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SPECIAL PURPOSE ADVISORS AND THE TRUSTEES THEY DIRECT: BACKGROUND, RECENT CASES & PRACTICAL CONSIDERATIONS

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TABLE OF CONTENTS

SPECIAL PURPOSE ADVISORS AND THE TRUSTEES THEY DIRECT: BACKGROUND, RECENT CASES & PRACTICAL CONSIDERATIONS[1]

I. Introduction

It is increasingly common for trust instruments to be drafted to compartmentalize trustee responsibilities and divide the traditional duties of a single trustee among various special purpose trustees. The allocation of functions among trustees and advisors varies from trust to trust, but normally involves dividing duties related to investments and/or discretionary distributions from those related to trust administration. For example, a trust agreement may grant various broad administrative powers to a trustee, but carve out specific investment or distribution powers that may only be exercised a specially named advisor or, alternatively, exercised by the trustee only with the consent of such advisor. A trustee that must follow the instructions of a special advisor is often called a “directed trustee”.

This paper briefly reviews some of the applicable common law and statutes that apply to directed trustees (Section II), discusses recent case law involving directed trustees under state statutes (Section III) and under ERISA (Section IV), and then discusses various issues that practitioners might consider when advising a directed trustee, a trust advisor or a settlor considering creating a trust a directed Trustee arrangement (Section V). Finally, the Appendix provides sample trust provisions for appointing an investment advisor (Section VI.A), a distribution advisor (Section VI.B) and a literary advisor (Section VI.C). The Appendix also provides an example of a provision that allocates responsibilities among co-trustees rather than naming a special advisor and a directed trustee (Section VI.D).

II. Directed Trustee: Background

A. The Common Law

Under the common law of trusts, a settlor may reserve to himself (or grant to a designated person) the authority to control the trustee in certain matters, either by directing the trustee or by requiring the trustee to receive consent prior to acting. In such cases, the advisor is sometimes referred to as the “special trustee” and the directed trustee as the “general trustee.” *See, e.g.,* Bogert, *Trusts and Trustees* § 122 (2d rev. ed. 1984), which provides in part:

> The use of a “special” trustee who is given a specific function or special responsibility has gained acceptance in recent years. The nature and scope of his power or authority may determine the liability of the special trustee and that of the “general” trustee to whom all other powers are granted.

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[1] The author is particularly grateful to Dennis Belcher of McGuire Woods, LLP, in Richmond, Virginia, as these materials are largely based on his outline prepared for the 2007 Heckerling Institute on Estate Planning panel entitled “Not My Fault-The Devil Made Me Do It! Responsibilities and Liabilities of a Directed Trustee,” which is shared with his kind permission. Nevertheless, any and all errors herein are purely the responsibility of the author.

Section 185 of the *Restatement (Second) of Trusts* articulates the directed trustee's duty to follow instructions, unless doing so would violate the terms of the trust or be a violation of a fiduciary duty. Section 185 provides:

> If under the terms of the trust a person has power to control the action of the trustee in certain respects, the trustee is under a duty to act in accordance with the exercise of the power, unless the attempted exercise of the power *violates the terms of the trust or is a violation of a fiduciary duty* to which such person is subject in the exercise of the power.

The *Restatement (Third) of Trusts (Tentative Draft*) reinforces the position taken in the *Restatement (Second)*. Section 75 of the *Restatement (Third)* provides:

> Effect of Power to Control Acts of Trustee. Except in cases covered by § 74 (involving powers of revocation and other ownership-equivalent powers), if the terms of a trust reserve to the settlor or confer upon another a power to direct or otherwise control certain conduct of the trustee, the trustee has a duty to act in accordance with the requirements of the trust provision reserving or conferring the power and to comply with any exercise of that power, *unless the attempted exercise is contrary to the terms of the trust or power or the trustee knows or has reason to believe that the attempted exercise violates a fiduciary duty* that the power holder owes to the beneficiaries.

The extent of a general trustee's duty and liability also depends on whether it may only act in response to the direction of the special advisor or whether it may initiate actions and execute them after obtaining the advisor's consent. A trustee who is required to obtain consent still has an affirmative duty to act, while a directed trustee "is ordinarily justified in doing nothing until such direction is given." *Restatement (Second) of Trusts*, § 185 (1959) Comment f. For example, a trustee who is required to obtain the consent of a beneficiary before selling shares of a closely held company still has a duty to monitor the company and make recommendations with respect to the retention or sale. A directed trustee should have no duty to monitor the company or to make recommendations about retention or sale.

The Restatement also distinguishes between powers held for the sole benefit of the holder and powers held in a fiduciary capacity. If the power is held for the sole benefit of the holder (e.g., a power retained by a settlor of a revocable trust), the directed trustee must follow the directions and the trustee's only duty is to verify that the exercise does not violate the terms of the trust. On the other hand, if the power is held in a fiduciary capacity (e.g., an investment advisor), the directed trustee has a duty under the Restatement approach to *verify that the exercise of the power does not violate a fiduciary duty* that the power holder has to the beneficiaries of the trust. Moreover, the trustee may be liable for following the advisor's directions "if the trustee has *reason to suspect* that the holder of the power is attempting to exercise it in violation of a fiduciary duty to which the holder is subject in the exercise of the power." *Restatement (Second) of Trusts* § 185 (1959), Comment e.

Under the Restatements, it is clear that a directed trustee cannot follow an instruction that would be a clear breach of a fiduciary duty. However, a direction to invest in or retain a concentration is more problematic. Under the Prudent Investor Rule, there is a duty to diversify unless "the Trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying." Uniform Prudent Investor Act, Section 3. When a third party has authority to direct investments, does the trustee have a duty to determine that special circumstances justify the retention of a concentration?

An equally serious question is whether and to what extent the directed trustee has a duty to investigate or a duty to warn. The "reason to suspect" standard in the *Restatement (Second)* Comment appears to require the directed trustee to monitor and even second guess the trust advisor. Moreover, Comment e. in the *Restatement (Third)* provides "If the trustee has reason to believe that the holder of a power may be attempting to exercise it in violation of a fiduciary duty to which the holder is subject, the trustee has a duty to not to comply and may be liable for compliance in disregard of that duty."

Can exculpation provisions protect the directed trustee? Although there is very little case law on the duties and liability of a directed trustee and Advisors, the treatises which discuss the issue question whether the directed trustee can be completely relieved of liability. See G. Bogert, *Trusts and Trustees* § 701 (2d rev. ed. 1982) ("Generally, a trustee cannot completely divest himself of trust investment responsibilities even though he is expressly relieved of those responsibilities by the settlor.")[2]

B. The Uniform Trust Code

Recognizing the growing instances of a settlor giving a third party the power to direct a trustee, the Uniform Trust Code addresses directed trustees. Section 808 of the Uniform Trust Code provides:

> (a) While a trust is revocable, the trustee may follow a direction of the settlor that is contrary to the terms of the trust.
>
> (b) If the terms of a trust confer upon a person other than the settlor of a revocable trust the power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust.
>
> (c) The terms of a trust may confer upon a trustee or other person a power to direct the modification or termination of the trust.

[2] See discussion in Ann Hart Wernz, *Directed Trustees: Between a Rock and a Hard Place: Issues of Liability of Co-Trustees and Successor Trustee*, 2007 HECKERLING INSTITUTE ON ESTATE PLANNING.

