Chapman and Cutler LLP

Chapman Client Alert

July 15, 2019 Current Issues Relevant to Our Clients

The New Illinois Trust Code: What It Means for Trustees and Trustmakers

Last week, Governor Pritzker signed HB 1471, giving Illinois new trust laws as of January 1, 2020. This Alert is the first installment in a six-part series on the new Illinois Trust Code ("*ITC*"), a version of the Uniform Trust Code ("*UTC*"). This series will highlight the significant changes to Illinois law, and also note where the Illinois statute varies from the UTC.

This Alert covers some of the new rules that apply to trustees. The ITC codifies the familiar duties of trustees, including the duty of loyalty, the duty for prudent administration, and the duty to account. Previously, these duties and their scope were a product of court decisions and treatises. There are four particularly notable changes that trustees should be aware of, and that individuals or bank trust departments should note when accepting new trusteeships after January 1st. Trustmakers (the creator or settlor of a trust) and their advisers should also be aware of these changes.

Duty to Account and Inform

Under previous Illinois law (the Illinois Trusts and Trustees Act), the duty to account was codified, but was very basic: a trustee must provide an accounting, at least annually, to current income beneficiary(ies). The trustee must also provide an accounting to the remainder beneficiaries at the termination of the trust. Except for certain actions of the trustee (delegation of investment authority, investment in affiliated mutual funds, decanting, and conversion to total return trust), there were no *statutory* duties of notice or duty to inform. Traditionally, any duties that a trustmaker (the creator or settlor of a trust) wanted to impose had to come from the trust instrument.

The ITC adopts the prior Illinois statute on accountings for all trusts that were irrevocable before January 1, 2020, and for a trustee of a revocable trust who began acting prior to January 1, 2020. For any trusts that become irrevocable after January 1, 2020, the ITC expands the class of beneficiaries who receive accountings and adds notice requirements. If a trust was revocable as of January 1, 2020, and becomes irrevocable thereafter, the new ITC rules on accounting and notice will only apply once there is a change in trustee.

Delivery of accounts. Under the ITC, a trustee must provide accountings, at least annually to (a) all current beneficiaries, that is any beneficiary who *could* receive a distribution at that time or any beneficiary who holds a presently exercisable general power of appointment, <u>and</u> (b) all presumptive remainder beneficiaries (which is a term defined by the ITC). Although the trustmaker can limit or even eliminate the duty to account to presumptive remainder beneficiaries, the trustmaker cannot eliminate the duty to account to all current beneficiaries. The trustee may deliver the accounting to a representative of a beneficiary. The topic of what beneficiaries can have a representative and who can be a representative will be addressed in our third Alert on the new Illinois Trust Code.

Notices. A trustee is required to provide notice, to all current beneficiaries and all presumptive remainder beneficiaries, in five different circumstances: (a) when a trust becomes irrevocable, (b) when there is a new trustee or a change in the trustee's contact information, (c) when a trustee resigns, (d) when a trustee is changed, or (e) when there is a change in the trustee's compensation. Some of these notices must be given within a certain time period (within 90 days) or, in the case of a change in compensation, in advance of the change. A trustmaker may narrow or even eliminate any one or more of these notice requirements, except the first one. A trustee must provide notice to all of these beneficiaries when a trust becomes irrevocable within 90 days (or within 90 days of acceptance, if the trustee was not acting when the trust became irrevocable).

These new accounting and notice requirements may require process changes for large corporate trust departments who regularly provide trust-related notices and accountings. To be prepared for these changes when the ITC goes into effect, careful attention should be paid to each of these new requirements to develop comprehensive new internal processes to ensure compliance with the ITC.

Exculpation of Trustee

Another important change in the duties of a trustee is with respect to exculpation clauses. Under previous Illinois law, the creator of a trust could exonerate the trustee from personal liability by inserting an exculpatory clause into the trust (subject always to the trustee's obligation to act in good faith). Such exculpatory clauses can still be added by a trustmaker. However, there is now a statutory presumption that such a provision is invalid if the trustee drafted or caused the exculpatory clause to be drafted. The trustee must be able to prove that the clause is fair under the circumstances and its existence and contents were adequately communicated to the trustmaker. This standard will be met if the trustmaker was represented by independent counsel in the drafting of the trust. Thus, new trustees will need to exercise care when asking for these exculpation clauses, lest they be presumed invalid.

Delegation

Under prior Illinois law, a trustee was not allowed to delegate any acts involving judgement or discretion, except for investments where it was prudent to do so, or where the trust instrument permitted the trustee to do so. Under the ITC, a trustee may delegate any duties and powers that a prudent trustee of comparable skills could properly delegate, so long as the trustee exercises reasonable care in the selection and monitoring of the delegee. If a trustee chooses to exercise this new ability to delegate, the trustee should understand that delegation requires careful selection and supervision and should not be taken lightly.

Discretionary Powers

The ITC adds new "savings" provisions that can limit the discretion given to a trustee in two situations. These "savings" provisions are designed to avoid the situation where a beneficiary who is also trustee or has the power to remove and replace a trustee has an inadvertent general power of appointment. The savings provisions work in two ways: (a) a beneficiary (other than a trustmaker) who is the sole trustee and has broad discretion to make distributions, can only make distributions to him or herself based on an ascertainable standard and may not make distributions to discharge personal obligations; and (b) where a beneficiary can unilaterally remove and replace a fiduciary with another fiduciary who is related to or subordinate to the beneficiary, that successor fiduciary's powers are similarly limited with respect to distributions to that beneficiary. A trustmaker can override these "savings" provisions and still give a trustee these broad powers, so long as it is clear that was the trustmaker's intention.

Conclusion

While the ITC may require shifts in processes and procedures for corporate and individual trustees, the best offense is a good defense. Spending time with the new regulations will ensure an opportunity to evaluate the similarities and differences of the ITC and prepare trustees for compliance with the new laws. Understanding the new laws will also assist trustmakers and their advisors in preparing new or revising existing trust agreements where needed.

For More Information

If you would like further information concerning the matters discussed in this article, please contact any of the following attorneys or the Chapman attorney with whom you regularly work:

David S. Crossett
Chicago
312.845.3011
crossett@chapman.com

Joseph P. Lombardo
Chicago
312.845.3428
lombardo@chapman.com

David A. Lullo
Chicago
312.845.3902
lullo@chapman.com

Rebecca Wallenfelsz
Chicago
312.845.3442
wallen@chapman.com

Mia D. D'Andrea
Chicago
312.845.3766
dandrea@chapman.com

Sara Ghadiri
Chicago
312.845.3735
ghadiri@chapman.com

Bryan E. Jacobson
Chicago
312.845.3407
bjacob@chapman.com

John C. Lulay
Chicago
312.845.3833
jlulay@chapman.com

Eric Silvestri
Chicago
312.845.3915
silvest@chapman.com

Chapman and Cutler LLP

Attorneys at Law · Focused on Finance®