

The Critical Discussion of Fiduciary Duties in Financial Transactions

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Abstract: The fiduciary liabilities and fiduciary duties are a set of opposite concepts. However, in comparison of the former, the latter plays a more important role in financial transactions with its unique value and internal logic. In terms of previous studies, most of them tend to focus on those corresponding obligations that should be undertaken by the parties, including the duties of the trustor and that of the trustee. However, with the development of relevant financial theory and practice, the duties of the beneficiary should also be taken seriously. In future, based on the current situation of imperfection of existing trust regulations, the improvement of relevant internal management and external supervision towards fiduciary institutions should be studied in a further step.

Keywords: Fiduciary Duty, Settlor, Trustee, Beneficiary.

1. Introduction

This legal essay aims to critically discuss fiduciary duties in financial transactions. There is a phenomenon that fiduciary liabilities normally do not appear in commercial relationship especially financial transactions because each client within the contractual nexus has the rights to choose the aspect of deals on the basis of their self-interests. Furthermore, a reasonable financial trust relationship must have at least one settlor, one trustee and one beneficiary, although there could be several settlors, trustees and beneficiaries or a free combination of them. Even in some cases, one person could play all roles of them. Under this background, this essay attempts to research various aspects of statutory duties in the field of fiduciary duties in financial transactions and attempt to have critical analyses.

Following the introduction, in the main body of this essay, section one will focus on duties of the settlor, including the delivery of property towards the trustee, the non-interference with management behaviours of a trustee, the payment of remuneration for trustee and the refusing illegal appropriation of the trust estate. Then, section two will concentrate on the bona fide doctrine, the duty of prudence, the payment of trust benefits, the publication of fiduciary work, and the restitution of properties. Ultimately, section three will be utilized to briefly discuss a tail that is often rarely mentioned, the duties of the beneficiary.

2. Duties of Settlor

The origin of the word fiduciary is from the Latin *Fiducia*, which means trust or confidence. In Roman law, trust is a contract and the appendage of the cession of property. The legal provisions on trust in Roman law focus on the initial holder of the property, that is the settlor, and emphasize that the settlor has the obligation to deal with his trust property reasonably. In a fiduciary relationship, the relevant rights and obligations of the settlor should be taken seriously by the lawmakers at the initial stage of the legislation. When the legal provisions on fiduciary duties are formulated, lawmakers are supposed to confirm the definition of the status

of the settlor to the best of their abilities, rather than constantly seek supplements and amendments of legal provisions. Compared with the trustee, the settlor himself is of a stronger side. If some unforeseen special events occur, the managerial approach of the trust property is too disadvantageous to realize the purpose of the trust or it is not in the interest of the beneficiary so that the settlor has the right to require the trustee to adjust the management rules of the trust property. If the trustee violates the purpose of the trust and management duties, resulting in the loss of the trust property, the settlor also possesses the right to sue him and claim for compensation, and the settlor could even dismiss the trustee according to the provisions of the trust documents or the judgment of courts.

2.1. Delivery of Property Towards the Trustee

After the establishment of the fiduciary relationship, the settlor ought to hand over the fiduciary property to the trustee for his right of possession and domination in order to enable him to actually control the property. In order to make the fiduciary relationship legal and effective, the settlor must completely offer the trust property belongs to himself and the 'jus disponendi' of the trust property to the trustee, so that the trustee could possess and use these specific properties for the benefit of the settlor. This requires the legislators to impose legally binding obligations on the settlor. If the settlor fails to deliver the trust property to the trustee in time or retains part of the power to dispose of the trust property, the legally established trust relationship will be deemed invalid. The right of the trustee to manage and dispose of the trust property is the essential feature of the trust. In order to manage and dispose of the trust property effectively, the trustee must be able to possess and control the trust property in reality. Hence, after the establishment of the fiduciary relationship, the settlor must deliver the trust property to the trustee. The continuous procession of the settlor is not only disadvantageous for the trustee to achieve the rights of the management and disposal of the trust property but also harmful to realize the purpose of the trust and the interests of the beneficiary. By the way, it is the truth that the settlor has the obligation to deliver the property to the trustee, but the trustee has no right to ask the

settlor to transfer the ownership of the trust property to him.