(d) A person, other than a beneficiary, who holds a power to direct is presumptively a fiduciary who, as such, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct is liable for any loss that results from breach of a fiduciary duty.

Those states that have adopted the Uniform Trust Code approach include Alabama, Arkansas, the District of Columbia, Florida, Kansas, Maine, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, Oregon, Pennsylvania, South Carolina, Texas, Virginia, and Wyoming.[3]

C. Statutory Authority Concerning Directed Trustees

According to one knowledgeable commentator, state statutes addressing directed trustees fall into one of three categories:

1. those states which follow the approach of § 185 of the *Restatement (Second)*,

2. those states which follow the approach of § 808 of the Uniform Trust Code, and

3. those states which have enacted more protective statutory protection for directed trustees.[4]

D. ERISA and Directed Trustees

ERISA is another area where directed trustees are regularly used. Congress enacted ERISA in 1974 to encourage and provide for the stability employee benefit plans, and it seeks to accomplish this goal by requiring plans to name fiduciaries and by giving them strict and detailed duties and obligations. Specifically, ERISA requires benefit plans to "provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan." 29 U.S.C. § 1102(a)(1). Because a directed trustee under an ERISA plan has similar responsibilities, the case law that has arisen under ERISA is instructive to trust advisors in the personal trust setting and is reviewed later in this paper.[5]

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[3] Richard Nenno, *Directed Trusts: Can Directed Trustees Limit Their Liability?* Chapter RWN – 18, 2006 Notre Dame Tax and Estate Planning Institute, RWN-18-5.
[4] Nenno, RWN-18-5.
[5] Ann Hart Wernz, *Directed Trustees: Between a Rock and a Hard Place: Issues of Liability of Co-Trustees and Successor Trustee*, 2007 HECKERLING INSTITUTE ON ESTATE PLANNING.

III. Recent Cases Under Directed Trustee Statutes

A. Duemler v. Wilmington Trust Company

Cite: CVA No. 20033 (Del. Ch., Nov. 10, 2004)

1. The Litigants

a. Plaintiff was a sophisticated investment advisor and securities lawyer who was named as a trust's sole investment direction advisor in the trust's governing instrument.

b. Defendant was the Wilmington Trust Company, which was the directed trustee.

2. The Facts

a. As the trust's sole investment direction advisor, Mr. Duemler had the express power to direct Wilmington Trust Company with respect to all trust investments.

b. While Mr. Duemler was on vacation, Wilmington Trust Company forwarded a prospectus to his regular mailing address.

c. Mr. Duemler should have taken action with respect to the prospectus, but did not provide Wilmington Trust Company with any directions concerning the prospectus.

d. Subsequently, the investment declined significantly in value.

3. The Claims and Contentions

a. Plaintiff. Mr. Duemler sued Wilmington Trust Company alleging that it breached its fiduciary duty to the trust by failing to provide him with financial information appropriate to allow him to make an informed decision.

b. Defendant. Wilmington Trust Company asserted, among other defenses, that it was protected by Delaware's directed trustee statute. See 12 Del C. Sec. 3313(a).

4. The Law

Section 3313(a) of Title 12 of the Delaware Code provides:

> (a) Where one or more persons are given authority by the terms of a governing instrument to direct, consent to, or disapprove a fiduciary's actual or proposed investment decisions, distribution decisions, or other decision of the fiduciary, such persons shall be considered to be advisors and fiduciaries when exercising such authority unless the governing instrument otherwise provides.

> (b) If a governing instrument provides that a fiduciary is to follow the direction of an advisor, and the fiduciary acts in accordance with such a direction, then *except in cases of willful misconduct on the part of the fiduciary so directed*, the fiduciary shall not be liable for any loss resulting directly or indirectly from any such act.
>
> (c) If a governing instrument provides that a fiduciary is to make decisions with the consent of an advisor, then *except in cases of ilful misconduct or gross negligence on the part of the fiduciary*, the fiduciary shall not be liable for any loss resulting directly or indirectly from any act taken or omitted as a result of such advisor's failure to provide such consent after having been requested to do so by the fiduciary.
>
> (d) For purposes of this section, 'investment decision' means with respect to any investment, the retention, purchase, sale, exchange, tender or other transaction affecting the ownership thereof or rights therein, and an advisor with authority with respect to such decisions is an investment advisor.

5. The Decision

a. In an unreported and unwritten decision,[6] the court ruled in favor of Wilmington Trust Company holding that there was no evidence of "willful misconduct" under Delaware's directed trust statute. The court stated that the statute requires the investment advisor to make investment decisions in isolation, without oversight from the trustee, and that to hold otherwise would undermine the role of investment trust advisor.

b. The court also found that Mr. Duemler breached his fiduciary duty as investment advisor to the trust.

B. Rollins v. Branch Banking and Trust Company of Virginia

Cite: 2001 W.L. 34037931 (Va. Cir. Ct., 2002)[7]

1. The Litigants

a. Plaintiffs were children and grandchildren of the settlors of two trusts created for their benefit.

b. Defendant was the corporate trustee of the trusts.

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[6] See Peter S. Gordon, *Directed Trusts: The Use of Trust Advisers and Protectors: Can Fiduciaries Limit Liability Through Directed Trusts? Empowering Trust Protectors While Minimizing Their Liability, Or Can a House Divided Long Stand?*, 2006 NOTRE DAME TAX AND ESTATE PLANNING INSTITUTE.

[7] See *id.* at 18-11.

2. The Facts

a. The trusts were funded primarily with shares of stock in two textile corporations.

b. At the trusts' inception, the trustee "obtained the written authority of the beneficiaries to over-concentrate the trust" with the textile stocks.

c. The trust remained over concentrated in the textile stock until 20 years later, when the stock was sold.

3. The Claims and Contentions

a. Plaintiffs. The beneficiaries sued the corporate trustee for breach of fiduciary duties, including the failure to diversify trust investments.

b. Defendant. Citing the Virginia directed trustee statute, the trustee filed the equivalent of a motion for summary judgment contending that "when, as here, the trust vests the power to make investment decision exclusively in persons other than the trustee, the trustee cannot be liable for the loss resulting from the retention of the investment."

4. The Law

Virginia's directed trustee statute provided, in part, as follows:

§26-5.2. Liability of fiduciary for actions of cofiduciary

> C. Whenever the instrument under which a fiduciary or fiduciaries are acting reserves unto the trustor, testator, or creator or vests in an advisory or investment committee or any other person or persons, including a cofiduciary, to the exclusion of one or more of the fiduciaries, authority to direct the making or retention of investments, or any investment, the excluded fiduciary or cofiduciary shall be liable, if at all, only as a ministerial agent and shall not be liable as fiduciary or cofiduciary for any loss resulting from the making or retention of any investment pursuant to such authorized direction.

