Delaware Banker

Fall 2016
Vol. 12 No. 4

Seeing Past the Trees

Discerning Material Purpose

PLUS: 2016 Delaware Trust Conference Section!

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Delaware Banker
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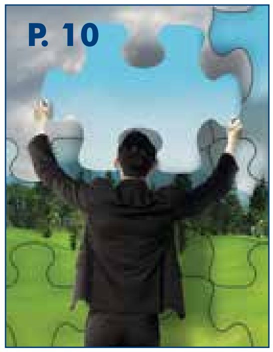
Delaware Banker

Fall 2016
Vol. 12, No. 4

The Quarterly Publication of the Delaware Bankers Association



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Delaware Banker welcomes news items from members of the Delaware Bankers Association. The Editors reserve the right to refuse any advertising or editorial copy deemed unsuitable for publication. The Editors reserve the right to set the publication date in accordance with the Association's needs. Direct submissions to Greg Koseluk at greg.koseluk@debankers.com

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View from the Chair

by
Mark A. Graham
EVP, Wealth Advisory Services
Wilmington Trust

Chairman
Delaware Bankers Association

"Through all the changes, the ups and the downs of national life, the mission of the Delaware Bankers Association has not changed."

The election is finally over! We've endured a lot of hyperbole in the current election cycle. But while some would have you believe its unprecedented, this is nothing new. In fact, "hyperbole" has been a big part of national elections almost as long as we've had them.

Aside from the first two elections, in which the unassailable George Washington breezed to victory, every presidential election since has had its share of political rough and tumble. The election of 1800, to start off, had two founding fathers, John Adams and Thomas Jefferson. Adams' Federalist party rumored that the opposition were radicals who would destroy the country. While Jeffersons' Democratic-Republicans accused the other side of selling out, almost treasonously, to Great Britain. Adams' son, John Quincy Adams, had a similarly muddy time in 1828 in his contest with Andrew Jackson. Jackson was branded an ignoramus who would rule as a dictator.

One of the most infamous campaigns was that of 1884 in which Grover Cleveland was accused of fathering a child out of wedlock, while his opponent, James G. Blaine, was alleged to have amassed a fortune via shady political deals. Ah, the good old days!

Lest you think this is a history magazine, and not Delaware Banker, let me come to the point. Since we were founded back in 1895, the Delaware Bankers Association has been through thirty-one presidential elections. And as a result of those elections we have had Democrats and Republicans, conservative, liberals, and moderates, in the White House. There has been prosperity and depression, war and peace. And through all the changes, the ups and the downs of national life, the mission of the Delaware Bankers Association has not changed:

> *To support its member institutions with leadership and information that will provide their employees, their communities and the State with a safe and viable financial services industry. The Association will represent the interests of the industry by addressing and/or initiating State and Federal legislative and regulatory agendas deemed important by the membership. The Association will promote educational and developmental programs as well as communication forums for the enhancement of the membership. Furthermore, it will promote and support the State of Delaware and its communities.*

Delaware's business-friendly corporate laws, its unique courts, and responsive legislature make that mission a bit easier in Delaware than in most states. There's also the two-hundred-plus year tradition of Return Day, where election rivals congregate in Georgetown to symbolically "bury the hatchet" and get back to the work of doing the best for all Delawareans.

Congratulations to Governor-elect John Carney and Lieutenant Governor-elect Bethany Hall Long. Also congratulations to Delaware's new representative in Congress, Lisa Blunt Rochester, as well as all the winners who will represent the First State in the State Senate and House. We appreciate your willingness to serve and look forward to your continued leadership and support of the banking industry.

So no matter who got elected, or didn't, you can rest in the knowledge that your bankers association is focused on working for the financial services industry and the state.

President's Report

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

"Each panel brought together subject matter expertise to share the latest information on Delaware Trusts."

Creating a hit record is never an easy process. It takes a unique blend of artistic collaboration to create a completely distinctive, yet universal product. It requires just the right mix of instrumental and vocal talents, an amazing amount of rhythm, and of course skill in blending all the individual tracks to create a production landmark in just the right key. The eleventh annual Delaware Trust Conference was filled with memorable musical and lyrical moments highlighting the unique advantages provided by the Delaware Product. Over the two days, all of the latest hits were played, along with the time-tested classics.

In the area of wealth management it takes just the right mix of 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 process that combines art with science, as in the creation of a hit record or a unique trust product, challenges can only be met by employing the skills of seasoned musical artists. When mixed together they create the Delaware Advantage.

Stylistic choices can make the difference between a record becoming a hit that remains timeless and one that never makes the charts at all. This also applies to venue selection. This year's conference was held for the second year at the spacious Chase Center on the Riverfront, complete with exhibitor hall and disco ball! Once again, a record number of attendees participated in dozens of jam sessions highlighting the Delaware Trust Advantage. And, just like the Billboard Top 40 a diverse selection of exhibitors perfectly complemented the panel presentations to provide a variety of wealth management options and solutions.

Just as in the earliest days of the music recording, this year's panel performances were recorded in single takes, with the tracks arranged and blended into one cohesive unit. The Delaware Trust Conference Planning 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 the music mixing process strives to bring out the best in multi-track recordings.

Producing a classic vinyl record is an art. While the science behind producing a record requires investors. It is a smart and savvy producer who knows who to invest in for maximum return. Seasoned music producers 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 thanking Greg Koseluk, Margaret Cregan and Renee Rau, the DBA Master Mixers who spent countless hours looking for new ways to produce the 2016 Delaware Trust Conference in order to add interest to the listening experience and deliver … Songs in The Key of Wealth.

Bravo!

What's New at the DBA

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Foundations of Delaware Trusts 2016

Foundations of Delaware Trusts returned for four new sessions for 2016. Trust professionals at every level of experience attended the sessions held on consecutive Wednesdays in September and October at the University & Whist Club in Wilmington. Sessions included: Due

(l to r) Thomas M. Forrest, President & CEO, U.S. Trust Company of Delaware, and David Diamond, President, The Northern Trust Company of Delaware

Diligence in the On-Boarding of New Accounts (Instructors: Anne Schumeyer, CTFA; and, Maria Iversen, SVP, The Northern Trust Company of Delaware); How to Properly Administer Directed Trusts (Instructors: Cynthia D.M. Brown, President, Commonwealth Trust Company; and, Scott E. Swenson, Partner, Connolly Gallagher LLP); Income and Gift Tax Planning (Instructors: Daniel Hayward, Director, Gordon, Fournaris & Mammarella, P.A.; and, Todd A. Flubacher, Partner, Morris, Nichols, Arsht & Tunnell LLP); and, Marketing Delaware: An Overview of Delaware and its Competition (Instructors: David Diamond, President, The Northern Trust Company of Delaware; and, Thomas M. Forrest, President & CEO, U.S. Trust Company of Delaware).

FDIC Directors College

Over 30 bank directors, senior officers, corporate secretaries, and board advisors attended the 2016 FDIC Directors' & Trustees' College held September 28th at the Atlantic Sands Hotel & Conference Center in Rehoboth Beach. The College provided interactive education on current topics of bank supervision and the ever-changing regulatory environment. Sessions included: Emerging Technology, and Strategic Planning.

