After ‘Reasonable Compensation’ Litigation, Who Pays Trustees’ Attorneys?; Part II; Legal Profession

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Last week, we reviewed Pennsylvania cases that addressed this question. This week, we review the law in other jurisdictions and look to see how attorney fees are treated in an array of similar circumstances outside of the trust arena.

“The right of a trustee to an award of counsel fees, incurred in the defense of its right to compensation as trustee, is generally recognized” the court held in Cleveland Trust v. Wilmington Trust, 258 A.2d (Del. 1969) (awarding reasonable compensation and attorney fees incurred in connection therewith). (See also *In re Trust of McKinley, 2002 Del. Ch. LEXIS 155 (Del. Ch. Dec. 31, 2002)*; Estate of Griffith, 218 P.2d (Cal. App. 1950).)

In Griffith, the trustee sought extraordinary compensation of $35,000, and $3,000 for its attorney fees in connection with the hearing on the application for extraordinary fees. The trust was a charitable trust established for the creation of the Griffith Park Observatory. The city of Los Angeles opposed the extraordinary services fee and the attorney fee. The court allowed a $30,000 fee for extraordinary services and the $3,000 attorney fee. Some courts merely require that a trustee’s reasonable compensation claim be made in good faith. (See, e.g., *In re Messer’s Guardianship, 17 N.W.2d 559, 562 (Wis. 1945*).)

Pennsylvania courts should favorably consider the decision of the *Florida Supreme Court in West Coast Hospital Association v. Florida National Bank, 100 So. 2d 807, 812-13 (Fla. 1958)*, in which the court awarded attorney fees because the trustee had made its reasonable compensation claim in good faith. At that time, Florida’s “new trust accounting law,” Chapter 26656 — (No. 177) H.B. No. 204, provided, in language almost identical to the Uniform Trust Act, that a trustee’s attorney fees for services “incurred by him in the management of the trust estate” should be paid by the trust. If there is a meaningful difference between the provisions, i.e., between “management” and “administration” of a trust, the use of “administration” in the UTA is probably broader, thus providing for payment of such fees even more clearly. The Florida statute was repealed by Laws 1974, c. 74-106, §3.

In 2006, Florida enacted the Florida Trust Code, effective July 1, 2007, allowing a trustee “reasonable expenses that were properly incurred in the administration of the trust.” This is identical to Uniform Trust Code Section 709, with the addition of the word “reasonable,” which is probably implied in any event, since it is difficult to imagine an expense that would be “properly incurred” but unreasonable.

Whether the claim is for increased trustee compensation or for the attorney fees involved in making that claim, each should be addressed in the same manner: "It does not seem logical to differentiate between fee-related services supporting the fiduciary's claim to compensation and fee-related services supporting the fiduciary's attorney's claim," Joseph L. Wyatt Jr. wrote in Trust Administration and Taxation.

The fiduciary and the attorney are each entitled to compensation by statute or by court determination rather than by contract; both are required to make the same sort of showing to the court that appointed them (thus requiring fee-related services). "The weight of the limited authority allows such compensation, although there is some authority to the contrary," Wyatt wrote. This treatise notes the "close analogy between attorney fees in bankruptcy matters and attorney fees for probate services for two reasons: the fee in both cases is set by the court, pursuant to broad statutory authorization ('reasonable' compensation), and the fee is paid out of the estate."

Judge Edmund S. Pawelec's argument in In re Nicely Estate, 18 Fiduc. Rep. 2d (Orph. Ct. Phila. Co. 1998), that the work benefits only counsel himself was the same argument rejected by the U.S. Court of Appeals for the Ninth Circuit in the bankruptcy context in *In re Nucorp Energy, 764 F.2d 655 (9th Cir. 1985*). As the California Supreme Court, in Estate of Trynin, 782 P.2d (Cal. 1989), pointed out: "Attorney fees in bankruptcy matters provide a close analogy to attorney fees for probate services, as in both cases the fee is set by the court pursuant to statutory authorization and paid out of an estate."

When statutes provide for payment of a party's reasonable attorney fees, that party is also entitled to attorney fees incurred to establish its entitlement to fees.