2.2. Non-interference with Management Behaviours of Trustee

In the range of official competence, the fiduciary property should be freely utilized and disposed of only by the trustee, excluding any interference, particularly the settlor himself. The administrative power of the trust property is an exclusive right obtained by the trustee on the basis of related trust contracts or related trust laws. Hence, the trustee possesses freedom for management and disposition of the trust property within the agreed or statutory limits of authority. The settlor ought to be filled with full of confidence in the absolute loyalty and competence of the trustee, making the decision-maker cope with issues completely on the basis of his own aspiration in order to better protect the interests of the settlor. The misleading and any other incorrect information disclosure from the settlor could be quoted by the trustee to rightfully and effectively avoid legal liabilities in a fiduciary relationship. Notwithstanding the settlor used to become the real owner of the trust property, after the transition of the trust property, the settlor has lost the ownership of the trust property and could no longer have the administrative power and the right of disposing to the trust property. Therefore, the settlor could not interfere in the method of management and disposal of the trust property of the trustee. In addition, in the fiduciary relationship, the administrative power of the trust property always belongs to the trustee, so that the settlor could not interfere in the management activities of the trustee at all, let alone change the management method of the trust property randomly. This is not only the representation of the legal validity of the fiduciary relationship but also the requirement of the principle of the independence of trust property.

2.3. Payment of Remuneration for Trustee

The settlor ought to bear the responsibility of the reward of the trustee if there is a clear agreement between them. In determining the amount of remuneration in advance, express clauses of contract terms would be the most important legislative authority rather than oral agreement that is disabled to be safeguard by legal provisions, when confronting fairness problem on account of the bargaining power. Strictly speaking, the settlor does not have any legal obligations about the remuneration to the trustee. Hence, the obligation of the remuneration from the settlor to the trustee that the public usually believes, is an obligation of the agreement undertaken by the settlor, in essence. If there is not an agreement between the settlor and the trustee in the fiduciary documents, and there is also no agreement on remuneration that could be discovered, the trust will be regarded as a gratuitous agreement. Therefore, the trustee could not enjoy any rights to request the settlor to pay for the remuneration, and the settlor could also appeal with the reason of no obligations to pay the reward for the trustee. Whereas, if both the settlor and the trustee have made clear provisions on the remuneration in the fiduciary documents, the settlor will have to follow the obligation to pay for the remuneration to the trustee and must strictly perform the obligation.

2.4. Refusing Illegal Appropriation of the Trust Estate

To some extent, the fiduciary property could be regarded as an independent property with a similar capability as the

function of a separate legal personality, which makes it neither belongs to the trustee nor to the settlor. The trust property is essentially independent compared with the other inherent properties no matter what is of the settlor or the trustee. Once the fiduciary relationship has been established successfully under the regulations of laws, the fiduciary property has been separated from any other self-owned sources in order to be a completely independent property for the purpose of the trust itself, which leads to the loss of ownership of the trust property for the settlor, the privileges of possession and disposition for the trustee, and the right of claim towards the trust income for the beneficiary. If the settlor or the trustee is confronting the problem about division, bankruptcy or disqualification, the trust property will not be classified as a property of liquidation or bankruptcy, which is capable to guarantee that the beneficiary will not forfeit the right of the trust property because of the bankruptcy or debt from the settlor or the trustee. In the duration of the fiduciary relationship, nobody is allowed to take forcible possession of the trust property. As far as the settlor is concerned, it is a compulsory legal obligation not to illegally appropriate the trust property. Therefore, once the settlor disobeys relevant legal provisions, he has to bear the corresponding legal responsibility.

By the way, in the fiduciary relationship, notwithstanding the beneficiary owns the beneficial right of the trust property, this kind of beneficial right could not be directly enforced against the trust property, but against the trustee. The beneficiary himself could not possess, utilize and control the trust property because the trust property also does not belong to the inherent property of the beneficiary and is independent of the inherent property of him. The creditor of the beneficiary is unable to directly perform the right of repayment against the trust property, nor could he ask the court for the implementation of the trust property.