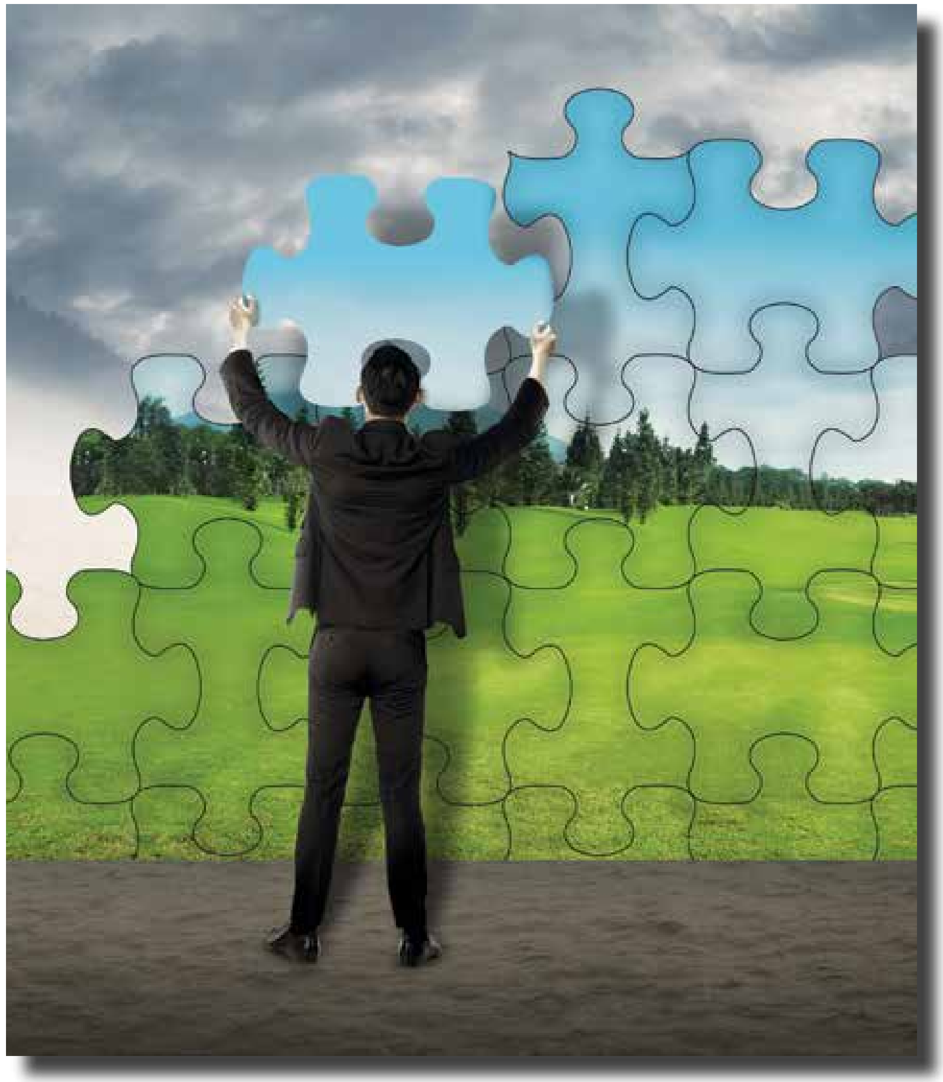
UD Trust Management Program

The Alfred Lerner College of Business and Economics at the University of Delaware invites applications for a continuing-track (non-tenure track) position to teach in the Trust Management minor and oversee outreach and administration for the Trust Management minor.

The University of Delaware anticipates launching the first-ever academic Trust Management program at an AACSB-accredited business school in 2017-18. The curriculum is offered through the collaboration of faculty members in the accounting, business law, and finance areas, and will provide a comprehensive skillset in trust management, as well as necessary grounding in taxation and estate planning. Successful candidates will demonstrate the drive and vision to implement an innovative, cutting-edge instructional program, and to be able to coordinate activities and relationship with the trust banking community.

The position starts September 2017. Those interested should apply online at http://www.udel.edu/udjobs/ and should carefully read the "Applicant Instructions" under the "Resources for Applicants" tab before submitting their application.

Seeing Past the Trees



Discerning Material Purpose

by
Trisha W. Hall
Connolly Gallagher LLP

Delaware is a favored jurisdiction for trusts due in large part to the flexibility and administrative ease afforded by its laws. Among the many advantages Delaware trust law offers is the ability to refresh an existing trust through decanting, merger or a non-judicial settlement agreement.

In 2013, Delaware enacted legislation enabling the use of an NJSA "with respect to any matter involving a trust", including the "interpretation or construction of the terms of the trust," "the direction to a trustee to refrain from performing a particular act or the grant to a trustee of any necessary or desirable power," and the "liability of a trustee for an action relating to a trust."[1] Certainly the scope and reach of the NJSA statute is not without limits. Indeed, an NJSA will be valid "only to the extent it does not violate a *material purpose* of the trust."

What constitutes a material purpose of a trust? How is it to be gleaned from a governing instrument that may consist primarily of standard trust language and very little at the insistence of the trustor? The term is not defined by the statute and there is little judicial guidance interpreting it.

Delaware's NJSA statute was modeled closely after Section 111 of the Uniform Trust Code. In fact, the Delaware NJSA statute matches Section 111 of the Uniform Trust Code nearly word-for-word. The phrase "material purpose" can be found in only three sections of the UTC: § 111, which deals with resolution of trust issues by means of an NJSA; § 411, which deals with modification of a trust by means of settlor's consent; and § 706, which deals with the removal of a trustee. Each of these sections prohibits the referenced action where engaging in such action would violate a material purpose of the trust. While none of these sections goes so far as to define the phrase, the comments sections pertaining to those code sections (and others)[2] provide some enlightenment.

The most useful guidance is found in the comments to § 411, where the drafters take the opportunity to cite the Restatement (Third) of Trusts:[3]

> Material purposes are not readily to be inferred. A finding of such a purpose generally requires some showing of a particular concern or objective on the part of the settlor, such as concern with regard to the beneficiary's management skills, judgment, or level of maturity. Thus, a court may look for some circumstantial or other evidence indicating that the trust arrangement represented to the settlor more than a method of allocating the benefits of property among multiple beneficiaries, or a means of offering to the beneficiaries (but not imposing on them) a particular advantage. Sometimes, of course, the very nature or design of a trust suggests its protective nature or some other material purpose.

The comment notes further that courts sometimes construe spendthrift provisions to be a material purpose, without any inquiry into the intention of the particular settlor. "This result is troublesome because spendthrift provisions are often added to the instrument with little thought." For some trusts, the presence of a spendthrift clause may be key to the trust's material purpose; however, an analysis of what is a trust's material purpose cannot end there.

A full reading of the UTC comments suggests that "material purpose" is closely related to the idea of "settlor's intent." Such a reading of the UTC comports nicely with Delaware common law. In Delaware, "The cardinal rule of law regarding construction of trust provisions is that the settlor's intent controls the interpretation of the language."[4] The Delaware Supreme court has said "that

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intent is determined by considering the language of the instrument, read as an entirety, in light of the circumstances surrounding its creation."[5]

Delaware case law appears to support the idea that material purpose and settlor's intent are fundamentally associated with one another. In *Chinn v. Downs*, a petition for instructions to determine the remainder beneficiaries of the trust,[6] Chancellor Marvel stated, "The Court's duty in a case such as the one at bar is to ascertain and give effect to the testator's or settlor's intent, *bearing in mind his or her dominant purpose*." (emphasis added). Although this ruling was issued more than 30 years prior to the passage of Delaware's NJSA statute, it is impossible to ignore the Court's association of "settlor's intent" with "dominant purpose."

Other courts, though, look beyond the text of the document. In *Rust v. Rust*, the U. S. Court of Appeals for the District of Columbia Circuit, ruling in a case where the beneficiaries sought to terminate a trust and distribute all of its assets, opined that "material purpose" is not precisely the same as settlor's intent (in this case, to maintain assets in trust for a certain duration), but rather is "the aim, object or motive underlying his intent" (in this case, to avoid an alimony obligation, provide for his daughter while a minor, and preserve the residue for himself and his heirs).[7] Under the *Rust* case, it seems fair to say that "material purpose" is akin to an overarching strategy or plan of a trust whereas "settlor's intent" is found in the tactics used to meet the objective. In other words, a settlor's intent can be used to decipher the meaning of specific words or provisions within a trust instrument, but the material purpose must be something greater, a view of the full context, the overarching motivation or stimulus for creating the trust, or drafting the instrument in such a way.

Reaching this conclusion, however, does not fully answer the question "what is a material purpose." Looking to other jurisdictions for answers provides only little additional guidance. Most cases that address the material purpose issue revolve around two questions. Can beneficiaries remove and replace a trustee who was named in the trust instrument without violating a material purpose? Does a restriction of a beneficiary's access to or control of the trust property constitute a material purpose?

The Superior Court of Pennsylvania had occasion recently to tackle this first question. In *Trust Under Agreement of Taylor*, the [8]Superior Court, reversing the trial court, found that amending a trust agreement to allow for the removal and replacement of a trustee was not inconsistent with a material purpose of the trust.[9] In analyzing this case, it is important to note that the trust instrument in question emphasized that the trustor's "'dominant purpose' in creating the trust was 'to care for his daughter…'"[10] It is equally important to note that the settlor, on two occasions, named specific institutions to serve as trustee, clearly evidencing his intent to appoint particular trustees. It is a logical conclusion, therefore, that the Court's holding was based on a differentiation between the trustor's "dominant purpose" to provide for the care of his daughter on the one hand, and , on the other hand, the trustor's intent that particular trustees serve to carry out this purpose.

The Supreme Judicial Court of Maine has also differentiated between "material purpose" and "settlor's intent" in making a ruling regarding the ability to modify the terms of a trust instrument. In *Pike Family Trusts*, beneficiaries sought to terminate testamentary trusts established by their late parents.[11] The trustee contended that a spendthrift provision precluded this result. The wills stated that the trustor's "primary intent" for creating the trusts was to provide for the comfort and support of the surviving spouse and children. Although the court recognized, based on the comments to the UTC a version of which having been enacted in Maine, that a spendthrift clause could be a material purpose of a trust, it held that the trustee had not sufficiently demonstrated that it was in this case. Accordingly, the court allowed the trusts to be terminated.

Not all trustors are kind enough to explicitly state what they consider to be the material purpose of the trust they are creating. Therefore, when considering whether an NJSA may be used to address a matter related to a trust, discerning material purpose may be required. As the cases discussed above demonstrate, doing so will entail taking a broader view of the trust as a whole ("seeing the forest") rather than focusing on particular clauses or phrases found within ("the trees").

Trisha Hall practices in the areas of estate and trust planning and administration. As a planner, she helps clients plan for the preservation - and ultimate distribution - of their assets in the way they desire. She advises clients on all aspects of estates and trusts, including wills, powers of attorney, probate and estate administration, and irrevocable trusts. In her work in estate and trust administration, Trisha counsels individual and institutional fiduciaries, and in doing so, brings her prior experience serving as in-house trust counsel for a trust company in Wilmington, Delaware. Trisha is actively involved in the Delaware State Bar Association's Estates & Trusts section, having served on the Power of Attorney committee and chaired the Fiduciary Access to Digital Accounts committee. She is also a member of the Estate

Planning Council of Delaware, the Delaware County Estate Planning Council, the Wilmington Tax Group, the Pennsylvania Bar Association, the American Bar Association, and is a Past President of the Society of Financial Services Professionals, Greater Philadelphia Chapter. She also serves as an editor of the Delaware Law Review.

