



ActionLine

A PUBLICATION OF THE FLORIDA BAR REAL PROPERTY, PROBATE & TRUST LAW SECTION

Drafting Lease Renewal Rents Without Prescience

Qualified Opportunity Zones Explained

The Real Party in Interest: Trustees



The Real Party In Interest: Trustees

By Cady L. Huss, Esq., Spivey & Fallon, P.A., Sarasota, Florida,
and Elizabeth M. Hughes, Esq., Greenspoon Marder, Miami, Florida

Florida Rule of Civil Procedure 1.210(a) permits actions to be prosecuted in the name of the real party in interest, including a personal representative or the trustee of an express trust, who may sue in that person's name without joining the party for whose benefit the action is brought. The Rules of Civil Procedure clearly contemplate that a trustee will prosecute a cause of action on behalf of the beneficiaries to which it owes fiduciary obligations. The Florida Trust Code also charges the trustee with the duty to enforce and defend claims or actions of the trust and to protect trust property.¹ To remedy a situation where a trustee is failing to adequately perform his or her duties, or maintains a conflict, the Florida Trust Code creates a mechanism which allows a beneficiary to seek the appointment of a special fiduciary.²

However, beneficiaries and their wily counsel have attempted to circumvent the real party in interest rule and the overarching themes of the Florida Trust Code to pursue causes of action involving trust assets in their own, individual capacities. Fortunately, trustees have reputable authority in defense of their position as the real party in interest and as the proper party to pursue actions on behalf of the trust.

Florida Statutes and Case Law: The Real Deal

The Florida Trust Code delineates specific duties and powers of a trustee. These statutes contain unequivocal provisions for which a trustee can be held liable for failing to abide. For example, Fla. Stat. § 736.0811 (2018) states: "[a] trustee shall take reasonable steps to enforce claims of the trust and to defend claims against the trust." Further, the trustee is required to collect all trust property and to accept or reject additions to trust property and to prosecute and defend claims in any jurisdiction to protect trust property.³ The trustee also has the authority to bind beneficiaries of the trust when establishing or adding to a trust.⁴

While the Florida Trust Code outlines the various duties of a trustee and requires a trustee to take reasonable steps for the recovery of trust assets, this is not an exclusive power or responsibility under the Code. The Code does not contain language naming the trustee as the exclusive or sole party able to bring actions on behalf of a trust, and therefore, leaves a small door open for a beneficiary to pursue a claim involving trust assets. Fortunately, most of the Florida cases addressing this topic support the concept that the trustee is the proper party to bring claims on behalf of the trust as the real party in interest.

As early as 1880, the Florida Supreme Court noted the importance of the trustee in litigation involving trust assets. The court explained that, "a trustee, in whom is vested the legal estate, is a necessary party in all proceedings affecting

the estate, where there is a remainder-man; for the trustee is liable for the proper care and preservation of the property."⁵ The Supreme Court of the United States has recognized the vital role of the trustee in trust actions. In *Hanson v. Denkla*, the Court stated that, "Florida adheres to the general rule that a trustee is an indispensable party to litigation involving the validity of the trust. In the absence of such a party a Florida court may not proceed to adjudicate the controversy."⁶ Courts have also addressed limited circumstances in which a trustee may not be required to bring the cause of action – for example, when the trust is a passive corporate entity or when the trustee possess a conflict.⁷

One of the most instructive cases in defense of the trustee as the proper party to bring claims on behalf of the trust is a 1990 case from the Second District Court of Appeal. In *Buerki v. Lochner*, the grantor, Robin Buerki, Jr. established a revocable trust that named his son, Robin Buerki III, and his live-in companion, Frances Lochner, as beneficiaries.⁸ Per the terms of the amended trust, which included a cohabitation agreement, the grantor was to sell his home and place the proceeds in the revocable trust within two months.⁹ When the grantor ultimately sold the home, he placed the proceeds in a money market account in trust for Ms. Lochner.¹⁰ When the grantor died, Ms. Lochner withdrew the funds from the money market account and deposited them in an account in her own name.¹¹ The trustee of Mr. Buerki Jr.'s Trust filed a declaratory action naming Robin Buerki III and Ms. Lochner as co-defendants and asked the court to determine whether the trust had the duty to obtain the home proceeds from Ms. Lochner.¹² Ms. Lochner counterclaimed and alleged that the proceeds were a gift and Mr. Buerki III crossclaimed seeking the imposition of a constructive trust.¹³

