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Burden of Evidence in Investment Surcharge Cases in Pennsylvania

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COMMENT

BURDEN OF EVIDENCE IN INVESTMENT SURCHARGE CASES IN PENNSYLVANIA

In investment surcharge cases, what evidence must an exceptant to a trustee's account produce to make out a prima facie case of negligent mismanagement? How can the trustee rebut this prima facie case? This Comment will concern itself with the answers to those questions, answers which lie largely in an analysis of equitable factors considered by the courts when they fashion the burden of evidence. Those factors control the burden of evidence in a trust surcharge case. They determine on whom the burden rests, how heavy the burden is, and, to some extent, what kind of evidence is necessary to sustain the burden. As a result of the influence of these equitable considerations, present in some cases and absent in others, the burden of evidence may vary considerably from case to case.

Before discussing the specific effects of these factors, certain preliminary observations are necessary. In order for an exceptant to a trustee's account to prove mismanagement, he must prove a breach of trust.[1] The exceptant relying on negligence must prove a specific[2] violation of the standard of care applicable to the trustee's fiduciary position. *Calhoun's Estate*[3] early expounded the standard of care generally applicable to trustees in Pennsylvania: "common skill, common prudence, and common caution."[4] A more recent declaration of this duty is found in the Fiduciaries Investment Act of 1949:

> The exercise of that degree of judgment and care, under the circumstances then prevailing, which men of prudence, discretion and intelligence exercise in the management of their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income to be derived therefrom as well as the probable safety of their capital.[5]

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1. RESTATEMENT (SECOND), TRUSTS § 204 (1959).
2. Burke Appeal, 378 Pa. 616, 626, 108 A.2d 58, 64 (1954): "Since the exceptant had alleged a breach of trust by the trustees, the burden of persuasion was on him to prove the particulars of any wrongful conduct . . . ."
3. 6 Watts 185 (Pa. 1837).
4. *Id.* at 188.
5. PA. STAT. ANN. tit. 20, §§ 821.6(1), 821.9(1) (1950). See Headley, *Trust Investments—Fundamental Principles Lawyers Should Know,* 91 TRUSTS & ESTATES 739 (1952), where it is stated: "I know of no case where a trustee has been surcharged for a failure to enlarge . . . the trust. In fact the hazards of attempting it are so

This statement of the applicable standard is general in nature; the broad language permits courts to apply the standard with remarkable flexibility. Decisions disclose that the presence or absence of certain significant factors in the cases exerts considerably greater influence on the courts' application of the standard than any statement of the standard.

One equitable factor of particular importance in delimiting the proper range of investment is a *discretionary power* in the trust instrument.[6] The existence and scope of a discretionary power is not always obvious. Since, as a rule, it is to the trustee's benefit to establish the power, he introduces the evidence on this issue. Suppose a trustee wants to rely on a discretionary power to widen the zone of permissible investment in order to justify investment in or retention of certain stocks. In that event, a presumption that the power for which he contends does not exist will operate against him.[7] Pennsylvania courts require the trustee to establish such a power "with the utmost clearness,"[8] to overcome the presumption. The logical foundation on which this presumption rests is the reluctance of courts to permit a trustee to exceed the proper sphere of safe investment, as decreed by the legislature,[9] in the absence of unquestionable authority from the settlor to do so. Conversely, in those comparatively rare cases in which it is contended that the trust instrument has restricted the proper area of investment,[10] the burden of establishing the narrowness of discretion should fall on the exceptant. Such a restriction likewise varies the usual legislative standard as to the proper scope of investment, and should be construed with

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great that the usual methods of doing so, through business and speculation, are normally prohibited . . . by law."

6. Lerch Estate, 399 Pa. 59, 159 A.2d 506 (1960).

7. Taylor's Estate, 277 Pa. 518, 121 Atl. 310 (1923); Barker's Estate, 159 Pa. 518, 529, 28 Atl. 365, 367 (1894) (dictum); Wood's Estate, 130 Pa. Super. 397, 197 Atl. 638 (1938); RESTATEMENT (SECOND), TRUSTS § 227, comment *u* (1959). *Cf.* Commonwealth Trust Co. Case, 331 Pa. 569, 575, 1 A.2d 662, 666 (1938): "[A corporate trustee] must justify every expenditure as a proper one according to the terms of the instrument under which it is acting, or the power and authority conferred upon it."

