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Resolution Procedures to Resolve Trust Beneficiary Complaints

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RESOLUTION PROCEDURES TO RESOLVE TRUST BENEFICIARY COMPLAINTS

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Editors' Synopsis: This Article posits that the Anglo-American trust system should provide a system of resolution procedures to handle beneficiary complaints in an efficient manner. Efficient handling of these complaints will lead to less format litigation between beneficiaries and trustees and will allow the Anglo-American trust system to compete successfully in the global marketplace. The author also provides some historical perspective on the development of trusts and provides an analysis of the current state of the Anglo-American trust system. A discussion of resolution procedures is also included, as well as an example of a resolution procedure policy for a trust company.

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I. INTRODUCTION

The purpose of this Article is to suggest that both for good business reasons and to protect against a suit for breach of fiduciary obligation, all serving fiduciaries should implement proper procedures for resolving beneficiary complaints.[1]

This Article focuses on complaints of trust beneficiaries against trustees, although the same ideas apply to all fiduciaries and their beneficiaries.[2] The premise of this Article is that if the American trust system had more early resolution of trust beneficiary complaints and less formal litigation,[3] we would have a more effective system better to serve the needs of all parties.[4] The Anglo-American trust system is poised to compete globally,[5] and it will

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[1] *See* Donald P. DiCarlo, Jr., *Using Fiduciary Procedures to Build Beneficiary Buy-In*, SK004 ALI-ABA 53, 56 (July 2004) (calling for reforms aimed at increasing the amount of beneficiary and trustee cooperation by establishing mediation procedures to resolve potential conflicts and creating a system for the beneficiary to provide the trustee with both negative and positive feedback on the current administration of the trust); *see also* Robert Whitman, *Flexible Fiduciary Accounting from the Outset of Administration*, PROB. & PROP., May-June 2004, at 45, 45:

> In the event that a reasonable plan for accounting cannot be agreed to between the fiduciary and the beneficiary group, the fiduciary shall offer a proper resolution plan to decide the matter. Depending on the circumstances, such a plan may involve an independent resolution officer, mediation, arbitration, or a court decision.

[2] 1 AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS § 2.5, at 43 (4th ed. 1987) [hereinafter SCOTT ON TRUSTS] ("A fiduciary relationship involves a duty on the part of the fiduciary to act for the benefit of the other party to the relation as to matters within the scope of the relation."); *see also* RESTATEMENT (THIRD) OF TRUSTS § 2 cmt. b (2003) ("The duties of a trustee are more rigorous than those of most other fiduciaries.") [hereinafter RESTATEMENT (THIRD)].

[3] *See* Lee S. Hausner & Douglas K. Freeman, *How to Achieve the Best Trustee/Beneficiary Partnership*, 30 EST. PLAN. 604, 604 (2003) (explaining that as trustee/beneficiary litigation increases, promoting open and safe communication between the parties involved to secure an effective partnership is important).

[4] *See* Robert Whitman & Kumar Paturi, *Improving Mechanisms for Resolving Complaints of Powerless Trust Beneficiaries*, 16 QUINNIPIAC PROB. L.J. 64, 76-77 (2002) (explaining that beneficiaries are at a disadvantage when challenging fiduciaries due to a lack of resources, expertise, and structure of the legal system).

[5] As the trust is used more commonly on a global basis, one can expect U.S. corporate fiduciaries to compete with foreign companies for trust business around the world. *See* Gerry O'Beirne, *The Expanded European Union: Growth and Global Implications*, HORIZONS, Summer 2004, at 4 (discussing the possible investment opportunities that may arise in new

receive only greater acceptance if trust beneficiary complaints are dealt with through "proper [resolution] procedures."[6] Without making reasonable adjustments now to protect the interests of complaining trust beneficiaries, some other form of trust system may overtake ours in the global marketplace.[7]

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member nations of the European Union because of membership advantages such as increased trade and aid).

One example of currently existing global competition is in the area of asset protection trusts. Asset protection trusts allow an individual to self-settle a trust to protect assets from creditors while still retaining a beneficial interest in the trust. Until 1997, this type of trust only existed in foreign countries, but in 1997, both Delaware and Alaska enacted laws allowing asset protection trusts. *See* Douglas J. Blattmachr & Richard W. Hompesch, II, *Alaska vs. Delaware: Heavyweight Competition in New Trust Laws*, PROB. & PROP., Jan.-Feb. 1998, at 32, 32 (explaining that competition to lead the domestic trust industry is increasing as more states realize the benefits of attracting trust business through the development of trusts favoring the settlor).

While trusts have been synonymous with wealth and privilege in America, many trust beneficiaries are persons with modest means and the modern trust serves many functions for beneficiaries that are far from wealthy. *See* Jackie Cohen, *Myths vs. Realities Of Trust Funds*, CBS MARKETWATCH.COM WEEKEND INVESTOR (Dec. 30, 2004), *at* https://secure.marketwatch.com/news/newfinder. The larger and more diverse population of trust beneficiaries today necessitates better and more innovative procedures to resolve trust beneficiary complaints.

[6] DiCarlo, *supra* note 1, at 56. DiCarlo offers an example of a beneficiary dispute resolution procedure. See *infra* Appendix.

All discussion and inquiry in the resolution and mediation process, including efforts involving the relationship manager, the manager, and the Resolution Officer shall be considered a part of "litigation settlement negotiation" and shall be inadmissible as evidence of any kind, subject to discovery of any kind, or direct or indirect use of any kind. A precondition to the application of this resolution process beyond step three is the signed statement by all parties that nothing arising directly or indirectly as a result of the resolution process will be used for any purpose in any other context. *Id.* at 57-60.

[7] Since the 1970s, the number of offshore trusts in international financial centers, known as tax havens, has risen because of their high degree of confidentiality and lack of taxes on trusts held for non-residents. To combat language barriers and a general distrust of financial institutions, offshore trust proponents created a trust protector to resolve any conflicts that may arise between the trustee and the beneficiary. *See* John H. Lahey, *International and Offshore Trusts: Resolving Conflicting Beneficiary and Fiduciary Interests*, SE87 ALI-ABA 277, 279 (June 2000) (asserting that the concept of a trust protector may be a useful addition to domestic trust law because it adds flexibility to trust governance structures, especially when competing with offshore trusts).

The rise in global competition for the delivery of trust services has not gone unnoticed by the American fiduciary community. While an attitude of resistance to working toward new techniques for resolving beneficiary complaints often is widely expressed, the author has met some who acknowledge the long range benefits that could come from reducing the need for formal litigation.

While achieving reform and change in our trust system historically has been a slow process,[8] the advantages gained from implementing proper resolution procedures, bearing in mind the concern for the long-term goal of global leadership, should speed this process.[9] Furthermore, the Restatement (Third) and the Uniform Trust Code ("UTC") will help expedite the needed changes.[10]

II. DRAFTING A RESOLUTION PROCEDURE INTO A GOVERNING INSTRUMENT

To focus on the idea of proper resolution procedures, the author would suggest language that could be included in the governing document:

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[8] *See* Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449, 1497 (1990) ("Where a change seems to be a natural step in a slow but continuous evolution in the common law, one feels relatively assured that the change was not motivated by current political pressures and has been carefully considered."). However, in the last part of the twentieth century, "[T]rust law in the United States has experienced a period of rigorous, comprehensive reexamination. Some of this reexamination has involved adaptation to the gradual evolution of trust practice, and of related tax law and planning, over a considerably longer period of time." Edward C. Halbach, Jr., *Uniform Acts, Restatements, and Trends in American Trust Law at Century's End,* 88 CAL. L. REV. 1877, 1881 (2000) (stressing modern trust laws' concern for finding balanced rules leading to the pursuit of the best interests of the trust beneficiaries).

[9] *See* Lahey, *supra* note 7.

[10] The UTC requires the trustee to administer the trust in accordance with its terms and purposes and the interest of the beneficiaries. UTC § 801. It also requires that a trust and its terms be for the benefit of its beneficiaries. UTC § 404. These requirements are mandatory and cannot be waived by the settlor. UTC § 105.

Joseph Kartiganer & Raymond H. Young, *The UTC: Help for Beneficiaries and Their Attorneys*, PROB. & PROP., Mar.-Apr. 2003, at 18, 18-19 (explaining that the UTC aids beneficiaries by providing for a bill of rights for beneficiaries and requiring trustee education). For an example of a beneficiary's bill of rights, see Robert Whitman, *Commentary: A Law Professor's Suggestions for Estate and Trust Reform*, 12 QUINNIPIAC PROB. L.J. 57, 61-63 (1997) (citing the need for greater beneficiary protection since the modern corporate fiduciary has been pressured to become more concerned with profit).

The UTC was drafted in coordination with the revision to the Restatement (Third) in an effort to intertwine the statutes of the UTC with the background materials of the Restatement. *See* David M. English, *The Uniform Trust Code (2000)*, SJ001 ALI-ABA 285, 293-94 (July 2003) (providing a history of the relationship of the UTC to the Restatement). "The Code, which was prepared in close coordination with the drafting of the Third Restatement, absorbs this benefit-the-beneficiaries requirement." John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 NW. U. L. REV. 1105, 1105, 1106-07 (2004) (dividing "the mandatory rules of [American trust law] into two groups: intent-defeating rules that restrict the settlor's autonomy, and intent-serving rules whose purpose is to discern and implement the settlor's true intent").

> In the event that any beneficiary shall complain to the trustee regarding any matter, and that complaint cannot be resolved, the trustee shall provide a reasonable procedure for complaint resolution.

Notice this language is fairly open-ended,[11] yet places the obligation for providing reasonable complaint resolution procedures with whom it belongs—the trustee.[12] Thus, depending on the particular facts of the matter involved, a trustee who refuses to offer mediation,[13] arbitration,[14] or any other reasonable alternative to formal litigation[15] may be breaching a fiduciary duty to the beneficiary[16]—quite apart from the ultimate determination

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[11] "The settlor and the drafting attorney can, however, anticipate and minimize the furor of the disappointed beneficiary. There is, of course, no one solution that will fit each situation." Steven M. Fast, *Structuring Trusts to Avoid Beneficiary Dissatisfaction*, SG012 ALI-ABA 29, 31 (July 2001) (suggesting that the attorney and the settlor may look to avoid future conflicts with the beneficiary by creating a clear explanation of the trust's structure as well as providing a provision for an ombudsman to resolve disputes).

[12] Under the agency theory of trusts, the trustee acts as the agent of both the settlor and the beneficiary and must balance the needs and rights of each principal. Allowing the trustee to formulate the resolution procedures allows for a fair process that should balance both the needs of the settlor and beneficiary—as the trustee is uniquely in tune to both parties' preferences and wishes. In such a situation, the conflict can be exploited to produce a positive result. *See* Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 626 (2004) ("[A] further benefit of the agency costs approach is that it provides a framework for evaluating the competing Anglo-American views."); *see also* Robert Whitman, *Fiduciary Accounting After Arthur Andersen and Enron*, 16 QUINNIPIAC PROB. L.J. 289, 295 (2003) (regarding resolution procedures: "Corporate fiduciaries must organize trust departments to insure that this will happen and they must advertise their understanding that this is a necessary part of the proper execution of their fiduciary duties").

[13] *See* Robert Whitman, *Invitation to Discussion*, SJ001 ALI-ABA 1, 4 (July 2003) (suggesting that to ensure that the trustee maintains his fiduciary duty in time of conflict with the beneficiary, the trustee should offer the beneficiary choices in dispute resolution).

[14] The American Arbitration Association has created rules for wills and trusts to provide for dispute resolution between fiduciaries and beneficiaries. *See* Fast, *supra* note 11, at 36. *See also* Whitman, *supra* note 13.

[15] *See* Whitman, *supra* note 13.

[16] *See* 4 SCOTT ON TRUSTS, *supra* note 2 § 282.1, at 31. "Effective risk management requires a trustee to focus on carrying out his, her or its fiduciary duties with great diligence and integrity. The result of these efforts will be that the trustee will effectively serve the beneficiaries. . . . Proper risk management should make for happier beneficiaries and . . . minimize fiduciary litigation." William C. Weinsheimer, *Risk Management for Trustees: Happy Beneficiaries Equal Empty Court Rooms (Part 1)*, SJ001 ALI-ABA 155, 157 (July 2003) (asserting that proper education, qualification, and preparation by the trustee will ensure proper administration of the trust and best serve the needs of the beneficiary).

regarding the merits of the claim.[17] For so-called "powerless beneficiaries,"[18] including the suggested language in the governing instrument would provide a mechanism for dispute resolution that would take into account the inability of a beneficiary to retain a lawyer at large expense[19] or to attract a lawyer who would serve on a contingent fee basis.[20] One would hope that appropriate resolution procedures in a governing document would reduce substantially the need for costly formal litigation[21] (which, win or lose, will include ill will toward the fiduciary on the part of the beneficiary).[22] Even when the claim is found to be without merit (and this might occur in a substantial

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[17] "Just because a complaint is lodged, does not mean that the fiduciary is free to relax her obligation to act in good faith and in the best interest of the beneficiary." Whitman, *supra* note 13, at 3.