Daniel R. Stanek, an associate at Connolly Gallagher LLP, assisted with preparing this article for publication.

Notes:

1- 12 Del. C. § 3338.

2- The comments under § 103, which defines terms used throughout the UTC, indicates that spendthrift provisions may constitute a material purpose, "although the Code does not presume this result." § 411(c), which was drafted in brackets so as to indicate that it should be optional for adopters, also provides that a spendthrift provision is not presumed to constitute a material purpose.

3- Section 65 cmt. d. (Tentative Draft No. 3, approved 2001).

4- *Dutra de Amorim v. Norment*, 460 A.2d 511 (Del. 1983) (citing *duPont v. Equitable Security Trust Co.*, Del.Supr., 122 A.2d 429, 434, 439 (1956); *Chinn v. Downs*, Del.Ch., 421 A.2d 915, 917 (1980); *Porter v. duPont*, Del.Ch., 194 A.2d 565, 566 (1963); *Delaware Trust Company v. Delaware Trust Company*, Del.Ch., 91 A.2d 44, 46-47 (1952)). See also *Fiduciary Trust Co. v. Fiduciary Trust Co.*, Del.Supr., 445 A.2d 927, 930 (1982); *Bird v. Wilmington Society of Fine Arts*, Del.Supr., 43 A.2d 476, 480 (1945).

5- Id.

6- 421 A.2d 915, 917 (1980).

7- 176 F.2d 66, 67 (D.C. Cir. 1949).

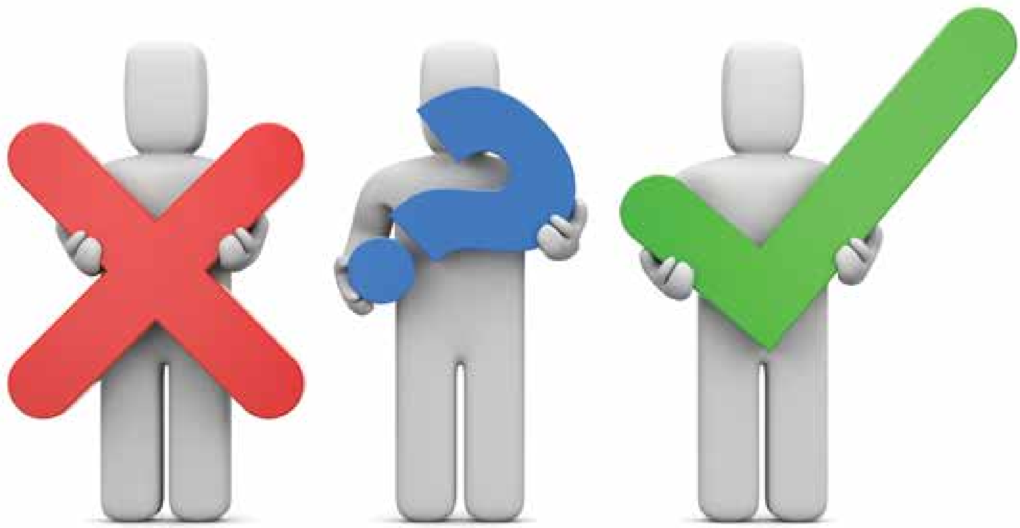
8- 2015 Pa. Super. 199, 124 A.3d 334 (2015).

9- Note: An appeal has been granted by the Supreme Court of Pennsylvania to determine whether the Superior Court erred in holding that trust beneficiaries may circumvent the requirements for removal of a trustee in §7766 of the PA Trust Act, by amending the trust under § 7740.1.

10- *Taylor*, 124 A.3d at 335.

11- *In re Pike Family Trusts*, 38 A.3d 329 (Me. 2012). While the wills of both husband and wife were at issue, the court referred only to the husband's will in its opinion "because that is the operative one that established the trust at issue here."

Similar Fact Pattern... Different Results



by
Peter Hopkins, CPA, MS (Tax)
and Marie Holliday, CPA, MBA
Cover & Rossiter

A pair of recent Tax Court cases should cause advisers to take note. The IRS's targets were Sumner Redstone and the estate of his brother, Edward. Sumner is the media mogul who resigned as executive chairman of both CBS Corporation and Viacom Inc. in February 2016, at the age of 92. Although Sumner gave up his titles, National Amusements, Inc. (NAI) continues to control nearly 80% of the voting shares of both companies. NAI is a privately owned global entertainment company that was founded by Mickey Redstone, father of Sumner and Edward. Eighty percent of NAI's stock is owned by the Sumner M. Redstone National Amusements Inc. Trust, which is controlled by Sumner. Sumner's daughter, Shari, owns the remaining 20%.

The Redstones made news in Delaware in July 2016, when former Viacom board members sued in the Court of Chancery over their termination by NAI. They claim that Sumner lacks mental capacity and that he is being manipulated by Shari. The case was scheduled to go to trial in October as this article went to press.

Background

Mickey began building drive-in theaters in 1936. Over time, he formed several corporations, and Sumner and Edward owned varying percentages of several of them. Both sons worked in the family business. In 1959, NAI was incorporated as a holding company to consolidate the interests of Mickey, Sumner and Edward. All three Redstones contributed the stock they owned in the separate corporations for NAI stock. Based on the stock they owned, the book values of the shares they exchanged for the NAI stock were $30,328 for Mickey, $17,845 for Edward and $18,445 for Sumner. Mickey also contributed $3,000 in cash. Although, these do not equate to fair values, the reorganization resulted in Mickey having contributed about 48% of NAI's assets and Sumner and Edward having supplied approximately 26% each. NAI issued certificates for 100 shares of Class A voting stock to each of Mickey, Sumner and Edward. The certificates were kept in NAI's vault.

In 1968, Mickey wanted to wind down his involvement in the business and do some estate planning. He gifted 50 of his 100 shares of NAI common stock to a trust for the benefit of his four grandchildren. The following year, Mickey exchanged his remaining 50 shares for 86,780 shares of NAI preferred stock.

In the late 1960s, Edward and his wife had their son, Michael, admitted to a psychiatric hospital over the objections of the rest of the Redstone family. Mickey and Sumner believed this reflected poorly on the family name. Eventually, Edward brought his son home, but he resented the intrusion of his parents and brother into his personal affairs. He also became unhappy with his role at NAI. He felt Mickey and Sumner were ignoring his opinions. Edward raised the possibility he might leave the family business. Sumner reacted by hiring an employee to assume Edward's responsibilities. Edward abruptly quit his job at NAI in anger.

Edward demanded his stock certificate from NAI and threatened to sell his shares to an outsider, if the company did not redeem them at a price he considered fair. Mickey countered by claiming NAI had a right of first refusal on any sale of its shares. Mickey also argued that even though 100 shares were registered in Edward's name, a portion of those shares had been held in an oral trust for the benefit of Edward's children since NAI's inception. He said this was his intention in 1959, when he allowed Edward to receive one-third of NAI's stock, even though he contributed only 26% of the company's initial capital. After negotiations broke down, Edward filed two lawsuits in Massachusetts demanding immediate delivery of his NAI stock. Edward's mother, Belle, convinced her son to compromise with his father.

In 1972, the parties settled allowing Edward to sell 66 2/3 shares of NAI to the company for $5 million and stipulating that the remaining 33 1/3 shares had been held in an oral trust for the benefit of Edward's children since 1959. Edward executed two trust instruments as settlor, one for each child, to formalize the arrangement, and each trust received 16 2/3 shares of NAI stock. Sumner became the sole trustee of each trust. Shortly after the settlement agreement was signed, Sumner executed two irrevocable trust instruments, one for each of his children. He transferred 16 2/3 shares of his NAI stock to each trust. Just as the instruments governing the trusts for Edward's children had, these instruments named Sumner as the sole trustee and stated that they formalized the oral trust that had existed since 1959. On the advice of his CPA, Sumner filed no 1972 gift tax return.

It all could have ended there and forever remained under the proverbial rug. However, in 2006, Edward's son, Michael, and the trustees of three Redstone family trusts sued Sumner, Edward and NAI, arguing that additional stock should have been transferred to the trusts in 1972, under the 1959 oral trust. The plaintiffs' claim was based on Mickey's assertion in the 1972 settlement agreement that "not less than 50 %" of the shares originally issued in Edward's name were held in the oral trust. The plaintiffs sought to be made whole under the purported oral trust, since only 1/3 of Sumner and Edward's original shares had been transferred to the 1972 trusts.

The case went to trial, and Edward testified that he believed he was the owner of all 100 shares of NAI that had been in dispute. However, on advice of counsel, he compromised and agreed to the settlement. Edward said that he paid no gift tax in 1972, because he made no gift. He simply renounced his ownership interest in the 33 1/3 shares to receive payment for the 66 2/3 shares.

