eastern Savings Bank* the date on which the title search of the borrower's property occurred and whether a bring-down search was performed in the eight days between CACH's recording of its judgment lien and closing of the mortgage loan. Had the title search company uncovered the lien, it is clear from the facts that Eastern Savings could have repaid the lien with the financing proceeds and still satisfied other liens. A refinancing lender should therefore ensure that both its attorney and title searcher are narrowing the gap between the time that the title search is conducted and the mortgage is recorded. A title search should be completed before the transaction and again just prior to recording—this is commonly called the "bring-down" search in Delaware practice.

Still, there is potential for liens to show up even if the gap between searching and recording has been narrowed. Fortunately, gap coverage from title insurance provides a remedy for these missed liens. Title insurers generally bear the risk of these liens, and a lender will be compensated in the event a lien or judgment is filed or indexed between the time of the search and time of recording. With such a narrow gap in the time from title search to recording, there will likely be little dispute between the title insurer and the refinancing lender about the gap coverage's applicability to the missed lien.

Disputable title insurance claims, however, will make obtaining compensation from title insurers more difficult. A refinancing mortgage lender with priority issues would not want to spend time litigating with its insurer. This is why it is absolutely crucial for lenders and title searchers to follow best practices and narrow the gap between searching and recording.

Conclusion

The Delaware Supreme Court has held that absent any kind of equitable circumstances, refinancing loans made in the normal course of business will generally not be entitled to a "leap-frog" in lien priority under equitable subrogation. *Eastern Savings Bank* therefore constricts the doctrine of equitable subrogation, but this constriction should not trouble refinancing lenders. Refinancing lenders should continue to ensure that their attorneys, settlement agents, and title searchers utilize best practices when performing a title search and recording, as they will likely not be able to rely on a prior mortgage's lien position in the event of a priority dispute.

Sara Toner focuses her practice on complex transactions involving the finance, acquisition, sale, lease, and development of commercial real estate properties. She has a particular emphasis on closing sophisticated commercial real estate loans, including CMBS financing, portfolio financing, and mezzanine and preferred equity transactions. Sara represents major real estate developers, financial institutions, significant holders of commercial real estate, and institutional clients in all types of commercial real estate transactions. She regularly advises clients on an array of real estate matters, including joint venture formation and equity capitalization.

Stephen Torok focuses his practice on matters related to commercial real estate, including the acquisition, sale, lease, finance, and development of commercial real estate properties. He represents developers, lending institutions, and other holders of commercial real estate property in a wide array of real estate matters. Prior to joining Richards, Layton & Finger, Steve worked at a mid-sized law firm litigating matters related to property taxation and exemption, real estate valuation, and eminent domain. During law school, Steve served as editor-in-chief of the William & Mary Bill of Rights Journal and received a Dean's Certificate for his service to the law school community.

The views expressed in this article are those of the authors and not necessarily those of Richards, Layton & Finger or its clients.

Notes:
1- 25 Del C. § 2106
2- Guarantee Bank v. Magness Construction Co. 462 A.2d 405 (Del. 1983).
3- Winchester v. Parm, 141 A. 271 (Del.Ch. 1928).
4- RESTATEMENT (THIRD) OF PROPERTY: MORTGAGES, § 7.6.
5- 73 Am. Jur. 2d § 58.
6- See Stoeckle v. Rosenheim, 10 Del. Ch. 195 (1913); Oldham v. Taylor, No. CIV.A. 18800-NC, 2003 WL 21786217, at *1 (Del. Ch. Aug. 4, 2003).
7- Eastern Savings Bank, supra, at *4 (quoting Reserves, Dev. LLC v. Severn Sav. Bank, FSB, 2007 WL 4054231, at *17 (Del. Ch. Nov. 9, 2007)).

What's in Your Vault?

Protect it By Partnering with Cybersecurity Professionals

by
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Young Conaway Stargatt & Taylor, LLP
and
Jason Yager and Randy Coneby
of GTM Risk Management

Cyberattacks against banks and other financial institutions are becoming more frequent and sophisticated. A recent study found that the financial services industry is attacked by cyber-threats 300% more than other industries.[1] A cybersecurity company reported that since 2013 a multinational gang committed a cyber-robbery scheme using spear phishing and malware to steal up to $1 billion dollars from more than 100 banks and financial institutions in 30 countries.[2] A successful cyberattack can inflict severe financial losses,[3] as well as reputational costs and liability exposure. Financial institutions also face increasing scrutiny from regulators to be prepared to prevent and respond to cyber-incidents.

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Cybersecurity

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Navigating the threat-infested waters of cybersecurity is a daunting challenge for any business, even for those with sufficient size and resources to face it head-on. But businesses need not face that challenge alone. Partnering with external legal and information-technology professionals can alleviate anxiety and be an effective tool in developing a strategy to manage cybersecurity risk.

One Size Does Not Fit All: Partnering Can Help With Unique Business Needs

The needs of a financial institution in addressing cybersecurity risks will vary based upon the size of the entity, complexity of operations, and the nature of the business and product offerings. Regardless of size or the availability of in-house professionals, partnering with outside legal and information-technology consultants experienced in cybersecurity assessment and risk management can be an effective tool in keeping pace with the rapid changes in technology, cyber-threats, and regulatory requirements. Small financial institutions with limited resources to devote to cybersecurity and technology needs may look to external partners to outsource all or a significant part of those needs. But even large institutions can benefit from having an independent assessment and consultation, particularly when a regulator or client requests a third-party audit or when an incident requires forensics investigation or notification to affected customers.

Engaging legal professionals early in cybersecurity risk-management process can serve to reduce liability. The compliance landscape for financial institutions includes a hodge-podge of federal and state laws and regulations, including the Gramm-Leach Bliley Act, Federal Financial Institutions Examination Council (FFIEC) standards, the Payment Card Industry Data Security Standards (PCI DSS), and state data-breach notification laws. Legal counsel can assist an institution to better understand its compliance obligations, proactively develop risk-management policies to address those obligations, and prepare and test plans for how the organization will handle and respond to various types of cybersecurity incidents.

Consulting with an external information-technology consultant also can be advantageous. An independent consultant can provide an outside perspective, free from internal biases, on the financial institution's information-security operations and advice for improving its cybersecurity posture. The consultant can draw upon its specialized knowledge and experience to assist the institution in crafting a cybersecurity strategy that takes into account the unique needs of the business, based upon its size, goals, obligations, and threats. An external technology consultant can assist the institution to maximize the efficiency and effective of its technology assets, while ensuring it obtains the necessary updates and replacements. By utilizing a consultant, the institution avoids the need to attract, train, and support technology specializations far removed from its core business purpose.