continued, page 46

On summary judgment, Ms. Lochner alleged that Mr. Buerki III lacked standing to pursue his crossclaim because only the trustee had the right to assert a claim involving the trust's property.¹⁴ The trial court agreed and dismissed the amended crossclaim with prejudice.¹⁵ The Second District affirmed and noted that while there is little authority on the issue, a claim must be brought by or on behalf of the real party in interest.¹⁶ As the legal title holder to trust property, the trustee would be the real party in interest to a cause of action to determine the trust's assets.¹⁷ The court also recognized, however, that the beneficiary may have a right to intervene in a suit where the trustee is a party to secure the proper administration and distribution of trust assets.¹⁸

While most courts, even outside of Florida, concur with the position stated in *Buerki* – the trustee, as legal title holder of trust property and as the real party in interest, is the proper party to bring actions involving trust assets – the Fourth District Court of Appeal in the outlier case *Marshall-Shaw v. Ford*, came to an inconsistent conclusion.

In *Marshall-Shaw v. Ford*, jewelry owned by Kathleen Ford's trust was stolen, and Ms. Ford filed an action for conversion, civil theft, conspiracy, unjust enrichment, and trespass against Anita Marshall-Shaw.¹⁹ Ms. Ford sought writs of attachment on Ms. Marshall-Shaw's property and also moved for the issuance of a prejudgment writ of garnishment.²⁰ At an evidentiary hearing on Ms. Marshall-Shaw's motion to dissolve both writs, Ms. Ford's attorney testified that the jewelry was owned by Ms. Ford's trust and that he and Ms. Ford were the co-trustees of the trust while Ms. Ford was the sole beneficiary.²¹ The trial court denied the motions to dissolve the writs of attachment and garnishment and Ms. Marshall-Shaw appealed.²² Ms. Marshall-Shaw alleged that Ms. Ford and her attorney were required to bring their claims in their capacity as co-trustees because the jewelry was owned by the trust.²³ The Fourth District disagreed and looked to Rule 1.210(a) as "a rule of enlargement rather than one of limitation of parties."²⁴ Without further discussion, the court concluded that Rule 1.210 authorized Ms. Ford, as the sole beneficiary of her trust, to maintain the suit in her individual capacity.²⁵ Although not expounded by the court in *Marshall-Shaw*, the Fourth District may have been recognizing *a priori* the rule in favor of Ms. Ford as the sole beneficiary and co-trustee to carve out another narrow exception to the trustee's standing to pursue actions for the return of trust assets.²⁶

Secondary Sources: The Real Statement

To further support the concept of the trustee as the real party in interest for claims involving trust assets, the practitioner can also utilize both the Second and Third Restatements of Trusts.

In appropriate circumstances, a trustee ad litem may be appointed to consider and, if appropriate, to maintain a proceeding against a third party on behalf of the trust and its beneficiaries.

.....

The Restatement (Second) of Trusts notes that "[t]he trustee is under a duty to the beneficiary to take reasonable steps to realize on claims which he holds in trust."²⁷ The comments to §177 contemplate that it may not be reasonable for a trustee to pursue all claims. The trustee must consider the expense involved in the cause of action as well as the merits of the claim.

The Restatement (Second) even considers an uncollectible defendant that may make the cause of action unsuitable for the trustee's pursuit.

The Restatement (Third) of Trusts also addresses claims by a trustee against third parties and the situations when either a trustee or a beneficiary, respectively, is the appropriate party to bring the claim. Section 107 states:

- (1) A trustee may maintain a proceeding against a third party on behalf of the trust and its beneficiaries.
- (2) A beneficiary may maintain a proceeding related to the trust or its property against a third party only if:
 - (a) the beneficiary is in possession, or entitled to immediate distribution, of the trust property involved; or
 - (b) the trustee is unable, unavailable, unsuitable, or improperly failing to protect the beneficiary's interest.
- (3) In appropriate circumstances, a trustee ad litem may be appointed to consider and, if appropriate, to maintain a proceeding against a third party on behalf of the trust and its beneficiaries.

The comments to the Restatement (Third) also recognize that in general, the Trustee is the holder of the title to trust property (including causes of action), the party charged with representing beneficiaries, and the appropriate party to consider and bring an action on behalf of the trust against a third party.²⁸ Except as indicated in the limited exceptions outlined in §107(2), the beneficiary should have no standing to sue a third party on behalf of the trust.