[18] A powerless beneficiary is a beneficiary that lacks adequate resources to resolve a complaint through formal litigation. *See* Whitman & Paturi, *supra* note 4, at 70. *See also* Robert Whitman, *Disclosure Strategies to Settle Complaints and Avoid Formal Litigation*, CK089 ALI-ABA (forthcoming 2005) (stating that powerless beneficiaries literally have no opportunity to be heard).

[19] *See id.*

[20] A "contingent fee" is

> [a] fee charged for a lawyer's services only if the lawsuit is successful or is favorably settled out of court. Contingent fees are usu[ally] calculated as a percentage of the client's net recovery (such as 25% of the recovery if the case is settled, and 33% if the case is won at trial).

BLACK'S LAW DICTIONARY 315 (7th ed. 1999); *see also supra* note 18 and accompanying text.

[21] Often, after a decision has been reached through the litigation process, the relationship between the beneficiary and the trustee has been irreparably damaged. In many cases, the next step may be an application for trustee removal. If removal is granted, the trustee is usually replaced by a successor, as provided for by the terms of the governing instrument or by court appointment. This successor now has the responsibility to understand the terms of trust, as well as to establish a productive relationship with the beneficiary. While a trustee may be brought up to speed on the trust rather quickly, establishing a relationship with the beneficiary takes time. If a proper resolution procedure had been in place, this valuable time, as well as any extra fees involved, may have been saved. *See* Jo Ann Engelhardt & Robert W. Whitman, *Administration with Attitude: When to Talk, When to Walk,* PROB. & PROP., May-June 2002, at 12, 16 ("Sometimes, knowing when to walk is as important as knowing how to talk. If the trustee has made its best efforts to ensure good communication and effective administration without meeting the beneficiaries' requirements, the best course may be to resign."); *see also* DiCarlo, *supra* note 1.

[22] *See* Englehardt & Whitman, *supra* note 21. Often, another unfavorable byproduct of trust litigation is family conflict. When family members have conflicts concerning a trust, family discord because of the strain of litigation is another cost to factor. *See also* Daniel Bent, *My Bequest to My Heirs: Years of Contentious, Family Splitting Litigation . . .*, HAW. B.J., Feb. 2004, at 28, 28-31 (asserting that alternative dispute resolution procedures provide a vehicle to settle disputes without damaging the family dynamic).

number of cases),[23] the beneficiary still could feel that the claim had been fairly heard and fairly decided.[24]

III. PROPOSED LANGUAGE FOR A CORPORATE FIDUCIARY POLICY MANUAL

Assuming that the corporate fiduciary's policy manual already has a reasonable process for resolving trust beneficiary complaints,[25] the following additional language is suggested for the policy manual to handle a situation in which the trust department has been unable to resolve a beneficiary complaint:

> In the event that the issue remains unresolved,[26] the beneficiary (or beneficiaries) shall be informed of the opportunity to refer the matter to a resolution officer who shall either be a neutral party or, if employed by the corporate fiduciary,[27] a party charged with the duty of acting as a neutral officer. The trust department may refer the matter to the resolution officer as well.[28] The resolution officer,

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[23] *See* Whitman, *supra* note 13.

[24] Mediation involves a neutral third party working with all parties individually in an effort to find a common ground on which a resolution can be achieved. The mediator also has a responsibility to maintain positive and non-aggressive negotiations. Arbitration is also beneficial because the proceedings can be private, so the public record does not contain a decision. See Bent, *supra* note 22.

[25] *See* Whitman, *supra* note 12. It makes sense that a corporate fiduciary would have alternate dispute resolution procedures in its manual. When a

> corporate fiduciary establishes an independent evaluation department . . . with the duty to examine the complaint and make an independent finding, that corporate fiduciary has gone further in meeting the duty than another that simply provides that complaints are to be sent to and adjudged by the same folks being complained about.

Whitman, *supra* note 13, at 3.

[26] As a rule of thumb, an effective trustee should attempt to resolve complaints early via prompt oral or written communication. In the correspondence, the trustee should explore the cause of the conflict and, if it is related to the administration of the trust, accept and discuss suggestions from the beneficiary. If the correspondence is not effective, the trustee should schedule a face to face meeting. The ultimate responsibility of the trustee is to exhaust every possible method of resolving the conflict in-house before sending the matter to a third party. *See* Mary Clements Pajak, *Counseling Fiduciaries on How to Avoid Beneficiary Complaints and Quickly and Fairly Settle Complaints,* SC85 ALI-ABA 21 (June 1998) (explaining that effective communication with the beneficiary not only reduces the amount of conflict, but also can serve to resolve the conflict in a timely manner without referring the matter to a third party).

[27] *See supra* text accompanying note 25.

[28] *See* DiCarlo, *supra* note 1.

charged to carry out the duties of a neutral party, shall meet with the respective parties in order to attempt to reach an agreed upon resolution[29] or a proper resolution procedure.[30]

"Depending on the circumstances of the case, the Resolution Officer can suggest a number of procedures for resolving the matter, including mediation, arbitration, a decision by the resolution officer, or any other reasonable procedure, short of formal litigation."[31] All suggestions and decisions made by the resolution officer shall be in writing and made available to the trust department and the beneficiary (or beneficiaries) within a reasonable amount of time.[32]

"Questions such as (but not limited to) who bears the expense of the resolution procedure, which parties are to be involved in the process, and the finality of the decisions reached, shall be subject to good faith negotiation between the trust department, the . . . beneficiary [(or beneficiaries)], and the Resolution Officer."[33]

Under this policy statement, the resolution officer would be the equivalent of an ombudsman.[34] At the choice of the trustee, the resolution officer could be a completely independent person[35] or, with a corporate trustee, a specifically designated employee. Although the resolution officer might be

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[29] Resolution by a resolution officer provides a cost effective and private solution. *See* Whitman, *supra* note 1, at 45.

[30] *See* DiCarlo, *supra* note 1; *see also infra* Appendix.

[31] DiCarlo, *supra* note 1, at 59. Litigation, mediation, and arbitration are all possible avenues that a beneficiary can choose, and each has its own strengths and weaknesses. Mediation provides a less formal approach because of the lack of formal rules or hearings, but unless the mediation is binding, it may not resolve the issue quickly. Binding arbitration is more formal, but it does not rise to the level of formal civil litigation. Litigation provides a structured proceeding but is costly and all decisions are a matter of the public record. *See* Bent, *supra* note 22. Because each dispute is unique, the resolution officer should have some freedom to decide which resolution procedure best fits the particular case.

[32] *See supra* note 2 and accompanying text.

[33] DiCarlo, *supra* note 1, at 59.

[34] "An ombudsman serves as an alternative to the adversary system for resolving disputes . . . [and is usually] independent and nonpartisan." BLACK'S LAW DICTIONARY 1115 (7th ed. 1999). Designation of an ombudsman may be the simplest way to resolve a conflict, especially if the person chosen is a trusted family friend or relative who has the respect of the beneficiaries. *See* Fast, *supra* note 11, at 35.

[35] In an effort to assuage a beneficiary's fear of impropriety on the part of the resolution officer, it may be better to have an independent person fill the position. If a beneficiary lacks faith in the resolution officer, the officer merely serves as a speed bump on the road to litigation.

an employee of the corporate fiduciary, the desired results likely could still be achieved.[36] If a resolution officer appeared to be blatantly partial to the corporate fiduciary, the resolution officer's actions would be subject to court scrutiny in connection with a case alleging breach of fiduciary duty to provide a proper resolution procedure.[37] The trust of a beneficiary and a corporate trustee may be placed in a resolution officer,[38] even if the resolution officer is an employee of the corporate fiduciary, because of the factor that the author considers to be the most important one in this entire area: it is good business to have a proper resolution procedure.[39]

IV. ANALYSIS

The four main complaints by trust beneficiaries against trustees are:

1. The payments are too small.[40]
2. The fees are too high.[41]
3. The investment performance is not good enough.[42]
4. Putting the money into a trust was stupid, because if I, the beneficiary, had it outright, I could do a lot better with it.[43]

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[36] While I like your idea of a resolution officer, I think that it is important that the beneficiary have some input as to the selection of that officer. If it is simply an employee of the corporate fiduciary, then I think the beneficiary may have the impression (rightly or wrongly) that the resolution officer is biased in favor of the fiduciary and, as a result, your goal of giving your beneficiary their "day in court" without the expense will not be accomplished. I think having a panel of officers (not affiliated with the fiduciary) from which the beneficiary can choose is more appropriate and serves the interests of both the fiduciary and the beneficiary.

E-mail from Rhonda Griswold, Esquire to Robert Whitman, Professor of Law, University of Connecticut School of Law (Oct. 20, 2003) (copy on file with author).

[37] *See supra* note 2 and accompanying text; *see also* Whitman, *supra* note 13.

[38] *See* DiCarlo, *supra* note 1, at 57.

[39] *See* Whitman, *supra* note 13.

[40] Telephone Interview by Anthony Cenatiempo with Standish Smith, Founder, Heirs, Inc., Villanova, Pa. (June 16, 2004).

[41] *Id.*; *see also* Susan S. Locke, *Counseling Fiduciaries on How to Avoid Beneficiary Complaints and Quickly Settle Complaints,* SE87 ALI-ABA 139, 148 (June 2000) (outlining the internal decision-making structure as well as the common complaints and resolutions employed by a bank organization).

[42] *See* Telephone Interview with Standish Smith, *supra* note 40; *see also* Locke, *supra* note 41, at 145.

[43] *See* Telephone Interview with Standish Smith, *supra* note 40; *see also* Locke, *supra* note 41, at 147.

Also, another complaint is that the attorney who drafted the trust instrument should be shot because no one ever thought things would work this way—and so on.[44]

Believing that trustees do not have difficulty dealing with some trust beneficiaries is unrealistic.[45] Imagine being a trust officer for the plaintiff in *United States v. Satan and His Staff*.[46] In that case, the plaintiff alleged "that Satan ha[d] on numerous occasions caused [the] plaintiff misery and unwarranted threats, against the will of plaintiff, that Satan has placed deliberate obstacles in his path and ha[d] caused plaintiff's downfall."[47]

However, believing that all trust beneficiary complaints lack merit would be equally foolish.[48] Those who doubt that wrongdoing can, and does, occur in the trust system and that injustices can, and do, occur are in denial.[49] For example, consider the plight of *RK*, a trust beneficiary who sought an accounting from her out-of-state trustees. *RK* believed she was entitled to approximately $30,000. After consistent stonewalling, *RK* sent the trustees a letter in which, because of her total frustration, she accused them of being "crooks" (which they may well have been). The trustees counterclaimed for defamation and received a default judgment against *RK* in their home state. *RK* could not afford to travel to court to defend herself. The judgment, by an allegedly "friendly" judge, was for $2,000,000.[50]

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[44] *See* Telephone Interview with Standish Smith, *supra* note 40.

[45] *See* Engelhardt & Whitman, *supra* note 21, at 16.

[46] 54 F.R.D. 282, 283 (W.D. Pa. 1971).

[47] *Id.* at 283.

[48] *See* Whitman & Paturi, *supra* note 4, at 67-68.

[49] For example, accountant Gary Mallows of Longmeadow, Massachusetts, was the trustee for the estate of Judge Vine Parmelee of Connecticut. Obviously, he was appointed because people believed he was honest and well-qualified. However, appearances may be deceiving. State investigators found that Mr. Mallows had drained the trust's assets ($163,000) by investing them in his personal business ventures. The probate court required him to post bond for the assets upon his appointment, but he failed to do so. Today the trust holds $108.00 and some costume jewelry. *See* Kim Martineau, *Handling of Judges' Estates Probed*, HARTFORD COURANT, July 14, 2004, at A1. In a system that involves a good deal of money, a lack of formal policing, and a good amount of self-discipline, wrongdoing likely occurs.