A Roadmap for Crafting a Cybersecurity Risk-Management Strategy

Managing the risks of cybersecurity requires a multi-faceted approach. By enlisting external professionals, a financial institution can focus on operating its business at the same time it protects important data. The management of cybersecurity risk is a business issue that requires a comprehensive strategy with leadership at the executive level. Certainly, having good technology is an important component. But the strategy should address data inventory, risk assessment, employee training, written policy, and an incident-response plan.

a.Data Inventory and Risk Assessment

A financial institution, whether large or small, needs to develop an understanding of the type of assets it has, where they are located, and which are the "crown jewels" that warrant priority in terms of developing a protection strategy. The data can then be classified according to sensitivity, and a risk assessment performed. Documents that contain customers' personally identifiable information (PII) and other sensitive data (like Social Security Numbers and bank account numbers)-which banks and financial institutions are legally obligated to protect-should be ranked high for protection.

Once the organization has classified its data and assessed risk based on its data assets, operational initiatives can be undertaken to prevent and detect potential security incidents. With respect to prevention, one area to consider is the enterprise-security profile. This would include assessment of the identity and access-management controls in place for all platforms used by the institution (e.g., mobile devices, applications, cloud storage, etc.). With respect to detection efforts, pre-incident vulnerability assessments and penetration studies are routinely done to identify gaps in enterprise security before they are exposed by an outside intruder. Depending on the sophistication of the entity's information-technology department, those tests can be done in-house or by external partners. Penetration tests and vulnerability assessments are done both from the "outside" (to test how a hacker might gain access to your network) and "inside" (to determine, once the hacker gains access, what applications have vulnerabilities that can be exploited).

b. Employee Training and Written Policy

The people a financial institution employs can be both its greatest defense and its greatest weakness when it comes to cybersecurity. Many cyber-attacks involve preying on human weakness, whether it be manipulating people through social engineering or enticing someone to click on a malicious link in a phishing email. Several incidents have been reported in Delaware and elsewhere of cybercriminals impersonating high-level employees in email scams involving the wire transfers of funds. One such scam cost a California company more than $46 million.[4] While email filters can be effective in blocking many malicious emails, a business's employees need to be well trained on how to identify phishing schemes and other threats that evade the technological barricades.

The institution should also have a written information-security policy. Having a written policy provides guidance to employees, may be needed to satisfy compliance obligations, and establishes a record that the business took reasonable steps to protect its sensitive data. Depending on the business, the policy may include such things as confidentiality requirements, acceptable use of the business's computer network, discussion of work matters on an employee's social media account, and the employer's and employee's rights and expectations with respect to the use of personal mobile devices for work purposes.

c. Incident Response Plan

It is also beneficial for the cybersecurity strategy to include the preparation and testing of an incident-response plan. Armed with knowledge of the entity's assets, risks, and threats, the business can draft a plan that outlines how it will handle various incidents that may arise. Among other things, the plan should identify the persons to be notified in the event of an incident and who will coordinate the response. The plan may identify multiple response teams, consisting of persons within the organization, as well as persons outside the organization whose expertise may be needed, depending on the incident, for technological support, forensics investigation, and legal advice. Preparation of an incident-response plan in advance of an incident occurring can make all the difference in retaining an incident, mitigating damage, limiting exposure, and returning to normal business operations.

External Consultants Are Resources for Before and After Cybersecurity Care

Managing cybersecurity risk requires addressing a number of elements that are tied to the organization's legal, contractual, and other responsibilities. The assistance of legal counsel in developing the plan can serve to ensure that the institution's plan accounts for those obligations. Once an incident occurs, it is beneficial to involve external legal counsel early in the process of investigating and responding to the incident. Because a data breach may give rise to litigation, involving legal counsel to direct the investigation and response efforts can give rise to a legal privilege that can protect the institution's communications and post-incident response activities from disclosure. There are multiple deadlines and specific reporting requirements that must be met under the various federal and state laws that govern data breaches. Legal counsel can also advise as to when and under what circumstances the institution should contact law enforcement or other authorities. Enlisting external legal counsel to assist with those matters enables the institution to focus on recovering from the breach and resuming normal business operations.

Likewise, an information-technology consultant can provide independent advice with respect to measures than may serve to prevent an incident in the first instance and to mitigate the consequences of incidents that do occur. It is beneficial to establish a relationship with an external consultant in the planning process when the business has time to fully evaluate the consultant, rather than when an incident occurs and the institution is under pressing time constraints to make decisions and take actions.

An outside consultant may be better situated to handle certain response needs than the institution's internal staff. For example,

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Cybersecurity

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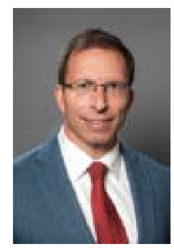
once there is a data breach, as with any "crime scene", it is important to preserve relevant evidence. Maintaining a record and chain-of-command for the evidence can be important in terms of responding to inquiries from law enforcement and regulators, as well as litigation. Great care should be taken in handling any end-user technology that was involved in the breach, such as employee workstations or mobile devices. If the suspected breach was initiated from outside the organization, the response may be vastly different than it would be for a breach initiated by an employee.

It may be necessary to perform a forensic investigation to study the technology and underlying data, and reconstruct a timeline of events regarding the breach. There are specific tools that should be run at this stage to retrace activity performed by the employee or outsider to develop an audit trail that can be used to identify what happened, how the breach occurred, and even possibly who was responsible. Depending on the sophistication of your information-technology department and the circumstances of the incident, this step can be performed in-house or by outside consultants. It is important to remember that part of the goal post-breach is not only to identify what happened, but to evaluate the affected environment to identify actions for remediation and process improvement that will prevent a recurrence and improve the institution's position in any resulting legal action.

Devising an effective strategy to manage the risks of cybersecurity is no easy feat. For banks and other financial institutions, securing the cyber-vault requires a comprehensive approach with measures aimed at prevention and preparation. Partnering with a team of external professionals can be an effective step to achieve that goal.

Cheryl Santaniello and Sara Beth Kohut are attorneys in the Wilmington, Delaware office of Young Conaway Stargatt & Taylor, LLP. As members of Young Conaway's Cybersecurity, Privacy and Data Protection practice group, they advise clients on crafting and implementing strategies to meet business goals and obligations with respect to protecting the integrity, privacy, and security of confidential data and information.



Jason Yager and Randy Coneby are Practice Leaders in the Radnor, Pennsylvania office of GTM Risk Management, Inc. As members of GTM's Information Technology Audit team they perform IT risk assessments, privacy impact assessments, disaster recovery and business continuity planning, network penetration and vulnerability assessments and other IT process reviews with respect to aiding organizations in the areas of Cybersecurity and Information Security.

Notes:

1- Raytheon Company, 2015 Industry Drill-Down Report: Financial Services, available at http://www.websense.com/assets/reports/report-2015-industry-drill-down-finance-en.pdf

2- Kapersky Lab, The Great Bank Robbery: Carbanak cybergang steals $1bn from 100 financial institutions worldwide, Feb. 1, 2015, available at http://www.kaspersky.com/about/news/virus/2015/Carbanak-cybergang-steals-1-bn-USD-from-100-financial-institutions-worldwide.

