



Third Parties and Trustees

By John Sharp

The last four sections¹ of Part 9 of the Michigan Trust Code deal with the liabilities of the trustee of a trust when dealing with persons who are not a trust beneficiary, a settlor, or another trustee of the trust, i.e., strangers to the trust. Only one of these four sections is derived from current Michigan law.

Contract and Tort

MCL 700.7910 deals with whether a trustee has personal liability (1) on a contract entered into in the trustee's fiduciary capacity or (2) for torts committed in the administration of the trust. MCL 700.7910 is derived verbatim from current MCL 700.7306.²

Subsection (1) specifies that a trustee is generally not liable on a contract entered into in the trustee's fiduciary capacity. However, if the trustee fails to reveal that the trustee is acting in a fi-

duciary capacity or fails to identify the trust that is the real contracting party, the trustee will be personally liable. This rule is consistent with the law of agency that an agent is personally liable if the agent fails to reveal the fact of his or her agency and that the agent is acting for a principal.³

Subsection (2) states that a trustee has personal liability for a tort committed in the administration of the trust only if the trustee is personally at fault. That is, the trustee has no vicarious liability, but is not relieved of liability for the trustee's own wrongdoing.

The remainder of MCL 700.7910 states how a claim can be presented both against the trust assets [subsection (3)] and a personal claim against the trustee [subsection (4)].

There are no reported cases under the precursor statute, MCL 700.7306. There is an unreported case, *Cassavaugh v Wells Fargo Bank*,⁴ in which the Michigan Court of Appeals reversed a grant



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of summary judgment in favor of a corporate trustee and remanded for further proceedings. The plaintiffs were trust beneficiaries who alleged that the defendant bank, while acting as trustee, had negligently hired and supervised an agent to prepare what turned out to be an erroneous estate tax return. While *Cassavaugh* arose under the prior Revised Trust Code,⁵ the Court of Appeals noted that the result would be the same under MCL 700.7306. The Court noted that negligence in the hiring or supervision of an agent is not derivative liability, but an allegation of the trustee's own wrongdoing.

MCL 700.7910 is ultimately derived from Section 1010 of the Uniform Trust Code (UTC).⁶ The comment to UTC § 1010 notes that the drafters believe that the language of the section is sufficient to protect a trustee from personal liability for violations of federal and state environmental laws unless the trustee is personally at fault.⁷

Fast Facts:

A trustee has no personal liability in either contract or tort absent the trustee's own malfeasance.

The fact that one of the trust's assets is a general partner's interest does not make the trustee liable as a general partner.

Absent notice of wrongdoing, a third party can assume that the trustee is acting properly and within the trustee's authority.

Partnership Liability

MCL 700.7911 is derived from UTC § 1011. There is no prior provision in Michigan law. This section deals with the situation in which a trustee holds as part of the trust assets a general partner's interest in a general or limited partnership. Subsection (1) provides that in a contract between a third party and the partnership, the trustee is not personally liable as long as the trustee's fiduciary capacity is disclosed. Subsection (2) states that a trustee is not personally liable for the partnership's torts, absent the trustee's personal fault.

MCL 700.7911(4) is interesting because it potentially expands the liability of the settlor. Paraphrasing slightly, the subsection provides that if the trustee holds the general partnership interest as the trustee of a revocable trust, the trustee is not liable; however, the settlor is personally liable for the obligations of the partnership as if the settlor were the general partner. This subsection appears to impose liability on the settlor whether the settlor is then acting as trustee of the revocable trust or not. The UTC comment states that this subsection was added to prevent a revocable trust from being used as a device to avoid claims against the partnership.⁸

Persons Dealing with Trustees

MCL 700.7912 affords protection to persons dealing with a trustee. The section applies to virtually any transaction. It is based on UTC § 1012. There is no prior provision of Michigan law.