When a statute permits a prevailing party to recover its attorney fees, courts routinely grant attorney fees incurred in pursuit thereof ("fees on fees") to avoid dilution of the underlying award. In trust matters involving a trustee's claim to "reasonable compensation, the same principle supports recovery of attorney fees incurred in pursuit of trustee's commissions and attorney fees incurred in pursuit of counsel's own fee. If a trustee is unable to recover its attorney fees incurred in its application for reasonable trustee compensation, the underlying award of reasonable compensation to it as trustee would be diluted. The same is true for trustee's counsel.

Courts regularly award "fees on fees" — attorney fees incurred in establishing the right to or amount of reasonable attorney fees. The reason is that an entitlement to a fee loses its benefit if the award is diluted by not covering the costs sustained in establishing that entitlement. Case law interpreting federal statutory schemes provide prime examples:

- ERISA (*29 U.S.C. §1001, et seq.*; see, e.g., *Strand v. Automotive Machinists Pension Trust, 2007 U.S. Dist. LEXIS 97339 (D. Or. June 22, 2007*) (granting "fees on fees" in ERISA case "as a matter of course".)).
- The Equal Access to Justice Act (*5 U.S.C. §504, 28 U.S.C. §2412*; see, e.g., *Commissioner, INS v. Jean, 496 U.S. 154, (1990*) (granting attorney fees on fee petition stemming from violations of the Equal Access to Justice Act)).
- The Prison Litigation Reform Act (*42 U.S.C. §1997e*; see, e.g., *Hernandez v. Kalinowski, 146 F.3d 196 (3d Cir. 1998*) (granting "fees on fees," i.e., attorney fees incurred in preparing the fee petition, "to avoid erosion of [the] award")).
- The Americans with Disabilities Act (*42 U.S.C. §12101, et seq.*; see, e.g., *National Federation. of the Blind v. Target, 2009 U.S. Dist. LEXIS 67139 (N.D. Cal. Aug. 3, 2009*) (granting attorney fees incurred in the fee petition stemming from a violation of the Americans with Disabilities Act)).

In such cases, the statutes only provide for the award of attorney fees to a prevailing party, but courts permit fees incurred in establishing the prevailing party's right to and the amount of those fees.

Similarly, officers and directors are entitled to attorney fees incurred in pursuing indemnification from their corporations. (See, e.g., *Zaman v. Amedeo Holdings, 2008 Del. Ch. LEXIS 60 (Del. Ch. May 23, 2008*) (noting the potential for a "pyrrhic victory" in fees on fees cases if attorney fees are not awarded on action for indemnity); *Carlson v. Hallinan, 925 A.2d 506 (Del. Ch. 2006*) (granting attorney fees in corporate indemnity case).)

Claims for "reasonable compensation" by trustees present something different from claims for attorney fees under either the statutory fee-shifting cases or the common-fund and common-benefit cases. Rather, they represent a third category in which an attorney fee is statutorily authorized and subject to court approval but not payable by a litigation opponent. "Repo[r]ted decisions concerning fee awards for fee-related services in cases meeting this description are few, but what authority there is generally supports the conclusion that compensation should be awarded for such services," the court held in Trynin.

The Trynin case discussed the then-recent bankruptcy case of Nucorp. In bankruptcy cases, the issue was decided, in favor of fees being paid by the estate, when Congress amended the Bankruptcy Code to add §330(a)(6) in 1994.

The analysis supporting "fees on fees" under federal statutes and corporate law is equally applicable to a trustee's efforts to establish its entitlement to reasonable compensation and its attorney fees under the UTA. Specifically, a trustee's right to reasonable compensation and payment of its expenses would be diluted if the trustee itself had to bear the burden of attorney fees to enforce that right. (See also *Serrano v. Unruh, 652 P.2d 985 (Cal. 1982*).)

In the relatively recent past (since Nicely in 1998), some of our Pennsylvania orphans' courts began to treat attorney fees incurred to establish a trustee's right to compensation as a special type of cost, which could not be charged to the trust itself. As described in these articles, this treatment of those expenses is contrary to long-established Pennsylvania precedent and the UTA enacted in 2006. It is inconsistent with how such expenses are treated in most other states and with how such expenses are dealt with in other areas of the law, such as bankruptcy, corporate indemnity and federal statutes imposing liability for attorney fees.

Such expenses are "properly incurred in the administration of the trust," and, accordingly, are payable from the trust itself. •

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