3- On average, a data breach can cost a company $6.5 million, or $217 per compromised record. Ponemon Institute LLC, 2015 Cost of Data Breach Study: United States, May 2015, available at www.ibm.com/security/data-breach.

4- Emily Field, Cybercriminals Stole Nearly $47m From Networking Company, Law360 Aug. 10, 2015.

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Estate Planning with a Pre-Emptive Strike

Delaware's Judicially-Supported Procedure for the Pre-Mortem Validation of Trusts Can Help Clients Avoid Costly Litigation

by
Daniel F. Hayward, William M. Kelleher and Joseph Bosik, IV
Gordon, Fournaris & Mammarella, P.A.

Herbert Hoover once famously stated that "Older men declare war… but it is youth that must fight and die." In the world of estate planning, a disgruntled family member can mean the difference between an efficiently administered estate and a costly, knock-down, brutal conflict of epic proportions among the estate's beneficiaries.

When a grantor engaged in estate planning creates a will or trust that reduces the interest of a potential beneficiary (most often the grantor's child or further descendant) in comparison to other similarly-situated individuals, or eliminates such potential beneficiary's interest entirely, the grantor has effectively declared war. However, historically the grantor would not be involved in the ensuing legal fight initiated by the "problem" beneficiary, because the full details of the will or trust at issue might not become known by such beneficiary until after the grantor's death. This leaves the other interested parties of the estate, which will almost certainly include family members of the grantor and the problem beneficiary, to combat claims that the will or trust is invalid due to the grantor's lack of capacity or because the grantor was unduly influenced. Not surprisingly, a will or trust contest can be a bitter and emotional fight that can drain the estate due to legal fees. The situation is made even more difficult by the fact that the grantor is not present to defend her intention and prove that she was of sound mind when she implemented the estate plan, which often necessitates third party testimony regarding the grantor's intent and state of mind. As such, while it is the grantor who may be declaring war, it is often the grantor's children and other interested family members who must engage in the fight when the grantor's plan is challenged.

In order to address the difficulties inherent in the standard will or trust contest, several states have instituted a process often referred to as "pre-mortem validation." Although the details of the process differ depending on the jurisdiction, broadly speaking pre-mortem validation involves providing interested parties with notice of the existence of a will, trust or other estate planning document, and then giving those interested parties a specific period of time in which they can challenge the validity of the document. If an interested party who receives the requisite notice does not bring an action contesting the validity of the document within the statutory time period, then that party is *forever* barred from bringing such a claim. To take the war analogy even further (and at the risk of beating the analogy into the ground), the pre-mortem validation process is tantamount to a "preemptive strike" from the grantor against any potential challengers.

The potential benefits of this process are obvious. A living grantor who can personally take the stand and speak to her state of mind and the circumstances surrounding the creation of the estate planning document at issue is, under almost all circumstances, preferable to third party testimony from individuals with differing interests under the document. In fact, the pre-mortem validation process may actually help to avoid a contest altogether by discouraging a problem beneficiary, who now must contend with a living grantor that is able to speak on her own behalf, from bringing what may be a frivolous claim of trust invalidity premised upon the grantor's lack of capacity or undue influence. In addition, states that give effect to no-contest provisions, such as Delaware[1], will present the problem beneficiary with a dilemma: is challenging the validity of the document worth potentially losing whatever interest the beneficiary *does* have under the document?

Pre-Mortem Validation in Other Jurisdictions

A brief look at other jurisdictions illustrates the variety of procedures in place involving pre-mortem validation. Currently, there are six states with some form of pre-mortem (also sometimes referred to as "ante-mortem") validation statutes.[2] In Arkansas, Ohio, and North Dakota, the statutes are only applicable to pre-death determinations of wills (and not trusts). Perhaps unsurprisingly, in Alaska and Nevada, the statutes allow for pre-death determinations of both wills and trusts.

Although no two states have identical pre-mortem validation statutes, there are similarities among them. For instance, each state has adopted the "contest model" of pre-mortem validation, meaning that those seeking to challenge the will or trust are provided with notice and have the right to challenge the document in an adversarial proceeding in open court. Additionally, each of the six states, other than Delaware, has adopted a "filing statute," whereby the grantor must petition the appropriate court to determine the validity of the document.[3]

Further, the purpose of pre-mortem validation in each of the states, other than Nevada, is solely to determine the validity of the document. Nevada enacted pre-mortem validation through amendment to its declaratory judgment statute, which now provides that "[a] maker or legal representative of a maker of a will, trust or other writings constituting a testamentary instrument may have determined any question of *construction* or validity arising under the instrument and obtain a declaration of rights, status or other legal relations thereunder."[4]

There is also considerable variation with respect to which parties are required to receive notice of the filing of a petition. In North Dakota, notice of a filing must be given to any beneficiary named in the will, as well as any of the testator's present intestate heirs.[5] Similarly, in Ohio, notice must be given to all persons named as beneficiaries in the will and all of the testator's intestate heirs as of the date of the filing.[6] Alaska's statutes provide for different necessary parties in actions involving a will, a revocable trust, or an irrevocable trust.[7]

Delaware's Pre-Mortem Validation Statute

In 2000, Delaware enacted a statute allowing for the pre-mortem validation of both revocable and irrevocable trusts, which currently reads, in relevant part, as follows:

> "(a) A judicial proceeding to contest whether a revocable trust or any amendment thereto, or an irrevocable trust was validly created may not be initiated later than the first to occur of:
> (1) *One hundred twenty days after the date that the trustee notified in writing the person who is contesting the trust of the trust's existence*, of the trustee's name and address, of whether such person is a beneficiary, and of the time allowed under this section for initiating a judicial proceeding to contest

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(continued from p. 21)

the trust provided, however, that no trustee shall have any liability under the governing instrument or to any third party or otherwise for failure to provide any such written notice. For purposes of this paragraph, notice shall have been given when received by the person to whom the notice was given and, absent evidence to the contrary, it shall be presumed that delivery notice mailed or delivered to the last known address of such person constitutes receipt by such person;…"[8]

Delaware's statute, in contrast to the other states with pre-mortem validation statutes, is not a "filing statute" and does not require any judicial filing on the part of the grantor or the trustee. Instead, the trustee provides notice to the interested parties and the parties then have 120 days to challenge the validity of the trust. Additionally, the statute does not require that any particular class of individuals be provided with notice. When initiating the process, the grantor and the trustee can be as restrictive or expansive regarding which parties will actually receive the statutory notice (although, of course, only those who so receive notice will be bound by the 120-day contest limitation). In 2015, Delaware enacted statutes expanding the pre-mortem validation process to include wills created by Delaware residents[9] and an exercise of a power of appointment.[10]

The *Ravet* Case

Although several states have statutory pre-mortem validation procedures for wills and trusts, Delaware is (or should quickly become) the most-favored jurisdiction for this process due to the fact that the Delaware statute has been tested, approved and directly applied by a court of competent jurisdiction (in this case, the Delaware Court of Chancery). The case at issue is often referred to as the *Ravet* case.[11]

On February 12, 2015, the Delaware Supreme Court affirmed a June 2014 ruling of the Delaware Court of Chancery that dismissed a petitioner's challenge to the validity of a Delaware trust as untimely based on notice given pursuant to the trust pre-mortem validation statute. Under the statute, notice is deemed given when notice is received by the interested party and , absent evidence to the contrary, it is presumed that the interested party received notice if that notice is delivered to that person's last known address.