8. Taylor's Estate, *supra* note 7, at 524, 121 Atl. at 311.

9. Statutes determine what investments are authorized for trustees in Pennsylvania. For this state's legal list of authorized investments, see generally the Fiduciaries Investment Act of 1949, PA. STAT. ANN. tit. 20, §§ 821.1–821.20 (1950).

> Subject only to the provisions of the trust instrument, if any, a fiduciary may accept, hold, invest in, and retain, any of the investments authorized by this act, and shall not be liable for loss on such investments so long as he exercises due care and prudence in the performance of his duties in regard to them. "Legal investment" or "authorized investment" or words of similar import used in a trust instrument shall be construed to mean any investment authorized by this act.

PA. STAT. ANN. tit. 20, § 821.2 (1950). For a discussion of recent amendments to this act, see Fiduciary Rev., Nov., 1961, p. 1.

10. *E.g.*, Dillon's Estate, 324 Pa. 252, 188 Atl. 134 (1936). It is declared by statute that the settlor may, by express provision in the trust instrument, restrict or enlarge the scope of investment. PA. STAT. ANN. tit. 20, § 821.18 (1950).

similar strictness.[11] Akin to provisions widening or narrowing the scope of investment are provisions which purport to alter the trustee's ordinary liability. Since these provisions are also in derogation of what would otherwise be the governing law, they too are eyed with disfavor and strictly construed. In *Hammett's Estate*,[12] a provision relieving the trustee "from any loss my estate may sustain by reason of the exercise of the discretion herein given" was held ineffective to relieve the trustee from liability for ordinary negligence. That wording was not sufficiently specific to include negligence in the exercise of the power.[13] To be effective, discretionary or exculpatory language must cover very clearly the transaction questioned, because all doubts will be resolved against the party who would use the provision to alter the law.[14]

Assuming a discretionary power forces its way through those presumptions against it, a great deal of weight will be accorded it. "In considering the responsibility of the accountant for its action [it is necessary to bear] . . . always in mind the authority . . . vested . . . ."[15] While invariably Pennsylvania courts give the power careful consideration, some of them have given the presence of the power more weight than others. In some cases, it would appear that the only effect of the power is to shift the burden of evidence on the negligence issue.[16] That is, although the exceptant can point to an investment which would otherwise be illegal, if the trustee shows authority in the trust instrument for making or retaining the questioned investment, the burden shifts back to the exceptant to prove negligence on the part of the trustee. The trustee has discharged for the moment his duty to account for the investment.[17] Under this approach, the standard of care has not changed; only ordinary negligence need be shown.[18] Other cases attach more weight to the presence of a discretionary power.[19] Not only does

11. *Cf.* RESTATEMENT (SECOND), TRUSTS § 227, comment *u* (1959).

12. 23 Pa. D. & C. 353, 356-57 (Orphans' Ct. 1935).

13. Where the provisions are very clear, however, they will protect the trustee from liability for negligence. Spring v. Hawkes, 351 Pa. 602, 41 A.2d 538 (1945) (instrument relieving trustee from liability except for gross negligence or willful misconduct).

14. Taylor's Estate, *supra* note 7.

15. Dickinson's Estate, 21 Pa. D. & C. 247, 249 (Orphans' Ct. 1934), *aff'd*, 318 Pa. 561, 179 Atl. 443 (1935); *cf.* RESTATEMENT (SECOND), TRUSTS § 227(c) (1959).

16. Glauser Estate, 350 Pa. 192, 38 A.2d 64 (1944); Clabby's Estate, 338 Pa. 305, 12 A.2d 71 (1940); Clay's Estate, 25 Pa. D. & C. 257 (Orphans' Ct. 1936) (semble); Dickinson's Estate, *supra* note 15.

17. Carwithen's Estate, 327 Pa. 490, 493, 194 Atl. 743, 745 (1937) (dictum): "If a trust investment is properly questioned, the burden of showing the wisdom or propriety of his conduct in making it is on the trustee." *Cf.* Mintz v. Brock, 193 Pa. 294, 44 Atl. 417 (1899); Puterbaugh's Estate, 44 Pa. Super. 102 (1910); RESTATEMENT (SECOND), TRUSTS § 172, comment *b* (1959).