5. The Decision

a. Analysis & Holding.

i. Ruling in favor of the corporate trustee with respect to the plaintiffs' diversification claim, the court relied on the Virginia directed trustee statute and the specific language of the trust instrument. For example, the Court stated:

> The plain language of the instrument, however, clearly contradicts the beneficiaries' argument. The beneficiaries, alone, had the power to make investment decisions. The statute enacted by the General Assembly recognizes the basic principal that the court cannot hold a trustee, or anyone else, liable for decisions that it did not and could not have made. The statute clearly applies in this instance and the beneficiaries have not stated a cause of action against the trustee for failing to diversify the trust assets. The demurrer is granted [no claim is stated against the directed trustee] as it relates to all claims for failure to diversify.

ii. The court did not grant the trustee's demurrer (failure to assert a valid claim), however, on all aspects of plaintiffs' count for breach of fiduciary duty. In denying the trustee's motion to dismiss that portion of the lawsuit, the court stated:

> To ensure the trust's conservation, a trustee also has a duty to keep informed as to the conditions of the trust. C.J.S., Trusts § 247. Additionally, the trustee has a duty to impart to the beneficiary any knowledge he may have affecting the beneficiary's interest and he cannot rid himself of this "duty to warn." *See Restatement 2d Trusts § 173*. In other words, the trustee has a duty to fully inform beneficiaries of all facts relevant to the subject matter of the trust which come into the trustee's knowledge and which are material for the beneficiary to know for the protection of his interests. Mimicking language adopted by the Supreme Court, the beneficiaries have pled that the trustee breached a duty to use the degree of care in the management of the trusts that a prudent person of discretion and intelligence would exercise in his own like affairs. This language is sufficient to state a cause of action against the trustee for breach of fiduciary duties. To permit such a claim does not contradict the language of the statute. The statute clearly prohibits the law from imposing liability on the trustee for failing to do what he had no ability to do. Va. Code § 26-5.2. The trust instruments clearly place the authority to make investment decisions with the beneficiaries. Their conduct in requesting the retention of Tultex prohibits them from complaining about the decision now. Va. Code § 26-5.2(C). As noted in § 26-5.2(D), the prohibition on recovery does not excuse a trustee from liability for failing to participate in the administration of the trust or for failing to attempt to prevent a breach of trust. Va. Code § 26-5.2. Thus, a trustee may be held liable for a loss caused by his conduct for actions which he was entrusted to take. The demurrer is overruled as to Count III, the allegations of breach of fiduciary duty, except as they relate to failure to diversify.

b. Implications.

i. *Rollins* was settled after the court's ruling without a final determination on the merits. Nevertheless, this case can be read to say that although a directed trustee can be protected by statute from liability for breach of fiduciary duties relating to investment performance, the directed trustee cannot be protected for breach of other fiduciary duties that the trustee owes to the beneficiaries (e.g., the duty to keep the beneficiaries informed). A directed trustee is still a trustee.

ii. Taken to its logical extreme, Rollins could also be read to say that whenever a directed trustee is directed to hold a concentration, the trustee, if a professional, would be required to inform the beneficiaries of the increased risks due to holding a concentrated position.

IV. Recent Cases Under ERISA

A. Tittle v. Enron, Inc.

Cite: 284 F.Supp. 2d 511 (S.D. Tex. 2003) WL 22245394, (S.D. Tex. Sept. 30, 2003) ("Enron").

1. The Litigants.

a. Defendants included Northern Trust as trustee of three Enron ERISA plans: a 401(k) Savings Plan, an employee stock ownership plan (ESOP), and a Cash Balance Plan.

b. Class of plaintiffs included participants in Enron's ERISA plans that held Enron stock.

2. The Facts

a. Enron removed and replaced Northern Trust as the trustee and recordkeeper of Enron ERISA plans, thereby triggering an automatic "blackout period," during which the plans would not be permitted to buy or sell Enron stock.

b. On October 16, 2001, Enron unexpectedly announced a $1.2 billion charge against its third-quarter earnings.

c. On October 17, 2001, pursuant to previously issued directions from Enron, in its role as the plan sponsor, Northern Trust imposed a blackout period on the purchase and sale of Enron stock in the 401(k) plan.

d. The blackout period extended from October 17, 2001 to November 14, 2001 during which time Enron stock declined in value from $33.84/share to $10.00/share.

e. Notably, many Enron executives owned most of their Enron shares outright, rather than through their 401(k) plans, so the executives were free to sell such shares during the 401(k) plans' blackout period.

3. The Parties' Claims and Contentions

a. Plaintiffs.

i. Plaintiffs' first claim against Northern Trust was for breach of fiduciary duties relating to the blackout. Plaintiffs alleged that:

A. The $1.2 billion charge against earnings made the blackout imprudent.

B. Northern Trust should have postponed the blackout by its own motion.

ii. Plaintiffs also asserted a claim for breach of fiduciary duty relating to Northern Trust's failure to diversify the 401(k) plan's assets. Plaintiffs' alleged that the defendants, including Northern Trust, knew or should have known that the investment in Enron stock was imprudent.

b. Northern Trust.

i. Northern Trust contended it was a "directed" trustee, as opposed to a "discretionary" trustee, under provisions of the plan documents and trust agreement.

ii. Northern Trust further contended that because it was a directed trustee, it had no responsibility or liability for the lockdown and was only required to determine whether its directed actions facially complied with the terms of the plan and ERISA.

iii. Northern Trust relied on the following paragraph from the legislative history of ERISA §403(a)(1) as its main authority:

> If the plan so provides, the trustee who is directed by an investment committee is to follow that committee's directions unless it is clear on their face that the actions to be taken under those directions would be prohibited by the fiduciary responsibility rules of the bill or would be contrary to the terms of the plan or trust.

4. The Applicable Law

a. As a general rule, ERISA provides that responsibility for investing plan assets belongs to the trustee. See ERISA §403(a)("The trustee or trustees shall have exclusive authority and discretion to manage and control the assets of the plan….").

b. ERISA also provides an exception, however, to the extent that "the plan expressly provides that the trustee or trustees are subject to the direction of a named fiduciary who is not a trustee, in which case the trustees shall be subject to proper directions of such fiduciary which are made in accordance with the terms of the plan and which are not contrary to this Act…" ERISA § 403(a). These are ERISA *directed trustees*.

5. The Decision

a. Analysis

i. With respected to question of whether Northern Trust was a directed trustee, the court's analysis focused on the meaning of the words "proper directions" "which are made in accordance with the terms of the plan and which are not contrary to this Act."

ii. The court relied on the common law roots of the directed trustee concept - the Department of Labor's position that even where the named fiduciary appears to have been granted full control over that portion of activity of plan management and plan assets and the plan trustee is directed to perform certain actions within that area, the directed trustee still retains a degree of discretion, authority, and responsibility that may expose the trustee to liability. The court also specifically cited *Restatement (Second) of Trusts* §§ 184 and 185 (1959) to apply a "knows or should know" standard of liability for the directed trustee of an ERISA plan.

iii. The court noted that case law addressing the duties of a directed trustee is "minimal" and "in conflict," and cited the ERISA § 403(a) provisions dealing with the subject.

b. Holding

i. With respect to the claims against Northern Trust, the court held that "the directed trustee still retains a degree of discretion, authority and responsibility that may expose him to liability…" 284 F.Supp. 2d, 511, 601 "[The] express imposition by the statute of a duty, though its scope is uncertain, on the directed trustee to determine whether the instructions given to him by the directing named fiduciary were "proper," "made in accordance with the plan" and "not contrary to ERISA," also implies that the trustee retains certain supervising and investigative duties…" 284 F.Supp. 2d 511, 590.