The facts of the case are critical to understanding why the petitioner's challenge was dismissed. More than 150 days prior to when the petitioner first attempted to file his petition challenging the validity of a trust created by his mother, the co-trustees sent packages providing notice of the trust to the petitioner by way of first-class mail to the petitioner's home and the petitioner's P.O. Box, and by certified mail to both of those addresses. The petitioner admitted that those addresses were correct and also that he was frequently home in the days after the mailings were sent. The petitioner also admitted that he checked his P.O. Box at least weekly.

On January 29, 2014, after the conclusion of an evidentiary hearing, Vice Chancellor Glasscock ruled that the petitioner's testimony was not credible when the petitioner denied receipt of any of the following: the unreturned first class mailings sent to both his home address and his P.O. Box, the four certified mail notices sent to his home address and P.O. Box, and a Federal Express package subsequently sent to his home address. Notably, the first notices for the certified mail were left at the petitioner's home and P.O. Box about 150 days before he filed his petition – well beyond the 120 day statutory period provided in the pre-mortem validation statute. Based on its finding that the petitioner's myriad denials of receipt of notice were not credible, and on its finding that Delaware's pre-mortem validation statute is a statute of repose with a hard and fast deadline, the Court dismissed the petition with prejudice.

The January 29, 2014 ruling was a bench ruling, meaning that no written opinion followed. However, after the bench ruling, the petitioner moved for post-judgment relief seeking to have the Court amend, alter or reconsider the judgment. The court denied all such motions on June 4, 2014.[12] In rejecting one of the petitioner's arguments, the Vice Chancellor explained that "I construed only the language of the statute, determining that, to the extent the statute could be interpreted, as the petitioner argued, to create a presumption of delivery (or receipt) rebuttable by "evidence to the contrary," such evidence must at a minimum be credible evidence." The Court explained that it found, and continued to find, that there was no such credible evidence presented.

The Chancery Court's ruling in *Ravet* is significant because it is the first Delaware ruling—and possibly the first nationally—that dismissed a case based on notice pursuant to a pre-mortem validation statute. That the dismissal was affirmed by Delaware's highest court is also notable and provides a strong measure of support to the validity and enforceability of Delaware's statute. The most important takeaway from the *Ravet* case is that the statute worked exactly as intended by barring a claim against the validity of a trust because the claim was not properly brought within the applicable time period.

Remaining Questions

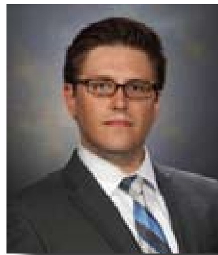
While Delaware's statutory language is clear and judicial blessing has been provided via the *Ravet* case, several questions regarding the pre-mortem validation process remain. If additional funds are added to the trust at issue, does the trustee need to provide another round of notices to the interested parties, even if the notice process was already completed upon the initial funding of the trust? What if the trust is amended or modified? What if an amendment or modification relates only to the trust's administrative provisions and in no way affects the beneficial interests of the trust beneficiaries? Can an interested party be bound if notice is provided to another individual who could virtually represent the interested party under Delaware's virtual representation statute? These questions can and should be resolved by continuing to refine and expand the statutory provisions over time, in order to ensure that Delaware remains on the leading edge of this process.

Conclusion

Delaware's pre-mortem validation process can be a powerful weapon in a grantor's arsenal to ensure that his or her intent is realized, and to be able to personally refute any challenge to the grantor's capacity or a charge of undue influence. Grantors and their advisors may even find that by choosing to "declare war" now, they can avoid a costly conflict altogether.

Daniel F. Hayward is a Director at the Wilmington law firm of Gordon, Fournaris & Mammarella, P.A. Daniel graduated with a Bachelor of Science degree in Chemical Engineering from the University of Delaware. He received his law degree from Villanova University School of Law in 2006 and is a member of the Delaware Bar Association. Daniel is currently enrolled in the LL.M. in Taxation program at Villanova University School of Law. He is also a member of the Estates and Trusts Section of the Delaware Bar Association.

William M. Kelleher is a Director at the firm. He specializes in fiduciary litigation—especially trust litigation—in the Delaware Court of Chancery, the nation's premier forum for the resolution of complex trust disputes. He has taken to trial several high-profile trust disputes in that court. Mr. Kelleher also counsels trust companies on fiduciary duties and other related issues. Immediately upon graduation from law school, Mr. Kelleher spent four years on active duty as a judge advocate general in the United States Coast Guard. Thereafter he served as a judicial law clerk at the Delaware Court of Chancery working for both Chancellor William B. Chandler, III and then Vice Chancellor (later Chief Justice) Myron T. Steele. Mr. Kelleher has also served as a Deputy Attorney General for the State of Delaware.



Joseph Bosik IV is an Associate at the Wilmington law firm of Gordon, Fournaris and Mammarella, P.A. Joe received his Bachelor of Arts in Business & Economics from Ursinus College and earned his Juris Doctor, cum laude, from Chapman University, Fowler School of Law, with an emphasis in tax law. He also served as an Articles Editor for the Chapman Law Review. Joe earned his LL.M. in Taxation at Villanova University School of Law

Notes:
1- See 12 Del. C. § 3329.
2- The six states are Alaska, Arkansas, Delaware, Nevada, North Dakota, and Ohio.
3- See Ralph Lehman, Determining the Validity of Wills and Trusts – Before Death, Probate Law Journal of Ohio, July/August 2011, at 247.
4- Nev. Rev. Stat. § 30.040(2) (emphasis added).
5- See NDCC § 30.1-08.1-02.
6- See R.C. § 2107.081(A).
7- See AS §§ 13.12.565(a) - (c) and AS § 13.36.390(1)(A).
8- 12 Del. C. § 3546(a) (emphasis added).
9- 12 Del. C. § 1311.
10- 12 Del. C. § 1312.
11- In the Matter of Restatement of Declaration of Trust Creating the Survivor's Trust Created Under the Ravet Family Trust Dated Feb. 9, 2012, C.A. No. 7743-VCG, V.C. Glasscock (June 4, 2014).
12- IMO Restatement of Declaration of Trust Creating the Survivor's Trust Created Under the Ravet Family Trust C.A. No. 7743-VCG (June 4, 2014).