18. Cases cited note 16 *supra*; see RESTATEMENT (SECOND), TRUSTS § 227, comment *u* (1959).

19. Lerch Estate, *supra* note 6; Jones' Estate, 344 Pa. 100, 23 A.2d 434 (1942);

the burden of evidence shift, but the standard of care changes. No longer is ordinary negligence the test of liability;[20] rather, "a trustee will not be held personally liable for the honest exercise of a discretionary power in the absence of *supine* negligence . . . ."[21] Such negligence may be required "as raises a presumption of willful default."[22] Most courts which apply as the standard of care this measure of supine negligence do not define the term. Recently, however, a definition of conduct which violates the supine negligence standard has developed: "clearly unwise and unjustifiable in the exercise of ordinarily good business judgment."[23]

The effect given discretionary powers, shifting the burden of evidence and, in the majority of cases, altering the standard of care, can be rationalized in several ways. The requirement of supine negligence reflects a reluctance to determine whether discretionary powers were properly exercised.[24] By inserting such a provision, the settlor is presumed to have intended that the judgment and discretion of the trustee should control, and the courts should interfere as little as possible.[25] Discretionary powers will be exercised overcautiously if trustees are frequently checked in exercising them, and so the settlors' intent will be thwarted. The crux of the reasoning appears to be the desire to give such powers an effect likely to further the settlors' ends in employing them in the first place.

To appreciate fully the effects of discretionary powers, it may be helpful to devote some thought to cases in which no such power exists. Here is the converse of the previously discussed situation; now the trustee has *unauthorized* stocks in his possession. Of course, if the trustee invests in stocks, in the absence of authority from either statute or trust instrument

Stirling's Estate, 342 Pa. 497, 21 A.2d 72 (1941); Dempster's Estate, 308 Pa. 153, 162 Atl. 447 (1932); Harts' Estate, 203 Pa. 480, 53 Atl. 364 (1902); Bartol's Estate, 182 Pa. 407, 38 Atl. 527 (1897); Reik's Estate, 18 Pa. D. & C. 252 (Orphans' Ct. 1933).

The approach selected by a court may depend on the equities of the respective parties. As a rule, if the discretionary power relaxes the standard of care, no surcharge is imposed. *But see* Harts' Estate, *supra* and Reik's Estate, *supra*. Perhaps it should be noted that the discretionary power was described as a "restricted" one in Harts' Estate, *supra* at 487, 53 Atl. at 366.

20. A power to retain, coupled with a narrow market, was sufficient to overcome a surcharge which would otherwise have attached under the prudent man rule in Dempster's Estate, *supra* note 19.

21. Detre's Estate, 273 Pa. 341, 350, 117 Atl. 54, 57 (1922) (emphasis added), quoted approvingly in Dempster's Estate, *supra* note 19, at 159, 162 Atl. at 448.

22. Bartol's Estate, *supra* note 19, at 411, 38 Atl. at 528. But a discretionary power will not excuse the trustee's complete inattentiveness to the investments. Blish Trust, 350 Pa. 311, 38 A.2d 9 (1944) (retention for six years of stock paying no income and constituting a large part of the corpus).

23. Lerch Estate, *supra* note 6, at 65, 159 A.2d at 510.

24. The terms of the trust may be broad enough to authorize the trustee to make investments which a prudent man would not make. Greenhouse's Trust Estate, 338 Pa. 144, 12 A.2d 96 (1940).

25. See RESTATEMENT (SECOND), TRUSTS § 187, comment *e* (1959).

to do so, he commits a breach of trust.[26] Of more importance for study of the standard of care and burden of evidence is the following situation: the trustee has acquired the settlor's stocks, some of which are nonlegals, and has not yet disposed of them, though not authorized to retain nonlegals. The trustee is not required to convert the nonlegals into legal stocks at once. If the market is poor, he may bide his time, awaiting a more judicious opportunity to sell. The Fiduciaries Investment Act of 1949 expressly provides for this situation: "A fiduciary may retain without liability for resulting loss any asset received in kind, even though it is not an authorized investment, provided he exercises due care and prudence in the disposition or retention of any such nonlegal investment."[27] However, when stocks are retained in the absence of authority, a heavy burden of proving that retention was not negligent rests on the trustee,[28] and the longer the stocks are kept, the greater the burden becomes.[29] Furthermore, it is clear that ordinary negligence will constitute a breach of duty in this situation—supine negligence need not be shown.[30] The burden of evidence and the standard of care are the converse of what they would be if a discretionary power were in the case.