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(continued from p. 15)

Sumner testified that he had voluntarily transferred 33 1/3 shares of NAI to the trusts for his children. He said that Mickey had made no claim about an oral trust regarding his NAI stock as he had Edward's shares. Rather, Sumner wanted to do the same thing for his children as Edward had done and just made an outright gift.

Ultimately, the Massachusetts courts ruled that the plaintiffs had failed to prove the existence of the oral trust.

Edward's Case

When the IRS got wind of Michael suing his father and uncle, they noticed Edward had not filed a 1972 gift tax return. The Service audited Edward and, in 2013, issued a notice of deficiency to his estate for 1972 gift tax of $737,625 with a 25% late filing penalty and an additional 50% civil fraud penalty. The Service claimed that if fraud could not be proven, a 5% negligence penalty should apply. The bill from the IRS ranged from $958,912 to $1,290,844 plus interest.

The Tax Court noted that a transfer of property in the ordinary course of business is deemed to have been made for full and adequate consideration and is, therefore, not a gift. The court identified characteristics that a transfer of property must have to be considered made in the ordinary course of business. These are:

(1) bona fide
(2) at arm's length
(3) free of any donative intent.

The Tax Court concluded that the transfer was bona fide. It found no evidence that Edward was colluding with Mickey and Sumner in 1972. Rather, Edward was estranged from his father and brother. Even though the Massachusetts courts ultimately ruled there had never been an oral trust, the Tax Court found the theory espoused by Mickey to have been persuasive enough to create a genuine dispute forcing Edward to sue to recover his stock and to agree to the settlement.

The Tax Court found that the transfer was at arm's length. The court noted Edward, Mickey and Sumner were represented by counsel in a genuine controversy. They engaged in lengthy negotiations. They reached a compromise that avoided the cost and uncertainty of litigation and the embarrassment of their family dispute being settled in public. The court was convinced that Edward had acted as one would act in settling differences with a stranger.

Edward's actions demonstrated to the Tax Court a lack of donative intent. The court concluded that his objective was to obtain full payment for all of his 100 shares of NAI. If Edward had any donative intent, he could have accepted the oral trust theory advanced by Mickey. Instead, he rejected it and initiated litigation. The court found no evidence that Edward was motivated by the love and affection that typically inspires one to make a gift.

The IRS agreed that Edward's transfer was bona fide, at arm's length and free of donative intent. However, the Service claimed that since Edward's children provided no consideration in exchange for the shares of NAI, this must be a gift. The Tax Court ruled that Edward had received full and adequate consideration and concluded the source of such consideration was irrelevant. Therefore, Edward made no gift in 1972, and a judgement was entered in favor of his estate.

Sumner's case

In 1974, the IRS commenced a gift tax audit of Sumner's records for 1970 through 1972, but they were not looking for a transfer of NAI shares. Instead, Sumner was audited as part of a project the IRS developed at the request of Congress to identify political donors contributing to multiple committees supporting the same candidate, skirting the $3,000 per candidate limit. The objective of the IRS project was to determine whether some contributions might be taxable gifts. At the conclusion of the audit, the Service determined that Sumner had no 1972 gift tax filing requirement. In May 2011, the IRS commenced a second 1972 gift tax audit of Sumner's records. Sumner complied with all document requests made by the Service. After more than a year and a half of examining Sumner's records, the IRS issued a notice of deficiency proposing gift tax and penalties in amounts identical to those it had sought from Edward.

Before trial in the Tax Court, Sumner moved for dismissal, claiming the government was barred by laches from determining a 1972 gift tax deficiency over 40 years later. The court denied this motion, citing prior rulings that the timeliness of tax claims of the United States is governed solely by the statute of limitations, which had not yet begun, since Sumner never filed a 1972 gift tax return.

Sumner contended that the proposed deficiency should be set aside, because the IRS conducted a second examination of his 1972 records without providing him with written notice that a second examination was necessary, as required by law. The Tax Court noted that Sumner, without complaint, cooperated with the revenue agent during the recent audit. By doing so, he is deemed to have consented to a second examination of his records and cannot use the lack of an IRS notice to shield himself from taxes he owes.

Despite Sumner's claim that his transfers of NAI stock to the trusts were done in the ordinary course of business to appease his father and facilitate the settlement of his brother's litigation, the Tax Court was not convinced. The court pointed to Sumner's testimony in the 2006 Massachusetts case in which he said that he had transferred the stock voluntarily and made an outright gift. The court found no evidence that Sumner received anything in exchange for the NAI shares and noted that his transfer to the trusts took place three weeks after the settlement agreement had been signed. Therefore, it had nothing to do with facilitating the settlement.

Sumner challenged the valuation of the shares transferred to the trusts, which the IRS based on the redemption price paid to Edward three weeks earlier. The Tax Court was not persuaded by Sumner's valuation expert, who testified that the stock was worth only $735,981, and accepted the IRS's valuation of $2.5 million.

The Tax Court found no evidence that the IRS had proven fraud and rejected the Service's proposed fraud penalty. The court also concluded that Sumner had demonstrated reasonable cause to merit abatement of both the negligence and late filing penalties, because he relied on the advice of competent tax professionals who told him he had no 1972 gift tax filing requirement.

The Tax Court ruled in favor of the IRS regarding the tax, but Sumner proved his case on all the penalties.

Lessons learned

1. If there is any uncertainty about whether a gift tax return is required, filing one and making full disclosure starts the running of the statute of limitations and creates an end date at which a taxpayer will have certainty.
2. Identical transactions done for different reasons may not have the same consequences. Look beyond the mechanics of a transaction to determine its tax characterization.
3. If the IRS wants to reexamine a tax period it already audited, the taxpayer's representatives should immediately clarify that the taxpayer does not consent.
4. In any controversy with the IRS, penalties should be challenged.
5. The IRS pays attention to public sources of information such as news reports and court decisions.
6. Seeking the advice of a competent tax professional can help avoid disputes with the IRS. Even if the advice turns out to be wrong, it demonstrates prudence and due care that can support a reasonable cause defense against penalties.

Peter Desmond Hopkins, CPA, MS Peter is a Manager in the Tax Department of Cover & Rossiter where he focuses on trusts and estates. Peter joined Cover & Rossiter in 2015, and has established a reputation for his excellent analytical skills, broad technical knowledge and commitment to optimizing his clients' tax situation. Peter earned a Bachelor of Business Administration in Public Accountancy from Baruch College in 1988. He completed his Master of Science in Taxation in 1995, at Baruch College as well. Peter has been licensed as a CPA in New York since 1991, and also holds a permit to practice in Delaware. He is a member of the American Institute of Certified Public Accountants.

Marie Holliday, CPA, MBA is the Managing Director of Cover & Rossiter and head of the Corporate Tax practice. Since joining the firm in 1997, she has applied her extensive experience in tax research and corporate tax planning to assist many clients in addressing a wide variety of situations. Marie focuses on finding tax-advantaged ways to operate companies during the various stages of the business cycle to influence future business growth and development. She earned her undergraduate and MBA degrees from the University of Delaware. In recognition of scholastic achievement she was selected for membership in the Beta Gamma Sigma honor society for the school of business. In addition, she had been a guest lecturer on a variety of tax topics at the University's Academy of Lifelong Learning.

Business Interests Held in Trust

Trust Features to Facilitate Fiduciary Decision Making

by
Donald P. DiCarlo Jr., J.D. LL.M (Tax)
Chief Wealth Strategist
and
Jeffrey C. Wolken, J.D.
National Director of Wealth and Fiduciary Planning
Wilmington Trust, N.A.

One of the biggest hurdles for business owners considering estate planning using personal trusts is the fear of giving up control over their most significant asset. After many years of successfully leading their company, they are understandably reluctant to let anyone else make decisions about how it is managed as an asset.

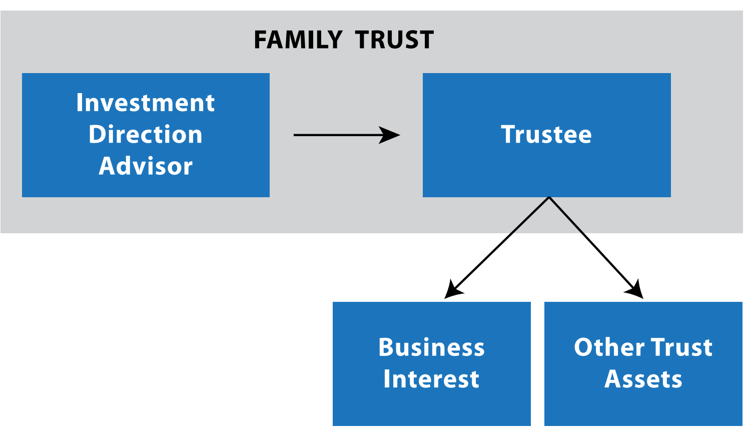
Under most traditional trust structures, the Trustee is responsible for assets placed in trust. The Trustee must make decisions about how to manage these assets—which can be particularly challenging when the primary asset is a closely held business. Because of its fiduciary duty to diversify the trust's investments, a Trustee may decide that a closely held business is not an appropriate investment for the trust, because it is undiversified and illiquid, and may decide to sell all or part of the ownership interest or manage it in a manner that is contrary to the family's goals. This, obviously, is not what most business owners want.