[50] This presents a clear example of a powerless trust beneficiary who, because of a lack of funding and expertise, is unable to have her complaint addressed effectively by the legal system. *See* Whitman & Paturi, *supra* note 4, at 77-79. *See generally* Raymond H. Young, *The Trustee's Right to Defend Itself: Is There Restraint on Alienation?*, SK004 ALI-ABA 345, 347-48 (July 2004) (outlining situations in which excessive litigation may have occurred between the trustee and beneficiary).

Beneficiaries raise many types of complaints.[51] These include:

1. My trustee has run away with my money.[52]
2. My trustee's actions are motivated by self-interest.[53]
3. My trustee does not give a straight answer to any question I ask.[54]
4. My trustee never returns my phone calls.[55]
5. When I get an accounting, I cannot understand it.[56]
6. My local bank has merged with an impersonal giant institution with offices far away.[57]
7. The trust company keeps putting in a new trust officer every three months and each new officer is younger and knows less than the one before.[58]

Further, all that is needed to create tensions in the system is a discretionary distribution power among a class of beneficiaries and an unanticipated second marriage after the death of the settlor.[59]

No matter how trust administration is improved, the same basic rules still apply:

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[51] *See* Telephone Interview with Standish Smith, *supra* note 40.

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] "An accounting is far too complex for the average beneficiary to understand." Joel C. Dobris, *Ethical Problems for Lawyers upon Trust Terminations: Conflicts of Interest*, 38 U. MIAMI L. REV. 1, 39 (1983) (stating that full disclosures to the beneficiary often are not sufficient to meet the fiduciary requirements when the beneficiary cannot understand the disclosure).

[57] *See* Telephone Interview with Standish Smith, *supra* note 40.

[58] *See id.*

[59] *See* Patrick J. Collins et al., *Financial Consequences of Distribution Elections From Total Return Trusts*, 35 REAL PROP. PROB. & TR. J. 243, 268 (2000) ("[T]he wholly discretionary trust not only fails to alleviate the conflicting claims to the trust estate of the two beneficiary classes, but also may place the trustee squarely in the middle of the distribution tug-of-war."); *see also* Philip H. Suter & Susan L. Repetti, *Trustee Authority to Divide Trusts*, PROB. & PROP., Nov.-Dec. 1992, at 54, 55:

> In many instances the settlor should leave some discretion in the trustees as to whether and when to divide a trust. The decision may rest on some future event, such as an accident rendering a beneficiary incapable of earning, a beneficiary's marriage to a wealthy person or a spendthrift, unexpected exposure of an intended beneficiary to creditors, changes in the domicile of beneficiaries, changes in the tax law (e.g., throwback rules for accumulation trusts), and other unanticipated future events.

1. Those who question the basic soundness of the system and its overall satisfactory performance are overacting and are not realistic.[60]
2. Determining whether the complaint has merit is an impossible task at the outset.[61]
3. No matter how we better the system, some people will abuse it and subvert it.[62] There will always be cases that need formal court litigation.[63]

Given the above, if a complaining beneficiary cannot be satisfied by the trustee, a proper resolution procedure is required to get a handle on whether a trust beneficiary's claim has merit.[64] If the claim does have merit, the complaint needs to be resolved quickly, cheaply, and properly.[65] Yelling and screaming between beneficiaries and trustees does nothing to improve the system.[66]

The focus of this Article is not on the merits of any particular complaint. Instead, the author puts forward a suggestion regarding the process that needs to take place when a trust beneficiary complains to a trustee—specifically, the importance of the fiduciary's having a proper resolution procedure in place. A reasonable modification is needed in the present system to allow beneficiaries to assert more easily the merits of their complaints and allow fiduciaries the chance to evaluate these complaints in an efficient manner and, if appropriate, to satisfy the complainant without costly drawn-out proceedings.

If that change does not come voluntarily, the Restatement (Third) and the UTC allow an equity court to require an appropriate change.[67] Proper

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[60] Today, most trusts are administered fairly and by competent, hard-working fiduciaries. *See generally* Whitman, *supra* note 12.

[61] *See* Whitman & Paturi, *supra* note 4, at 67-68.

[62] *See supra* text accompanying note 49.

[63] Only in a very rare case should it be necessary for a trust beneficiary to formally litigate with a corporate fiduciary. Even when that litigation is required, there should be a concern on the part of a corporate fiduciary that counsel for the fiduciary does not act in an overzealous manner.

Whitman, *supra* note 12, at 295; *see also* Young, *supra* note 50.

[64] *See* DiCarlo, *supra* note 1; *see also* Whitman, *supra* note 13, at 3.

[65] *See* Whitman, *supra* note 13, at 4.

[66] *See* Pajak, *supra* note 26, at 31.

[67] UTC section 105(b)(2) (Supp. 2004) states: "The terms of a trust prevail over any provision of this [Code] except: . . . the duty of a trustee to act in good faith and in accordance with the purposes of the trust." (alteration in original) If the trust authorizes bad faith trusteeship, the trust would be deemed illusory. *See* Langbein, *supra* note 10, at 1123-24; *see*

resolution procedures are not only good for the trust business, but they also will place the American system of trust administration in a better position to compete for trust business on a global scale.[68]

V. THE BASIC HISTORY SURROUNDING THE DEVELOPMENT OF THE TRUST MODEL

Those who deal with trusts are proud of the flexibility that trusts provide.[69] Sir Frederic Maitland said: "Of all the exploits of Equity the largest and the most important is the invention and development of the Trust."[70] "If we were asked what is the greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence I cannot think that we should have any better answer to give than this, namely, the development from century to century of the trust idea."[71] Actually, some questions exist as to whether the groundwork for the trust was laid by Englishmen at all (but that is a topic for another day).[72]

The modern trust grew out of the common law's feoffment to uses.[73] In

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also McNeil v. McNeil, 798 A.2d 503 (Del. 2002) (holding invalid a provision of the trust closing off court review of trustee decisions).

One commentator has suggested that settlors could form a "quiet trust" if they wanted to keep their intentions secret. *See* Donald D. Kozusko, *In Defense of Quiet Trusts*, TR. & EST., Mar. 2004, at 20, 20-21. This trust restricts the beneficiary from obtaining information on the trust, but the commentator believed that by appointing a "watchman," the beneficiary will be protected from malfeasance on the part of the trustee. *Id.* at 22. It seems, however, that if the trustee rejects the beneficiary's request for information, the rejection would constitute bad faith on the part of the trustee and the trust might be considered illusory. *See* Robert Whitman, *Full Trust Disclosure is Best*, TR. & EST., July 2004, at 59, 60.

[68] *See supra* note 7 and accompanying text.

[69] *See* Jeffrey N. Pennell, *Flexible Trusts*, SC75 ALI-ABA 263, 267 (June 1998) (discussing the importance of the flexibility of trusts as an aid for practitioners in satisfying their clients).

[70] F.W. MAITLAND, EQUITY: A COURSE OF LECTURES 23, 23 (A.H. Chaytor & W.J. Whittaker eds., 1936).

[71] WILLIAM MAITLAND, *The Unincorporate Body*, *in* SELECTED ESSAYS 128, 129 (H..D. Hazeltine et al. eds., 1936).

[72] The dominant view is that the English trust was modeled after the German treuhand or salman. *See* GEORGE T. BOGERT, TRUSTS § 2, at 6-7 (6th ed. 1987) [hereinafter BOGERT ON TRUSTS].

[73] The term "use" in English law derives from the Latin "opus," which means a benefit or "on behalf of." One person could give land or chattels to another for the use or benefit of a third person. Uses were employed by knights embarking on crusades, by persons wishing to confer the benefit of land on a religious order not authorized to hold land, and by villeins who could convey their land only by yielding it to the lord "for

the thirteenth century, shortly after the Norman Conquest, people (nearly always men) began to enfeoff land to another "to the use" of a third (*A* to *B* to the use of *C*).[74] *A* was called the "feoffor."[75] In the modern trust, *A* is now called the "settlor," or the "grantor," "trustor," "founder," "donor," or "creator."[76] The one to whom the land was enfeoffed, *B*, was called the "feoffee to uses."[77] Today, *B* is known as the "trustee."[78] The one for whose benefit the land was held, *C*, was called the "cestui que uses."[79] Today, *C* is known as the "beneficiary," or, less commonly, the "cestui que trust."[80]

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the use of" the intended grantee.

David A. Thomas, *Anglo-American Land Law: Diverging Developments from a Shared History—Part I: The Shared History*, 34 REAL PROP. PROB. & TR. J. 143, 178 (1999).

[74] The modern trust is an outgrowth of the ancient use. There have been four more or less clearly defined stages in its development. The first period began when uses were first employed not long after the Norman Conquest. Although it had become increasingly common to convey land to a feoffee to the use of a third person, or more frequently to the use of the feoffor, these uses were not enforced by the courts until the fifteenth century. *See* SCOTT ON TRUSTS, *supra* note 2, §§ 1.2-1.4, at 12-14.

[75] A "feoffor" is "[t]he transferor of an estate in fee simple." BLACK'S LAW DICTIONARY 634 (7th ed. 1999).

[76] "The *settlor* of a trust is the person who intentionally causes it to come into existence. He is often called the trustor, grantor, founder, donor, or creator of the trust." GEORGE G. BOGERT & GEORGE T. BOGERT, THE LAW OF TRUSTS & TRUSTEES § 1, at 4 (rev. 2d ed. 1984) (footnote omitted) [hereinafter BOGERT ON TRUSTS AND TRUSTEES].

[77]
> In the middle ages in England conveyancers of land invented the "use" which is the ancestor of the modern trust. The owner of land enfeoffed another to the use of the feoffor or another. The transferee was called a "feoffee to uses" and the intended beneficiary of the use a "cestui que use."

Id. § 2, at 13-14 (footnote omitted).

> The feoffee to uses of the early English law corresponds point by point to the salman of the early German law, as described by Beseler fifty years ago. The salman, like the feoffee, was a person to whom land was transferred in order that he might make a conveyance according to his grantor's directions.

Oliver Wendel Holmes, *Early English Equity*, *in* COLLECTED LEGAL PAPERS 1, 4 (1920) (footnotes omitted); *see also* BOGERT ON TRUSTS, *supra* note 72, § 2, at 7.

[78] "The *trustee* is the individual or entity (often an artificial person such as a corporation) which holds the trust property for the benefit of another." BOGERT ON TRUSTS AND TRUSTEES, *supra* note 76, at 4-5. *See also* RESTATEMENT (THIRD) § 2 cmt. f (2003).

[79] "Cestui que use" refers to the person a use was created for and is similar to what we would call a "cestui que trust" or "beneficiary." *See* SCOTT ON TRUSTS, *supra* note 2, § 3.2, at 52.

[80] "The *beneficiary* or *cestui que trust* is the person for whose benefit the trust property is held by the trustee." BOGERT ON TRUSTS AND TRUSTEES, *supra* note 76, § 1, at 5; *see also* RESTATEMENT (THIRD) § 2 cmt. f (2003).

For a modern definition of an express, or intentional, trust, we can turn to the Restatement (Third):

> A trust . . . is a fiduciary relationship with respect to property, arising from a manifestation of an intention to create that relationship and subjecting the person who holds title to the property to duties to deal with it for the *benefit* of a charity or for one or more persons, at least one of whom is not the sole trustee.[81]

The Restatement (Third) also outlines purposes for creating a trust, including that "[trust] administration must be for the *benefit* of its beneficiaries. . . ."[82]

Trust instruments commonly provide that the trustee hold the trust "property for the *benefit* of" the beneficiary.[83] The obligation of the trustee is to benefit the beneficiary.[84] What does this mean? Does it include more than the obligation to deal properly with and to protect the trust property?[85]

The need to place the protection of the beneficiary and the beneficiary's interests above the interests of the trustee grows out of the medieval idea of chivalry.[86] Originally, trustees could not accept payment for their good

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[81] RESTATEMENT (THIRD) § 2 (2003) (emphasis added).

[82] *Id.* § 27(2) (emphasis added).

[83] BOGERT ON TRUSTS, *supra* note 72, § 2, at 4 (emphasis added). A long-standing rule, though recently reformulated, is that a trust must be for the benefit of the beneficiary. *See* Langbein, *supra* note 10, at 1105; *see also* BOGERT ON TRUST AND TRUSTEES, *supra* note 76, § 1, at 7.