3. Duties of Trustee

A specialised relationship arises, after a perquisition that a client has accepted the requests from the opposite side and enjoy the delegate function authorized by legal provisions for performance of the function, which is regarded as the fiduciary duty of a trustee. It is the necessity to endow the minimum of the substantive content of the trust, in the process of the performance of the trustee to achieve the meaning of the trust honestly and in good faith for the benefit of the beneficiary. In the absence of clear legal provisions, the trustee needs to transfer the profits to the beneficiary in accordance with the instructions or indications of the settlor rather than carrying out the obligations on the basis of his own initiative. Furthermore, when it is applied to the legal cases that affect the trustee, the limitation of actions of legal provisions are normally difficult to be utilized to be directly quoted to protect the legitimate rights and interests of the trustee. Only in one circumstance could the trustee actively choose to disobey the instructions of the settlor or the beneficiary on how to perform specific functions of the trustee. That is, the law, especially the legal provisions with the spirit of the breach of contract law, has lifted the restriction on the trustee on the basis of any statutory rules in a specific field in advance. The public could only expect the legislative organization to promulgate a novel and simpler restriction law or reformulate the existing restriction law so that the trustee could directly put forward the limitation period of claims for the breach of trust.

3.1. Bona Fide Doctrine

The trustee must implement related property rights in accordance with fiduciary purposes and fiduciary provisions in financial transactions. The bona fide doctrine is a code of ethics in financial transactions, which requires all people who are willing to participate in the market-oriented economy to pursue their own interests without harming the interests of others and social public welfare. Every dishonest breach of contract, whatever it is, is a breach of trust. As long as the trustee does not have any illegal actions such as intentional negligence, the intentional breach of contract, the fraud, and other actions against the bona fide doctrine, there will not be any settlors or beneficiaries with legal rights to control the actions of the trustee or prohibit the agent from exercising his legal rights by any means. It is the fact that the clear boundaries of the bona fide doctrine could still not be precisely defined by legislators or jurisprudential scholars so that the lawmakers would better adore giving this concept a technical meaning that is to say a formula around dishonesty and moral degeneration. However, the bona fide doctrine of integrity and righteousness must be observed as a legal criterion or legal regulation, especially for trustee. The Bona fide doctrine is described as 'cannot be defined accurately' but it is a principle that needs to be honestly and reasonably treated. Notwithstanding, as one of the fundamental principles of law, the bona fide doctrine has not been directly defined with strict demands of legal provisions, it is permanently unacceptable for one of the parties to not fulfil the purpose of the bona fide doctrine during financial transactions in real life.

3.2. Duty of Prudence

When engaged in fiduciary management affairs, the trustee should be completely subordinated to the interests of beneficiaries and pay attention to the duty of prudence. The legal relationship of financial trust has created the fiduciary regime which emphasizes the importance of the loyalty and prudence of fiduciary duties in financial transactions. Between the settlor and the trustee, there will be an agreement about how should the trustee operate and manage the trust property, which is considerably reflective to forge a potential contractual relationship in the process of financial transactions. As the representative of the settlor, the trustee is authorized to manage the fiduciary property of the settlor and possesses the right of discretion, which means that the trustee could not cultivate the intention for his self-interest via this position in order to avoid conflicts occurred between parties on both sides. Whereas, If the trustee fails to fulfil his trust obligations in accordance with legal provisions, he shall have the obligation to make up for any losses of the settlor with his own property. Furthermore, at a special time, the trustee should have positively executed his duty of prudence but he missed relevant business opportunities because of his hesitation, which could be regarded as a breach of contract to the trustee himself.

The duty of prudence is essentially process-oriented rather than result-oriented. That is to say, the rule of the prudent trustee expresses a standard of behaviours, rather than a standard of result. Whether the trustee has abided by the prudent investor rule should be taken into account in accordance with the facts and circumstances when the trustee makes a decision or take an action. To measure whether the investment behaviours of a trustee is prudent or not, the focus should not be merely confined to one financial transaction

case, but the settlor or the beneficiary ought to evaluate all the trust property portfolio as a whole. Furthermore, the trustee with or claiming to have unique technical abilities or special skills and pieces of knowledge, are obliged to use them to execute his duties as a trustee.

3.3. Payment of Trust Benefits

The trustee has the obligation to offer trust benefits to the beneficiary in accordance with fiduciary provisions in financial transactions. On the Basis of the confidence of the trustee, the settlor entrusts his property rights to him, with the most fundamental purpose to enable the beneficiary to obtain the fiduciary benefits. The trustee should, in accordance with the thoughts of the settlor, manage or dispose of the fiduciary property in his own name, for the benefit of the beneficiary, and abide by the trust obligations stipulated in the trust documents. In such a fiduciary legal relationship, the trustee should undertake the obligation to pay the trust benefits to the beneficiary, which is not only the difference between the trust and the other property management methods but also the essence of the trust.