However, these issues can be addressed by establishing a trust with specific features that allow the business to remain as the trust's primary asset while a Trustee performs the administrative duties required.

Directed Trust language

With a Directed Trust, the trust document provides that the Investment Direction Advisor manages all trust investments, including business interests (see Figure 1). The Investment Direction Advisor thus makes decisions on voting, retention, and sale of assets. The Trustee is required to follow the written directions of the Investment Direction Advisor, however the Trustee is still responsible for performing the administrative functions of the trust. The Trustee may need to manage the business interests if no Investment Direction Advisor is serving.

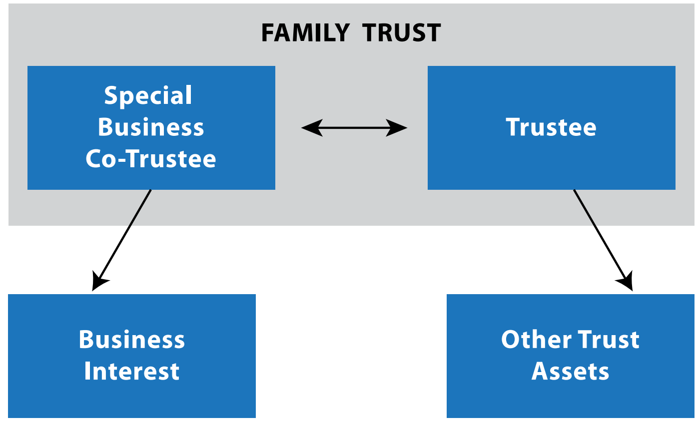
Figure 1
Directed Trust
Trustee follows directions of Investment Direction Advisor



Special Business Co-Trustee language

A Special Business Co-Trustee manages the business interests for a family trust in conjunction with a primary Trustee. The Special Business Trustee can exercise voting power and make decisions regarding retention, sale, and encumbrance, while the primary Trustee retains the management of all other trust assets (see Figure 2). The primary Trustee is required by the trust document to implement the administrative tasks based upon the Special Business Co-Trustee's management of the business interests. Because there are co-fiduciary duties shared between the primary Trustee and Special Business Trustee, the relationship may be cumbersome.

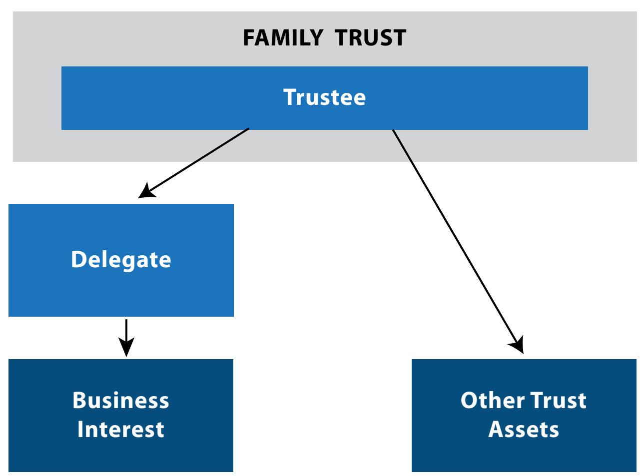
Figure 2
Special Business Co-Trustee
Primary Trustee has no responsibility over business interest



Delegation by Trustee language

Trustees may also choose to delegate responsibility to a third party or to a Co-Trustee (see Figure 3). By exercising reasonable care in the selecting and monitoring of the delegate, the Trustee is generally not responsible for the decisions or actions of the delegate. The delegate manages the business interests held in the trust. Unlike Investment Direction Advisors or Special Business Co-Trustees, the Trustee has the duty to periodically review the actions of the delegate. However, the beneficiaries of the trust can execute agreements to consent to the delegation and exonerate and indemnify the Trustee.

Figure 3
Delegation by Trustee
Trustee delegates authority to delegate



(continued on p. 22)

(continued from p. 21)

Managing the Trustee's duty to diversify

There are a few different ways to approach managing the Trustee's duty to diversify, aside from having the trustee give up investment authority over the business interests. Figure 4 (opposite page) illustrates the types of strategies that can be implemented to offset the Trustee's liability if diversification does not occur due to the intentional holding of mostly (or all) business interests.

By incorporating the right trust features, a business owner can take advantage of the many benefits of a trust without sacrificing control of the business.

Don DiCarlo the national practice group leader overseeing all wealth and fiduciary planning activities at Wilmington Trust. He and his team of wealth strategists are responsible for assisting our high-net-worth families, executives, and business owners in developing and implementing complex tax, estate, and business succession planning strategies.

Jeffrey Wolken is responsible for developing trust planning strategies for high-net-worth individuals and families throughout the United States and abroad. He works closely with his clients' legal, tax, and investment advisors to construct and implement appropriate trust structures that take advantage of the state of Delaware's unique trust and tax laws.

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Figure 4
Managing the Trustee's duty to diversify

Tools for Trustees to manage duty	What it Means	Duty of Trustee	Liability of Trustee	Issues
Retention Clause (in document)	Trust document instructs Trustee to retain Business Interest	Trust retains Business Interest - implied duty to monitor performance	In accordance with state law. Trustee cannot act in bad faith or with gross negligence and generally must monitor asset	Trustee generally requests beneficiaries waive diversification and requires beneficiaries ratify retention
Exculpation Clause (in document)	Document relieves Trustee from liability for retention	Trustee retains Business Interest	In accordance with state law. Trustee generally cannot act in bad faith or with gross negligence	Trustee requests beneficiaries to exonerate Trustee for not diversifying
Delegation	Trustee delegates authority to Delegate	Trustee must use reasonable care in selecting Delegate. Trustee must monitor Delegate	Delegate (not Trustee) is liable for failure to exercise reasonable care regarding retention of assets	Trustee may require beneficiaries to release Trustee from liability for delegating
Structured Out-Voting or Business Co-Trustee	Co-Trustees vote to retain interest	Trustee follows decision of Co-Trustees	Trustee presumably not liable if dissent documented	Is corporate trustee held to a higher standard than non-corporate Trustee?
Approved Breaches, Consent, & Ratification	Beneficiaries approve decision not to diversify	Trustee follows instructions as approved	Trustee presumably not liable	Obtaining appropriate consents and virtual representation
Directed Trustee (in document)	Direction Advisor manages Business Interest/other assets. Trustee is directed to perform administrative functions	Trustee follows direction of Advisor as provided in trust document	Trustee generally not liable other than Trustee's own willful misconduct	Trustee may be liable for willful misconduct. Trustee may need to manage business if no Direction Advisor is serving
Business-Imposed Retention under Buy-Sell Agreement	Buy-Sell Agreement requires Trustee to retain interest	Trustee follows language in Buy-Sell Agreement	Trustee not liable for following Terms of Buy-Sell Agreement	Trustee may wish to keep beneficiaries informed

2016 Delaware Trust Conference

Songs in the Key of Wealth

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A Rockin' Trust Conference!

Over 415 Trust and Wealth Management professionals attended the 2016 Delaware Trust Conference: Songs in the Key of Wealth, October 25th and 26th at the Chase Center on the Riverfront in Wilmington. All of the sessions borrowed the titles of popular songs to illustrate their message. This year the conference unveiled an app for use on smartphones and other mobile devices. Included in the app were two interactive games that ran throughout the event. The winners of the game received free registrations to the 2017 Delaware Trust Conference. Congratulations to the winners: Rachel Cebada, and Amy Jones, both of Wilmington Trust. Congratulations also to the winner of exhibitor drawings. J. Zachary Haupt of Morris Nichols Arsht & Tunnell LLP won a Stratocaster guitar raffled off by Weiner Benefits Group, and Jeremy Eicher of Cooch and Taylor won a gift certificate raffled off by Broadridge Financial Solutions.

Thank you to all speakers, liaisons, and attendees for another great Delaware Trust Conference. Special thanks to the sponsors and exhibitors (see page 23 for a complete listing) for their support!

Ch-Ch-Ch-Changes! Stephanie Loomis-Price, Esq., Shareholder, Winstead PC and Beth Shapiro Kaufman, Esq., Member, Caplin & Drysdale, open their session on recent developments in song, as Michael M. Gordon, Esq., Director, Gordon Fournaris & Mammarella, P.A. looks on.