[84] "It does not matter how the benefits are to come to the beneficiary. The important trust concept is that he has the right to obtain them." BOGERT ON TRUSTS AND TRUSTEES, *supra* note 76, § 1, at 7.

[85] The trustee holds the property "for the benefit of" the beneficiary. It is unnecessary at this point to consider how the beneficiary may obtain that benefit. The methods vary greatly, according to the terms of the particular trust. In one case the trustee may have no duty other than to hold the property, and the beneficiary may take the benefits directly. In another instance the trustee may be charged with detailed management of the trust assets and the beneficiary may receive the benefits indirectly.

BOGERT ON TRUSTS, *supra* note 72, § 2, at 4.

[86] "Tenure held by knight-service" was a "tenure in which a person held land in exchange for military service." BLACK'S LAW DICTIONARY 234 (7th ed. 1999).

> Under the tenures system, the landed classes did not own their estates, but in fact held them as tenants of the Crown and of the few select lords to whom the Crown had originally conveyed its land. . . . The most prestigious estates were held as tenures in chivalry. When a tenant in chivalry died leaving an heir under the age of maturity, the guardianship of that heir fell to the lord of the estate, regardless of whether the heir's mother was still alive. The guardian in chivalry could control both the lands and the person of the ward until the infant reached the age of twenty-

deeds[87] and only individuals could serve as trustees.[88] The only protection for the beneficiaries was the trustee's solemn oath to act properly to protect the beneficiary and the interests of the beneficiary in accordance with the instructions given by the settlor.

In the nineteenth century, statutes permitted corporate fiduciaries to serve and to charge fees.[89] The statutes brought with them a movement to turn trust administration into a profit center for the major banking interests.[90]

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one, if male, and sixteen, if female. This control included the right to arrange the ward's marriage, which, since the ward stood to inherit a considerable estate, was of significant value.

Sarah Abramowicz, *English Child Custody Law, 1660-1839: The Origins of Judicial Intervention in Paternal Custody*, 99 COLUM. L. REV. 1344, 1366-67 (1999) (discussing the importance of the Tenures Abolition Act of 1660, which empowered English judges to remove children from the fathers).

[87] "Originally uses and trusts were not enforceable in any court but were purely honorary. The performance of his duties was voluntary on the part of the feoffee to uses and could not be enforced." BOGERT ON TRUSTS, *supra* note 72, § 3, at 9; *see also* SCOTT ON TRUSTS, *supra* note 2, § 1.3, at 13.

[88] "At early common law, a corporation could not serve as trustee. This is no longer the case. A corporation may act as trustee in furtherance of and as an adjunct to its corporate purpose." CHARLES E. ROUNDS, JR., LORING: A TRUSTEE'S HANDBOOK § 3.1, at 33 (2003) [hereinafter LORING].

[89] As a general rule, however, a corporation now needs statutory authority to have as its purpose the administration of trusts. Thus, absent trust powers conferred by statute, an automobile manufacturing company, for example, may act as trustee of its own employee benefit plan but not as trustee of the plans of other corporations.

LORING, *supra* note 88, § 3.1, at 33.

[90] The great contribution made by America to the development of the trust is in the employment of the corporate trustee. In England as late as 1743 the Attorney-General argued that a corporation could not be a trustee. Lord Chancellor Hardwicke, however, told the Attorney- General that nothing was clearer than that corporations might be trustees. The earliest instance in the United States of a specific grant to a corporation of the power to act as trustee seems to have been that of the Farmers' Fire Insurance & Loan Company, chartered in New York in 1822. Since that time the creation of corporations with power to administer trusts has become increasingly common. The Congress finally found it necessary to permit national banks to enjoy similar powers. Although the corporate trustee is primarily an American institution, the institution is spreading to other countries, and even in the more conservative mother country the corporate trustee is becoming common. . . . In England the individual trustee receives no compensation for his work, unless it is otherwise provided by the trust instrument. In the United States, however, he receives compensation.

SCOTT ON TRUSTS, *supra* note 2, § 1.8, at 27-28.

The statutes also brought about the lobbying of legislators by banking interests to enact statutes that were helpful to corporate fiduciaries. These statutes emphasized the relationship between the settlor and the trustee and downgraded the position of the beneficiary.[91] For example, because of statutory enactments, removal of a trustee became extremely difficult unless trustee conduct was tantamount to intentional wrongdoing.[92] Trustee duties were narrowed to the duty of loyalty and the duty of prudent investment. The goal became a purely business-type relationship between trustees and beneficiaries.[93]

VI. IMPORTANT IDEAS TO BEAR IN MIND REGARDING TRUSTS

The ancestor of the modern trust was the "use."[94] Legal historians trace the use back to the middle of the thirteenth century, when the Franciscan

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[91] *See* Broadway Nat'l Bank v. Adams, 133 Mass. 170 (1882) (favoring the right of the settlor to restrain alienation of property by the beneficiary).

[92] Removal may be ordered because of hostility between the trustee and a beneficiary but only in rare cases. "[R]emoval . . . [, for example,] . . . might be justified if a communications breakdown is caused by the trustee or appears to be incurable." On the other hand, relief has been denied if the trustee's duties are essentially ministerial or if the proper administration of the trust is not jeopardized by the hostility.

LORING, *supra* note 88, § 7.2.3.6, at 361 (alterations in original) (quoting UNIF. TRUST CODE § 706 cmt.).

[93] One of the hallmarks of the trust relationship is the trustee's duty of absolute loyalty to the trust. One should not accept the office of trustee if there are any doubts about one's ability to carry out the duty of loyalty. This does not mean that trust administration should be something other than a business. It *is* a business, and it should be. Compensation provides a trustee with the incentive to keep trust matters high on his list of priorities.

Id. § 3.2, at 35.

Today there is growing tension between those who want to attempt to continue to limit fiduciary law to 19th century norms, and those seek to recognize the overriding duty of fiduciaries to protect beneficiaries and to recognize that purpose of the trust is to benefit the beneficiary. Compare John Langbein, *Rise of the Management Trust*, TR. & EST, Oct. 2004, at 52 (stating that fiduciary law rests on only two core principles, the care norm and the loyalty norm), *with* Robert Whitman, *A Comment on Professor Langbein's Description of the Rise of the Management Trust*, TR. & EST., Jan. 2005, at 16 (stating that historically fiduciary duty required broader protection efforts, that trust law does not exist in a vacuum, and that flexibility is needed in applying fiduciary law to the present environment).

[94] In the Middle Ages in England, conveyancers of land invented the use, which is the ancestor of the modern trust. As to the history of uses and the enactment of the Statute of Uses, see 1 SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 455 (A.L. Goodhart & H.G. Hanbury eds., rev. 7th ed. 1956).

friars came to England.[95] The friars, belonging to the mendicant order, were forbidden from owning any sort of property, so their pious benefactors began to convey land to suitable persons in the neighborhood to hold to the use of the friars. Thus, *A* the owner of Blackacre, would enfeoff *B* and *B*'s heirs to hold Blackacre to the use of the friars. The legal fee simple passed by transfer to *B*, the feoffee to uses, who was to hold title for the mendicant order, the cestui que use. The mendicant order then possessed Blackacre, with *B* holding legal title for the benefit of the mendicant order. Although some evidence suggests that ecclesiastical courts enforced early uses,[96] in the beginning uses were not enforceable in the civil courts.[97] No common-law form of action existed whereby *C*, the cestui, could bring an action against *B*, the feoffee.[98] The law courts, paralyzed by the rigidity of their procedures, offered no relief.[99] As alleged breaches of fiduciary duty to beneficiaries became commonplace,[100] this state of affairs appeared to be unconscionable to the chancellor, the keeper of the king's conscience.[101] Early in the fif

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[95] The Mortmain Acts prohibited alienation of land to religious orders, and that, coupled with the vow of poverty taken by mendicant orders, provided the framework for the introduction of the use. *See* Avisheh Avini, *The Origins of the Modern English Trust Revisited*, 70 TUL. L. REV. 1139, 1143-44 (1996) (addressing the influence of Roman, English, German, and Middle Eastern influences in the creation of the modern trust).

[96] When the holder of the legal title proved faithless to his trust, as was sometimes the case, the Church itself imposed sanctions of penance, public condemnation or even excommunication. These remedies were sometimes applied also to private uses which were occasionally set up. With the development of Chancery as a court, legal remedies superseded the ecclesiastical ones.

RALPH A. NEWMAN, LAW OF TRUSTS 14 (1949).

[97] English uses existed long before a court of chancery existed to enforce them. The earliest expression of the word "use" was employed in the seventh century, yet the earliest mention of a court of chancery is in the fourteenth century. *See id.* at 12-13.

[98] "[F]or many years uses and trusts existed as honorary obligations but had no legal standing. If the [feoffee to uses] saw fit to deny that he held the property [of another], and to appropriate it to his own use, he might do so with impunity." BOGERT ON TRUSTS AND TRUSTEES, *supra* note 76, § 3, at 9.

[99] Common-law courts lacked the procedures to examine the parties, and as a result, the courts refused to take the cases involving breach of trust. *See* NEWMAN, *supra* note 96, at 16.

[100] The lack of common-law court intervention bred an environment ripe for fraud. *See id.*

[101] As keeper of the king's conscience, the rules of the equity courts were different from the rules of the common-law courts.

It was comparatively speedy—the Chancery was not tied down to the law terms, nor was there any undue delay in getting the defendant before the court. This in itself meant that it was less expensive. Moreover, the chancellor always professed to have a special regard for the interests of the poor. It was the reverse of technical,

teenth century, the chancellor, on application by the trust beneficiary, began to compel feoffees to uses to perform as they had promised they would.[102] Once the chancellor enforced uses and the obligation to protect the beneficiary and the beneficiary's interests (thus removing some of the risk of faithless feoffees), the employment of uses grew rapidly.[103]

Landowners found that putting legal title in a feoffee to uses created all sorts of benefits.[104] For example, prior to the Statute of Wills in 1540, land could not be devised by will; it descended to the eldest son.[105] Landowners seeking relief from the forced primogeniture rule turned to the use and found the desired flexibility.[106] *A* could enfeoff *B* and *B*'s heirs to the use of *A*

> and it was eminently calculated to get at the real facts by the most direct methods. . . . Finally, the fact that the chancellor, by reason of his close connection with the Council, could act with the whole force of the executive government, enforcing his orders in the last resort by a commission of rebellion, prevented abuses of the machinery of the Chancery, similar to those abuses of the machinery of the common law courts, which were facilitated both by the weakness of their executive power and the technicality of their procedure.

5 SIR WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 286 (3d ed. 1945).

[102] Originally the only pledge for the due execution of the trust was the faith and integrity of the trustee; but the mere feeling of honour proving, as was likely, when opposed to self-interest, an extremely precarious security, John Waltham, Bishop of Salisbury, who was Lord Keeper in the reign of Richard the Second, originated the writ of *subpoena*, by which the trustee was liable to be summoned into Chancery, and compellable to answer upon oath the allegations of his *cestui que trust*. No sooner was this protection extended, than half the lands in the kingdom became vested in feoffees to *uses*, as trusts were then called. Thus, in the words of an old counsellor, the parents of the trust were Fraud and Fear, and a Court of Conscience was the Nurse.

THOMAS LEWIN, A PRACTICAL TREATISE ON THE LAW OF TRUSTS AND TRUSTEES *1-*2 (James H. Flint ed., 8th ed. 1888).

[103] *Id.*

[104] Examples of the benefits provided by uses included avoiding dower, avoiding creditors (because at common law the creditors only could attack the legal title holder), avoiding forfeiture of title due to criminal acts, and helping the mortmain acts, which prevented alienation of land to religious organizations. *See* BOGERT ON TRUSTS, *supra* note 72, § 3, at 7-8.

[105] Primogeniture began sometime in the early thirteenth century; it treats the eldest son as the sole heir. The assumption was that the eldest male was the best candidate to perform the services necessary to satisfy feudal obligations. *See* Mark A. Senn, *English Life and the Law in the Time of the Black Death*, 38 REAL PROP. PROB. & TR. J. 507, 558-59 (2003) (stressing the importance of the Black Death in the development of English property law).

