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Paying A Trustee's Attorney's Fees In Breach Of Trust Actions

A Practitioner's Roadmap Through Section 736.0802(10)

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With the passage of the most recent amendments to Fla. Stat. § 736.0802(10) ("subsection 10" or "the statute"), litigants now have a much clearer picture of their rights and duties when it comes to a trustee's use of trust assets to pay its attorney's fees and costs in defending against a breach of trust action.

As most practitioners know, this statute has been on the books, in one form or another, for many years.¹ Found in the section of the Trust Code describing a trustee's duty of loyalty, subsection 10 addresses the inherent conflict that a trustee faces when sued by a beneficiary for breach of trust. The provision deals with that conflict by imposing restrictions on a trustee's ability to use trust assets to defend itself in that situation. The prior version of the statute was comprehensive in scope; in practice, however, it left many open questions. In its latest version, which became effective on July 1, 2016, subsection 10 clarifies the rights and duties of trustees and beneficiaries alike, and attempts to set forth the procedural steps required of both when a trustee decides to use the assets of the trust, rather than its own assets, to defend against a breach of trust action.

What Fees Are Implicated?

Prior to its most recent amendment, subsection 10 did not consistently describe what categories of fees and costs were at issue. The amended statute makes clear that only those fees and costs incurred in connection with the breach of trust or breach of fiduciary duty allegations are at issue. Legal fees and costs incurred by the trustee in performing trust administration services, for example, are not implicated and nothing in subsection 10 would preclude a trustee from using trust funds to pay those attorney's fees or costs.

When Is The Statute Triggered?

Subsection 10 opens with an express reminder that the payment of attorney's fees or costs incurred in any proceeding may be made by a trustee from assets of the trust without court authorization unless the subsection is triggered.

It is now clear that subsection 10 is not triggered unless and until a beneficiary actually files a pleading in which a breach of trust claim is made against the trustee. A letter from the beneficiary's attorney claiming a breach does not trigger the statute. Nor does an unfiled draft complaint or an answer to an interrogatory. The statute draws a bright line for the trustee. If the beneficiary has not alleged *in a filed pleading* a claim or defense of breach of trust, the provision is not triggered and

there is no procedural bar to the trustee using trust funds to pay its attorney's fees and costs.

The Trustee's Notice of Intent

Once the statute has been triggered, the trustee must decide if it intends to attempt to use trust funds to defend against the claim. If the trustee decides that it has no intention of using trust funds to pay for its attorney's fees and costs in that litigation, it need not follow the notice procedures spelled out in the statute and discussed below. The prior version of subsection 10, when read literally, seemed to impose a notice obligation on the trustee even if it did not intend to use trust assets.

But assuming the trustee decides that it cannot or will not pay the cost of defending the breach of trust claim, and that it instead intends to pay its attorney's fees and costs from trust assets, the trustee must first give notice to all qualified beneficiaries whose shares of the trust may be impacted by this use of trust assets.²

The notice must identify the judicial proceeding in which the allegations are pending, and it must inform the person served of his or her right to apply to the court for an order prohibiting the trustee from using trust assets to pay the trustee's attorney's fees or costs. Bear in mind that, once that notice is given, the trustee need not wait before paying legal fees from the trust. It need not wait to see how the litigation will play out or, for that matter, whether a beneficiary will attempt to preclude use of trust funds to pay legal fees and costs.

The issue of whether a waiting period should be imposed was the subject of much debate in the RPPTL Section's Probate and Trust Litigation Committee. Ultimately, the Committee concluded that no waiting period should be required. Thus, under the amended statute, as soon as a trustee provides notice, it can pay its legal fees and costs using trust assets. Nevertheless, a trustee's decision to pay at that point is not risk-free, as the court not only can preclude the use of further trust funds, but the court can also require a refund of fees and costs already paid, with interest at the statutory rate.