The Delaware Bankers Association thanks the members of the trust conference planning committee who helped make the 2016 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 Trust Delaware; Timothy Carroll, Esq., COO, New York Private Trust; L. Joseph Covas, Jr., Executive Vice President, Reliance Trust Company of Delaware; David A. Diamond, Esq., SVP & National Trust Specialist, The Northern Trust Company of Delaware; Matthew P. D'Emilio, Esq., Director, Cooch & Taylor, P.A.; Mark E. Doyle, J.D., LL.M., Senior Vice President, Bessemer Trust Co. of DE; 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 & CEO, U.S. Trust Company of Delaware; Daniel F. Hayward, Esq., Director, Gordon, Fournaris & Mammarella, P.A.; Maria Iversen, CTFA, SVP, Sr. Trust Advisor and Team Lead, The Northern Trust Company of DE; George W. Kern, Esq., Managing Director, Bessemer Trust Company of DE; Gregg Landis, Senior Director - Team Leader, BNY Mellon Wealth Management; Carlo Lombardi, Esq., Vice President, Wilmington Trust Company; Darlene M. Marchesani, J.D., LL.M., Chief Trust Officer & Trust Counsel, Evercore Trust Co. of DE; Sandra Martine, Assistant Vice President, Christiana Trust, A Division of WSFS; M. Lisa Meehan, CCTS, VP, Group Manager, Personal Trust, Christiana Trust, A Division of WSFS; Mark V. Purpura, Esq., Director, Richards, Layton & Finger, P.A.; Jordon Rosen, CPA, AEP ®, Director – Estates & Trusts, Belfint Lyons & Shuman, P.A.; Nicole M. St. Amand, CTFA, Assistant Vice President, Wilmington Trust Company; Anne Schumeyer, CTFA; Vincent C. Thomas, Esq., Partner, Young Conaway Stargatt & Taylor, LLP; Lizzie Vannote, VP & Trust Officer, J.P. Morgan Trust Company of Delaware; Lynn Welch Watson, CFP, EA, VP, Sr. Trust Officer, Brown Brothers Harriman Trust Company of Delaware; and, Kalimah Z. White, Vice President, J.P. Morgan Bank.

Thanks also to the conference Ambassadors who went out of their way to make new members and first time attendees welcome. The Ambassadors were: Cynthia D.M. Brown; Lisa K. Berry; David A. Diamond; Todd A. Flubacher; Thomas M. Forrest; M. Lisa Meehan; Nicole M. St.Amand; Anne Schumeyer; and, Lynn Welch Watson.

Still the One! An examination on why Delaware is still the right place to situs a trust with (l to r): Quincy Cotton, Esq., Partner, Roberts & Holland LLP; Dave J. McCabe, Esq., Senior Partner, Willkie Farr & Gallagher, LLP; Gail E. Cohen, Chair and General Trust Counsel, Fiduciary Trust International; and, Richard W. Nenno, Esq., Senior Managing Director and Trust Counsel, Wilmington Trust Company

Nancy B. Rapoport, Esq., Executive Vice President and Provost, University of Nevada, addresses the issue of collaboration and teamwork in "Why Can't We Be Friends?"

"We Are Family" Jerome K. Grossman, Esq., Partner, Young Conaway Stargatt & Taylor, LLP; and, Patricia H. Matthews, Vice President, J.P. Morgan Trust Company of Delaware, discuss innovative uses of Delaware Statutory Trusts to resolve family governance concerns.

"All Over the World" - Stanley A. Barg, Esq., Partner, Kozusko Harris Duncan, Private Client/Wealth Management Counsel; Leigh-Alexandra Basha, JD, LLM, Partner, McDermott Will & Emery; and, Daniel F. Lindley, Esq., Fiduciary Practice Lead, Global Family & Investment Offices, Northern Trust discuss uses of Delaware trusts for international clients.

"You Got It" - Differing perspectives on the draft Uniform Directed Trust Act provided by (l to r): Robert H. Sitkoff, Esq., John L. Gray Professor of Law, Harvard Law School; Laura Mandel, Esq., Manager of Fiduciary Risk, Global Risk Management for The Northern Trust Company; Todd A. Flubacher, Esq., Partner, Morris Nichols Arsht & Tunnell LLP; and,Diana S.C. Zeydel, Esq., Global Chair, Trust & Estates/Wealth Management, Greenberg Traurig, PA.

Senator Thomas Carper and DBA President Sarah Long at Tuesday evening's reception.

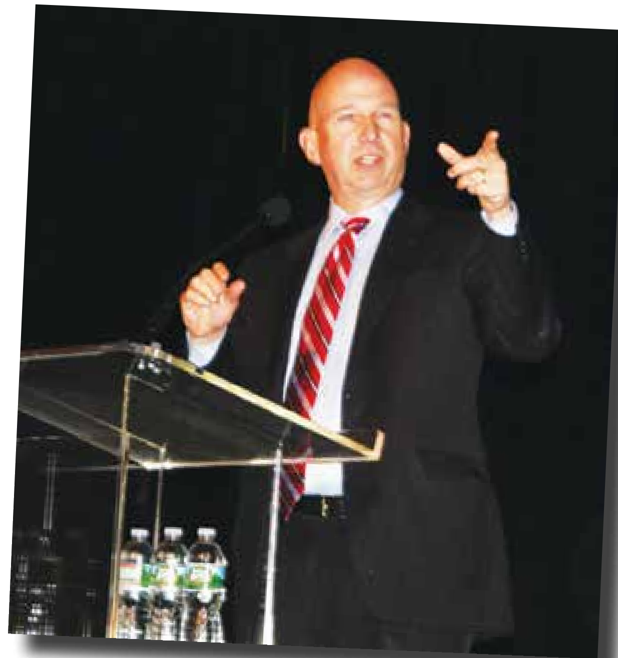
Senator Christopher Coons addresses Tuesday evening's reception.

(l to r) Cythnia D.M. Brown, President, Commonwealth Trust Company, and DBA Trust Committee Chair; Mark A. Graham, EVP, Wealth Advisory Services, Wilmington Trust, and DBA Chairman; and, Mark Oller, Adminstrative VP, Managing Director, Wilmington Trust, at Tuesday evening's reception.

Wednesday's session begin with a "Hot, Hot, Hot" discussion of regulatory topics with (l to r) Mark V. Purpura, Esq., Director, Richards Layton & Finger, P.A.; Phoebe Papageorgiou, Esq., Senior Counsel II, American Bankers Association; David Chaves, Special Agent, White Collar Coordinator, Federal Bureau of Investigation; and, Lisa W. Collison, Review Examiner, Office of the State Bank Commissioner, State of Delaware.

Onboarding a trust? "Get It Right the First Time!" That's the advice of (l to r): Timothy B. Carroll, COO, New York Private Trust Company; Bridget Boyd, SVP, Citicorp Trust Company of Delaware; Scott Jaffe, JD, LLM, Assistant Vice President, Christiana Trust; and, Sharon Corbett, Charles Schwab Trust Company of Delaware.

It's the taxmen discussing tax legislation and current litigation! (l to r):
George W. Kern, Esq., Managing Director, Bessemer Trust Company of DE;
James H. Cundiff, Esq., Partner, McDermott Will & Emery; and,
Thomas M. Forrest, President & CEO, U.S. Trust Company of Delaware.



Governor Jack Markell explains why Delaware is
a "Wonderful World" for trusts and business
at Wednesday's luncheon session.

"Still the Same" - The new basis consistency rules are discussed by (l to r): Jordon N. Rosen, CPA, Director, Belfint Lyons & Shuman, P.A.; Jeffrey C. Wolken, National Director of Wealth & Fiduciary Planning, Wilmington Trust Co.; David Kirk, Esq., Executive Director, Ernst & Young LLP; and, Vincent F. Lackner, Jr., President, The Lackner Group.

It always ends with ethics! (l to r) Donald F. Parsons, Jr., Esq., Senior Counsel, Morris Nichols Arsht & Tunnell LLP; W. Donald Sparks, II, Esq., Director, Richards Layton & Finger, PA; and, S. Thomas Davidson, JD, Director, Trust Administration, RBC Trust Company (Delaware) Ltd. discuss attorney client privilege in the trust world with "Private Eyes."

Louis D. Memmolo, Employee Benefits Advisor, Weiner Benefits Group, congratulates J. Zachary Haupt of Morris Nichols Arsht & Tunnell LLP, the winner of a Stratocaster guitar.

DBA President Sarah Long congratulates Rachel Cebada on winning the interactive "Click" game featured on the conference app.

Accounting for Success

by
Jordon Rosen, CPA, MST, AEP®
Director
Belfint Lyons & Shuman, P.A.

"Of interest will be whether the State will keep the current filing due dates..."

Tax Return Filing Due Dates Change For 2016 Returns

Buried in the Surface Transportation and Veterans Health Care Choice Improvement Act of 2015 (the "Act") is an unassuming tax provision that changes the filing due dates for business tax returns for taxable years beginning after December 31, 2015. The provisions of the Act do not affect the sacred April 15 due date for individual returns (although note that due to the 15th falling on a weekend and the observance of Emancipation Day in Washington, D.C., 2016 individual returns will not be due until Tuesday, April 18, 2017). Of interest will be whether the State will keep the current filing due dates which in some cases provides for an additional two weeks beyond the federal due date, or whether they will conform to the new federal due dates.

Section 2006 of the Act provides that partnership and S Corporate returns will be due by the 15th day of the 3rd month following the close of the tax year (March 15 for calendar year businesses). This isn't a change for S Corporations, but does cut the filing time by a full month for partnerships.

With one exception, C Corporation returns will get an extra month to file Form 1120 (e.g. from March 15 to April 15 for calendar year corporations). The one exception is for June 30 fiscal year C Corporations, which will continue to file by the 15th day of the 3rd month (September 15) until after the 2025 tax year, when it will then get the extra month to file. The maximum extension time for C Corporations is a bit tricky. Calendar year corporations will be allowed a 5-month extension period through the 2025 tax year; June 30 fiscal year corporations will be allowed a 7-month extension for that 10-year period and all others will be allowed a maximum extension of 6 months.