Discretionary powers are not the only means of altering the standard of care and the burden of evidence; one factor which may have similar effect in a surcharge case is *acquiescence*. Acquiescence may appear to operate as a partial defense to the trustee, but unlike a discretionary power, acquiescence may also be a complete defense. That difference between the two factors arises because the policy behind the courts' weighing acquiescence in arriving at their determinations rests on entirely different ground than the reasoning behind the consideration they give a discretionary power. The policy behind the consideration given to acquiescence probably springs from the concept *volenti non fit injuria*. This concept of acquiescence thus

26. Commonwealth *ex rel.* v. McConnel, 226 Pa. 244, 75 Atl. 367 (1910): a fiduciary invests in nonlegals at his own risk; good faith and sound judgment are immaterial.

27. PA. STAT. ANN. tit. 20, § 821.14 (1950); see RESTATEMENT (SECOND), TRUSTS § 231 (1959). For a consideration of the effects of the Fiduciaries Investment Act of 1949 on pre-existing law, see generally Note, *Retention of Trust Investments*, 55 DICK. L. REV. 342 (1951).

28. Lewis' Estate, 344 Pa. 586, 26 A.2d 445 (1942); Casani's Estate, 342 Pa. 468, 21 A.2d 59 (1941); Reinhard's Estate, 322 Pa. 325, 185 Atl. 298 (1936); Taylor's Estate, *supra* note 7; Mellier's Estate, 18 Pa. D. & C. 595 (Orphans' Ct. 1933), *aff'd*, 312 Pa. 157, 167 Atl. 358 (1933); Curran's Estate, 18 Pa. D. & C. 103 (Orphans' Ct. 1932). 2 SCOTT, TRUSTS § 230.2 (1939), quoted in Casani's Estate, *supra* at 483, 21 A.2d at 65 (concurring opinion). The trustee "is the one with knowledge of the practical difficulties, the lack of a market, and the like." Mellier's Estate, *supra* at 598. But would that not be the case when a discretionary power is present?

29. Blish Trust, *supra* note 22; Casani's Estate, *supra* note 28; *cf.* Curran's Estate, *supra* note 28.

30. Taylor's Estate, *supra* note 7.

has much in common with the philosophy behind the tort concept of assumption of risk: one who consents to the consequences of wrongful conduct should not be heard to complain. To be true to theory and analogy, if acquiescence be proven to the satisfaction of the court, there should be no surcharge liability for breach of trust. Numerous cases so hold.[31] These cases have the support of the *Restatement of Trusts*: if, to use the *Restatement* term, *consent* to the trustee's investment decision is shown, the trustee is not liable for a loss on that investment.[32]

Since acquiescence may wholly bar a claim of mismanagement, it becomes important to note the kind and amount of evidence the trustee must introduce to avoid a surcharge. Most commonly introduced is evidence showing the exceptant's approval of the investment. Approval of the investment in previous accounts, for example, may be sufficient.[33] Tacit approval may be evidenced by a failure to object to regular statements showing the nature of the investment.[34] In addition, the lapse of time during which the current exceptant might have objected is important, since a long delay will invoke the equitable doctrine of laches in conjunction with acquiescence.[35] Certainly, approval of the investment coupled with the receipt of benefits from the investment by the present exceptant will raise the defense of acquiescence.[36] It would be patently inequitable to permit a beneficiary to enjoy the benefits of a speculative investment for so long as it may remain lucrative, and to throw the loss on the trustee as soon as the investment ceases to be productive. Evidence of this type of conduct bars a surcharge.