Keeping It Real

Although the Florida trust code does not explicitly state that the trustee has the exclusive authority to bring claims for the return of, or to protect, trust assets, a comprehensive reading of the trust code provides for the application of this concept. Other than the outlier case of *Marshall-Shaw*, Florida case law substantially supports the general understanding amongst practitioners that the trustee is the best party to bring these claims on behalf of the trust unless there is a conflict, delay, or the beneficiary is entitled to immediate possession of the asset. Common law throughout the country highlights the

continued, page 47

same themes as set forth in *Buerki v. Lochner*, such that the consensus among all sister states, and the Restatement (Third) of Trusts, is the Trustee is the best party to bring causes of action involving trust assets. ⁴



E. HUGHES

Elizabeth Hughes is an attorney in Greenspoon Marder's Wills, Trusts & Estates practice group in Miami, FL, where she represents clients in all aspects of probate, trust, and guardianship litigation. She is a proud graduate of Class Two (2017) of the ACTEC Florida Fellows Institute. Ms. Hughes currently serves as a Vice-Chair of the Probate and Guardianship Committee of the Dade County Bar Association.



C. HUSS

Cady L. Huss is an estate and trust lawyer with Spivey & Fallon, PA in Sarasota, Florida. Her primary focus is litigation, including will and trust contests, lack of capacity and undue influence claims, fiduciary disputes, and exploitation of the elderly. Cady serves on The Florida Bar's Probate Rules Committee and various committees of the Real Property, Probate, and Trust Law Section.

Endnotes

- 1 Fla. Stat. § 736.0811 and § 736.0816(23) (2018).
- 2 Fla. Stat. § 736.1001(1)(e) (2018).
- 3 Fla. Stat. § 736.0816(1) and (23) (2018).

- 4 Fla. Stat. § 731.303(1)(b)(2) (2018).
- 5 *Winn v. Strickland*, 34 Fla. 610 (Fla. 1894) citing *Wilson v. Russ*, 17 Fla. 691 (Fla. 1880).
- 6 *Hanson v. Denckla*, 78 S.Ct. 1228, 1235 (1958).
- 7 See *Trueman Fertilizer Co. v. Allison*, 81 So. 2d 734 (Fla. 1955) and *Milton v. Milligan*, 2013 WL 828607 (N.D. Fla. 2012).
- 8 *Buerki v. Lochner*, 570 So. 2d 1061, 1062 (Fla. 2d DCA 1990).
- 9 *Id.*
- 10 *Id.*
- 11 *Id.*
- 12 *Id.*
- 13 *Id.*
- 14 *Id.*
- 15 *Id.*
- 16 *Id.* at 1063.
- 17 *Id.*
- 18 *Id.*
- 19 *Marshal-Shaw v. Ford*, 755 So. 2d 162 (Fla. 4th DCA 2000).
- 20 *Id.* at 164.
- 21 *Id.*
- 22 *Id.*
- 23 *Id.*
- 24 *Id.*
- 25 *Id.*
- 26 *A priori* also recognized in *St. Martin's Episcopal Church v. Prudential-Bache Securities, Inc.*, 613 So.2d 108, 109 (Fla. 4th DCA 1993) – The court cited *State of Delaware v. Florida First National Bank*, 381 So. 2d 1075 (Fla. 1st DCA 1979) which held, in dicta, "unequivocally that a beneficiary of a private trust has the power to maintain a lawsuit to enforce the trust." The Fourth DCA noted "It is not surprising, therefore, that standing to sue – as to property of the trust, anyway – is thus recognized a priori by the rule in favor of the beneficiary."
- 27 Restat. 2d of Trusts § 177.
- 28 Comments to Restat. 3d of Trusts § 107.

RODSTEIN
♦ LAW ♦

REAL PROPERTY APPEALS
BUSINESS LAW APPEALS
LITIGATION SUPPORT

To reverse an unjust result.
To protect a hard-fought victory.
To create a strong record for appeal.

David W. Rodstein
8400 North University Drive, Suite 316
Tamarac, Florida 33321
954.947.7878
drodstein@rodsteinlaw.com
RodsteinLaw.com

PROFESSIONAL ♦ AGGRESSIVE ♦ ETHICAL

Martindale-Hubbell
AV PREEMINENT
Peer Rated for Highest Level of Professional Excellence 2018