E&O

Trustee Professional Liability

Claim Scenarios

Investment decisions - even good investments are subject to criticism.
A trustee conservatively purchased securities that held their value while yielding very good dividends, thus producing income for the trust and the trust's income beneficiaries. The residual beneficiaries (the trustee's stepdaughters) nonetheless complained. They alleged the trustee had invested for income, benefitting the then-current income beneficiaries, when he should have invested for growth or appreciation, to benefit them. The trustee is now defending a $12 million claim, at his own expense, because the assets of the trust had been fully distributed to the residual beneficiaries before their claims were made.

Accounting objections - winning can be expensive.
A trustee managed a trust holding commercial real estate, generating high income and appreciation, even in the current market, but he was sued by a beneficiary asserting a number of objections to the trustee's account. The beneficiary contended, for example, that the bookkeeping summaries were too hard to understand, and not in accord with Generally Accepted Accounting Principles (GAAP), and hired an expert to support his request for $4 million in damages. Ultimately all of the claims were denied by the court, but not before the trustee incurred $315,000 to defend himself. The beneficiary now asserts the trustee should pay these fees from his own pocket.

Negligent delegation - trustees get blamed for falling markets.
The decedent spent a lifetime building a successful enterprise of interrelated distribution companies, but by the time he died (of suicide), his affairs were in disarray, the value of his business was declining, seemingly due to unavoidable industry changes, and insider theft had run rampant. The trustee moved quickly to contain the damage, restore profitability, and maximize the value of several properties. He has nonetheless been challenged by the decedent's surviving spouse, who alleges the trustee's negligence in retaining executives and professionals to run the decedent's business is the cause of many losses. Regardless of the merits of these accusations, it has proved expensive and difficult for the trustee to defend himself, and he faces millions in potential liability.

Taxes - only two things are certain in life, and one of them is trustee exposure.
Failure to gain the most favorable tax treatment for the trust and the beneficiaries is a frequent source of claims against trustees. The taxation of estates is immensely complicated, even to tax attorneys and accountants, and the rules change seemingly every year. Yet trustees are required to make a number of fairly quick and irreversible decisions and elections within a limited period of time. Many decisions necessarily will be based on speculation as to future occurrences, such as which of the decedent's assets are most likely to appreciate within an undefined period of time.

Dead men tell no tales - liability at the expense of a deceased trustee's family.
Sometimes a trustee is not around to defend himself. Any liability in this instance could be assessed against the deceased trustee's own estate, at the expense of the deceased trustee's heirs, such as his surviving spouse and children. In one case a beneficiary claimed the trustee had favored some beneficiaries at the expense of others, and had otherwise mismanaged the trust. When the trustee died, the beneficiary continued her action against the deceased trustee's estate. This left the deceased trustee's family to defend the action, without the benefit of their star witness (the deceased trustee), and, significantly, without the benefit of the trust finances with which to defend the deceased trustee's actions.

Co-trustee liability - you are your brother's keeper.
Having a co-trustee does not always make a trustee's job easier. Unlike in sole trustee agreements, there is always the chance of disagreement and impasse among co-trustees, who often may be siblings or other close but antagonistic relatives, particularly when they are also beneficiaries of the trust. For example, when a trustee's discretionary authority prevents the investment of trust funds, his co-trustee may bring allegations against him based upon trust management decisions in which he claims he wasn't involved, yet had financial ramifications to him - not as a co-trustee, but as a beneficiary entitled to trust distributions.

These scenarios are not intended to be interpreted as coverage positions. Coverage for any given claim is based upon its facts and the specific terms and conditions of the policy.

Charities are not always charitable to trustees.
The trustee of a charitable trust is subject to most of the same challenges as other trustees, but he is frequently also under the scrutiny of well-funded beneficiaries (often wealthy and assertive institutions, such as hospitals, universities, and religious organizations), the attorney general, and in some cases, the donor/settlor. Typical claims involve excessive compensation, decisions related to the investments chosen, and gifts to ineligible or disfavored donees.

Liquidating trusts.
Liquidating trusts present their own special hazards. Shareholder investments, for example, can be especially hard to characterize in the context of a poorly managed corporation. Treating an investment as contribution to capital versus a loan will have a profound effect: in one case the shareholder recoups her investment pro rata at the expense of the creditors, in the other case the shareholder is paid last if at all. Another contentious item involves the payment of claims, because each claim honored reduces the shares of the other claimants. Payment of claims that are arguably inflated or otherwise miscalculated, potentially time barred, or of a non-priority class will expose the trustee to legal challenge.

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