[106] For example, a settlor would use powers of appointment to give the first remainder to a son more capable than the oldest child. *See* David A. Thomas, *Anglo-American Land Law: Diverging Developments from a Shared History—Part II: How Anglo-American Land Law*

during *A*'s lifetime and then to the use of such persons as *A* might appoint by will. The chancellor enforced the use in favor of *A*'s devisees. Particularly because of its success in evading feudal death taxes,[107] the use became a popular planning device in England.[108] The employment of the use to avoid taxes brought on the Statute of Uses.[109]

Searching for a way to restore his feudal revenue and replenish his treasury, Henry VIII set out to abolish the use.[110] Henry interested himself personally in a lawsuit in the courts, which resulted in a decision that put the legality of the use into doubt.[111] Fearing that uses might become unenforceable[112] (with drastic consequences for the cestuis), Parliament, at Henry's urging, reluctantly enacted the Statute of Uses in 1535, which became effective in 1536.[113] By this Statute, uses were not made illegal.[114] On the contrary, legal title was taken away from *B*, the feoffee to uses, and given to *C*, the cestui que use.[115] In the words of that time, the use was executed—that is, converted into a full legal interest.[116] *C*, the former cestuis—now clothed with full legal title—could breathe easy in terms of having proper title to the property,[117] but *C* was required to pay the king's

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Diverged after American Colonization and Independence, 34 REAL PROP. PROB. & TR. J. 295, 315 (1999) (tracing the development of land law in England and in the original thirteen colonies).

[107] Uses were used by tenants to avoid claims made by the feudal lords. The lord was entitled to relief when the tenant died, and if no heir existed, the land escheated back to the lord. If the land was conveyed to feoffees to the use of the tenant, many of the incidents could be avoided. "The cestui que use owed homage or fealty to no overlord." SCOTT ON TRUSTS, *supra* note 2, § 1.4, at 16.

[108] *See* LEWIN, *supra* note 102.

[109] "Widespread evasion of feudal dues by conveyance to uses had swept over the majority of English land by the sixteenth century, prompting passage of the Statute of Uses." *See* Thomas, *supra* note 73, at 188.

[110] *See* NEWMAN, *supra* note 96, at 23.

[111] Henry largely backed the Statute of Uses because as a land owner, his feudal rights were being deflected by uses. *See id.* at 24.

[112] Many land-owning members and lawyers in the House of Commons valued the benefits of uses and were reluctant to endorse the King's proposal. However, the King was persistent and used his royal authority to threaten the land claims of the land owners and began to hear claims regarding attorney malpractice. *See* 4 SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 454 (3d ed. 1945).

[113] *See* SCOTT ON TRUSTS, *supra* note 2, § 1.5, at 18-19.

[114] *See id.* § 1.5, at 19.

[115] *See id.* § 1.5, at 19-20.

[116] *See id.* § 1.5, at 19.

[117] As holder of legal title, the former cestui now no longer had to worry about fraud on the part of the trustee, which ran rampant when many trustees disregarded their pledge to act

death duties.[118]

Although the purpose of the Statute of Uses was to abolish uses by executing them, imaginative common-law lawyers and judges found holes in the Statute.[119] Courts responded to the public's desires by holding that the Statute did not operate if *B*, the feoffee to uses (trustee), was given active duties to perform.[120] An active trust—imposing duties on the trustee to deal with the property in a special manner—was regarded as quite different from the use in which the feoffee ordinarily was passive by merely holding legal title and allowing the cestui que use to manage the property and take the profits.[121]

Active uses became known as trusts.[122] Because courts did not apply the Statute of Uses to active trusts, the chancery could meet the public's wishes by reasserting its jurisdiction over uses (under the name of trusts). The chancery developed the modern trust in which *B*, the trustee, has legal title and *C*, the beneficiary, has the benefit flowing from the trustee's proper management.[123]

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loyal to the trust. *See generally supra* note 102 and accompanying text.

[118] *See* NEWMAN, *supra* note 96, at 24.

[119] Courts strictly construed the Statute of Uses and only applied it to real property. Therefore, the Statute did not affect gifts of money or chattels. The Statute only applied to passive trusts, not active trusts, and it did not affect a use upon a use. *See* BOGERT ON TRUSTS, *supra* note 72, § 5, at 12-13.

[120] Duties of administration required the legal title in the trustee. Thus, if land was conveyed to A for life, to collect the profits thereof and pay them to B and his heirs, the trust would be active, and the Statute would not execute the use but leave the legal estate in A and the equitable interest in B, separately.

Id. § 5, at 13.

[121] A passive trust is one in which legal title is transferred to one person for the benefit of another, and the trustee has no duties. This type of trust was more prevalent than the active trust before the passage of the Statute of Uses. *See* BOGERT ON TRUSTS, *supra* note 72, § 2, at 6.

[122] *See id.* (giving a history of uses and trusts).

[123] The Statute of Uses also was held inapplicable to a use on a use. If *A* conveyed to *B* to the use of *C* to the use of *D*, the statute executed the first use, so that *C* got legal title, but did not execute the second use, even though both uses were passive. *See* Sambach v. Dalston, 21 Eng. Rep. 164 (1634). Lord Chancellor Hardwicke remarked in a later case that this doctrine reduced the Statute's effect to "add[ing] at most, three words to a conveyance." Hopkins v. Hopkins, 26 Eng. Rep. 368, 372 (Ch. 1738). Clearly from the statutory language, the Statute did not apply to personal property but only to a case in which the feoffee was "seized of land." In current American law, exemptions from the Statute of Uses, especially the exemptions for active trusts and for trusts of personal property, still are recognized. *See* RESTATEMENT (THIRD) § 6 cmt. a (2003).

Today, a trust is seen as a property arrangement under which ownership of the property is divided: the trust property's legal title goes to the trustee and its equitable, or beneficial, title goes to the beneficiary or beneficiaries. Beneficiaries may be divided into income beneficiaries and beneficiaries with future interests or remainders.[124] A trust may be totally discretionary,[125] an annuity trust,[126] or a unitrust.[127] In any event, a class of persons, designated as beneficiaries, will be entitled to protection by the trustee.[128]

VII. ENFORCEMENT OF TRUSTS

American case law and English case law are very different.[129] In Amer

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[124] The term "beneficiary" includes not only beneficiaries who received their interests under the terms of the trust but also beneficiaries who received their interests by other means, including by assignment, exercise of a power of appointment, resulting trust upon the failure of an interest, gap in a disposition, operation of an antilapse statute upon the predecease of a named beneficiary, or upon termination of the trust.

UNIF. TRUST CODE § 103 cmt., 7C U.L.A. 154 (Supp. 2004).

[125] A "discretionary trust" is "[a] trust in which the trustee alone decides whether or how to distribute the trust property or its income to the beneficiary. The beneficiary, in other words, has no say in the matter." BLACK'S LAW DICTIONARY 1515 (7th ed. 1999).

Discretionary powers to sprinkle, spray, and accumulate income and to invade principal are governed by standards set forth in the governing instrument. A standard can be broadly drafted (*e.g.*, the power to invade principal for *C*'s "benefit") or narrowly drafted (*e.g.*, the power to invade principal to pay *C*'s "medical bills"). A typical standard found in many trusts permits payment for the "maintenance and support" of the beneficiary.

LORING, *supra* note 88, § 3.5.3.2, at 89.

[126] An "annuity trust" is one

from which the trustee must pay a sum certain annually to one or more beneficiaries for their respective lives or for a term of years, and must then either transfer the remainder to or for the use of a qualified charity or retain the remainder for such a use. The sum certain must not be less than 5% of the initial fair market value of the property transferred to the trust by the donor. A qualified annuity trust must comply with the requirements of IRC (26 USCA) § 664.

BLACK'S LAW DICTIONARY 1514 (7th ed. 1999).

[127] A "unitrust" is "[a] trust from which a fixed percentage of the fair market value of the trust's assets, valued annually, is paid each year to the beneficiary." *Id.* at 1535.

[128] One of the essential elements of a trust is that there must be at least one beneficiary who has the trust administered to him via the trustee. A court may appoint a trustee when one is not named in the governing instrument. *See* BOGERT ON TRUST AND TRUSTEES, *supra* note 76, § 1, at 6.

[129] The English conception is more formal: precedents bind because of their source, because they are decisions of higher courts, irrespective of their content. In America the authority of precedents is less exclusively source-oriented. Precedents tend to bind because the principles they

ica, if the highest court decides that its previous decision is wrong, the court overrules itself.[130] So, if over time a previous decision appears to society to create unjust results, the highest court may overrule itself and establish a new rule that is seen as more just.[131] In England, until 1966 (when it gave itself the right to do so),[132] the House of Lords, the highest court,[133] could not overrule itself. Since 1966, the House of Lords rarely has overruled itself, although older cases are distinguished and rulings are narrowed.[134]

In England, the law still is seen as coming from the sovereign and from God.[135] In the United States, courts, especially an equity court, are more concerned with reaching a just result.[136] Yet, that will not always be the

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> embody are widely thought to be right and good, and if they are not right and good, they are less likely to be treated as binding.

P.S. ATIYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY OF LEGAL REASONING, LEGAL THEORY, AND LEGAL INSTITUTIONS 417 (1987).

[130] *Id.*

[131] *Id.*

[132] In 1966, the House of Lords decided that it was free to depart from prior precedent when it was deemed correct to do so. Lord Gardiner, L.C., speaking for the Lords, said:

> Their lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose therefore to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.

Re Dawson's Settlement, 3 All E.R. 68, 77 (H.L. 1966).

[133] In England, the House of Lords is the only court of last resort, while in America, each state and territory has a court of last resort, along with the federal Supreme Court. *See* ATIYAH & SUMMERS, *supra* note 129, at 267.

[134] Both today and prior to the 1966 practice statement, a case commonly will be distinguished from case law to avoid the precedent that is still rigidly adhered to in comparison to American case law. *See* R.J. WALKER & RICHARD WARD, WALKER & WALKER'S ENGLISH LEGAL SYSTEM 70-72 (7th ed. 1994).

[135]

> Upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these. There are, it is true a great number of indifferent points, in which both the divine law and the natural leave a man at his own liberty; but which are found necessary for the benefit of society to be restrained within certain limits. And herein it is that human laws have their greatest force and efficacy; for, with regard to such points as are not indifferent, human laws are only declaratory of, and act in subordination, to the former.

1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES 42 (Augustus M. Kelley 1969) (1803).

[136] "[C]ommon law principles of equity leaven the law, softening its rigors so that the law's aim of administering justice fairly is not lost." Cleveland v. Beltman N. Am. Co., 30

result.[137] In some cases, broad, overriding policies may prevent a just result. But, even if the matter is not directly addressed in the court's opinion, it is not unusual for an American judge to want to do the just thing in a case, if possible.[138]

The tendency of the American equity court to seek a just result can be seen in early American jurisprudence.[139] In *Rice v. Polly & Kitty*,[140] the crew of the ship alleged that they had been beaten cruelly by the captain and the mate. Accordingly, the crew left the ship in a foreign port in the midst of the voyage, returned to Philadelphia on another ship, and instituted suit for lost wages against the ship owners. By way of defense, the ship owners asserted that by signing the articles for the voyage, the crew had put themselves out of protection of the law.[141] The court, sitting with the equivalent of equity powers,[142] recognized that the law vested the master or the captain with a

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F.3d 373, 374 (2d Cir. 1994). "Equity requires doing justice to all parties in the action." Folkers v. S.W. Leasing, 431 N.W.2d 177, 182 (Iowa Ct. App. 1988) (citing McGaffee v. McGaffee, 58 N.W.2d 357, 360 (1953)). "To do justice between the parties is the object of a court of equity." Rainer v. Holmes, 75 N.W.2d 290, 292 (Wis. 1956).

[137] "[T]his court's powers in equity are intended to enable it to give full effect to the requirements of justice. This tenet should not be misinterpreted to condone the circumvention of fundamental legal methods in order to achieve desired results." Timken Co. v. United States, 777 F. Supp. 20, 27 (Ct. Int'l Trade 1991). An equity court may not ignore statutes and case law to help someone in trouble. *See* First Federated Sav. Bank v. McDonah, 422 N.W.2d 113, 115 (Wis. Ct. App. 1988).

[138] *See* David R. Barnhizer, *Prophets, Priests, and Power Blockers: Three Fundamental Roles of Judges and Legal Scholars in America*, 50 U. PITT. L. REV. 127, 160 (1988) ("To the extent that cases before them reveal substantial deviations from the content of the practical visions of justice they have attained, judges are obligated to decide those cases in accordance with what will do justice.").