With regard to other extensions of time to file, the maximum extension for a (calendar year) partnership will be 6 months, until September 15. The maximum extension for filing fiduciary tax returns (Form 1041) will be 5 ½ months, until September 30 for calendar year filers. This is a welcome change that avoids the crunch when both of the above returns were previously due at the same time, but now allowing for a 2-week spread between filings and then another 2 weeks until October 15 when an individual beneficiary would be filing their tax return.

The due date for filing the FinCEN Report 114, relating to the Report of Foreign Bank and Financial Accounts is now April 15, with a maximum extension of 6 months ending on October 15. This is a change from the old due date of June 30 with did not allow any provision for an extension of time. In addition, first time filers may now get a waiver for failure to timely file this form.

Other filing due date changes include:

- Forms 3520 and 3520-A related to Foreign Trusts will be due the 15th day of the 3rd month with a maximum 6 month extension allowed.
- The maximum extension for Form 990 (series), 5227, 6069 and 8870 is now 6 months.

In conclusion, I can't help but say – many happy returns!

Jordon Rosen, CPA, MST, AEP® is a Director at the Wilmington CPA firm of Belfint, Lyons & Shuman and is the past chair of the DSCC Tax Committee. He can be reached at jrosen@belfint.com or 302.573.3911.

Compliance Focus

by
Allison N. Wirth, Esq., CRCM
Director of Research & Communications
FIS Risk, Information Security &
Compliance (RISC) Solutions

"While impacted institutions may have taken steps to prepare for compliance with the MLA final rule, there may be additional work to be done."

Key Themes of the Military Lending Act Amendments

As the industry prepares to comply with the DOD amendments to its regulation that implements the MLA, there are some key themes to hone in on. The amendments: expand the definition of "consumer credit" to be consistent with Regulation Z; provide a safe harbor for creditors who use the DOD's online database or a consumer credit report when determining "covered borrower" status; modify the Military Annual Percentage Rate (MAPR) to include additional fees and charges; and change the loan disclosures required for covered credit. October 3, 2016 was the compliance deadline, with an exemption for credit card compliance. The credit card compliance deadline is October 3, 2017, with a possible extension to October 3, 2018.

Expanded Definition of "Consumer Credit"

Perhaps most notably, the DOD revised the scope of "consumer credit" under the MLA to align with the definition found in the Truth in Lending Act (TILA). Accordingly, "consumer credit" is now defined in the MLA as: Credit offered or extended; to a covered borrower; primarily for personal, family or household purposes, and that is: Subject to a finance charge, or Payable by a written agreement in more than four installments.

This increases the MLA's scope to include more types of open-end and closed-end credit transactions, which consequently requires more creditors to comply with the law. It will be important for financial institutions offering covered types of credit to ensure that they incorporate MLA compliance into their compliance management systems and operations.

"Covered Borrower" and Safe Harbor

While the amendments do not change who is a covered borrower under the MLA, they do change how a creditor can obtain a safe harbor for compliance when establishing whether a borrower is covered. A "covered borrower" is defined in the Final Rule as: A member of the armed forces who is: serving on active duty under a call order of longer than 30 days or, serving on active Guard and Reserve duty; as well as dependents of qualifying servicemembers.

The MLA continues to offer creditors a safe harbor for compliance when a covered-borrower check is performed in conformity with the rule's requirements, however, the amendments change what constitutes a safe harbor.

For accounts consummated or established on or after October 3, 2016, a creditor seeking a safe harbor for compliance with the rule may use either (or both) of the new methods listed above, however, these methods are not required to be used.

Regarding frequency, a creditor is only required to conduct a covered-borrower check once: when the consumer initiates the transaction or applies to establish an account, or, when the creditor develops or processes a firm offer of credit.For "pre-screened offers," a creditor may rely on its original covered-borrower check as long as the consumer responds no more than 60 days after the offer date. ***Important: A creditor must retain proof of the determination in order to receive the safe harbor.***

Calculation of the MAPR

The MLA generally prohibits a creditor from charging a covered borrower a MAPR that is greater than 36 percent. The framework for MAPR computation is comprised of the traditional makeup of the annual percentage rate (APR) found in Regulation Z plus other finance charges and fees, including: Credit insurance premiums; Application fees; Participation fees; and, Fees for ancillary "add-on" products. For example, the MAPR would include the fees and/or premiums related to credit insurance, debt cancellation and debt suspension. For open-end credit accounts, these fees must be included in the MAPR even if the fees will be collected after the account is opened.

Loan Disclosures

The MLA final rule seeks to simplify the information that creditors must provide to a covered borrower at the time they become obligated on the transaction or establish an account for credit. The amendments eliminated the requirements for a specific statement regarding protections available to covered borrowers and for providing disclosures "clearly and conspicuously."

New disclosure requirements include: a statement of the applicable MAPR that describes the charges the creditor may impose, instead of the periodic rate of the MAPR itself and the total dollar amount of all charges included in the MAPR; any disclosure required by Regulation Z, delivered in accordance with the requirements of Regulation Z; a clear description of the payment obligation of the covered borrower, which may be satisfied by a payment schedule (closed-end credit) or an account opening disclosure (open-end credit); and, provision of the required MLA disclosures to the borrower both in writing and orally. A creditor may elect to provide the oral disclosures either in person or by providing the covered borrower with a toll-free telephone number.

Key Takeaways

While impacted institutions may have taken steps to prepare for compliance with the MLA final rule, there may be additional work to be done. Here are some key steps for ensuring compliance with the MLA amendments. Please note this list is not exhaustive. It is intended to spark an institution's internal discussion.

- Update regulatory applicability matrix so all newly covered products are appropriately mapped to the MLA.
- Review written and oral disclosures and their accompanying procedures for compliance with requirements.
- For open-end credit accounts, establish procedures to monitor the MAPR each billing cycle and prevent the MAPR from exceeding 36 percent.
- Establish procedures on open-end credit accounts to address when the borrower is no longer covered.
- Assess the institution's usage (if any) of the safe harbor provision.
- Evaluate methods for identifying covered borrowers and adjust those procedures if needed.
- Update all impacted policies, procedures, job aids and training materials.
- Train staff in affected business units on the changes.
- Include MLA in upcoming monitoring and audit schedules for covered products and services.
- Flag calendars for future credit card compliance deadlines and implement an action plan for implementing the changes, including clear lines of responsibility, key milestones and deadlines.
- Report to the board of directors on changes implemented to ensure compliance.

For Your Benefit

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

"Regardless of any future changes that may be made, employers that provide group health coverage for their employees must prepare for upcoming ACA deadlines. "

Donald J. Trump has been elected the 45th President of the United States. What does that mean to us? First we can begin to get over the election fatigue created as a result of this historic campaign season. Then, we can ponder the prophetic power of 'The Simpson's' episode back in 2000 that predicted a Trump presidency, next we begin to anticipate what changes could actually come based on what he has promised.

The Future of the Affordable Care Act

Trump ran in part, on a platform of repealing and replacing the ACA. He has already met with House and Senate leaders to lay the groundwork for legislation next year. Both the Senate and the House of Representatives have virtually all opposed the ACA, calling for its repeal and proposing changes.

While it is largely unclear, at this time, what those changes will look like, Republicans in the past have suggested the following:

- Full repeal of the ACA with replacement health care reform legislation;
- Partial repeal of key provisions (such as the individual and employer mandates), while retaining some less controversial provisions;
- Changes to the Medicare and Medicaid programs; and
- Implementing new policies intended to expand coverage and lower health care costs.

Considering newly elected officials will not take office until early 2017, there will likely be no significant legislative or regulatory changes to the ACA before then. Employers may want to hold off on making any large-scale changes related to their employer-provided health care.

Regardless of any future changes that may be made, employers that provide group health coverage for their employees must prepare for upcoming ACA deadlines. These may include:

- Employer Shared Responsibility Rules. The ACA requires applicable large employers (ALEs) to offer affordable, minimum value health coverage to their full-time employees (and dependent children) or face a penalty.
- Employer Reporting of Coverage. Employers still have to report information under Sections 6055 and 6056 to the IRS and to certain individuals about the coverage they offer or provide during the year.
- Changes to ACA Limits for 2017. The out-of-pocket maximum increased to $7,150 for self-only coverage and $14,300 for family coverage for the 2017 plan year.
- Summary of Benefits and Coverage (SBC). Health plans and issuers must provide an SBC to participants and beneficiaries.

Additional Compliance Issues

The 2016 election results also raise questions over other compliance requirements that are set to take effect later in 2016 and early 2017.

- New overtime wage payment rules under the FLSA are set to take effect on Dec. 1, 2016. These rules increase the salary that must be paid for an employee to qualify for a "white collar exemption."
- Clarifications to existing anti-retaliation rules issued by the Occupational Safety and Health Administration (OSHA) are also set to take effect on Dec. 1, 2016, after a number of delays.
- For the 2017 plan year, the health FSA dollar limit will increase to $2,600.

Dodd-Frank Act

It's possible a Trump administration could bring an end to the Department of Labor's fiduciary rule, as well as what amounts to the repeal of the Dodd-Frank financial reform law via the Financial CHOICE Act.