If a trustee does not give notice but nevertheless uses trust funds to pay its legal fees or costs, it is not going to like the consequences. Such conduct is in clear violation of the statute, and any qualified beneficiary can move to compel the return of such funds to the trust. By statute, those funds must be returned to the trust, along with interest at the statutory rate.

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To top it off, the beneficiary may receive an award of fees, under Fla. Stat. § 736.1004 for pursuing that relief.

The Beneficiary's Motion to Preclude Use of Trust Assets

Absent a motion by a beneficiary seeking to preclude the trustee's use of trust assets and a court order granting such a motion, a trustee who has provided the requisite notice of intent may pay its attorney's fees and costs from the trust.

The amended statute sets forth the procedure for a beneficiary to challenge the trustee's use of trust funds to pay its legal fees and costs if the beneficiary chooses to do so and is not otherwise barred under Fla. Stat. § 736.1008 ("Limitations on proceedings against trustees"). As noted above, if a trustee makes payment without notice, the statute provides that a beneficiary is entitled to an order compelling the return of those funds (with interest) on that basis alone.

Even where the trustee has provided notice, however, the beneficiary may move the court for an order (i) prohibiting the further payment of legal fees and costs from the trust and, (ii) if fees or costs have already been paid, requiring the return of funds already used. The statute clarifies the showing that such a beneficiary will have to make and the types of evidence available to both beneficiary and trustee at the hearing.

The statute provides that the court must deny the beneficiary's motion unless it finds that there is a reasonable basis to conclude that there has been a breach of trust. Even if the court does find that there is a reasonable basis, the court may still deny the beneficiary's motion for "good cause" (a term which the statute does not define).

Further, no longer will the parties to such a proceeding have to debate what evidence can be submitted in connection with such a hearing. The court may consider typical summary judgment evidence (affidavits, answers to interrogatories, admissions, and depositions), as well as actual live testimony or other evidence admissible under the Florida Evidence Code. These evidentiary submissions are not a one-way street; both the beneficiary and the trustee have the right to present evidence at the hearing.

If the court grants the beneficiary's motion, the court may preclude the use of further trust funds and, if the trustee had already paid attorney's fees or costs from the trust, the court may order the return of such funds along with interest at the statutory rate. What happens if, despite such an order, the funds are not returned? The short answer is very bad things for the trustee. The statute authorizes such remedies and sanctions as the court deems appropriate, including the striking of the trustee's defenses and pleadings.

Although the statute answers many questions that existed under the prior version of the statute, it does not answer all of them. In addition to not defining what constitutes "good cause" for the court to deny a beneficiary's motion, the statute remains noticeably silent on the topic of who must return funds

to the trust if the court orders a refund. The court plainly has jurisdiction to require that the trustee return such funds. But the trustee's attorney can also potentially be ordered to return the funds, assuming it has been properly served with process as part of the proceedings.³

What Happens If The Claim Is Dismissed Or Resolved?

The statute provides that if a claim or defense of breach of trust is withdrawn, dismissed or judicially resolved (in the trial court, as the amended statute makes clear) without any determination that the trustee has committed a breach of trust, the procedures revert to the norm in which subsection 10 does not apply. In other words, the trustee may use trust assets to pay attorney's fees and costs without court order and without service of a notice of intent. This includes payment of any fees or costs that were refunded to the trust pursuant to an order of the court.

As under the prior version, the statute continues to provide that it does not limit an interested person's right to challenge or object to a trustee's payment of fees or costs from the trust, as provided under other provisions of the Trust Code. **■**



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Endnotes

- 1 Initially Fla. Stat. § 737.403(2) (added to the Trust Code in 1974).
- 2 Fla. Stat. § 736.0802(10) (2016).
- 3 See *Simmons v. Estate of Baranowitz*, 189 So. 3d 819 (Fla. 4th DCA 2015); *Kozinski v. Stabenow*, 152 So. 3d 650 (Fla. 4th DCA 2014).



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