Evidence of acquiescence can, however, be overcome. Though chargeable with conduct from which acquiescence may be inferred, an exceptant may come forward with evidence indicating he had no *knowledge* of the facts concerning the mismanagement.[37] This evidence, coupled with a showing that the trustee must reasonably have known that the exceptant's knowledge was

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31. Walton Estate, 348 Pa. 143, 34 A.2d 484 (1943); Clabby's Estate, *supra* note 16; Wilbur's Estate, 334 Pa. 45, 5 A.2d 325 (1939); Rambo's Estate, 327 Pa. 258, 193 Atl. 1 (1937); Stephen's Estate, 320 Pa. 97, 181 Atl. 559 (1935); Macfarlane's Estate, 317 Pa. 377, 177 Atl. 12 (1935); Towne's Estate, 25 Pa. D. & C. 641 (Orphans' Ct. 1936); Elverson's Estate, 15 Pa. D. & C. 383 (Orphans' Ct. 1931); *cf.* Grote Trust, 390 Pa. 261, 135 A.2d 383 (1957) (signed waiver held to bar surcharge).

32. RESTATEMENT (SECOND), TRUSTS § 216 (1959).

33. See Clabby's Estate, *supra* note 16.

34. Wilbur's Estate, *supra* note 31; Towne's Estate, *supra* note 31.

35. Wilbur's Estate, *supra* note 31; see Towne's Estate, *supra* note 31; Maser's Estate, 21 Pa. D. & C. 559 (Orphans' Ct. 1934).

36. Clabby's Estate, *supra* note 16.

37. Bard's Estate, 339 Pa. 433, 13 A.2d 711 (1940); Macfarlane's Estate, *supra* note 31, at 382, 177 Atl. at 15 (dictum); Rothermel's Estate, 47 Pa. D. & C. 478 (Orphans' Ct. 1943).

Here again notice the analogy between acquiescence and assumption of risk. Knowledge is also a prerequisite for assumption of risk.

inadequate, will rebut the trustee's assertion of acquiescence.[38] The burden of proving that any information supplied by the trustee was inadequate is on the exceptant.[39] The policy against permitting one to recover who has consented to the wrongful conduct requires the exceptant to dispel all inferences to be drawn from his conduct.

The policy behind the defense of acquiescence is so strong as to have some effect on the outcome of a case even though the evidence of acquiescence is insufficient to raise a complete bar. When there is some evidence of acquiescence but not such evidence as would demand the exceptant be barred, the standard of care and the burden of evidence are influenced with results very analogous to the effects of a discretionary power. Evidence of acquiescence is permitted to lower the standard of care and increase the burden of evidence on the exceptant.[40]

> It is not without significance that appellants, both of whom are college graduates and women of social position, and who, as it appears, were at all times aware of the challenged investments and familiar with the properties by which they were secured, indicated no dissatisfaction whatever with the manner in which these investments were handled by accountant until their request for the accountings . . . .[41]

Consideration of such evidence may be explained on the ground that the belief of a beneficiary that a particular disposition is advisable is evidence of the wisdom of that course of action.[42] This rationale is not particularly convincing as a justification of the weight given by the courts to evidence of acquiescence. If one is looking for evidence of prudence, much better evidence exists than the previous wishes of the current exceptant. The significance attached to acquiescence by the courts is explained more adequately as a reflection of the strong policy against permitting one to recover who has encouraged the mismanagement. But whatever their reasoning, courts give weight to even slight evidence of acquiescence in determining whether to impose a surcharge. The trustee is well advised to introduce any evidence available to him which would point in that direction, though he well knows the evidence of acquiescence is insufficient to bar the claim.

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38. RESTATEMENT (SECOND), TRUSTS § 216(2)(b) (1959); *cf.* Linnard's Estate, 16 Pa. D. & C. 143 (Orphans' Ct. 1931), *petition for bill of review denied*, 200 Pa. 32, 148 Atl. 912 (1930).

39. Macfarlane's Estate, *supra* note 31. Initially, however, the trustee may have the burden of showing that some information was supplied. Bard's Estate, *supra* note 37.

40. Greenawalt's Estate, 343 Pa. 413, 21 A.2d 890 (1941); Saeger Estates, 340 Pa. 73, 16 A.2d 19 (1940); Shipley's Estate (No. 1), 337 Pa. 571, 12 A.2d 343 (1940); Gardner's Estate, 323 Pa. 229, 185 Atl. 804 (1936).