[139] "Equity was transplanted to the American Colonies along with the common law. By the time of the Constitutional Convention in 1787, all thirteen states had, at one time or another, granted their courts or governors equity powers." John R. Kroger, *Supreme Court Equity, 1789-1835, And the History of American Judging*, 34 HOUS. L. REV. 1425, 1438 (1998) (citing the history of the Supreme Court's use of equity in its first forty-five years as a resource for the court in modern times).

[140] 20 F. Cas. 666 (D. Pa. 1789) (No. 11,754).

[141] "When mariners enter into articles for a voyage, they do not thereby put themselves out of the protection of the laws, or subject their limbs and lives to the capricious passions of a master or his mate." *Id.* at 667.

[142] The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction. . . .

U.S. CONST. art. III, § 2.

great degree of discretionary power.[143] Nonetheless, the court explained that "the law [the equity court] always watches the exercise of discretionary power with a jealous eye."[144] The court awarded the crew wages and ordered the ship owners to pay the costs of the suit.[145]

Regarding the continuing importance of the common law,[146] the text of UTC section 106 provides: "The common law of trusts and principles of equity supplement this [Code], except to the extent modified by this [Code] or another statute of this State."[147] The comment to section 106 of the UTC also states:

> The Uniform Trust Code codifies those portions of the law of express trusts that are most amenable to codification. The Code is supplemented by the common law of trusts, including principles of equity, particularly as articulated in the Restatement of Trusts, Restatement (Third) of Property: Wills and Other Donative Transfers, and the Restatement of Restitution. The common law of trusts is not static but includes the contemporary and evolving rules of decision developed by the courts in exercise of their power to adapt the law to new situations and changing conditions.[148]

UTC section 404 discusses trust purposes and provides: "A trust may be created only to the extent its purposes are lawful, not contrary to public policy, and possible to achieve. A trust and its terms must be for the *benefit* of its beneficiaries."[149]

Based on UTC sections 106 and 404, and backed up by the Restatement (Third), it appears that American courts will continue to work to create a well-balanced system of trust administration that will work equally well for settlors; trustees, both individual and corporate; and beneficiaries, both present and future. The name of the game today is working hard to achieve a balanced trust administration system that will avoid the costs of formal litigation whenever possible by informally solving problems and creating

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[143] *Rice*, 20 F. Cas. at 667.

[144] *Id.*

[145] *Id.*

[146] "The law of trusts is to be found for the most part in the decisions of the courts and not in the statutes." SCOTT ON TRUSTS, *supra* note 2, § 1.10, at 31. The UTC is itself a codification of the common law of trusts and in no way restricts the ability of an equity court to exercise its discretion and adapt the law to new situations. *See* UNIF. TRUST CODE § 106 cmt., 7C U.L.A. 162 (Supp. 2004).

[147] UNIF. TRUST CODE § 106, 7C U.L.A. 169 (Supp. 2004).

[148] *Id.* § 601 cmt., at 162.

[149] *Id.* § 404, at 183 (emphasis added).

workable solutions.[150]

Despite the general merging of law and equity,[151] we still speak of legal and equitable obligations because all the underlying distinctions between law and equity remain important.[152] In most states today, where law and equity have merged and are enforced by the same court, the equity judge is still (1) applying equitable procedures and remedies and (2) seeking the just result.[153]

Despite questions raised about the nature of the beneficiary's interest,[154] one point is clear: trusts are for the benefit of beneficiaries.[155] Unless the settlor is also a beneficiary, the settlor has no standing to enforce the trust.[156]

While the law traditionally has not treated trusts as contracts,[157] leading

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[150] *See* Whitman, *supra* note 12, at 294-95.

[151] Although a uniform separation between the courts of law and courts of equity existed in England at the time of the American Revolution, the governments of the United States used various methods to administer equity. In most states, remedies both at common law and at equity were administered by a single court. In the federal realm, the courts had equity jurisdiction equivalent to that of the English chancery court. Today, a distinction between actions at law and actions at equity no longer exists in the majority of states, such actions having been replaced by a "civil action" in which all legal remedies are received.

Joseph Hendel, *Equity in the American Courts and in the World Court: Does the End Justify the Means?*, 6 IND. INT'L & COMP. L. REV. 637, 643 (1996) (arguing that the American means-based equity system is more morally acceptable than the international ends-based equity system); *see also* BOGERT ON TRUSTS & TRUSTEES, *supra* note 76, § 1, at 7-8.

[152] "The civil action procedurally eliminates the distinction between law and equity, but the substantive distinction still remains: in both the state and federal courts, remedies at law and remedies at equity are recognized as separate." Hendel, *supra* note 151, at 643.

[153] *Id.*

[154] *See* Bohac v. Graham, 424 N.W.2d 144 (N.D. 1988) (holding that the settlor's intent is crucial in determining the beneficiary's interest in the trust); *see also* Hays v. Harmon, 809 N.E.2d 460, 469 (Ind. Ct. App. 2004):

> As to the beneficiaries' interest, the nature of this interest is to be determined from the terms of the trust. . . . In the case of a charitable trust, however, an otherwise indefinite devise is sufficiently ascertained if the trustee is empowered to devote the fund in such manner as he deems just and the purpose is not unlawful or against public policy.

(internal citation omitted).

[155] *See infra* note 156; *see also* RESTATEMENT OF TRUSTS § 3 (1935); BOGERT ON TRUSTS AND TRUSTEES, *supra* note 76, § 1, at 6; SCOTT ON TRUSTS, *supra* note 2, § 3.2, at 52.

[156] *See* RESTATEMENT (SECOND) OF TRUSTS § 200 cmt. b (1959).

[157] *See id.* § 197 cmt. b:

> A trustee who fails to perform his duties as trustee is not liable to the beneficiary for breach of contract in the common-law actions of special assumpsit or covenant or in a similar action at law in States in which the common-law forms of action

legal scholars[158] have acknowledged that trusts have a contractual aspect.[159] The Restatement points out, however, that "[t]his 'contractual approach' . . . was certainly a limited one. . . ."[160] Yet recently, Professor Langbein[161] advocated extending the contract approach, arguing that "[t]rusts *are* contracts."[162] This suggestion should be evaluated against the practical changes that would come about if trusts generally were considered simply to be contracts between the settlor and the trustee.[163] Today, action against a trustee for breach of duties essentially is not by contract or at law.[164] Except in very limited circumstances, the jurisdiction of equity remains exclusive.[165] The remedy against the trustee remains in the hands of the beneficiary.[166] Conceivably, equity courts may embrace an allegation that a trustee has failed to establish a proper resolution procedure or has failed to implement it in good faith.[167]

VIII. TOWARD A PROPER RESOLUTION PROCEDURE

Some years ago, the author founded and chaired a Law Professor

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have been abolished. The creation of a trust is conceived of as a conveyance of the beneficial interest in the trust property rather than as a contract.

[158] Professor Austin Scott served as the reporter for the Restatement (First) of Trusts. RESTATEMENT (FIRST) OF TRUSTS Introduction, at x (1935). Professor Scott also was the Dane Professor of Law at Harvard University. SCOTT ON TRUSTS, *supra* note 2, at title page.

[159] *See id.* § 1, at 2.

[160] RESTATEMENT (THIRD) Reporter's Notes on § 2, at 33 (2003).

[161] Professor Langbein has been the Chancellor Kent Professor of Law and Legal History at Yale Law School since 1990. Professor Langbein is an adviser to the American Law Institute's Restatement of the Law of Trusts (Third) and a member of the drafting committee on the UTC. Professor Langbein's impressive Curriculum Vitae can be found at http://www.law.yale.edu/outside/html/faculty/langbein/cv-langbein.pdf (last visited Jan. 1, 2005).

[162] *See* John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 627 (1995) (suggesting that the settlor is free to make any deal with the trustee) (emphasis added).

[163] *See id.*

[164] *See* RESTATEMENT (SECOND) OF TRUSTS § 197, at 433 (1959).

[165] *See* BOGERT ON TRUSTS, *supra* note 72, § 157, at 559 (stating that a court of law can give relief when the amount requested is certain or easily ascertainable); *see also* RESTATEMENT (SECOND) OF TRUSTS § 198 at 434 (1959).

[166] *See* RESTATEMENT (SECOND) OF TRUSTS § 200, cmt. b (1959).

[167] *See* John Gibeaut, *Stock Responses–Shareholders Ask For Changes in Corporate Governance, and the Courts are Starting to See it Their Way*, A.B.A. J., Sept. 2003, at 38, 40 ("'It's the same chancellor; it's the same law,' Veasey says. 'But we use the common law. The common law is always evolving. As so, the expectations of directors are evolving.'") (quoting Chief Justice E. Norman Veasey).

Advisory Group for Trusts and Estates ("Advisory Group").[168] Thirty law professors banded together to suggest improvements in the system that would be in the public's interest. The Advisory Group believed that powerful forces were shaping trust and estate law to meet their own short- sighted ends.[169] For example, the Advisory Group was aware that, historically, Charles Dickens had exposed corruption in the English probate system[170] and that in America, politicians like those in Tammany Hall in New York City[171] dispensed patronage from the New York Surrogates Court.[172] The Advisory Group wanted to find identifiable areas of present practice that appeared to invite suggestions for improvement.

When the Advisory Group opened for business, it received a wide variety of complaints from trust beneficiaries. Common concerns expressed included: (1) unwillingness of trustees to cooperate with requests for infor-

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[168] The Advisory Group was composed of some thirty law professors and additional members of collateral boards who all pledged to attempt to improve the administration of trusts. The most recent chair of the Advisory Group was Professor Ronald Chester of New England Law School.

[169] The Uniform Trust Act is an example.

> The banking industry has always been involved in the evolution of the Uniform Trust Act. It was first suggested "by the Trust Division of the American Bankers Association (ABA)["] in order to, in part, relax a few equity rules regarding trust administration . . . in order to facilitate convenience in the (corporate) administration of trusts." The ABA continues to advise the Commission as to whether its state banking affiliates (lobbies) will provide the support that can be so critical for its enactment.

Standish H. Smith, *Reforming the Corporate Administration of Personal Trusts–The Problem and a Plan*, 14 QUINNIPIAC PROB. L.J. 563, 564 (2000) (footnote omitted) (calling for reforms in the corporate fiduciary system that will level the playing field between the trustee and beneficiary).

[170] *See* CHARLES DICKENS, BLEAK HOUSE (Norman Page ed., Penguin Books 1971) (1853) (providing a scathing criticism of the drawn-out probate process of the nineteenth century English Court of Chancery).

[171] *See* Joseph E. Ritch, *They'll Make You an Offer You Can't Refuse: A Comparative Analysis of International Organized Crime*, 9 TULSA J. COMP. & INT'L L. 569, 593 (2002) (stating that Tammany Hall is widely recognized as the symbol of political corruption throughout the world and laid the foundation for organized crime groups to gain protection from law enforcement activities).

[172] "Critics in New York have long contended that the surrogate's courts power to appoint guardians has been abused." Mayor Fiorello H. LaGuardia called the surrogate's court "the most expensive undertaking establishment in the world" when, during his anti-Tammany administration, he found himself unable to cut off that source of patronage to Tammany lawyers. JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, & ESTATES 212 n.4 (6th ed. 2000) (quoting Tom Goldstein, *Once More, Surrogate Talk*, N.Y. TIMES, Sept. 4, 1977, at E5).

mation,[173] (2) unwillingness to admit any wrongdoing,[174] (3) lack of resolution procedures short of litigation,[175] and (4) difficulty accessing the courts for powerless trust beneficiaries.[176]

The Advisory Group had no statistical data (and still does not)[177] on the subject of trust beneficiary satisfaction. The Advisory Group assumed (and the author thinks it likely remains true)[178] that the American trust system worked fairly well overall. The Advisory Group also assumed that most trustees, individual and corporate, were honest and hard working and that most trust beneficiaries appreciated the efforts made on their behalf.[179] But cases repeatedly came up in which what appeared to be meritorious complaints were not dealt with in any way other than by forcing formal litigation.[180] The Advisory Group was not concerned so much with the merits, or lack thereof, of any particular complaint, but rather with the set up for resolving complaints. The Advisory Group found that resolution procedures varied dramatically depending on who was the trustee,[181] the circumstances of the case,[182] the probate court rules and procedures,[183] and the expectations of the parties.[184]

Most corporate fiduciaries interviewed by the Advisory Group reported that the following resolution procedures were available to beneficiaries presenting a complaint:

1. Speaking with the trust officer.
2. Failing resolution, speaking with a senior trust officer.

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[173] *See* Telephone Interview with Standish Smith, *supra* note 40.