The Delaware Trust: A Device to Avoid Forced Heirship

by
Charles J. Durante
Connolly Gallagher LLP

Among the freedoms that Americans take for granted, but not available everywhere else, is the ability to dispose of property as one wishes. A competent adult American can leave his or her property to anyone, with minimal constraints. In virtually every other part of the developed world, forced heirship is the rule.

"Property owners have the nearly unrestricted right to dispose of their property as they please" summarizes the current Restatement of Property. "The main function of the law in this field is to facilitate rather than regulate."

Throughout Europe, South America and the Muslim world, much of a decedent's property must descend within the family. Half of a deceased Brazilian's property must pass to specified relatives. Comparable rules apply in Germany and the Netherlands. Sharia law mandates the disposition of two-thirds of an estate. A fecund Frenchman or Belgian has even more limited testamentary freedom. If there are three or more children, 75 percent of his estate must pass to them. If an Austrian bachelor dies without children, one-third of his estate must retrace itself to his parents.

Some nations have multiple systems. In Nigeria and India, there is freedom of disposition – but if the parties are Muslim, compliance with Sharia law is a statutory requirement. Forced heirship can even affect Americans who become domiciliaries of a civil law jurisdiction. Domicile is sufficient to activate forced heirship rules, even if the expatriate doesn't change citizenship.

Foreign law sounds remote, but takes on immediacy when it is coupled with enforce¬ment tools that seek to traverse the English Channel, and even the Atlantic. Just as the estate tax must be coupled with a gift tax to have its desired effect, forced heirship laws rely on clawback remedies. The calculation of the family share invariably includes lifetime gifts. If the probate estate is insufficient to pay the mandated family legacy, a testator's lifetime gifts can be pursued, often with a generous statute of limitations. French heirs have 30 years to pursue their statutory shares.

For citizens of forced heirship jurisdictions who want to escape these constraints, and decide for themselves how, to whom and under what circumstances their property should pass, a Delaware trust provides refuge.

The Delaware asset protection trust is an obvious vehicle. In the 1997 enabling act for the Delaware asset protection trust, the General Assembly provided that certain alimony and child support decrees would be enforceable against such trusts. A 2000 amendment clarified that this exception does not include forced heirship claim.[1] Thus, no demand for a forced heirship, even if it yields a judgment in another jurisdiction, can be enforced against a Delaware asset protection trust.

Trusts that do not become irrevocable until their grantors die should also not be subject to the claims of forced heirship. The reasons are rooted in Delaware statute, longstanding Delaware policy, and persuasive case law elsewhere.

The first reason that a decedent's trust, which was revocable but funded during his life, should not be subject to a forced heirship claim is statutory. Delaware has long followed a policy "to give maximum effect to the principle of freedom of disposition and to the enforceability of governing instruments."[2]

Second, this policy has been established over generations. Freedom of disposition has been the governing principle in Delaware, long before those words were formally added to the Delaware Code in 2000.[3] In a vintage case, the Court of Chancery enforced a requirement that a beneficiary be a recognized member of the Catholic Church to receive distributions from a trust. The beneficiary, an Episcopalian, complained that enforcing such a condition impaired her freedom of religion. The Court disagreed: "The constitutional guarantees are limitations on the powers of the government, not the governed."[4] (This approach has been followed elsewhere, notably in a widely-followed Illinois Supreme Court decision which enforced a provision that conditioned the receipt of an inheritance by the grantors' grandchildren on whether they married a Jewish spouse or a person who converted to Judaism within a year of marriage.)[5]

The rare cases when a Delaware court has refused to enforce Wills or trusts are when they violate public policy, such as a Will directing that a beneficiary only receive principal if he divorced his wife or if she died,[6] and trusts requiring state officials to select scholarship recipients only from among white applicants.[7]

The third reason is authority that has accumulated in states where comparable situations have arisen. In New York, where the issue has been most frequently raised, the courts have constantly held that its law has primacy over foreign mandates.

New York's highest court held that a joint bank account should pass by survivorship, rather than by the laws of Spain, because the joint account agreement prevailed over foreign community property laws. "New York has the right to say as a matter of public policy whether

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Delaware Trusts

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it will apply its own rules to property in New York of foreigners who choose to place it here for custody or investment, and to honor or not the formal agreements or suggestions of such owners by which New York law would apply to the property they place here."[8]

A New York appellate court held that a bank account designed as a "Totten Trust" – an early form of POD – should pass to the beneficiary designated by the account holder, an Argentine national, on his death, not to a daughter claiming under that country's forced heirship law. "It seems preferable that as to property which foreign owners are able to get here physically, and concerning which they request New York law to apply to their respective rights, when it actually gets here, that we should recognize their physical and legal submission of the property to our laws, even though under the laws of their own country a different method of fixing such rights would be pursued."[9]

Recently and emphatically, a New York appellate court declined to permit an estranged child to claw back his forced heirship share from the beneficiaries of gifts made by his deceased mother, holding that "forced heirship provisions of a civil law jurisdiction like France are inapplicable to inter vivos transfers of property executed in New York, irrespective of whether the transferor's domicile was New York or France. This is because the validity and effect of these transfers, as well as the capacity to effect them, are governed by the law of the state where the property was situated at the time of the transfer."

To be sure, a forced heirship claim can properly be raised in Delaware, in a proceeding involving the probate estate. At least once, the Court of Chancery evaluated such a claim, involving Delaware property of a nonresident decedent,[10] and a judgment of a court in Louisiana, where a vestige of forced heirship remains,[11] could well be enforceable to govern the disposition of an ancillary administration in Delaware.

But a challenge to trust provisions, based on a different nation's (or state's) idea of how families should dispose of their property, should not be favorably received by a Delaware court. Indeed, Delaware's single, weak forced heirship statute – the spouse's right to elect against the Will – shields any property in a trust from the spouse's elective share.[12] If Delaware policy does not permit a clawback against trust property to satisfy claims under its own forced heirship law, there seems no reason to bowdlerize a trust where such remedies arise on another continent.

No one, however, wants to be the test case. To be poised to enjoy the protection of Delaware law against forced heirship, a trust should either be an irrevocable asset protection trust, or if revocable, should be funded during the grantor's life, with assets not physically located in the foreign jurisdiction, with a Delaware trustee, and the grantor not a co-trustee. Notice to beneficiaries to foreclose later challenge to the trust[13] may also be considered.

Charles Durante, Partner, Connolly Gallagher LLP, brings 35 years of professional leadership to the planning of strategies for the inter-generational passage of personal and business property. He advises fiduciaries on the administration of trusts and estates, counsels foundations and other non-profit organizations, and advises clients in the areas of Delaware statutory trusts, Delaware holding companies and Delaware limited liability companies. His work includes defense in a number of will contests and litigation of significant public impact. Chuck advises many of Delaware's leading trust institutions in matters of planning, administration and risk management. He has recently chaired the Estates and Trusts Section of the Delaware State Bar Association and headed the Wilmington Tax Group.