41. Saeger Estates, *supra* note 40, at 80, 16 A.2d at 23.

42. Gardner's Estate, *supra* note 40, at 233, 185 Atl. at 806.

The converse of acquiescence is evidence of previous *protest* by the exceptant to the trustee's course of action. Such evidence has the effect one logically would expect: previous protest reduces the exceptant's burden on the negligence issue.[43] The effect of protest on the burden of evidence, however, is not as pronounced as that of acquiescence. Due weight must be given the consideration that the trustee is charged with the duty of interposing his judgment between the wishes of the protesting beneficiary and the trust fund, if the trustee considers the beneficiary ill-advised.[44]

Besides acquiescence and discretionary powers, a variety of factors may influence the standard of care and burden of evidence in individual cases.[45] Courts consider the type of trustee in determining what may be expected of him in the way of prudent management. Is this an experienced corporate trustee or is the testator's widow the fiduciary? Obviously this factor should, and does, affect the standard exacted.[46] Aside from the requirement that one should employ whatever skill he has,[47] a distinction between corporate and private trustees may be drawn on the ground that the settlor would intend the latter to be held only to the lesser standard.[48]

The courts also consider, in setting the standard, the nature of the misconduct alleged. Is there some evidence of bad faith on the part of the trustee?[49] Or was the trustee honestly trying to further the settlor's intent?[50] Is the investment questioned one which the trustee actually made, or has he only retained it, perhaps awaiting a better opportunity to sell?[51] Is the stock

43. Maser's Estate, *supra* note 35, at 561 (dictum); Mellier's Estate, *supra* note 28. Indeed, these cases support the proposition that when a trustee retains nonlegals in the absence of authority to do so, he *must* obey a demand to sell.

44. Dickinson's Estate, *supra* note 15, at 251. In this case, there was authority to retain nonlegals. Contrast the approach of the court in this case with that taken in the two cited in note 43 *supra*.

45. See Moore, *A Rationalization of Trust Surcharge Cases*, 96 U. PA. L. REV. 651-62 (1947).

46. Glassburner's Estate, 40 Pa. Super. 134 (1909) (trustee testator's brother and not an active businessman); Merrell's Estate, 25 Pa. Dist. 323, 326 (Orphans' Ct. 1916):

> A widow is a favorite of the law. . . . We would not give full scope to this testator's will if we . . . held her liable for the investments made by her in good faith, but which . . . would seem to have been injudicious.

Compare RESTATEMENT (SECOND), TRUSTS § 227, comment *d* (1959).

47. BOGERT, TRUSTS AND TRUSTEES § 541 (2d ed. 1960).

48. Merrell's Estate, *supra* note 46, at 325: "Is it not fair to infer . . . that [the settlor] . . . had in contemplation the possibility that his wife might make [the challenged] . . . investments?"

49. McGuffey's Estate, 123 Pa. Super. 432, 187 Atl. 298 (1936), held that when a corporate trustee purchases a mortgage from itself, the burden is on the trustee to show that due care was exercised in the purchase. See RESTATEMENT (SECOND), TRUSTS § 170, comment *i* (1959).

50. The background of the settlor is considered in determining whether an investment is proper—retention of an investment made by the settlor might be found to be in accordance with his intent. Appeal by Stewart, 110 Pa. 410, 6 Atl. 321 (1885).

51. See Dempster's Estate, *supra* note 19, at 160, 162 Atl. at 448.

which the trustee holds legal or nonlegal? Despite a discretionary power, perhaps some weight should be given the legislative determination of what investments are proper.[52]

All the equitable factors that have been discussed are cast in the balance in arriving at a determination of the standard of care and the burden of evidence. Whenever circumstances are present which mitigate the trustee's alleged offense, the standard of care is accordingly reduced and the exceptant's burden of producing evidence of negligence becomes correspondingly heavier. Whenever circumstances are present which aggravate the offense, the standard of care is increased, and the exceptant's burden of producing evidence of negligence is decreased.