In the recent blog post, Scholarly Financial Planner, Ron Rhodes, an attorney who leads the financial planning program at Western Kentucky University said that he anticipates the DOL's fiduciary rule, along with the rule's best interest contract exemption (BICE), to be "halted" in early 2017. He also sees the Securities and Exchange Commission's authority to adopt its own rule under Section 913 of the Dodd-Frank Act being "repealed." We shall see.

Increased Premium Costs for Individual and Exchange Health Insurance

According to a report from the Department of Health and Human Services (HHS), premiums for a midlevel benchmark plan from the federal Marketplace will increase an average of 25 percent, before applying applicable subsidies. In Delaware, we are facing increases of 32% or more. This is a significant increase when compared to the 7 percent increase in 2016 and the 2 percent increase in 2015.

While we await what a Trump presidency will bring for our country, we can spend the weekend binging on old episodes of 'The Simpsons' to find out what else the future holds for us!

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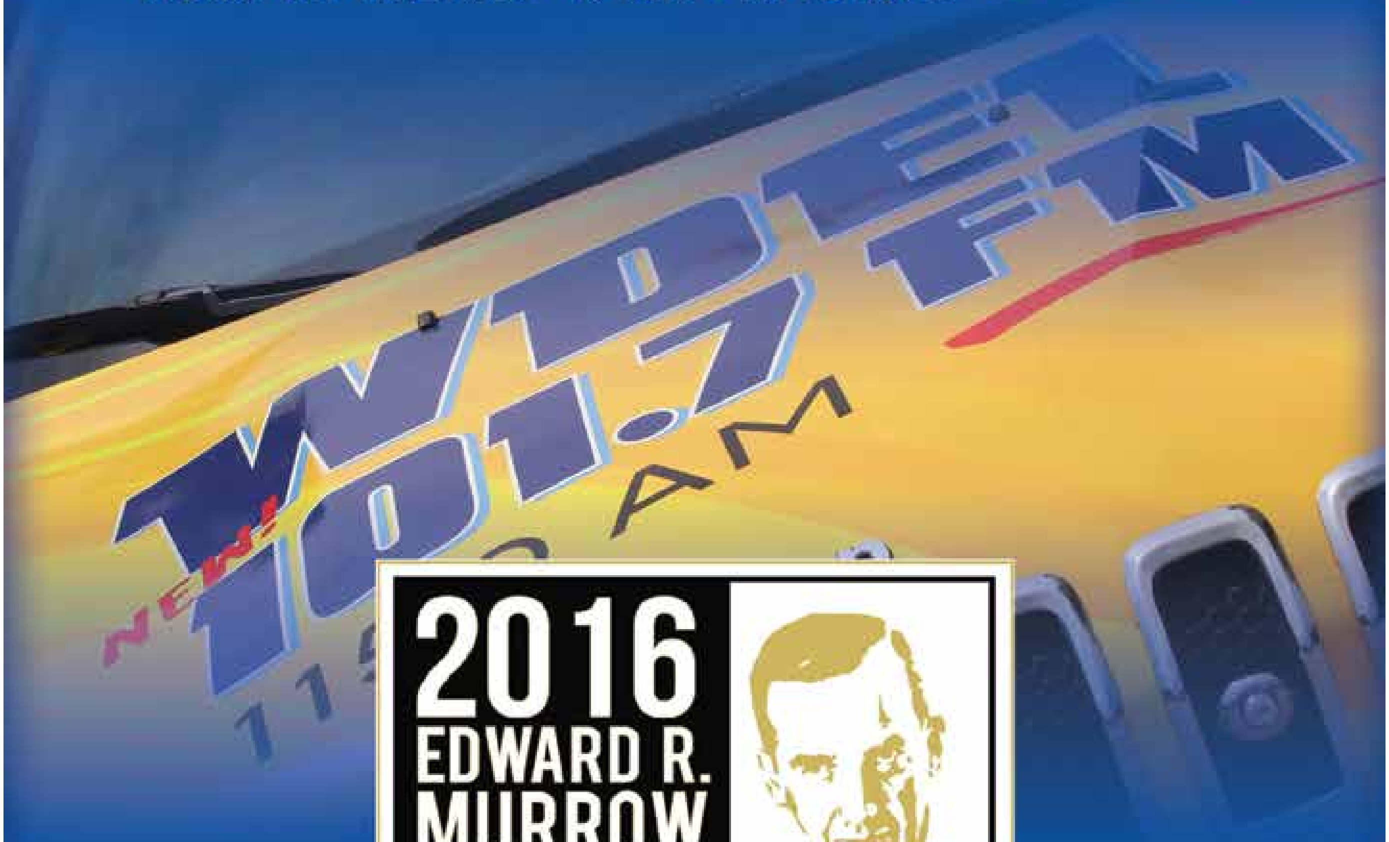

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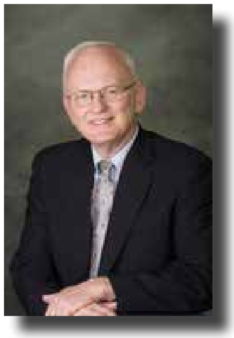
March 1 - 3, 2017
DBA Executive Officer Washington Visit

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 Willard Hotel. Sponsorships Available!



May 18, 2017 - DBA Annual Meeting and Dinner
Hotel duPont, Wilmington, DE.

Join Delaware's top bankers at this annual event at the historic Hotel du Pont with dinner in the elegant Gold Ballroom. Keynote Speaker: James Olson, Professor, George Bush School of Government and Public Service, and former Chief of Counterintelligence, Central Intelligence Agency. Mr. Olson spent thirty years chasing Soviet KGB secrets, and jumping out of moving cars as a spy for the CIA. Don't miss this exciting and informative speaker! Sponsorships Available!

Trust Law Update

by
Vincent C. Thomas, Esq.
Young Conaway Stargatt & Taylor, LLP

"...a non-exhaustive checklist of items for the trustee to consider prior to entry into any guarantee agreements on behalf of the trust."

Guarantee of Loans by a Trust: Considerations for the Trustee

Oftentimes, trustees of Delaware trusts are asked to enter into guarantee agreements on behalf of the trust to guarantee loans for the benefit of trust beneficiaries or in connection with entities that may be owned by the trust. This column provides a non-exhaustive checklist of items for the trustee to consider prior to entry into any guarantee agreements on behalf of the trust.

I. Power to Guaranty

First, the trustee should determine if the trust instrument specifically authorizes or prohibits a loan guarantee. If the trust instrument addresses the issue, the trustee should strictly comply with the terms of the trust instrument. If the trust is silent, as is oftentimes the case, the trustee will need to comply with 12 Del. C. § 3325(19). Notably, 12 Del. C. § 3325(19), permits a guarantee ONLY if it is (i) made for investment purposes; (ii) made in lieu of a distribution amount that could have been made currently to or for such beneficiary under the terms of the governing instrument, not made in excess of such amount, and the fiduciary creates a reserve for the potential liability; or (iii) made to or for the benefit of another trust of which such beneficiary is also a beneficiary, provided the requirements of (ii) above are also satisfied.

II. Affiliates

If the loan to be guaranteed is from an affiliate of the trustee, the trustee must ensure compliance with any terms in the trust instrument regarding affiliated investments, applicable Delaware statutes regarding affiliated investments, and the trustee's common law fiduciary duties (e.g., duty of loyalty).

III. Guarantee Terms

The trustee should cautiously review the guarantee agreement for traps for the unwary, including, but not limited to:

a. Joint and Several Guaranty Agreements. Suppose the trust owns a 50% interest in an LLC. LLC is borrowing money and the lender has requested that the trust and the other 50% owner (such owner not being a current trust beneficiary) jointly and severally guarantee the loan. Since the loan theoretically benefits a non-beneficiary, should the guarantee by the trust be limited to 50% of the loan?

b. Representations, Warranties, and Covenants. Many guarantee agreements require the guarantor to take additional actions that may be governed by different provisions in the trust instrument or Delaware Trust Act. For example, guarantee agreements often require the guarantor to pledge assets as collateral or restrict the guarantor from transferring assets. The trustee will generally need to ensure that the trust instrument or Delaware law authorizes such additional acts or requirements.

IV. Consider Bootstrap Protections

If there is any uncertainty regarding the trustee's power to enter into the particular guaranty, the trustee could consider a number of protections. For example, if the trust is revocable or otherwise amendable (e.g., trust protector amendment power), a provision could be added specifically authorizing the entry into the particular guarantee agreement. The trustee could also consider resolving any ambiguity or having the beneficiaries direct the trustee to enter into the guarantee agreement pursuant to a non-judicial settlement agreement under 12 Del. C. §§ 3338(d)(1) or (3). Lastly, the trustee should always consider seeking a release from liability for entry into the guarantee agreement under 12 Del. C. § 3588.

Problem Solvers

No two problems are alike. Every situation is unique. That's why families choose you as their trustee. You know the rules. You remain current. You are resourceful. Most importantly, you know people.

So when you need help on a question, you've already given significant thought to the problem. You might just need the reassurance of a sound second opinion. Or you might be facing a matter of major risk management, or even the foreshadowing of litigation.

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