[174] *See* Whitman & Paturi, *supra* note 4, at 70.

[175] *See* DiCarlo, *supra* note 1.

[176] *See* Whitman & Paturi, *supra* note 4, at 70.

[177] *See id.* at 68.

[178] *See* Whitman, *supra* note 13.

[179] *See* Whitman, *supra* note 12, at 291; *see also* David A. Baker & Mary K. McWilliams, *Defending the Fiduciary*, *in* ESTATE, TRUST, AND GUARDIANSHIP LITIGATION Ch. 1 (David A. Baker ed., Illinois Institute for Continuing Legal Education Main Handbook 2002 ed.) (stating that fiduciaries rarely breach the duties of loyalty, care, and impartiality).

[180] *See* Whitman, *supra* note 13, at 3.

[181] "The demands on the trustee often require tremendous skill in teaching, mentoring, motivating, and problem solving. In the most successful relationship, the trustee views its role as a partner, not as a custodian." Hausner & Freeman, *supra* note 3, at 604.

[182] *See supra* text accompanying note 31.

[183] *See* Whitman & Paturi, *supra* note 4, at 70-71.

[184] Reasonable expectations by both parties involved leads to proper administration of the trust. *See* Hausner & Freeman, *supra* note 3, at 607. "Beneficiaries who have a clearer understanding regarding trust administration are far less likely to complain." Whitman, *supra* note 12, at 296.

3. Still failing resolution, speaking to the head of the trust department.

Failure to reach resolution after this three-step process meant that the beneficiary needed either to abandon the complaint or retain a lawyer and move to formal litigation.[185] The obvious weakness in this resolution procedure is that the person hearing the complaint often is the same person about whom the beneficiary is complaining.[186] When this happens, the conflict of interest is clear.[187] Furthermore, even if the executive department of the bank heard the complaint, upper management of the bank would be disassociated from any direct concern for the fiduciary obligation. Management normally is concerned more with the impact that adverse litigation could have on bank profits.[188] In short, outside of the trust department, banking executives appear less concerned with fiduciary duty and more concerned with bottom-line profits.[189]

Once a complaint passes beyond a certain point, the overriding obligation of the fiduciary to the beneficiary often disappears.[190] In formal litigation, should all overriding duties to the trust beneficiary be suspended?[191] The Advisory Group discovered that when the litigation team arrived, a distinct shift from reasonableness and flexibility to hard ball litigation often occurred.[192] The shift can be seen in the following example:

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[185] *See generally* Young, *supra* note 50.

[186] While trustees owe a fiduciary duty to the beneficiary, imagining how trustees could be objective in this situation, especially when their reputation is on the line is difficult. A corporate fiduciary is further constrained because if the fiduciary acquiesces to the need of the beneficiary, the fiduciary may anger its other master, the employer, who is motivated by profit margins. Outside of the trust department, profit may trump fiduciary duty.

[187] *See* Smith, *supra* note 169, at 567.

[188] Banks often are more concerned with the negative opinion that comes with litigation. Compliance units at banks with fiduciary services assess the risk to earnings or capital arising from negative public opinion. *See* Locke, *supra* note 41, at 151.

[189] *See* Whitman, *supra* note 12; *see also* Whitman & Paturi, *supra* note 4, at 69 n.7.

[190] Litigation is usually left to the litigators. . . . Litigation is not an enjoyable process for most people, except the ones getting paid. There are lawyers who do it well and who are courteous, efficient and knowledgeable. However, most of the time, attorneys abuse the process with threats, intimidation and poor lawyering.

Locke, *supra* note 41, at 141-42. Also, some litigators file suit before alternative dispute resolution procedures can be discussed to cut off this avenue of resolution. *See id.* at 153.

[191] Some courts have held that the fiduciary duty should not be suspended. *See In re* Trust Created by Hill, 499 N.W.2d 475 (Minn. Ct. App. 1993) (denying the plaintiff's claim of hostility on the part of the trustee and finding that the defendant trustee had not breached his fiduciary duties any time during the three year litigation process).

[192] "Whether we like it or not, 'hard-ball' tactics, 'scorched earth' strategies, and so-

> A Princess Diana memorial fund has stopped giving grants to charities because of financial problems linked to its bitter legal feud with the American collectibles maker, the Franklin Mint, the fund's top administrator [explained] . . . . Until the court battle is resolved, the Diana, Princess of Wales Memorial Fund is asking other trusts to make good on the $16 million in grants it has already pledged to beneficiaries—including charities working with land mine victims and AIDS sufferers, said chief executive Andrew Purkis. . . . Fund trustees decided to freeze the fund's $89.6 million in assets to ensure it could pay any legal bills.[193]

Viewing American-style litigation today, it does not seem coincidental that our English ancestors, the Normans, decided their disputes by armed combat.[194] Arguably, the key mistake in legal theory today is that once the litigation stage is reached, the fiduciary, individual or corporate, no longer recognizes that the fiduciary still has an obligation to continue to protect the overriding interest of beneficiaries.[195] Even before the formal litigation stage, to what extent should attorneys for the corporate fiduciary be focusing on protecting the fiduciary in the event of litigation?[196] If the fiduciary is

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called 'take no prisoners' litigation are not only in vogue these days, but often are required of lawyers in the aggressive pursuit of their clients' interests." Paul L. Friedman, *Taking the High Road: Civility, Judicial Independence, and the Rule of Law*, 58 N.Y.U. ANN. SURV. AM. L. 187, 191 (2001) (calling for a restoration of civility in the legal profession to safeguard the essential independence of the courts and sustain the rule of law).

[193] Pat Seremet, *Princess Di Fund Woes*, HARTFORD COURANT, July 14, 2003, at D2.

[194] *See* Jeffrey Robert White, *Important Civil Trials of the Millennium: It's Been a Long Road From Trial by Combat to Trial by Jury*, TRIAL, Mar. 2000, at 62 (tracing the milestones in the development of the civil justice system from the Norman Conquest to modern times); *see also* Holdsworth, *supra* note 101, at 308-10.

[195] In matters involving fiduciary duties outside of the trustee and beneficiary dynamic, it has been held that the obligation extends through the litigation. *See* Eugene R. Anderson et al., *Procedural, Practical, Tactical, and Strategic Issues in Insurance Coverage Disputes Stemming from Mass Tort Claims*, at 207, 232 (PLI Litig. & Admin. Practice Course, Handbook Series No. H4-5128, 1992) ("In a practical sense, the insurer occupies a position comparable to that of a trustee for the benefit of its insureds. This is the very essence of a fiduciary obligation. An insurance company's fiduciary obligation continues even during litigation with its policyholder.") (internal citation omitted).

[196] There are two competing views on the duties an attorney owes a fiduciary. The majority holds that the fiduciary is the sole client of the attorney—fiduciary duties do not exist between the attorney and the beneficiaries. The minority holds that an attorney retained by the fiduciary for the purposes of trust administration actually represents the trust and its beneficiaries. In the minority jurisdictions, the attorney-client privilege will not prevent the disclosure of conversations with the trustee to the beneficiary, even if the two have a dispute. *See* Steven M. Fast, *Walking the Line Between Protecting the Trustee and Protecting the Beneficiary*,

overly concerned with its own protection, might that in itself be a breach of its fiduciary obligation?[197] How should the trust officers be instructed to act?[198]

In nineteenth century American jurisprudence, legal scholars and legislatures (clearly influenced by powerful corporate fiduciary interests)[199] made a concerted effort to bury the fact that fiduciaries are continually obligated to beneficiaries until the fiduciary properly resigns.[200] A proper resignation may be either court-approved, beneficiary-approved, or occur in connection with the proper termination of the trust.[201] The attempt to hide fiduciary obligation to the beneficiaries was carried out by over-stressing the need to satisfy the intention of the settlor,[202] by viewing a fiduciary's duties

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SG012 ALI-ABA 1, 3-4 (July 2001) (offering guidance to attorneys on how to represent the interests of the fiduciary properly).

[197] The main purpose of the trustee is to administer the trust for the benefit of the beneficiary. *See supra* note 84 and accompanying text. A trustee may be breaching the fiduciary duty if in litigation it appears that concern for the trustee's own survival trumps an obligation to the beneficiary because it may be construed as not acting in the best interests of the beneficiary. *See supra* note 2 and accompanying text.

[198] *See* DiCarlo, *supra* note 1; *infra* Appendix.

[199] In 1870, for example, the Pennsylvania legislature specifically authorized trustees to invest in bonds of the Pennsylvania Railroad Company; an act of 1872 did the same favor for bonds of the Philadelphia and Reading Railroad Company. It must have been clear to all where the impetus for these laws arose. This was not a plain and narrow path but an invitation to corruption.

Lawrence M. Friedman, *The Dynastic Trust*, 73 YALE L.J. 547, 562 (1964) (describing trust law as a reflection of social, psychological, legal, and economic sources).

[200] "But if the trustee has once accepted the trust, he cannot relieve himself of his duties under the trust, unless he is permitted to resign." 2 SCOTT ON TRUSTS, *supra* note 2, § 106, at 96. "If the trustee once accepts the appointment as trustee, he is under a duty to administer the trust as long as he continues to be trustee." *Id.* § 169, at 310. "It is the duty of a trustee to administer the trust solely in the interest of the beneficiaries." *Id.* § 170, at 311.

[201] *See* 2 SCOTT ON TRUSTS, *supra* note 2, §§ 106-106.3, at 96-102,; 4A SCOTT ON TRUSTS, *supra* note 2, §§ 344, at 542; *see also* BOGERT ON TRUSTS AND TRUSTEES, *supra* note 76, §§ 511, 1010, at 4, 448.

[202] In Claflin v. Claflin, 20 N.E. 454 (Mass. 1889), the Massachusetts Supreme Judicial Court held that a testator has a right to place restrictions on the property in trusts if the testator does not contravene public policy.

> The *Claflin* rule therefore vests the power of termination, in trusts of this type, in the hands of the trustee rather than the beneficiary. The trustee wields that power as the earthly representative of the dead settlor. The rule has practical significance only if the trustee out of respect for the dead or some other motive, refuses the beneficiary's request. Insofar as *Claflin* favors the settlor's wishes over those of the beneficiary, it reflects the attitude of the dynastic trust.

Friedman, *supra* note 199, at 586.

as running to the trust property rather than directly to the beneficiaries,[203] and by stressing the right of the fiduciary to protect itself before and while engaging in litigation.[204]

The basic nineteenth century approach in trusts (and elsewhere) was to attempt to obliterate the need for an equitable result by framing theory exclusively in law.[205] A good example is the classic Williston and Corbin debate in connection with the Restatement (First) of Contracts.[206] The Restate-

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[203] *See generally* Friedman, *supra* note 199.

[204] The courts and academics authorized the fiduciary to favor the trust contract more than the beneficiary by stressing the right of the settlor and enforcing the intent of the settlor in the trust language. Thus, by de-emphasizing the equitable duties of the fiduciary, the trustee had more protection during litigation. Professor Langbein is seemingly in step with this nineteenth century approach in his article stressing the importance of contract law in trust analysis.

> When an indignant court follows Cardozo and limits its analysis to sounding off about fiduciary standards being "stricter than the morals of the market place" and "the punctilio of an honor the most sensitive," the court is neglecting to discuss whether the underlying deal supports the level of fiduciary obligation that the court invokes.

Langbein, *supra* note 162, at 658.

The rights of the settlor and the rise of contract led to a suggestion that a settlor could form a quiet trust if the settlor wanted to keep his intentions secret. This trust restricts the beneficiary from obtaining information on the trust. By appointing a trust protector, the beneficiary is protected from malfeasance by the trustee. *See* Kozusko, *supra* note 67, at 21-22 *But see* Whitman, *supra* note 67 (arguing that nondisclosure is risky to beneficiaries both emotionally and financially).

[205] *See generally* Gregory S. Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189, 1213-15 (1985) (stating that the goal of classicist legal thought in the nineteenth century was synthesizing equity and common law for greater stability).

