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TRUST AND ESTATE 2016-1

A PRACTITIONER'S PERSPECTIVE ON EMERGING LEGAL TRENDS

Watch Out for Trust and Estate Risk

Claims against lawyers arising from trust and estate engagements are skyrocketing in both number and severity. CNA data reveals that claim frequency is 25% higher for trust and estate representations compared to all other areas of practice. Multiple factors unique to this area of practice raise claim frequency.

These engagements are frequently complex matters that require a lawyer with specialized experience and training. Prior to accepting a representation relating to complex wills and trusts, attorneys would be well-served to ask themselves, "are these types of cases really in my wheelhouse?"

Almost all lawyers receive requests for help on issues involving clients' wills and trusts. It is very hard to say no to "Mom" when she asks you to draft a will. If there is a lawyer in the family, he or she will almost always be named as administrator or executor, and then the fun begins. The more money that is involved in the estate, the more likely litigation will ensue between family members who otherwise would have gotten along. Highly skilled lawyers often lose their professionalism, diligence and caution when working on a family will or estate. All lawyers should remember to treat friends and family engagements, and especially friends and family trusts and estates engagements, just like any other matter. If a lawyer does not have the skillset or the ability to handle a matter competently, the lawyer has to enlist the help of someone with that experience. Even when representing family or friends in such engagements, it is still necessary to use engagement letters and conflict waivers, just as with any other client matter. For example, if the lawyer does not know anything about tax and is not competent to give tax advice, the lawyer had better make sure the engagement letter limits the scope of representation by specifically excluding any legal advice or services related to taxes.

The Role of the Lawyer

Lawyers are often involved throughout the entire trust and estate process. It's often the lawyer who helps devise the plan whereby assets are transferred from one generation to the next. These planning activities can be fraught with peril, especially with regard to tax considerations. Once the plan is complete, the wills, trusts, powers of attorney and other documents also are typically drafted by the lawyer. Mistakes in drafting sometimes can have a large impact on an estate or trust. Wealthy individuals often turn to their trusted lawyer to serve as trustee. Serving in that capacity creates conflict of interest risks and places the lawyer right in the middle of bitter family disputes. The same problem arises if the lawyer is asked to serve as executor or administrator. While the fees for these positions can sometimes appear lucrative, the risk of serving in this role usually outweighs the compensation received. Lawyers also frequently serve as trial counsel in trust and estate litigation. These disputes are bitter and hard fought, and vast sums of money often are at play. If the lawyer served as a drafter or planner of the estate in question, the risks arising from the litigation role are multiplied exponentially.

Finally, sometimes in smaller cases, a lawyer who provides services also may be a beneficiary. Often, there is a dispute as to whether the lawyer/beneficiary provided legal services. Bear in mind that allegations of conflicts of interest and ill will abound in the wills, trusts & estates practice areas.

Trusts and Estates Claims: Factors Increasing Claims Frequency

- Expansion of potential claimants - erosion of privity requirement
- More second marriages/blended families, resulting in conflicts of interest
- Aging of population - transfer of significant intergenerational wealth
- Highly technical, intricate practice area / easy to make mistakes

Typical Claims Arising from Trusts and Estates Engagements

There are many opportunities for garden variety negligence claims in a trust and estate engagement as well. Faulty tax planning, faulty drafting, and failure to timely file IRS elections or returns are just some of the pitfalls for the unwary. Even experienced professionals can stumble across land mines, particularly given the complexity and constant changes involved in tax law. Simple malpractice, however, may be the least of one's worries.

Plaintiffs' attorneys often will attempt to enhance ordinary negligence claims with devastating breach of fiduciary duty counts, while emotionally charged plaintiffs often claim an intentional breach. Plaintiffs typically allege fraud, aiding and abetting or Racketeer Influenced and Corrupt Organization Act ("RICO") claims. Obviously, these counts may raise insurance coverage defenses. While a thorough discussion of coverage is outside the scope of this article, bear in mind that coverage issues and fraud claims greatly add to the complexity of the defense. Likewise, ethical complaints frequently arise against lawyers involved in bitter family estate battles.

Damages

Damages in trust and estate claims are often severe. Sometimes assets can be conveyed to the wrong person and create a substantial damage claim. Taxes, including penalties and interest, are another frequent element of damages. Plaintiffs typically try to claim taxes, penalties and interest that they haven't actually paid. State laws widely differ on the issue of whether taxes not yet paid are recoverable damages. The disgorgement of legal fees is a frequent remedy in breach of fiduciary duty cases, although not an exclusive one. Punitive damages are also on the table in most states for acts that are found to be malicious, evil or fraudulent. Finally, fees incurred by other professionals who remedy the problems created by the attorney often are an element of damages and can add significantly to the total damages sought.

Complexity Creates Risk

The problems faced by lawyers in trust and estates claims have some nuances that are different from those typically faced in other types of claims. When a lawyer and accountant both are working on a complex estate plan, there often is a lack of seamless interface between the two. A pattern of referring work back and forth to each other can lead a jury to think the referral was self-interested and tortious. If a claim is made against both, there can be finger pointing which makes easy work for the plaintiff.

Real trouble can arise if a lawyer is involved in selecting investment advisors or stockbrokers. While lawyers seldom lack confidence, their training and licensure for investment advice is easily challenged if the market tumbles. If they have "steered" a client to a broker or investment advisor and the market turns down, the relationship with the other professional will be subject to severe scrutiny. Anything that hints of a discount, kickback or reward can be devastating. Likewise, pulling a client into an investment in which the lawyer already is vested may be viewed as using client money to prop up a failing personal asset.

Another area of concern for estate lawyers arises when a will contest raises issues of the testator's capacity. The lawyer who drafted and probably witnessed the will is hard-pressed to testify to anything other than "the testator was sharp as a tack." The plaintiff often will bring in an MRI of the testator's brain that shows a pool of fluid where the brain once resided. The thought processes and capabilities of the elderly are difficult to ascertain and often will be a question of fact. Disappointed family members who want to challenge testamentary capacity will try to throw the lawyer under the bus out of necessity.

Non-client beneficiaries and "wannabe" beneficiaries often assert that the lawyer owed a duty not only to the deceased but also to them. Some states, including California, Hawaii, Wisconsin and Illinois, have found broad liability for lawyers in cases brought by the beneficiaries of a will or trust. Other states, including Colorado, Michigan, South Carolina, Florida and Iowa, have found lawyer liability to beneficiaries when the lawyer frustrates the testator's intent. On the other hand, Alabama, Maryland, Texas and Nebraska, have concluded that there must be strict privity for a beneficiary to sue the lawyer.

Just like tax laws, these third-party liability principles are in constant motion. Sometimes lawyers must prove the testator's intent. Video or audio recordings of the decedent's intentions can ameliorate this problem substantially. Many states have a "dead man's statute" which governs the admissibility of hearsay to prove the deceased's intent. Often the critical determinations are made not in a trial court of general jurisdiction but instead in the state's probate court. In some states, like Georgia, many probate judges are not even lawyers. They often are not comfortable with the type of litigation that arises from malpractice cases with substantial dollars at play.

Conflicts

Perhaps the biggest problem in the trusts and estates representation is conflicts of interest. Lawyers often assist not just one family member but three or four generations. Engagement letters and conflict of interest letters too often are not utilized. Unfortunately, there also is a tendency for the lawyer to prefer one client or one beneficiary over another, based on probabilities of future business or personal evaluation of moral worth.

At the end of the day, these claims are driven by: the roles of the lawyer; complex tax and legal issues; conflicts of interest; and personal relations within the family. Lawyers beware: here be dragons.

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