The so-called trust interest refers to the interest generated by the fiduciary property itself and its income, such as the capital of money and the fructus generated, the fruit trees and their fruits, mother animals and their milk products and descendants, houses and rents for rent. The duty of the trustee is to manage and utilize those properties and offer the fiduciary benefits to the beneficiary. The trustee's payment of fiduciary benefits to the beneficiary is limited to the trust property, including the capital of money and the fructus. In other words, the trustee has successfully fulfilled his legal obligations by providing the capital of money and the fructus to the beneficiary instead of paying his private property as compensation. If the trustee causes losses in financial transactions in the process of managing and utilizing the fiduciary property, as long as the trustee has no-fault, there is no need for him to bear the corresponding legal responsibilities.

3.4. Publication of Fiduciary Work

The trustee ought to manage fiduciary assets and individual assets separately, as well as disclose business affairs to beneficiaries in order to accept relevant supervision. The trustee should annually report the situation of the management, including the utilization, disposal and income and expenditure of the trust property to the beneficiary so as to accept the supervision. The reason for the establishment of the reporting obligation system is to facilitate the beneficiary to supervise the trustee in time and put forward his own opinions, in order to safeguard the legitimate rights of the beneficiary. The trustee has the responsibility to report on how he manages the fiduciary property. To be specific, it is the trustee who manages or entrusts other professional managers to replace his own work. The object of the report is the beneficiary, that is, the other party in the fiduciary relationship. In addition, the trustee has the duty of confidentiality according to relevant legal provisions, which is also supervised by the beneficiary. The contents of confidentiality include the personal information of the beneficiary, as well as the trustee's handling of trust affairs. In the fiduciary relationship, in order to ensure that the disclosure of personal privacy will not cause undue damage to the beneficiary, the trustee should bear the obligation of confidentiality in accordance with relevant legal provisions.

3.5. Restitution of Properties

At the end of the fiduciary relationship, the trustee is supposed to return to the settlor and the beneficiary with total assets. The establishment of trust is a civil act, adopting the principle of autonomy of will. Hence, once the specified cause occurs, the trust will automatically terminate. In addition, trust affairs are implemented around the realization possibility of the purpose of the trust. If the purpose of the trust has been realized, or the purpose of the trust is expected to be impossible for realization for various reasons, there is no need for the existence of the trust.

4. Duties of Beneficiary

In principle, the beneficiary in the legal relationship of financial trust should not be endowed with any legal obligations. It is not uncommon for judges to ignore the beneficiary and regard the beneficiary as the settlor. Sometimes, this judgement is on the basis of the provisions of a legal clause, which is not directly related to the understanding of the principle of tacit justice. However, in more cases, it is sometimes determined by the discretionary power and the subjective initiative of the judge. The legal action of the judge to regard the beneficiary as the settlor is not malicious and is not necessarily invalid, such as in the case of breach of contract or violation of precautions. In other words, in some cases, if the judge wants to accurately determine the substantive status of the beneficiary, it is appropriate for the judge to determine the beneficiary as the settlor to a large extent.

In particular, the charitable trust, which is also named the community trust or public trust, is a novel form of financial trusts, concentrating on the pursuit and the Realization of public interests, with the core feature of commonweal in the process of financial transactions. If there are some ultimate beneficiaries of the charitable trust, such as children who have been deprived of education, patients or victims, they can be identified as beneficiaries. On the contrary, if there could not be an individual who could ultimately obtain the fiduciary benefits in a charitable trust relationship, the institutions that ultimately obtain those fiduciary benefits should be listed as beneficiaries, such as universities established for education, institutions established for the purpose of scientific research, and those environmental protection organizations established for a greener lifestyle of human beings. In addition, a considerable organization of the charitable trust could also be regarded as the beneficiary in real life, that is to say, it is unacceptable to some degree to merely list the individuals as beneficiaries at the tail of the funding targets of the organization of the charitable trust.

5. Conclusion

This legal essay has demonstrated fiduciary duties in

financial transactions in order to critically illustrate their unique value and internal logics. In a fiduciary relationship, the relevant obligations of the settlor should be put in the most important position via the legislation. As the representative of the settlor, the trustee who is authorized to manage the fiduciary property should also be attached importance with. In particular, the beneficiary in the relationship of financial trust should not be endowed with any legal obligations. Notwithstanding those fiduciary duties in financial transactions has been generally analysed, they are still filled with some unknowns. Future research should consider more carefully around the development of those three general aspects of the fiduciary duties.

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