[206] Samuel Williston, Harvard Law School professor, served as the reporter for the Restatement (First) of Contracts and was a follower of the conceptual school of thought. Conceptualists believed that the law was a system of relatively few fixed, general principles. Professor Arthur Corbin of Yale Law School served as an advisor to the Restatement (First) of Contracts and was more aligned with the legal realist approach to law. American legal realists believed that the law should not be static and instead should be adaptable to the social and moral norms of the time. The two legal giants clashed during the Restatement meetings on what constituted consideration. Williston's position ultimately prevailed and is found in section 75 of the Restatement (First) of Contracts. Corbin's position, though not included in the definition of consideration, was included as section 90 of the Restatement (First) of Contracts and represented a broad definition of what could constitute a contract. However, with the passage of time, Corbin's position prevailed. *See* GRANT GILMORE, THE DEATH OF CONTRACT 58-65 (1974). *See also* Daniel J. Klau, *What Price Certainty? Corbin, Williston, and the Restatement of Contracts*, 70 B.U. L. REV. 511, 522-27 (1990) (discussing the conflict between Corbin, the archetypal legal realist, and Williston, the conceptualist, in forging the Restatement (First) of Contracts).

ment (First) of Contracts reporter was Professor Williston from Harvard.[207] He proposed the concept of consideration as the sole basis for an enforceable contract.[208] Professor Corbin[209] from Yale offered up the doctrine of promissory estoppel as another route to an enforceable contract.[210] Those familiar with the legal history of the 1930s understand that Harvard Law School was the bastion for the scientific calculation of law,[211] and Yale Law School[212] was home of Corbin, Llewellyn,[213] and Frank,[214] who together created the foundation for the American Legal Realist School.[215] Professor Austin Scott[216] was from Harvard and designed the Restatement (First) of Trusts in a manner that scientifically categorized the legal doctrines.[217]

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[207] *See* GILMORE, *supra* note 206 and accompanying text.

[208] *See id.* at 62.

[209] *See id.* and accompanying text.

[210] *See id.* at 64.

[211] Dean Langdell of Harvard is credited with introducing the scientific study of the law as early as 1870. His case-based study of the law to extract legal principles is still in use today. *See* ALBERT J. HARNO, LEGAL EDUCATION IN THE UNITED STATES 53-59 (1953).

[212] "The Yale Law School faculty was congenial, fun-loving, hardworking, and relentlessly intellectual . . . . [N]ot a person on it did not profess to be a realist." LAURA KALMAN, LEGAL REALISM AT YALE 1927-1960 at 119 (2001).

[213] Professor Karl Llewellyn was the true mastermind behind the American legal realist movement, which held as one of its tenets that the meaning of law was derived from its relation to laymen and not to courts. *See* N.E.H. HULL, ROSCOE POUND & KARL LLEWELLEYN 171-72 (1997).

[214] Jerome Frank argued in his book, LAW AND THE MODERN MIND, that individual factors often influenced judges when they made a decision. After reaching a decision, a judge would then rationalize the decision with a discussion of case law. Professor Frank considered Yale Law School his spiritual home and began his affiliation with the school in 1932. *See* KALMAN, *supra* note 212, at 6-7, 171-72.

[215] Legal realism is the theory that law is based not on formal rules or principles but instead on judicial decisions that should derive from social interests and public policy. BLACK'S LAW DICTIONARY 907 (7th ed. 1999).

[216] *See supra* text accompanying note 158.

[217] Launched in 1923, the restatement project may well have represented the final effort to realize Langdell's ideal of a science of law. By restating the law in a clear and simple fashion, the institute hoped to illuminate its correct principles. The institute selected Harvard law professors Beale, Williston, Francis Bohlen, and Warren Seavey as the reporters of its four restatements. Each was assigned a subject: Williston drew contracts; Beale, conflicts; Bohlen, torts; and Seavey, agency. Subsequently their colleague Austin Scott agreed to write the restatement of the law of trusts. The institute directed its reporters to "make certain much that is now uncertain and to simplify unnecessary complexities" and "to promote those changes which will tend better to adapt the laws to the needs of life." As work progressed, the institute abandoned the second objec-

The Restatement (First) of Trusts might have been drafted differently if Scott had seen the fiduciary relationship to the beneficiaries in the way Justice Benjamin Cardozo saw it when he announced *Meinhard v. Salmon*:[218]

> Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.[219]

The introduction to the UTC[220] explains that the purpose of the UTC is to fill in trust law missing from many states.[221] Actually, it can be argued that creating the UTC makes no sense at all unless it helps to create a better functioning trust system that better balances the rights and needs of settlors, beneficiaries, and trustees.[222] Realistically, however, a forthright statement to that effect might have doomed the adoption of the UTC, given the power of the banking lobby over state legislatures.[223]

> tive, telling its reporters to "state clearly and precisely in the light of the decisions the principles and rules" of existing law. Increasing legal certainty became the institute's only objective, a goal underlined by its decision to print the rules in especially bold black letters.

KALMAN, *supra* note 212, at 14 (footnotes omitted).

[218] 164 N.E. 545 (N.Y. 1928).

[219] *Id.* at 546 (internal citation omitted).

[220] UNIF. TRUST CODE prefatory note, 7C U.L.A. 143 (Supp. 2004).

[221] This greater use of the trust, and consequent rise in the number of day-to-day questions involving trusts, has led to a recognition that the trust law in many States is thin. It has also led to a recognition that the existing Uniform Acts relating to trusts, while numerous, are fragmentary. The Uniform Trust Code will provide States with precise, comprehensive, and easily accessible guidance on trust law questions. On issues on which States diverge or on which the law is unclear or unknown, the Code will for the first time provide a uniform rule.

Id. at 144.

[222] *See* Halbach, *supra* note 8, at 1908.

[223] Drafting the UTC, as well as drafting other uniform acts, is a highly

The author was privileged to be able to sit on the UTC drafting committee as an observer and advisor.[224] This opportunity was an interesting experience. In the author's view, not enough attention was paid to the idea that a major goal of the new legislation should be to protect the right of a trust beneficiary to complain, because allowing complaints to be properly heard is good for business.[225] Although it may be that most complaints are spurious,[226] some are not.[227] Further, if a complaint is not fairly heard and if the beneficiary is given a hard time, the fallout is that the beneficiary walks away and tells everyone that our trust system is unfair.[228]

Lest the author be misunderstood, he fully recognizes that many beneficiary complaints lack merit,[229] many beneficiaries are unrealistic and hard to deal with,[230] and that trust companies must be profitable.[231] The reality is that if the law now changed course and took away that profitability, trust companies would close their doors and look for something else to do.[232] From the author's point of view, a balanced system can protect the settlor's interests

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> political process. The Commissioners are anxious to create Acts that will be broadly passed by the states so that they are quite sensitive to the lobbying efforts of powerful groups. In the case of the UTC, this would include the lobbying efforts of major corporate fiduciaries. It is noteworthy that the UTC's stated goals do not emphasize an attempt to fashion a trust administration system that creates a fairer and more level playing field for all of the interested parties, or a system that works better than the systems now in place. Given the checkered and political history of probate and trust administration, the NCCUSL may have missed an opportunity to create a uniform act that would be truly groundbreaking.

Whitman & Paturi, *supra* note 4, at 66 n.2; *see also* Smith, *supra* note 169 and accompanying text.

[224] They also invited Standish Smith of the Heirs Group and Professor Ronald Chester of the New England School of Law as observers and advisers. In a number of cases, formulations worked out during the drafting sessions were later revised without notice to the invitees. These changes were undoubtedly due to pressure from powerful corporate banking lobbying groups.

[225] *See* DiCarlo, *supra* note 1.

[226] *See* Whitman, *supra* note 13, at 3.

[227] *See* Whitman & Paturi, *supra* note 4, at 67-68.

[228] "It certainly might quiet the constant trust beneficiary complaint that when they complain, they get no respect from their trustee (individual or corporate)." Whitman, *supra* note 13, at 4.

[229] *See id.* at 3.

[230] *See* Engelhardt & Whitman, *supra* note 21, at 15.

[231] Because trust maintenance is a business, corporate fiduciaries are entitled to maintain a profit. However, time spent on increasing the degree of profit should be subservient to time spent dealing with concerns arising out of the trust. *See* Whitman, *supra* note 13, at 293-94.

[232] *See generally id.*

(as best as we can know them or think we know them), protect beneficiary rights, and keep trustees and trust companies operating with a reasonable amount of earned profits.[233]

IX. CONCLUSION

Globalization of the trust business is a coming reality.[234] If American trust companies are to retain their leadership role,[235] a proper resolution procedure, short of formal litigation, should be made available by all fiduciaries.[236] Not only is it beneficial for business because it reduces litigation costs, but this procedure also is beneficial for all parties involved because it encourages cooperation. The Restatement (Third) and the UTC have opened the door for change that will ensure America's leadership role, but the fiduciary community must be willing to take up the challenge.

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[233] *See generally id.*

[234] *See supra* note 7 and accompanying text; *see also* Alexander A. Bove, Jr., *The Purpose of Purpose Trusts*, PROB. & PROP., May-June 2004, at 34 (discussing the rise of purpose trusts in foreign jurisdictions); Steven M. Fast et al., *Drafting to Excess*, SJ001 ALI-ABA 109 (July 2003) ("As trust law has evolved, particularly through uniform laws, it has increasingly restrained the intent of settlors. This has resulted in some settlors choosing to establish their trusts offshore. . . ."); *cf.* O'Beirne, *supra* note 5 (discussing the impact of the European Union on the global market).

[235] *See generally* Blattmachr & Hompesch, *supra* note 5.

[236] *See* Whitman, *supra* note 13, at 3.

APPENDIX

Trust Company
Beneficiary Dispute Resolution Procedure

Introduction

TRUST COMPANY believes that good client relations are important to its future success as a professional administrator of trusts. In its role as a trustee, TRUST COMPANY recognizes its fiduciary responsibilities to provide to the client a means of resolving misunderstandings/disagreements/disputes that may arise from time to time between our clients (beneficiaries, settlors) and TRUST COMPANY. In this regard, TRUST COMPANY has made a commitment not only to increase its efforts to identify and deal with client issues in a timely manner but also to improve its policies/procedures to forestall the need for future remedial action. Clearly, TRUST COMPANY cannot guarantee that mediation (whether internal or external) will result in a solution that will fully satisfy any particular client. Nevertheless, it is believed that by becoming an active partner in the dispute resolution process, many issues can be resolved amicably as well as cost effectively. To this end, TRUST COMPANY has designated _____ to serve as the neutral contact party and resolution officer ("Resolution Officer") for clients who wish to offer suggestions or seek resolution of a complaint pursuant to the attached procedures. TRUST COMPANY sincerely believes that a majority of disputes can be resolved without the need to resort to litigation if both parties are willing to work together in a spirit of cooperation. TRUST COMPANY offers the following mediation procedure.

Procedure

1. Every beneficiary concern, whether made formally or informally, in the form of a casual remark or even in jest, is reported to the relationship manager's staff manager, and the staff manager will then, through the relationship manager, craft a response.
2. The staff manager will determine whether a beneficiary concern should be classified as a "complaint," as defined in _____.
3. Every complaint is acknowledged within three days of receipt as directed by the staff manager.
4. The staff manager will attempt to resolve the complaint in a reasonable fashion. If the staff manager concludes at any time that the complaining party is not reasonably satisfied with the response, including any proposed or executed remedy, the complaining party shall be informed of the opportunity to refer the matter to the Resolution Officer. The staff manager may directly and immediately refer the matter to the Resolu-

tion Officer as well in his or her discretion.

5. If all beneficiaries then eligible to receive Trust distributions ("qualified beneficiaries") are not aware of the complaint, the relationship manager will notify them upon referral to the Resolution Officer of the complaint and the initial suggested resolution to the complaint.
6. The Resolution Officer is designated from time to time by the Trust Administrative Committee ("TAC") and is neither a member of TAC nor connected with the matter generating the complaint.
7. The Resolution Officer will make appropriate inquiry and advise TAC, with copy to the relationship manager, whether the initial response was appropriate and, if not, set out a recommended response.
8. In order to reach this recommended response, the Resolution Officer, as a neutral party, may meet with the respective parties in order to attempt to reach an agreed upon resolution or a proper resolution procedure. Depending on the circumstances of the case, the Resolution Officer can suggest a number of procedures for resolving the matter, including mediation, arbitration, a decision by the resolution officer, or any other reasonable procedure, short of formal litigation.
9. If TAC fails to object within thirty business days to the Resolution Officer's proposed response, the Resolution Officer will direct the staff manager and relationship manager to respond according to the terms of the proposed response and so advise the qualified beneficiaries.
10. Questions such as (but not limited to) who bears the expense of the resolution procedure, which parties are to be involved in the process, and the finality of the decisions reached, shall be subject to good faith negotiation between the trust department, the qualified beneficiaries, and the Resolution Officer.

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