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In New York, A Trust Beneficiary Has Powerful Rights

By **Thomas Wiegand and Justin Ellis** (January 23, 2018, 1:27 PM EST)

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Suppose that the beneficiary of a trust reads in the news that his trustee, a national banking corporation, has just settled a large class action alleging fraud and breaches of fiduciary duty. The beneficiary is concerned that the trustee has committed similar wrongdoing for his trust. But he falls outside of the definition of the settling class — and, in fact, he signed a release after an accounting of the trust three years ago. Any claims he might raise against the bank seem covered by the release, even though nobody raised the bank's wrongdoing when he signed it. Does he have any recourse?

In New York, the answer — as explained by recent Appellate Division and Surrogate's Court decisions — is a clear yes. New York courts have a long tradition of viewing all agreements between a fiduciary and a beneficiary, including releases, with "suspicion" and of "scrutiniz[ing]" those transactions "with the most extreme vigilance."[1] A release is thus only effective if the beneficiary gets full disclosure of — and understands — all relevant or material facts.[2]

As the Second Department explained just last fall, the trustee's duty to disclose goes further than merely disclosing facts; a beneficiary must also be "fully aware of the nature and legal effect" of any releases that he signs.[3] In In re Lee, the Appellate Division faulted a corporate trustee for failing to "affirmatively demonstrate that all of the petitioners, who at the time of execution were not represented by counsel, were fully aware of the nature and legal effect of the releases" they signed.[4] That decision follows the long-standing rule that, for a beneficiary's release to stick, the beneficiary must be "fully apprised of the effect of the acts ratified" and "his or her legal rights in the matter."[5] The doctrine that ignorance of the law is no excuse simply does not apply to trust accountings.[6]

A lack of full disclosure, whether of fact or law, will "nullify" or make voidable any release.[7] Such releases can also be undone if the beneficiary shows fraud, misrepresentation, coercion, mistake, accident, "other misconduct," or any "other ground[s] tending to destroy the validity of the waiver."[8] The burden of proof lies on the trustee, not the beneficiary, to show that the beneficiary received all information relevant to the accounting and that the trustee's actions were on the whole "just and fair."[9] That being said, courts may still enforce a release against a sophisticated beneficiary, despite his claims that he did not receive full information, if, given the nature of the parties' relationship, the

beneficiary knows about information relating to his trust that would make relying on the fiduciary unreasonable.[10]

Beneficiaries can also use both formal and informal discovery tools to investigate whether prior releases were valid. First, the trust's records belong to the trust, not the trustee, and a beneficiary may demand the right to inspect the trust's records whether or not an accounting has been finalized or litigation is in progress.[11] A beneficiary should thus be able to request the trustee's records whether or not he signed a release in the past.

Second, the beneficiary can use the accounting process to investigate the validity of prior releases. The New York County Surrogate's Court has recently reaffirmed beneficiaries' broad rights to ask for, and receive, information through an accounting even if a release was signed or the trust terminated. On Dec. 27, 2017, the New York Surrogate's Court recognized in In re de Sanchez that "trustees generally, and corporate trustees in particular, have an obligation to retain records of the estates for which they are responsible, and, [even] if they are released by trust beneficiaries from any further responsibility, it is in their interest to obtain and retain written releases and a record of the disclosure they made to secure such releases."[12] The de Sanchez court thus required an accounting even though it was not clear whether the trust earlier had been accounted for and terminated.

Once an accounting is started, Section 2211 of the Surrogate's Court Procedure Act entitles beneficiaries to depose the trustee, either before or after filing objections, about "*any* matter[s] relating to his or her administration of the estate," not just matters raised in an accounting.[13] Courts have thus allowed a Section 2211 examination to cover matters that were not raised in the accounting,[14] as well as matters relevant to the estate's administration that occurred before the fiduciary was appointed.[15]

A trustee might argue that inquiry by a beneficiary into events, time periods or subjects covered by a prior accounting is barred by res judicata. The New York Court of Appeals has held that res judicata covers claims regarding a prior accounting that were "discernible" from that prior accounting.[16] Courts have accordingly denied discovery on res judicata grounds where the discovery covers topics that were expressly raised in a prior accounting leading to a release or decree.[17] But de Sanchez demonstrates that beneficiaries with colorable claims for undoing a prior decree should get discovery into whether those claims are valid. Any extrinsic evidence that discovery reveals is admissible to show that res judicata or other preclusion doctrines do not apply.[18] As a result, a petitioner who seeks to undo a prior decree can at least seek information from the trustee about whether that prior decree really has preclusive effect.

New York law gives beneficiaries powerful tools to investigate and combat trustees' wrongdoing, even where that wrongdoing might fall within the general language of a prior release. Beneficiaries should not hesitate to use those tools. Likewise, trustees cannot blindly rely on the fact of a release to avoid future inquiry into their conduct. With the protections that New York law grants beneficiaries, nobody should assume that a release really is the end of the story.