ii. However, the court acknowledged the directed trustee's duty is imprecise: "The directed trustee's undefined duty to supervise and to question would be determined at a minimum by what was prudent under the particular circumstances at the time and, as under common law, be heightened where the directed trustee knew or should have known of the named fiduciary's breach of its duties….Nevertheless, the nature and scope of that higher standard remains unclear. This Court will accordingly apply a fact-specific approach to determining that duty here." 284 F.Supp. 2d 511, 590 (Emphasis added.)

iii. The court also concluded that there was "a factual question whether the evidence is sufficient to give rise to a fiduciary duty by the directed trustee to investigate the advisability of purchasing the company stock…" 284 F.Supp. 2d 511, 601.

c. Implications and Questions

i. The court's extensive reliance on the common law of trusts may well cause the Enron decision to be used as precedent in determining the scope of liability of directed trustees of personal trusts.

ii. The "reason to suspect" standard of the *Restatement (Second)* was defined in the Enron case, discussed infra, to be a "knew or should have known" standard. The "knows or should know" standard implies some kind of duty to investigate although it is not clear whether the duty to investigate exists for the directed trustee in all cases or only when there are a number of significant red flags.

B. In re WorldCom, Inc.

Cite: 354 F.Supp.2d 423 (S.D.N.Y., 2005), case settled, not reported in F.Supp.2d, 2005 WL 3116188 (2005)

1. The Litigants

a. Plaintiffs were participants in WorldCom's 401(k) plan.

b. Defendant Merrill Lynch Trust Company, FSB, ("Merrill Lynch") was the directed trustee of the WorldCom 401(k) plan.

2. The Facts.

a. In 2002, WorldCom, Inc. announced that it had discovered $3.8 billion in accounting irregularities and would need to restate its financial statements for both 2001 and the first quarter of 2002.

b. WorldCom filed for bankruptcy less than a month after the financial restatement announcement.

3. The Parties' Claims and Contentions

a. Plaintiffs.

In the wake of WorldCom's collapse, plaintiffs brought a class action suit against Merrill Lynch for breach of its fiduciary duty as directed trustee. Plaintiffs alleged that:

i. Merrill Lynch breached its duty by allowing participants to maintain investments in company stock.

ii. Merrill Lynch knew or should have known that continuing investment in WorldCom stock was imprudent, and Merrill Lynch should have taken unilateral action to stop participants from continuing to contribute money to the company stock fund in their accounts, and to liquidate participants' company stock holdings.

b. Merrill Lynch contended that, at least until WorldCom announced the accounting irregularities, there were no public indicators that WorldCom was in such serious financial distress that such unprecedented action by a directed trustee was warranted.

4. The Applicable Law

Under ERISA, a "directed trustee" of a 401(k) plan takes direction from the plan fiduciary and from participants as to how pension assets should be invested.

5. The Decision

a. Analysis

i. The key issue in the case was determining what circumstances would require a directed trustee to step in if the plan fiduciary charged with responsibility over investments fails to take action.

ii. The opinion drew heavily from the reasoning expressed in a 2004 Department of Labor interpretive bulletin discussing the fiduciary obligations of directed trustees.

iii. The court reasoned that a directed trustee has an obligation to inquire as to the prudence of continuing investments of 401(k) assets in company stock only if the directed trustee has material non-public information regarding the company, or when reliable public information raises serious questions regarding the company's viability as an ongoing concern.

b. Holding

The court ruled that plaintiffs failed to show Merrill Lynch knew of reliable public information raising serious questions regarding WorldCom's viability as an ongoing concern before WorldCom's public announcement of its accounting irregularities, and therefore, also failed to show that this was one of the "rare cases in which a directed trustee had a duty under ERISA to investigate whether the continued investment of Plan assets in company stock was imprudent."

c. Implications

i. The court's opinion comprehensively analyzes the role of directed trustees in 401(k) plans, bringing a large measure of certainty to an area that has become the subject of much debate. More specifically, the opinion states that:

A. The "choice of investment options within a plan remains in the hands of the named investment fiduciary," and "a directed trustee has no duty to investigate the wisdom of those choices or any obligation to render advice regarding the choices."

B. When a directed trustee receives directions to invest plan assets in company securities, or when plan assets are already invested in such securities, a directed trustee has a fiduciary duty of inquiry under ERISA when it knows or should know of reliable public information that calls into serious question the company's short term viability as a going concern.

C. Analysts' recommendations to sell the company's securities do not represent reliable information regarding the company's viability.

D. Knowledge that a company's fortunes and stock price are declining, or knowledge of a government investigation into the company, also does not impose a duty of inquiry.

ii. The court's opinion also demonstrates that a duty of inquiry may arise when formal civil or criminal charges have been filed by government bodies, depending on the nature of the formal charges.

C. Defelice v U.S. Airways, Inc.

Cite: 397 F.Supp.2d 735 (E.D.Va. 2005).

1. The Litigants

a. Plaintiff was a U.S. Airways' 401(k) plan participant with holdings in U.S. Airways' company stock fund.

b. Defendants included Fidelity Management Company, a trustee for the 401(k) plan.

2. The Facts

a. In 1988, U.S. Airways established a 401(k) employee retirement savings plan under ERISA. Employees made tax-deferred contributions to the plan, matched by U.S. Airways, which the employees could invest in any one of several different options.

b. By the terms of the plan, participants were solely responsible for the investment decisions and no other entity could be held liable for losses resulting from investment decisions.

c. U.S. Airways was the plan administrator and fiduciary, and was responsible for initiating or terminating the different investment options.

d. In 1993, Fidelity Management Company (Fidelity) was named plan trustee. The following specific language governed Fidelity's investment decisions: "U.S. Airways shall direct the Trustee to invest the assets of the Trust in separate Investment Funds…and the Trustee shall have no responsibility for the determination of Investment Funds…and shall not render investment advice to any person in connection thereto." The plan also incorporated ERISA default language, whereby a fiduciary was not liable unless it was clear that the direction from the investment manager would violate the terms of the plan or trust agreement.

e. Beginning in 1993, U.S. Air Group Common Stock Fund was one of many investment options available under the plan.

f. U.S. Airways suffered severe financial difficulty from 1998 through 2002. Despite its falling stock price, the company stock fund remained an option in the 401(k) plan participants until U.S. Airways filed for bankruptcy protection in August 2002.

3. The Claims

a. Plaintiff brought a class action lawsuit to recover losses from the investments in the company stock fund from August 2001, when the plans for a United-U.S. Airways merger were rejected by the Department of Justice, to August 2002, when U.S. Airways declared bankruptcy.

b. According to the plaintiff, Fidelity should have known that continued investment in the company stock fund was no longer prudent and should have terminated that as an investment option.

4. The Decision

a. Holding and Analysis

i. The court granted a motion to dismiss, relieving Fidelity Management Company of liability for keeping the company stock fund as an investment option in the retirement plan.

ii. The court reasoned that:

A. Fidelity had certain authority over activities assigned to it by way of the trust agreement, and as to those duties Fidelity was subject to the standard of prudence. The duties on which Fidelity was so liable, however, were more administrative duties.