Notes:
1- *12 Del. C.* §3573.
2- *12 Del. C.* § 3303(b).
3- *Annan v. Wilmington Trust Co.,* 559 A.2d 1289 (Del. 1989) ("the seminal rule of construction in trust cases: that the settlor's intent controls the interpretation of the instrument").
4- *Delaware Trust Co. v. Fitzmaurice,* 31 A.2d 383 (1943), *aff'd in pert. part, Crumlish v. Delaware Trust Company,* 27 Del. Ch. 374; 38 A.2d 463 (1944).
5- *Estate of Feinberg,* 919 N.E. 2d 888 (Ill. 2009).
6- *Davidson v. Wilmington Trust Co.,* 2 A.2d 285 (1938).
7- *Bank of Delaware v. Buckson,* 255 A.2d 710 (Del. Ch. 1969); *Will of Potter,* 275 A. 2d 574 (Del. Ch. 1970); *Milford Trust Co. v. Stabler,* 301 A.2d 534 (Del. Ch. 1973).
8- *Wyatt v. Fulrath,* 211 N. E. 2d 637 (N.Y. 1965).
9- *De Werthein v. Gotlib,* 594 N.Y.S. 2d 230 (App. Div. 1993).
10- *Taormina v. Taormina Corporation,* 109 A. 2d 400 (Del. Ch. 1954) (finding the decedent to be a domiciliary of Mississippi, rather than Italy or Louisiana, so forced heirship did not apply).
11- Although after 1996, forced heirship rights are only granted to children who are under 23 or disabled. LA. CONST. art. XII, § 5.
12- *12 Del. C.* § 908(b).
13- *12 Del. C.* § 3546.

A Vintage Conference!

The 2015 Delaware Trust Conference, the 10th annual edition, presented Vintage Wealth Planning...Aged to Perfection October 26th and 27th at the Chase Center on the Riverfront in Wilmington. Over 370 trust, legal, and accounting professionals received timely information on the unique Delaware trust product. The Delaware Bankers Association wishes to thank all the sponsors, speakers, panelists, planning committee members, and attendees for making the conference a success.

Thirty-nine firms sponsored the event (see page 19 for a complete listing), along with nine exhibitors, including: Atlantic Trust Company of Delaware; First Republic Wealth Managment; First State Trust Company; RBC Trust Company (Delaware) Limited; Reich & Tang; Reliance Trust Company of Delaware; Weiner Benefits Group; Wells Fargo Private Bank; and, the University of Delaware.

The Delaware Bankers Association also wants to thank the members of the trust conference planning committee who helped make the 2015 Delaware Trust Conference a success: Committee Chair, Cynthia D.M. Brown, Esq., President, Commonwealth Trust Company; Lisa K. Berry, Managing Director, PGB Trust & Investments of Delaware; Bridget Boyd, MBA, CFTA, SVP & Senior Trust Officer, Citi Turst Delaware; Timothy Carroll, Esq., COO, New York Private Trust; L. Joseph Covas, Jr., Executive Vice President, Reliance Trust Company of Delaware; Jennifer A. Cuva, CTFA, Manager and Trust Officer, Charles Schwab Bank; David A. Diamond, Esq., SVP & National Trust Specialist, The Northern Trust Company of Delaware; Matthew P. D'Emilio, Esq. Director, Cooch & Taylor, P.A.; Charles J. Durante, Partner, Connolly Gallagher LLP; Robert W. Eaddy, President & CEO, The Bryn Mawr Trust Company of Delaware; Todd A. Flubacher, Partner, Morris Nichols Arsht & Tunnell LLP; Thomas M. Forrest, CPA, President, U.S. Trust Company of Delaware; Daniel F. Hayward, Esq., Director, Gordon, Fournaris & Mammarella, P.A.; Danielle M. Kiss, Vice President, JPMorgan Trust Company of Delaware; Anne Marie Levin, J.D.,LL.M, CTFA, Key National Trust Company of Delaware; Carlo Lombardi, Esq., Vice President, Wilmington Trust Company; Mark V. Purpura, Esq., Director, Richards, Layton & Finger, P.A.; Nicole M. St. Amand, CTFA, Assistant Vice President, Wilmington Trust Company; Anne Schumeyer, Vice President, PNC Delaware Trust Company; Vincent C. Thomas, Esq., Partner, Young Conaway Stargatt & Taylor, LLP; Lynn Welch Watson, CFP, EA, VP, Sr. Trust Officer, Brown Brothers Harriman Trust Company of Delaware; and, Kalimah Z. White, Vice President, JPMorgan Bank.

10 Years! DBA President Sarah Long recognizes the 15 participants who have attended each edition of the Delaware Trust Conference since it began in 2006.

United States Senator Christopher Coons addresses the topic of ethics after Monday's luncheon.

(l. to r.) Todd Flubacher, Esq., Partner, Morris Nichols Arsht & Tunnell LLP; Stephanie Loomis-Price, Esq., Shareholder, Winstead PC; and, Beth Shapiro Kaufman, Esq., Member, Caplin & Drysdale, start the 2015 Delaware Trust Conference with a panel on Recent Developments in Federal Case Law, Regulations, and Delaware Trust Law. The panelists returned Tuesday afternoon for a session of questions and answers.

Natalia Murphy, Esq., Director, Wealth Planner, Citi Private Bank, and G. Warren Whitaker, Esq., Partner, Day Pitney LLP discuss Multinational Planning with Delaware Trusts during Monday's breakout sessions.

U.S. Senator Thomas Carper and DBA President Sarah Long at Monday evening's reception.

Conference attendees enjoy a break with exhibitors in the spacious Governor's Hall at the Chase Center on the Riverfront.

Robert H. Sitkoff, Esq., John L. Gray Professor of Law, Harvard Law School and Cynthia DM Brown, Esq., President, Commonwealth Trust Company and Chair of the DBA Trust Committee at Monday evening's reception.

Julie Min Chayet, Esq., SVP, U.S. Trust, Thomas M. Forrest, CPA, President & CEO, U.S. Trust Company of DE, and Kristin Ashman, J.D., Regional Trust Head, Brown Brothers Harriman Trust Company, NA, at Monday evening's reception.

Charles J. Durante, Esq., Partner, Connolly Gallagher LLP, and
Stephanie Loomis-Price, Esq., Shareholder, Winstead PC
at Monday evening's reception.

Donna Mitchell, President & CEO, Deutsche Bank Trust Co. DE, and
Ed Reznick, President, Charles Schwab Bank Personal Trust Services Division,
at Monday evening's reception.

(l. to r.) Michael E. Roberts, JD, LL.M, CFP, EVP, Personal Trust, Reliance Trust Company, President, Reliance Trust Company of Delaware; Jeffrey T. Getty, JD, MS (Tax), CFP, AEP, SVP, Director of Wealth Strategy, Key Private Bank; and, Edward A. Renn, Esq., Partner, Withers Bergman LLP; discuss The Key Benefits a Corporate Trustee Can Make in Trust Administration during Tuesday afternoon's session.