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[1] In re James' Estate, 86 N.Y.S.2d 78, 88 (Sur. Ct. N.Y. Cty. 1948) (collecting cases); Nesbitt v. Lockman, 34 N.Y. 167, 169 (1866) (similar).

[2] In re Ryan's Will, 291 N.Y. 376, 417 (1943) (quoting Adair v. Brimmer, 74 N.Y. 539, 553, 554 (1878)); In re LeoGrande, 13 Misc. 3d 1070, 1076 (Sur. Ct. Nassau Cty. 2006); In re Estate of Hunter, 190 Misc. 2d 593, 599 (Sur. Ct. Westchester Cty. 2002); James' Estate, 86 N.Y.S.2d at 87.

[3] In re Lee, 153 A.D.3d 831, 833 (2d Dep't 2017).

[4] Id.

[5] Ryan's Will, 291 N.Y. at 417 (quoting Adair, 74 N.Y. 539 at 554).

[6] See id. (quoting Adair, 74 N.Y. 539 at 554) ("The maxim 'ignorantia legis excusat neminem,' cannot be invoked in such a case.").

[7] LeoGrande, 13 Misc. 3d at 1076; Birnbaum v. Birnbaum, 117 A.D.2d 409, 416 (4th Dep't 1986).

[8] CPLR 5015(a)(3); In re Anderson's Will, 22 Misc. 2d 662, 662 (Sur. Ct. Suffolk Cty. 1960); see In re Frutiger's Estate, 29 N.Y.2d 143, 149-50 (1971); Estate of Hunter, 190 Misc. 2d at 599; In re Celantano's Will, 31 Misc. 2d 727, 727 (Sur. Ct. Nassau Cty. 1961); In re Sturges' Will, 24 Misc. 2d 14, 15 (Sur. Ct. Nassau Cty. 1960).

[9] Estate of Hunter, 190 Misc. 2d at 600 (quoting In re Levy's Estate, 19 A.D.2d 413, 417 (1st Dep't 1963)); see LeoGrande, 13 Misc. 3d at 1076; In re Amuso's Estate, 13 Misc. 2d 686, 689 (Sur. Ct. Nassau Cty. 1958); see also Cowee v. Cornell, 75 N.Y. 91, 100 (1878).

[10] Pappas v. Tzolis, 20 N.Y.3d 228, 233 (2012); see also Centro Empresarial Cempresa SA v. Am. Movil SAB de CV, 17 N.Y.3d 269, 278 (2011) (a release given by a "sophisticated principal" to a fiduciary will be effective, at least when the relationship "is no longer one of unquestioning trust"); see also In re Schoenewerg's Estate, 277 N.Y. 424, 428 (1938) (a beneficiary who knows about the trustee's potential liability but is "content to waive inquiry" before signing a release cannot later set the release aside).

[11] In re Application of Greene, 88 A.D.2d 547, 547-48 (1st Dep't 1982) (beneficiary was entitled to demand trust's books and records, even where the trustee protested that an accounting was not yet done); see George G. Bogert et al., The Law of Trusts and Trustees, § 962 (2017 rev.) ("[T]he beneficiary is entitled to demand of the trustee all information about the trust and its administration for which the beneficiary has any reasonable use.").

[12] In re de Sanchez, No. 2001-3187/G, 2017 WL 6731861, 2017 N.Y. Slip Op. 32685(U), at *1 (Sur. Ct. N.Y. Cty. Dec. 27, 2017).

[13] N.Y. Sur. Ct. Proc. Act § 2211(2) (emphasis added).

[14] See In re Stanley's Estate, 59 Misc. 2d 232, 234 (Sur. Ct. N.Y. Cty. 1969) (refusing to "limit the examination of the executors only to such matters relating to their administration of the estate as shown in the account"); see also In re Estate of Dorman, 175 Misc. 2d 479, 480 (Sur. Ct. Cattaraugus Cty. 1998) (following Stanley's Estate).

[15] In re Bierschenk's Estate, 140 N.Y.S.2d 749, 750 (Sur. Ct. Kings Cty. 1955).

[16] In re Hunter, 4 N.Y.3d 260, 270 (2005).

[17] In re Hambleton, 202 A.D.2d 1051, 1051 (4th Dep't 1994) (affirming decision of surrogate to bar discovery into matters covered by prior judicial settlement as res judicata); In re Estate of Zahoudanis, 2000 NYLJ LEXIS 253 (Sur. Ct. Kings Cty. Jan. 7, 2000) (denying discovery into topics covered by prior decree).

[18] Restatement (Second) of Judgments § 77 (2017 rev.); see Ripley v. Storer, 309 N.Y. 506, 518 (1956) (extrinsic evidence may be considered to determine scope of issues litigated for purposes of issue preclusion).