B. On the particular activity charged by the plaintiffs, Fidelity was *not* a fiduciary because it was specifically directed by U.S. Airways on the issue of which investment options to include in the plan.

C. As a directed trustee, Fidelity is subject to the direction of the named fiduciary and must comply with proper directions of such named fiduciary if they are made in accordance with the plan and are not contrary to ERISA. Fidelity's liability is limited to those circumstances where it fails to follow proper direction or it complies with improper direction.

D. Proper direction from a plan fiduciary is "genuine" or "valid" direction. The directions must be clear and unambiguous and preferably in writing.

b. Implications

Imposing on the directed trustee the requirement not to follow directions that are "contrary to the plan" and "contrary to ERISA" does not impose on the trustee a duty to second-guess the wisdom of the investment manager. The duty is to avoid transactions that are patently prohibited by the plan or ERISA. The directed trustee is not to follow the direction of the named fiduciary where that direction is collusive or fraudulent.

D. Summers v. State Street Bank & Trust Company

1. The Litigants

a. The plaintiffs were a class of United Air Lines (UAL) employees.

b. Defendant State Street Bank & Trust Company (State Street) was the directed trustee under UAL's ESOP.

2. The Facts

a. This litigation arose as a result of the UAL bankruptcy in December 2002. At that time, UAL employees owned more than half of the company stock through an ESOP.

b. The plan named the ESOP Committee, which consisted of six members' appointed by employee unions, as the plan fiduciary. The plan also directed the ESOP Committee, "to establish an investment policy and objective for the Plan, except that it is understood that the Plan is designed to invest exclusively in Company Stock".

c. The company President issued a letter to employees in October 2001 which stated that it was likely that unless "the bleeding [was] stopped…United will perish sometime next year." Following the letter, UAL stock fell to $15.05 a share.

d. The stock price continued to decline throughout the 2001 and 2002, with only occasional increases in the plan's favor.

e. By August 2002, the stock price had fallen to $2.70/share and State Street Bank notified the ESOP Committee that it might be imprudent for the plan to continue to hold UAL stock as its sole asset.

3. The Claims

a. Plaintiffs brought suit against State Street, as co-fiduciary of the Committee in charge of managing the ESOP's assets, for failing to sell UAL stock from the plan as the stock price fell.

b. Plaintiffs argued that State Street knowledge of several factors upon the eve of UAL's bankruptcy imposed a duty on State Street to sell the company stock from the plan.

4. The Law

Although ERISA's provisions may relieve directed trustees from liability when they obey the direction of the plan's named fiduciary, liability may be imposed under ERISA for breach of fiduciary duty by co-trustees if a trustee knew of a breach and took no reasonable stops to prevent the breach, or if by failure to exercise prudence the trustee did not learn of the breach.

5. The Decision

a. Analysis & Holding.

i. The court granted summary judgment in favor of the directed trustee, identifying the issue as follows: "Whether a directed trustee of an ESOP has any fiduciary duty with respect to trust assets, specifically any duty ever to replace the employer's stock – the normal holding of an ESOP – with some other security?"

ii. And with respect to plaintiffs' arguments, which relied on the idea that in October of 2001, when the stock was at $15.05, the ESOP Committee and its co-fiduciary State Street Bank should have known that UAL was overvalued and would wind up in bankruptcy, the court stated that the market had a different view of United in October 2001, i.e. that the market was setting a price that did not reflect imminent bankruptcy or financial ruin, and "It would be *hubris* for a trust company like State Street to think it could predict United's future more accurately than the market could."

iii. The court further reasoned that the real danger was UAL's overall lack of diversification, not imminent bankruptcy - "That is why ERISA fiduciaries have a duty of diversification as part of their overall duty of prudence – unless as in this case they are directed pursuant to an ESOP to invest everything in stock of the participant's employer."

c. Implications.

i. The directed trustee for an ERISA governed plan is stuck between a rock and a hard place: If the trustee diversifies the holdings of an ESOP, the trustee has violated the direction of the plan and the purpose of the ESOP – to give the employees a stake in the company they work for; yet if the trustee fails to diversify the holdings, he may be imposing unwanted risk on the plan participants.

ii. The court acknowledged the difference between a directed trustee governed by ERISA and a directed trustee governed by a private trust document, however. Relying on Langbein's contract theory of trust law, the court noted that the settlor of a private express trust may set the standard of liability for the trustee, and provide whether the trustee must follow the wishes of the settlor or the direction of an investment committee or even excuse the trustee from the prudent investor rule. With respect to ERISA-governed trustees, however, the court noted that such trustees must comply with the duty of prudence.

V. Practical Considerations

A. Advantages and Disadvantages of Using a Trust Advisor

A trust advisor can add significant flexibility to an estate plan, but this flexibility comes at a cost, so it is important that the client weigh the advantages and disadvantages before opting for a trust advisor and directed trustee.

1. **Advantages**

The main advantage to be gained from using a trust advisor is that it can allow the trust agreement to change over time with changing circumstances that the settlor did not anticipate, such as changes in law and/or beneficiaries.

2. **Disadvantages**

a. Potential tax issues can arise (discussed below).

b. Increased costs of administration – A directed trustee complicates the administration of a trust by adding another layer of administration, which can increase complexity, confusion, and costs. An alternative may be to name the trust advisor as a co-fiduciary or sole fiduciary where the law is clear as to the duties, responsibilities and liabilities, or where the trust agreement provides specific guidance (See sample provision in Section VI.D.)

c. Increased likelihood that important issues will be overlooked due to confusion over whose duty is involved.

B. Impact on Directed Trustee's Role

1. **Generally**

Does the directed trustee have the duty to supervise or monitor the actions of the trust advisor? If so, what is the scope of such duty? The answer to these questions will determine, in part, the liability of the directed trustee for the trust advisor's actions. In determining a directed trustee's duties, the practitioner, the advisor and the directed trustee should each review the trust instrument and applicable state law.

2. **Governing Instrument**

In reviewing the trust instrument, the parties involved should pay particular attention to:

a. The characterization of the role of the trust advisor. (Is the power is held in a fiduciary capacity or personally?);

b. The terms of the grant of authority to the trust advisor;

c. The duty of the trustee to supervise and monitor the directions given to the trustee by the trust advisor under the governing instrument and/or applicable state law;

d. The procedure, if any, for the directed trustee to question the directions given to the trustee by the trust advisor;

e. Whether responsibility falls back on the directed trustee during time of vacancies in trust advisor position;

f. Whether the trust agreement contains any limitation on the liability of the directed trustee for following the trust advisor's directions; and

g. The extent to which state law will permit the settlor to limit the liability of the directed trustee. See G. Bogert, *Trusts and Trustees* § 701 (2d rev. ed. 1982) ("Generally, a trustee cannot completely divest himself of trust investment responsibilities even though he is expressly relieved of those responsibilities by the settlor.")

3. **Applicable State Law**

State statutes in some jurisdictions provide clarity as to the characterization of the trust advisor's capacity and the directed trustee's duty to review the trust advisor's actions. These issues are addressed in the statutes from a variety of viewpoints. Some state statutes adopt the approach taken by the Uniform Trust Code, which is to treat the trust advisor as a cofiduciary and limit the duties of the directed trustee to a limited monitoring role. Other states, including Virginia, expressly permit the exclusion of a trustee from exercising investment power and make the directed trustee "liable, if at all, only as a ministerial agent." (Virginia Code § 26-5.2 C.)