This section applies by its terms to "person[s] other than a trust beneficiary."⁹ It generally provides that any person dealing with a trustee has no liability if a trustee exceeds or improperly exercises the trustee's powers unless the person has actual knowledge that the trustee is doing so.¹⁰ It further provides that a person dealing in good faith with the trustee has no duty "to inquire into the extent of the trustee's powers" or whether the trustee is acting properly,¹¹ and need not see to the proper application of the funds by the trustee.¹² Even if the trustee's powers were in fact terminated, unless the third party knew of such termination, the third party is protected "as if the former trustee were still a trustee."¹³

The UTC comment notes that a third party dealing with a trustee "may assume that the trustee has the necessary power."¹⁴ The UTC comment goes on to suggest that any person who wishes assurance that the trustee has the necessary power should request a certificate of trust under UTC § 1013 (which is enacted in MCL 700.7913).¹⁵

On the other hand, the UTC comment warns that this section does not protect any person who, at the time the property or funds were delivered to the trustee, "had notice that the trustee was misapplying or intended to misapply the property."¹⁶ All the protections of MCL 700.7912 apply to persons who act in good faith and without knowledge. The section does not allow someone with knowledge of trustee wrongdoing to "turn his head, pretending he just doesn't see."¹⁷





Persons with actual knowledge of trustee malfeasance may not hide behind the shields of these provisions. This is as it should be.

Certificate of Trust

MCL 700.7913 is based on UTC § 1013. There is no prior provision of Michigan law. The section provides for a “certificate of trust” to be executed by one of the incumbent trustees as proof of the authority of the trustee and the existence of the trust. The certificate under MCL 700.7913 must be distinguished from the “certificate of trust existence and authority” provided for by the real estate recording statutes.¹⁸ Pursuant to MCL 565.433, only a settlor or an attorney for either the settlor or the trustee may give the certificate of trust existence and authority.¹⁹

MCL 700.7913 authorizes the trustee to furnish a certificate of trust to any person (other than a trust beneficiary) instead of a copy of the trust instrument. The certificate’s contents are specified in the section. Any person who receives such a certificate is entitled to rely on it for any purpose, and has no liability for doing so absent actual knowledge that the certificate is incorrect.²⁰

The certificate’s purpose is to keep the trust provisions private.²¹ MCL 700.7913(4) specifically states: “A certificate of trust need not contain the dispositive terms of the trust.”²² The UTC comment says, “A certification provides the third party with an assurance of authority without having to disclose the trust’s dispositive provisions.”²³ Paraphrasing slightly, subsection (8) allows a court to impose damages, costs, expenses, and legal fees on a person who demands a copy of the trust instrument instead of a trust certificate unless the person acts pursuant to a “legal requirement.” The section does not specify what a “legal requirement” is, but the UTC comment gives some examples, including due diligence reviews in connection with the capital markets, state or local government requirements for documentation, regulatory agency requirements, and insurance purposes.²⁴

Conclusion

While most of the last four sections of Part 9 of the Michigan Trust Code expressly relieve third parties of liability when dealing with trustees, it is clear that the provisions are intended to make it easier for trustees to administer trusts free from undue administrative burdens. On the other hand, persons with actual knowledge of trustee malfeasance may not hide behind the shields of these provisions. This is as it should be. ■



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FOOTNOTES

1. MCL 700.7910 through 700.7913 (the “Act”).
2. MCL 700.7306 is deleted from Part 3 by the Act.
3. See Fuller & Eisenberg, *Basic Contract Law* (3d ed), p 1031.
4. *Cassavaugh v Wells Fargo Bank*, unpublished opinion per curiam of the Court of Appeals, issued October 13, 2005 (Docket No. 257880).
5. 1978 PA 642, MCL 700.1 through 700.993.
6. See Langbein & Waggoner, *Uniform Trust Code and Comments*, in *Uniform Trust and Estate Statutes* (2009–2010 ed), § 1010 (“UTC” or “UTC comment”).
7. *Id.*
8. Comment to UTC, § 1011.
9. MCL 700.7912(1).
10. *Id.*
11. MCL 700.7912(2).
12. MCL 700.7912(3).
13. MCL 700.7912(4).
14. Comment to UTC, § 1012.
15. *Id.*
16. *Id.*
17. Bob Dylan, *The Answer is Blowin’ in the Wind* (1962).
18. MCL 565.431 through 565.436. These rules still apply to real estate matters, notwithstanding the enactment of MCL 700.7913.
19. Perversely, an individual acting as trustee is not authorized to execute a “certificate of trust existence and authority” under MCL 565.433, but an officer of a bank acting as trustee is so authorized.
20. MCL 700.7913(6).
21. Comment to UTC, § 1013.
22. MCL 700.7913(4).
23. Comment to UTC, § 1013.
24. *Id.*