(l. to r.) Mark V. Purpura, Esq., Director, Richards Layton & Finger, PA; Lisa W. Collison, Chief Bank Examiner, Office of the State Bank Commissioner, State of Delaware; Becky Kelly, Managing Partner, Fiduciary Education Center; and, Joel Miller, Asset Management Group Leader, Office of the Comptroller of the Currency present the Fiduciary Risk Management session on Tuesday morning.

Paul S. Lee, J.D., LL.M, Senior Regional Wealth Advisor, Wealth Mangement, The Northern Trust Company, presented a dynamic presentation on "Running the Basis (Catching Maximum Tax Savings)" Tuesday.

"We have a winner!" Exhibitor David Brown, Private Mortgage Banker, Wells Fargo Home Mortgage, picks a raffle winner at the end of the Conference, as DBA President, Sarah Long, looks on.

Compliance Focus

CFPB Complaint Monitoring

by
Allison N. Wirth, Esq., CRCM
Director of Research & Communications
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"Given that the CFPB actively utilizes the consumer complaint data it gathers to determine its regulatory focus, it behooves all industry participants to familiarize themselves with the CFPB's complaint database."

When the Dodd-Frank Act was passed in 2010, creating the CFPB, it mandated the collection and tracking of complaints from consumers regarding consumer financial products and services. Initially, its complaint-tracking and monitoring function was limited to complaints related to credit cards. This function has since been greatly expanded and will gradually include all financial products and services. Not surprisingly, as the types of complaints accepted have increased, so has the overall volume, with nearly 700,000 complaints in fewer than four years.

We have reviewed the CFPB's Spring 2015 Semi-Annual Report to determine any trends or patterns in enforcement actions and identify lessons learned. The report highlights several areas where we can expect to see CFPB focus from a product and service perspective, including: Debt settlement services; Consumer credit scores; Reverse mortgage products; Arbitration agreements; Student loans; Medical debts; and, Payday loans.

Between April 1, 2014 and March 31, 2015 the CFPB participated in forty-five enforcement actions. These are the aggregated monetary results: $114 million in redress to over 700,000 consumers; $19 million in relief for violations of various consumer financial protection laws; and, $32 million in civil money penalties.

The largest number of violations cited by the CFPB involved unfair, deceptive or abusive acts or practices under the Consumer Financial Protection Act of 2010 (CFPA). UDAAP is frequently a risk associated with regulatory violations, and examiners have shown no hesitance in applying this to enforcement, often in conjunction with violations of other laws and regulations.

In the Summer 2015 Supervisory Highlights, the CFPB underscores the importance of effective complaint management when describing an examination of institutions that failed to respond to consumer complaints:

> The institutions did not log or record consumer complaints that were resolved by agents or their managers – depriving compliance personnel of an important tool for detecting violations of Federal consumer financial law during collection activities. Examiners identified instances where complaints and inquiries forwarded from third-party debt collectors were not recorded, categorized, or processed by the financial institution receiving them. Instead, they remained unreviewed in an electronic queue. Supervision directed the institutions to enhance their procedures and monitoring program to ensure that inquiries and complaints were timely identified, categorized, and resolved, and to conduct an audit to identify and analyze the items in the queue, and the root cause for why the items stayed in the queue.

Your complaint management program should include a board-approved policy and written procedures that enable employees to understand and fulfill their respective roles in the complaint process. Additional details to consider include capturing all complaints, regardless of the method by which they are received. This could include verbal complaints in person at a branch or over the telephone, or written complaints sent via mail, email, online forms, agency submissions (such as through the CFPB), consumer groups such as the Better Business Bureau, Attorneys General and on social media forums. You should also ensure that personnel understand that complaints from both customers and non-customers should be logged for response, as should complaints from both individual consumers and from businesses. It is also critical that complaints to and about third-party service providers are tracked and monitored for satisfactory and timely responses, as well as any patterns or trends that may appear.

Complaints that "raise legal issues involving potential consumer harm from unfair treatment or discrimination or other regulatory compliance issues" should be escalated to appropriate parties, such as General Counsel. – *CFPB Supervision and Examination Manual V.2, CMR 10*

Given that the CFPB actively utilizes the consumer complaint data it gathers to determine its regulatory focus, it behooves all industry participants to familiarize themselves with the CFPB's complaint database, as well as the numerous publications issued by the Bureau. Together these tools and analytics provide a compass for the direction in which the CFPB is heading. This insight enables companies to focus precious resources on the areas that are likely to receive the most examiner attention and avoid negative compliance examination comments and ratings.

by
Louis D. Memmolo, GBA, CHRS
Employee Benefits Advisor
Weiner Benefits Group

"There are many considerations when thinking about the various alternative funding options available."

Alternative Funding Ideas for Your Group Health Plan

With the rising cost of medical insurance, many employers are looking for alternative ways to fund their plans. All group medical plans fall into one of two categories: self-funded or insured. Each type of plan carries its own set of advantages, disadvantages, rules and constraints.

Insured plans continue to provide virtually no short term risk or volatility, simple but rigid benefit structures and easy administration. However, they come with many frustrations, internal fees, regulations and lack of control. There are many considerations when thinking about the various alternative funding options available. Most of these are based on some form of self-funding.

Self-funding

In a self-funded plan, the employer assumes the risk and responsibility of medical claims instead of contracting with an insurance carrier to prefund claims. With the help of their advisors, the employer sets premium rates based on expected claims.

The employer typically contracts with a third party administrator to administer claims, rent provider networks and purchases stop loss insurance that protect the plan against high and unpredictable claims.

Some of the advantages of self -funding include more control over plan designs, cash flow and the individual components that make up the plan. You also avoid state mandates and ACA Health Insurance fees. The employer can benefit from lower internal costs, greater flexibility and more control over retained funds.

Level Funding

Level funding is a variation of a self-funded plan that addresses one of the main concerns for employers by structuring the plan in a way that allows the employer to pay a fixed, predictable amount each month to a carrier or TPA, aiding in budgeting efforts and protecting against sudden, unexpected claim spikes. This approach typically includes the fixed costs for administration, reinsurance stop loss, fees and a set amount for claims based on underwriting projections. Under this arrangement, the employer has the benefit of capping their health insurance premiums with the possibility of a refund if claims experience is more favorable than projected.

Group Medical Captives

A captive is self-insured plan set up as an independent insurance company that is created and owned by at least one non-insurance company for the purpose of insuring the employee benefits risks of its owner (s). A captive mitigates the risk associated with a self-funded plan by sharing the risk amongst the owners of the captive. Each of the employer group owners provide a capital outlay and contribute to a risk pool that acts as a shock absorber for claims. Any unused funds at the end of the period are returned to the owners of the captive. Group health captives are a relatively new way for employers to fund health plans and reduce risk. Selecting an experienced group captive manager with the right captive members is critical to the success of these programs.