4. **Uniform Trust Code**

It is instructive to review the provisions of the Uniform Trust Code covering the issue of the duty of a directed trustee to supervise the actions of the trust advisor. Section 808(d) of the UTC provides a presumption that a trust advisor is a fiduciary, which creates certain duties on the part of the directed trustee and potential liability on the part of the trust advisor. Section 808(b) provides rules for when the trustee must question the directions of the trust advisor, stating, in part, that the trustee:

> …shall act in accordance with an exercise of the power unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust.

Thus, the UTC significantly limits a directed trustee's liability, but does not completely eliminate a directed trustee's potential liability for following the instructions of a trust advisor.

C. Issues to Consider When Drafting for a Trust Advisor/Directed Trustee

1. Except in the case of a revocable trust that has its settlor as its trust, it is likely that a trust advisor will be deemed to be a fiduciary (notwithstanding any language to the contrary in the document). As a consequence, the settlor needs to be aware of the responsibility and potential liability he or she is imposing on the advisor.

a. The statutes and case law have not yet developed sufficiently to know what the standard of care is for these advisors and the extent they can be sued for breach.

b. The powers of the advisor are also not fleshed out in statute or case law. For example, does the advisor have the right to compel information from the trustee? Is the advisor entitled to compensation and, if so, what constitutes reasonable compensation for a person performing these functions? Can the advisor employ agents and delegate and, if so, what liability does the advisor have for such agents actions?

c. It is critical that the trust document address these issues since the law currently does not.

2. If a client desires to name a trust advisor and grant the advisor a significant power, the drafter should name a successor power holder and/or specify a procedure for determining a successor power holder if no person named in the trust agreement is able or willing to serve.

D. Other Considerations

1. Tax Considerations

There can be adverse tax consequences to granting a trust advisor powers over trust property, and these the tax consequences will depend on whether the trust advisor is considered to hold the power personally or as a fiduciary and the nature of the power. For example, certain powers, if held personally, would be classified as a general power of appointment, causing inclusion of the trust assets in the gross estate of the power holder under Internal Revenue Code section 2041. Also, retention of certain powers can cause trust income to be taxable to the power holder under the grantor trust rules of the Internal Revenue Code (§§ 671 et seq.) Because of the possibility of adverse tax consequences to the power holder, the drafter must be cautious in naming as the trust advisor a beneficiary of the trust.

2. Reduced Compensation for Directed Trustee

a. Similar to a delegating trustee, the compensation of a directed trustee should be lower than a trustee with investment responsibility, because the directed trustee generally has less responsibility and therefore less risk of liability.

b. Corporate trustees often charge 20% - 40% less for directed trustee services than they would for complete trustee services.

c. However, when the reduced fees of the corporate trustee are combined with the additional fees of the trust advisors or investment managers, the combined fees are often higher than those of a traditional trustee that performs all trustee functions.

d. Because of the increased costs, using multiple fiduciaries in smaller trusts generally will not make economic sense.

3. Individual Trust Advisor, Committee or Entity

a. Depending in part on the trust advisor's responsibilities, in some instances, the client may want to name a committee of individuals as trust advisors. If so, the drafter should provide governance procedures in the trust instrument.

b. Some trust advisors may be concerned about individual liability for holding the power. If liability is a concern, it may be possible to provide some minimal level of liability protection by using an entity, such as a limited liability company, as the trust advisor.

4. Using Family Members as Trust Advisors for Investment Decisions

Aside from potential tax issues, special issues arise in using family members as trust advisors for investment decisions. The concept of multiple fiduciaries is gaining some credence among advisors to the wealthy as a means of educating beneficiaries and other family members on issues of wealth management. It is sometimes anticipated that the investment committee or trust advisor will be family members who are expected to use the role to gain experience in investments.

a. From a practical perspective, this raises serious concerns for a corporate fiduciary that is serving in an administrative capacity.

i. At a minimum trust advisors and investment committees will complicate trust administration and may result in delays in reaching and implementing decisions.

ii. This is especially troublesome if critical investment decisions will be delayed.

b. The corporate fiduciary presumably has special skills and expertise and thus would be held to higher standards under the Uniform Prudent Investor Act and trust law generally, while it is required to take investment direction from a committee which is learning investments on the job.

c. If investments are inappropriate and losses are incurred, the individuals on the committee are less likely than a corporate trustee to be able to make the trust whole. The beneficiaries may well look to the corporate trustee to cover the losses.

E. Due Diligence for the Directed Trustee

1. Notwithstanding that a trustee is relieved under the governing instrument or applicable law of a particular responsibility that has been given to the trust advisor, a directed trustee should not feel bullet-proof. A directed trustee is still a trustee and not an agent. With respect to investments, a trustee has duties other than the duty to invest prudently. A state statute similar to the Uniform Trust Code statute may protect a directed trustee from a claim of improper investments, but can the trustee be held liable for breaching the trustee's other fiduciary duties?

2. Directed trustees will need to consider whether the directed trustee status is one they can afford to assume and to evaluate whether they are being adequately compensated for the risk.

3. Directed trustees should consider methods by which they can evaluate the expertise, financial status, performance, ethics and judgment of the third parties from whom they are required to take directions.

4. The directed trustee still has certain responsibilities that may create liability:

   a. The trustee is required to make a determination that the asset directed to be purchased does not violate law or the provisions of the trust agreement, but it is unclear what type of due diligence is required. Certainly the trustee must object if the investment constitutes self-dealing. But what if the investment would result in lack of diversification or in the trustee's opinion favors the income beneficiary over the remainder beneficiary?

   b. The trustee is also required to monitor the trust advisor to determine when and whether an emergency exists thus requiring action on the part of the trustee.

VI. Appendix—Sample Provisions

A. Investment Advisor

<u>ARTICLE I</u>
<u>Trustee Powers</u>

A. Investment Responsibility. Subject to the direction or consent of the Investment Advisor, the Trustee may retain any property originally owned by the Grantor and invest and reinvest in all forms of real and personal property, whether inside or outside the United States, including, without limitation, common trust funds of a corporate Trustee, mutual funds, partnerships (including a partnership in which a Trustee is a partner) and other forms of joint investment (which may but need not be managed by, advised by or affiliated with a Trustee), without regard to any principle of law limiting delegation of investment responsibility by the Trustee.

B. Borrowings. The Trustee may borrow from anyone, even if the lender is a Trustee under this Agreement, and may pledge property as security for repayment of the funds borrowed, including the establishment of a margin account. No Trustee shall be personally liable for any such loan, and such loan shall be payable only out of assets of the trust.

C. Sale or Exchange of Property. The Trustee may sell property at public or private sale, for cash or upon credit, exchange property for other property, lease property for any period of time and give options of any duration for sales, exchanges or leases. The Trustee may give such warranties or indemnifications as the Trustee may deem advisable.

D. Participation in Mergers and Reorganizations. The Trustee may join in any merger, reorganization, voting-trust plan or other concerted action of security holders and delegate discretionary powers (including investment powers) in entering into the arrangement.