The final consideration is how the burden of evidence may be met. What sort of evidence is used by the exceptant to imply negligence, and what sort is used by the trustee to rebut inferences of negligence? Evidence introduced by the exceptant indicating the trustee failed to take steps which trustees usually take in the exercise of prudence results in an inference of negligence; if the trustee is then unable to introduce some evidence of care,[53] the inference stands. One concludes that no attention was paid the investments.[54] The trustee is expected to come forward with evidence of care because he alone knows what measures were adopted to insure prudent investment and retention.[55]

As to care in making investments, evidence must be introduced on the crucial issue whether the trustee has made a diligent investigation of the stock or has invested haphazardly.[56] Matters which a trustee should consider when investing are all those relating to the safety of the fund and the regularity of the income.[57] "Ordinarily this involves securing information from

52. See Casani's Estate, *supra* note 28, at 481, 21 A.2d at 65 (concurring opinion).

53. Lentz Estate, 364 Pa. 304, 72 A.2d 276 (1950) (expert testimony as to negligence outweighed by evidence of frequent consideration given investments).

54. Blish Trust, *supra* note 22; Seamans' Estate, 333 Pa. 358, 5 A.2d 208 (1939); Kelch's Estate, 21 Pa. D. & C. 204 (Orphans' Ct. 1934), *aff'd*, 318 Pa. 296, 178 Atl. 129 (1935).

> The evidence clearly reveals . . . no consideration . . . . It is most apparent that the trustees . . . did nothing . . . .
> At no place in the testimony does it appear that the accountant ever considered the advisability of converting the stock into legal investments. Neither does it appear that the officers of the company or the individual trustee ever considered the intrinsic value of the stock and the question whether, at any particular time . . . it would be a sacrifice to sell, or whether the current market quotation was a fair price . . . . It does not affirmatively appear that such tests were ever applied by anybody.

Kelch's Estate, *supra* at 211.

55. Mellier's Estate, *supra* note 28.

56. See Ihmsen's Appeal, 43 Pa. 431 (1862); Hammett's Estate, *supra* note 12; RESTATEMENT (SECOND), TRUSTS § 227, comment *b* (1959).

57. RESTATEMENT (SECOND), TRUSTS § 227, comment *o* (1959). Specifically, the *Restatement* suggests consideration of:

> (1) the marketability of the particular investment; (2) the length of the term

sources on which prudent men in the community customarily rely."[58] Market conditions should be evaluated with respect to stocks.[59] A trustee should avail himself of any information to which he has access pertaining to the background of the stock.[60] The stock should be considered in light of other investments in the trust; evidence of diversity is evidence of care.[61]

When care in retaining investments is in issue, evidence is important which bears on whether the trustee has fulfilled his duty to keep himself informed as to the continued safety of the stocks. The *Restatement of Trusts* puts his burden thus:

> The trustee is under a duty to use reasonable care to keep himself informed in regard to the property which he holds in trust, although he is not under a duty to watch the stock ticker or to keep himself informed as to the daily fluctuations in the market price, as a mere speculator would do.[62]

Though the trustee does not have to watch daily fluctuations, proof of frequent consideration of the stocks[63] or, from an exceptant's standpoint, proof of infrequent consideration is important; if the trustee has not considered the stock fairly often, the possibility is suggested that retention resulted primarily from inattention. When the trustee considers the stock, he must "study carefully the circumstances and conditions" controlling "the value of the investment."[64] The trustee should follow the market and consider fluctuation of prices.[65] If the trustee can prove there was no

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of the investment, for example, the maturity date, if any, the callability or redeemability if any; (3) the probable duration of the trust; (4) the probable condition of the market with respect to the value of the particular investment at the termination of the trust especially if at the termination of the trust the investment must be converted into money for the purpose of distribution; (5) the probable condition of the market with respect to reinvestment at the time when the particular investment matures; (6) the aggregate value of the trust estate and the nature of the other investments; (7) the requirements of the beneficiary or beneficiaries, particularly with respect to the amount of the income; (8) the other assets of the beneficiary or beneficiaries including earning capacity; (9) the effect of the investment in increasing or diminishing liability for taxes; (10) the likelihood of inflation.

Cases considering those items: (2) Edward's Estate, 6 Pa. D. & C. 121 (Orphans' Ct. 1925); (3) McGuffey's Estate, *supra* note 49; (7) Kipp's Estate, 277 Pa. 294, 121 Atl. 57 (1923); Estate of Old, 176 Pa. 150, 34 Atl. 1022 (1896); (8) Kipp's Estate, *supra*; Estate of Old, *supra*.