Consortiums

Consortiums are plans that, by joining a large purchasing group, members can gain the advantages of self-funding with the safety and stability of shared risk insured plans. The difference is consortium members are not owners and have no initial capital outlay. Each member maintains their own autonomy and benefits, retain full transparency in the billing, renewal process and claim utilization. The members control and manage 100% of their own surplus.

In conclusion, while self-funding in its various forms is not for everyone, there are many advantages and ways to address the concerns associated with funding your own health plan that can alleviate the need to shop the market every year, put control back into your hands, help you avoid some ACA directives, while providing stability for you and your employees.

DBA Calendar of Events

For more information on these and other programs visit ***www.debankers.com***, or phone the DBA at 302-678-8600, or email: debankers@debankers.com

Follow us on Twitter
@DBAbankers

March 2016

March 2nd - 4th – 2016 DBA Executive Officer Visit to Washington, DC. This highly acclaimed event for top-level bank executives provides an extraordinary opportunity to meet with the key federal regulators as well as with our industry's representatives at the American Bankers Association in Washington, DC. In addition, we also meet with the entire Delaware Congressional Delegation. This year, DBA participants will be staying at The Mayflower Hotel located at 1127 Connecticut Ave NW, Washington, DC 20036. Sponsorship opportunities are available.

April 2016

April 26th - 2016 Teach Children to Save Day. Join other Delaware volunteer bankers as they visit public, private, and parochial schools, throughout the state as part of Delaware's 18th annual Teach Children to Save Day. Banker volunteer registration starts March 1st at www.debankers.com.

May 2016

May 12th – The 121th DBA Annual Meeting and Dinner. Hotel du Pont, Wilmington. Join Delaware's top bankers at this annual event at the historic Hotel du Pont with dinner in the elegant Gold Ballroom. Guest Speaker: Katty Kay, Journalist, Lead Anchor, BBC World News America. Sponsorship opportunities are available.

October 2016

October 25th & 26th – 2016 Delaware Trust Conference. Chase Center on the Riverfront, Wilmington, DE. Save the Date Now! You won't want to miss the eleventh annual edition of this premiere trust event that hightlights the advantages of the Delaware Trust product. Join dozens of expert panelists from the trust, legal, and accounting fields to learn the latest Delaware Exclusive information. Sponsorships are available.

Delaware Bankers Association/Financial Education Alliance

Web and CD Seminars

For more information, or to register, please visit the Web Seminar link at www.debankers.com. The DBA has introduced an improved web seminar catalog featuring an easy to view, searchable listing. There is no log-in required to view the catalog. The checkout function has also been improved and includes itemized receipts.

November - December 2015

November 19 - Capital is King: Raising Capital for Community Banks in Today's Challenging Markets

December 1 - Handling Critical Incidents: The Robbery Issue

December 2 - Agricultural Lending: Loan Documentation & Administration

December 3 - ACH Year-End Review: A Peek Back and a Look Forward at the Horizon of Payments

December 4 - Introduction to Commercial Lending - Two-Part Series

December 8 - Lending Compliance Update

December 8 - Deposit Compliance Update: 2015 Year-End Review

December 9 - Your FCRA Exam, the CFPB & Your Bank: How to Prepare

December 10 - Lending to Healthcare Providers

December 11 - Credit & Compliance Risk Growing in 2016: Best Practices to Help You Prepare for Your Next Exam

December 14 - Overview of CRE Appraisal Guidelines & the Review Process - Part 1

December 15 - Nuts & Bolts: The Approaches to Value in a CRE Aprraisal, Including Cap Rates - Part 2

December 16 - Best Ever Commercial Compliance Checklists

December 17 - Paper, Rock, Scissors, Lizard, Spock: Who is the Weakest Link in IT Security?


New
5:30am - 9:00am
The Larry Mendte Show
Delaware's NEW, LIVE, LOCAL, Morning Show
NEWSRADIO
1450 WILM
iHeart
RADIO
NEWSRADIO
1410 WDOV

Lending Law Update

by
Eugene A. DiPrinzio, Esq.
Young Conaway Stargatt & Taylor, LLP

"As a lender, it is critical to know what specific risks are to be undertaken when analyzing a particular piece of mortgage collateral."

Lender's Title Insurance Endorsements – Which Ones?

Most commercial mortgage loans are prudently insured with title insurance. Title insurance is a policy of indemnity that protects the lender against matters that are not disclosed by the public records. Title insurance provides a lender with comfort on the priority and status of its mortgage lien as it relates to the public record. Loan title policies are usually underwritten by national title companies that serve the locale in which the loan collateral is encumbered. The policies are written in an amount equal to the principal amount of the mortgage loan. The premium for the title policy is routinely paid for by the Borrower and is based on rates that are approved within the recording jurisdiction. In many circumstances, lenders will request that the loan policy be supplemented to include particular endorsements which are likewise subject to underwriting approval by the title insurer. Knowing when and which title insurance endorsements to use for a commercial property is important because they provide affirmative assurance or coverages for particular kinds of risks. In Delaware, there are three (3) title insurance endorsements which are predominantly requested by commercial mortgage lenders:

1. The "access endorsement" which provides coverage for vehicular and pedestrian access to the insured property, usually from a street or right-of-way.

2. The "environmental endorsement" which is primarily used in a non-residential context, and insures the priority of the insured mortgage over environmental protection liens, which may be recorded in the public records.

3. The "comprehensive endorsement" which protects against violations of private restrictions, encroachments and mineral rights. This endorsement also insures against loss or damage for a violation of a private covenant or restriction that could divest, subordinate or extinguish the lien of the insured mortgage. It also protects against unenforceability or a lack of priority of the insured mortgage and the enforced removal of an improvement by virtue of a building setback violation or subdivision notice.

These three endorsements are just a sample of the covered risks that can be addressed by title insurance. As a lender, it is critical to know what specific risks are to be undertaken when analyzing a particular piece of mortgage collateral. Counsel should provide some guidance to lenders on matters which may be problematic on the public record or which may be disclosed by an accurate survey. Some title examinations require greater scrutiny than others and available affirmative coverages can go a long way to insure title for a specific transaction policy.

Judgement and Strength

A trustee makes judgments constantly. A trustee mediates among beneficiaries of various ages and needs, navigates their life events and monitors the capital markets. Applying fiduciary standards to a document that can be opaque, amid varying circumstances and an evolving legal landscape, a trustee often faces challenges the grantor never anticipated.

When you need advice, you want the benefit of experience, with clear explanation, from those who understand your craft, and the demands you face. When court proceedings must be pursued or defended, you deserve strong, focused and sure-handed advocacy.

When professionals call on other professionals for advice, they call Connolly Gallagher. They draw on leaders in trusts, estates, fiduciary litigation and taxation, who bring 70 years of steeled experience, at a law firm ranked among the region's best by U.S. News & World Report and Best Lawyers, colleagues in an environment ranked as one of the state's best workplaces.

Connolly Gallagher. Trusted by trustees.

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