E. Acquisition and Maintenance of Real Property. The Trustee may acquire, hold and maintain any residence (whether held as real property, condominium or cooperative apartment) for the use and benefit of any one or more of the beneficiaries of any trust whenever that action is consistent with the terms of that trust, and, if the Trustee shall determine that it would be in the best interests of the beneficiaries of that trust (and consistent with the terms of that trust) to maintain a residence for their use but that the residence owned by that Trust should not be used for such purposes, the Trustee may sell said residence and apply the net proceeds of sale to the purchase of such other residence or make such other arrangements as the Trustee shall deem suitable for the purpose. Any proceeds of sale not needed for reinvestment in a residence as provided above shall be added to the principal of that trust and thereafter held, administered and disposed of as a part thereof. The Trustee may pay all carrying charges of such residence, including, but not limited to, any taxes, assessments and maintenance thereon, and all expenses of the repair and operation thereof, including the employment of household employees (including independent contractors) and other expenses incident to the running of a household for the benefit of the beneficiaries of that trust.

F. Acquisition and Maintenance of Personal Property. The Trustee may acquire, hold and maintain as a part of each trust hereunder any and all articles of tangible personal property or any other property whether productive, underproductive or unproductive of income, and without any duty to convert such property to productive property, and pay the expenses of the repair and maintenance of such property, and sell such property and apply the net proceeds of sale to the purchase of such other property as the Trustee deems suitable for the purpose.

G. Loans. The Trustee may make loans to buy property from, and generally have the power to make contracts with, the Grantor's estate or the Grantor's Wife's estate or the trustee of any trust subject to any wealth transfer tax upon either of their deaths, regardless of the fact that one or more or all of the persons serving as Trustee hereunder are also serving as a selling or borrowing or otherwise contracting Personal Representative or Trustee; provided that such loans shall be for adequate interest and shall be adequately secured, and such purchases shall be for the property's then fair market value.

ARTICLE II
Investment Advisor

A. The Trustee shall exercise the powers hereinbefore granted to it in Paragraphs A, B, C, D, E, F, and G of ARTICLE I ("Trustee Powers") with respect to each trust hereunder only on the written direction of the Investment Advisor of such trust, provided that (i) the Trustee shall manage and invest the otherwise uninvested cash in each such trust in its sole discretion and (ii) the Investment Advisor may at any time, or from time to time, delegate to the Trustee the authority to exercise in its sole discretion the power to buy or sell any property (or, having delegated the authority to do so, revoke such authority).

B. Initially, Trustee shall exercise such powers on the direction of the Investment Advisor, but the Investment Advisor may establish from time to time whether the Trustee shall exercise such powers with the consent or on the direction of such Investment Advisor.

C. The Investment Advisor of each trust hereunder shall be [Individual #1], so long as [he/she] is willing and able to act in such capacity. The Investment Advisor may appoint one or more persons to be successor Investment Advisor to take office upon the death, resignation or incapacity of the Investment Advisor or any person serving as Investment Advisor. If the office of Investment Advisor is vacant and no successor takes office pursuant to any other provision of this Agreement, the Investment Advisor of each trust hereunder shall be [Individual #2], so long as [he/she] is willing and able to act in such capacity. If [Individual #2] is unable or unwilling to serve, then the Investment Advisor of each trust hereunder shall be beneficiary for whom the trust was set aside. If such beneficiary is under a legal disability, then his or her guardian or similar fiduciary shall serve as the Investment Advisor of his or her trust held hereunder.

D. If at any time there is no Investment Advisor of a trust hereunder or if such Investment Advisor fails to express in writing to Trustee his or her direction (or consent or disapproval, if appropriate) or as to the exercise of one or more of the powers listed in paragraph A within fifteen (15) calendar days after Trustee has sent a written request for such direction (or consent or disapproval, if appropriate) to such Advisor's last known address by certified mail (or by any other means for which the sender shall have evidence of receipt by the addressee), Trustee may act in the matter as it deems appropriate.

E. Each person who shall serve as Investment Advisor hereunder shall, in exercising his or her functions as Investment Advisor, act in a fiduciary capacity, and in such a way as, in the judgment of such person, seems in conformity with the purposes of this Agreement and the trusts created hereunder. The Investment Advisor need not inquire into the Trustee's performance of its duties and shall not be held liable for any loss whatsoever to any trust hereunder, unless it results from actions taken in bad faith. The Investment Advisor shall serve without compensation, but may be reimbursed for out-of-pocket expenses, including investment counsel fees.

B. Distribution Advisor

ARTICLE I
Distribution Advisor

A. The Trustee shall distribute income and/or principal to one or more beneficiaries only on the written direction of the Distribution Advisor of such trust.

B. The Distribution Advisor of each trust hereunder shall be [Individual #1], so long as [he/she] is willing and able to act in such capacity. The Distribution Advisor may appoint one or more persons to be successor Distribution Advisor to take office upon the death, resignation or incapacity of the Distribution Advisor or any person serving as Distribution Advisor. If the office of Distribution Advisor is vacant and no successor takes office pursuant to any other provision of this Agreement, the Distribution Advisor of each trust hereunder shall be [Individual #2], so long as [he/she] is willing and able to act in such capacity. If [Individual #2] is unable or unwilling to serve, then the Distribution Advisor of each trust hereunder shall be beneficiary for whom the trust was set aside. If such beneficiary is under a legal disability, then his or her guardian or similar fiduciary shall serve as the Distribution Advisor of his or her trust held hereunder.

C. No discretionary distribution shall be made from any trust that would discharge or substitute for a legal obligation of any person serving as Distribution Advisor even if such a distribution otherwise would be authorized under the terms of the trust.

D. Each person who shall serve as Distribution Advisor hereunder shall, in exercising his or her functions as Distribution Advisor, act in a fiduciary capacity, and in such a way as, in the judgment of such person, seems in conformity with the purposes of this Agreement and the trusts created hereunder. The Distribution Advisor need not inquire into the Trustee's performance of its duties and shall not be held liable for any loss whatsoever to any trust hereunder, unless it results from actions taken in bad faith. The Distribution Advisor shall serve without compensation, but may be reimbursed for out-of-pocket expenses.

C. Literary Advisor

ARTICLE I
Literary Advisor

A. Trustor designates __________ as "Literary Advisor" to the Trust, and authorizes said Literary Advisor to direct Trustees in connection with the management of any of Trustor's Literary Property (defined in Paragraph D, below) owned from time to time by the Trust. Trustor authorizes the Literary Advisor herein named to appoint by instrument in writing a successor Literary Advisor to serve in the event that [he/she] is unable or unwilling to serve as Literary Advisor or to continue so serving. If __________ shall fail or cease to act as the Trust's Literary Advisor without designating a successor, Trustor designates __________ as Literary Advisor.

B. The Trust's Literary Advisor shall have the power to direct the Trustees to copyright or renew any copyright of any copyrightable work in the name of the Trust or in such other name as my Literary Trustee shall determine, to exploit in such manner as [he/she] shall determine any such copyright and to authorize the use of such part or all of any copyrightable work, or any rights arising by reason of any copyright, in such manner as said Literary Advisor shall determine.

C. In the event that (a) the Trustees shall take any action in reliance upon or in accordance with the Literary Advisor's advice and (b) neither such action by the Trustees nor such advice by the Literary Advisor shall constitute gross negligence, willful neglect or self-dealing on the part of the Trustees or the Literary Advisor, then Trustor directs that the Trustees shall not be liable to the Trust or any beneficiary hereunder for or by reason of any such action so taken.