58. RESTATEMENT (SECOND), TRUSTS § 227, comment *b* (1959).

59. Casani's Estate, *supra* note 28; Mitchell's Estate, 21 Pa. D. & C. 225 (Orphans' Ct. 1934).

60. Jones' Estate, *supra* note 19.

61. RESTATEMENT (SECOND), TRUSTS § 228 (1959); *but see* Elkins' Estate, 20 Pa. D. & C. 483 (Orphans' Ct. 1934) (repudiating duty to diversify), *aff'd*, 325 Pa. 373, 190 Atl. 650 (1937); see generally Note, *Trusts—Trustee's Duty to Diversify Investments*, 89 U. PA. L. REV. 536 (1941).

62. RESTATEMENT (SECOND), TRUSTS § 231, comment *b* (1959).

63. Lentz Estate, *supra* note 53.

64. Clay's Estate, *supra* note 16, at 265.

65. Casani's Estate, *supra* note 28, at 475-77, 21 A.2d at 62-63.

market for stocks that allegedly should have been disposed of, there can be no surcharge.[66]

In connection with evidence on the issue of care in either the selection or retention of investments, trustees should keep written records indicating the consideration given investments.[67] The records should include: (1) any information bearing on market conditions and the study of the investments in light of those conditions; (2) reports from financial services;[68] (3) information gathered from investment journals,[69] stock digests,[70] and newspaper quotations;[71] (4) thoughts expressed by other investors in interviews;[72] and (5) minutes of meetings of trustees (if more than one) at which advisability of purchase and retention of stocks is discussed.[73]

Finally, to what extent will the advice of counsel as to the propriety of making or retaining a particular investment protect the trustee? Certainly, that the trustee has sought such advice should be some evidence of care.[74] On the question of *legality* of a given investment, perhaps the advice of counsel should be full protection.[75] As to the prudence of making the investment, the trustee can substitute no one's judgment for his own.[76] The opinion of the attorney can only be of value to indicate that the trustee did consult others before arriving at his determination whether a given investment was a prudent one.

In conclusion, it is emphasized that the location, weight, and, in some cases, nature of the burden of evidence are determined by a number of extrinsic factors of varying significance according to their equitable value. What the courts look for to determine whether the parties have met their burden of evidence accords with the practical realities of the business world.

66. Glauser Estate, *supra* note 16; Reinhard's Estate, *supra* note 28; O'Brien's Estate, 18 Pa. D. & C. 501 (Orphans' Ct. 1933) (narrow market).

67. Stirling's Estate, *supra* note 19, at 504, 21 A.2d at 76.

68. *Id.* at 505, 21 A.2d at 76.

69. Casani's Estate, *supra* note 28, at 474, 21 A.2d at 62.

70. Stirling's Estate, 342 Pa. 497, 506, 21 A.2d 72, 76 (1941).

71. Casani's Estate, *supra* note 28, at 474, 21 A.2d at 62.

72. *Ibid.*

73. See generally Moore, *supra* note 45, at 663-72.

74. Stirling's Estate, *supra* note 70; Lindsay's Estate, 211 Pa. 536, 166 Atl. 848 (1933); Dempster's Estate, 308 Pa. 153, 162 Atl. 447 (1932); Whitecar's Estate, 147 Pa. 368, 23 Atl. 575 (1892); Grossman's Estate, 22 Pa. D. & C. 531 (Orphans' Ct. 1935); Reik's Estate, 18 Pa. D. & C. 252 (Orphans' Ct. 1933).

75. Dempster's Estate, *supra* note 74; Reik's Estate, *supra* note 74, at 256 (dictum); *but see* Grossman's Estate, *supra* note 74 (trustee accountable for gross error, notwithstanding advice of counsel).

76. Whitecar's Estate, *supra* note 74, at 369, 23 Atl. at 575: "[E]ven the advice of counsel will not justify a man in abandoning his own common sense"; Reik's Estate, *supra* note 74.

Courts look for those indicia of caution and circumspection which characterize the actions of intelligent businessmen. Proof of mismanagement is proof of imprudent disposition of the trust *res*, unjustified by mitigating circumstances.

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