D. The term "Literary Property" shall refer to and include all right, title and interest in and to any literary works and properties of any kind and nature written and created by Trustor (whether alone or in collaboration with others) and transferred to the Trust, which may include copyrights (and any and all renewals and extensions thereof), rights and proceeds under contract for the publication, performance or other exploitation thereof, royalty rights and other rights and causes of action existing in connection therewith or which may arise or accrue therefrom, whether such literary works or properties shall be finished or unfinished, or published or unpublished, including the rights to secure, extend or renew any copyrights therein and the right to exercise all rights with respect to the copyrights of any literary works or properties. The foregoing shall include the rights to publish or otherwise exploit the physical property of the Trust as well as literary works and properties.

E. The Trust's "Literary Advisor" shall be reimbursed for any reasonable expenses incurred in the preparation of any material for publication and in handling all other literary affairs for this Trust.

D. Allocation of Responsibility Between Individual and Corporate Co-Trustees

ARTICLE I
Definitions

A. "Trustees" shall include _________________ TRUST COMPANY or any successor thereto (sometimes herein referred to as the "corporate Trustee") and any individual Trustee as may be acting at any time.

B. "Individual Trustee" shall mean the individual named as Trustee in this agreement and any successor or successors to such Trustee and not the corporate Trustee.

C. "Family Companies" shall include (i) Family Holdings, LLC, (ii) any entity in which Family Holdings, LLC, either alone or in combination with its Members, owns fifty percent (50%) or more of the equity or voting interests, or any successor to any of said entities, or (iii) any entity in which majority control is distributed to the owners thereof by any of entity describe in (ii) or (iii). A holding company that holds shares in a Family Company shall also be treated as a Family Company for the period during which and to the extent that such ownership continues.

ARTICLE II
Special Provisions Relating to the Retention
of Shares in Family Holdings, LLC and Other Family Companies

A. Trustor directs Trustees to interpret and enforce this Agreement under all circumstances and at all times so as to carry out Trustor's directions and intentions to assist in the retention of substantive ownership of any shares of Family Companies within a group of persons consisting of the present shareholders, their descendants and trusts for their benefit and to preserve these companies as [describe business]. To this end, Trustor encourages Trustees to acquire shares of Family Companies whenever possible.

B. Trustor hereby directs Trustees to retain all shares in Family Companies for the entire period of this trust and of any successor trust arising, directly or indirectly, under the terms of this Agreement, except such interests may be sold to another trust for descendants of Trustor which intends to hold shares for long term investment purposes in accordance with the terms this Article, or, in default of any such purchaser, to Family Holdings, LLC or its successor.

C. Notwithstanding the other provision in this Article, Trustees need not retain all shares in Family Companies if it becomes no longer feasible to carry out the direction of Trustor as set forth in this Article III due to developments or circumstances that could not reasonably have been foreseen by Trustor.

D. In further implementation of Trustor's intentions and directions under this Article, Trustees are hereby directed to vote all shares in Family Companies as follows:

1. Against any proposal which would dilute or decrease the percentage stock interest of descendants of Trustor and trusts for their benefit in such companies.

2. Against any sale or other transfer of a significant or substantial portion of the assets of any Family Company unless the net proceeds are to be invested, or held for investment, in operating assets or in a controlling share interest in an entity engaged in the active conduct of trades or businesses.

3. Against any sale, merger, or other transfer of any shares, newly issued or otherwise, of any Family Company unless descendants of Trustor and trusts for their benefit shall receive at no additional cost their pro rata share in such successor corporation and such transfer shall not result in any significant change in the substantive control or ownership of such Family Company or its successor.

ARTICLE III
Replacement of and Allocation of Responsibilities Among Trustees

A. The initial individual Trustee shall be [Initial Individual Trustee]. When an income beneficiary who is a descendant of Trustor reaches the age of thirty years, he or she shall replace [Initial Individual Trustee] as the individual Trustee and shall serve as co-Trustee with the corporate Trustee with respect to the trust for such income beneficiary.

B. The corporate Trustee shall act as the active Trustee for the purpose of transmitting distributions, implementing the decisions of the Trustees, maintaining all records of the trust, preparing reports to all of the individual Trustees and the income beneficiaries of the respective trusts, and preparing and signing reports and returns for the trust or trusts.

C. All Trustee decisions shall be made by unanimous agreement between or among the Trustees serving at such time; provided, however that the vote of any one or more Trustees who is a descendant of Trustor shall control with respect to voting for directors of Family Companies. In the event Trustees are unable to reach agreement within a thirty (30) day period then action shall be deferred until such time as agreement can be reached or the matter resolved by a court of competent jurisdiction upon application of any Trustee.

D. Notwithstanding the foregoing provisions, in the event the corporate Trustee does not provide a specific written basis for disagreement with any written recommendation of the individual Trustee within thirty (30) days (or such shorter time period as remains until a vote is required to be cast in the event the issue relates to the voting of shares) after such recommendation is made by registered or certified mail (or by any other means for which the sender shall have evidence of receipt by the addressee), the recommendation of the individual Trustee shall be followed and, if pertinent, the shares shall be voted in accordance with his views. Further, if at any time or times during the continuance of any trust created hereunder there shall be no individual Trustee, or if the individual Trustee shall fail to respond within thirty (30) days after the corporate Trustee shall have sent to the individual Trustee, by registered or certified mail (or by other means for which the sender shall have evidence of receipt by the addressee), at his last known address, a written request for such response, then the corporate Trustee is authorized and empowered hereby to take such action as it, in its sole discretion, shall deem to be in the best interests of the beneficiaries of such trust.

E. During any period when there is no income beneficiary who is a descendant of Trustor who has reached the designated age and is able and willing to serve, when [Initial Individual Trustee] is not serving, the corporate Trustee shall act alone until there is an income beneficiary who is a descendant of Trustor who is the designated age and is able and willing to act as a co-Trustee of such trust.

F. Any individual Trustee may resign by written notice delivered to the corporate Trustee; and the corporate Trustee or any successor corporate Trustee may resign by giving written notice to the individual Trustee or, if there shall be no individual Trustee, then to the adult income beneficiaries (*i.e.*, adult beneficiaries who are issue of Trustor or widows of issue of Trustor). The corporate Trustee or any successor corporate Trustee may be removed as corporate Trustee at any time by the individual Trustee if the individual Trustee shall establish that the corporate Trustee has been guilty of gross negligence or willful wrongdoing in the discharge of its duties under this Agreement. Any such resignation or removal of the corporate Trustee shall be effective on the date when a duly appointed successor corporate Trustee accepts such appointment.

G. Whenever for any reason the corporate Trustee hereunder or its successor shall be removed, resign, or refuse or fail to act as Trustee of any trust created hereunder, the individual Trustee or, if none, the current income beneficiary (including a widow or a legal guardian of a minor beneficiary) shall appoint such trust company in Delaware as shall be willing to commit itself, prior to accepting an appointment, to carry out the purposes expressed herein as successor Trustee, with the same powers and duties as if it had been originally named herein as the corporate Trustee of such trust.