# RESOLUTION PROCEDURES TO RESOLVE TRUST BENEFICIARY COMPLAINTS

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Editors’ Synopsis: This Article posits that the Anglo-American trust system should provide a system of resolution procedures to handle beneficiary complaints in an efficient manner. Efficient handling of these complaints will lead to less format litigation between beneficiaries and trustees and will allow the Anglo-American trust system to compete successfully in the global marketplace. The author also provides some historical perspective on the development of trusts and provides an analysis of the current state of the Anglo-American trust system. A discussion of resolution procedures is also included, as well as an example of a resolution procedure policy for a trust company.

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The substance of this Article was delivered in a talk on October 11, 2003, in Maui, Hawaii, to the Hawaii Estate Planning Counsel, the Probate and Estate Planning Section, and the Elder Law Section of the Hawaii State Bar Association. The Hawaii Bar organized the conference as a tribute to, and in memory of, Leighton Wong, Esquire, of the Hawaii Bar. Professor Whitman welcomes any comments and may be reached via email at rwhitman@law.uconn.edu.

Professor Whitman gratefully acknowledges the assistance of Anthony Cenatiempo in preparing the footnotes to this Article.
I. INTRODUCTION

The purpose of this Article is to suggest that both for good business reasons and to protect against a suit for breach of fiduciary obligation, all serving fiduciaries should implement proper procedures for resolving beneficiary complaints.1

This Article focuses on complaints of trust beneficiaries against trustees, although the same ideas apply to all fiduciaries and their beneficiaries.2 The premise of this Article is that if the American trust system had more early resolution of trust beneficiary complaints and less formal litigation,3 we would have a more effective system better to serve the needs of all parties.4 The Anglo-American trust system is poised to compete globally,5 and it will

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1 See Donald P. DiCarlo, Jr., Using Fiduciary Procedures to Build Beneficiary Buy-In, SK004 ALI-ABA 53, 56 (July 2004) (calling for reforms aimed at increasing the amount of beneficiary and trustee cooperation by establishing mediation procedures to resolve potential conflicts and creating a system for the beneficiary to provide the trustee with both negative and positive feedback on the current administration of the trust); see also Robert Whitman, Flexible Fiduciary Accounting from the Outset of Administration, PROB. & PROP., May-June 2004, at 45, 45:

In the event that a reasonable plan for accounting cannot be agreed to between the fiduciary and the beneficiary group, the fiduciary shall offer a proper resolution plan to decide the matter. Depending on the circumstances, such a plan may involve an independent resolution officer, mediation, arbitration, or a court decision.

2 1 AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS § 2.5, at 43 (4th ed. 1987) [hereinafter SCOTT ON TRUSTS] (“A fiduciary relationship involves a duty on the part of the fiduciary to act for the benefit of the other party to the relation as to matters within the scope of the relation.”); see also RESTATEMENT (THIRD) OF TRUSTS § 2 cmt. b (2003) (“The duties of a trustee are more rigorous than those of most other fiduciaries.”) [hereinafter RESTATEMENT (THIRD)].

3 See Lee S. Hausner & Douglas K. Freeman, How to Achieve the Best Trustee/Beneficiary Partnership, 30 EST. PLAN. 604, 604 (2003) (explaining that as trustee/beneficiary litigation increases, promoting open and safe communication between the parties involved to secure an effective partnership is important).

4 See Robert Whitman & Kumar Paturi, Improving Mechanisms for Resolving Complaints of Powerless Trust Beneficiaries, 16 QUINNIPIAC PROB. L.J. 64, 76-77 (2002) (explaining that beneficiaries are at a disadvantage when challenging fiduciaries due to a lack of resources, expertise, and structure of the legal system).

5 As the trust is used more commonly on a global basis, one can expect U.S. corporate fiduciaries to compete with foreign companies for trust business around the world. See Gerry O’Berne, The Expanded European Union: Growth and Global Implications, HORIZONS, Summer 2004, at 4 (discussing the possible investment opportunities that may arise in new member nations of the European Union because of membership advantages such as increased trade and aid).

One example of currently existing global competition is in the area of asset protection
trusts. Asset protection trusts allow an individual to self-settle a trust to protect assets from creditors while still retaining a beneficial interest in the trust. Until 1997, this type of trust only existed in foreign countries, but in 1997, both Delaware and Alaska enacted laws allowing asset protection trusts. See Douglas J. Blattmachr & Richard W. Hompesch, II, Alaska vs. Delaware: Heavyweight Competition in New Trust Laws, PROB. & PROP., Jan.-Feb. 1998, at 32, 32 (explaining that competition to lead the domestic trust industry is increasing as more states realize the benefits of attracting trust business through the development of trusts favoring the settlor).

While trusts have been synonymous with wealth and privilege in America, many trust beneficiaries are persons with modest means and the modern trust serves many functions for beneficiaries that are far from wealthy. See Jackie Cohen, Myths vs. Realities Of Trust Funds, CBS MARKETWATCH.COM WEEKEND INVESTOR (Dec. 30, 2004), at https://secure.marketwatch.com/news/newfinder. The larger and more diverse population of trust beneficiaries today necessitates better and more innovative procedures to resolve trust beneficiary complaints.

DiCarlo, supra note 1, at 56. DiCarlo offers an example of a beneficiary dispute resolution procedure. See infra Appendix.

All discussion and inquiry in the resolution and mediation process, including efforts involving the relationship manager, the manager, and the Resolution Officer shall be considered a part of “litigation settlement negotiation” and shall be inadmissible as evidence of any kind, subject to discovery of any kind, or direct or indirect use of any kind. A precondition to the application of this resolution process beyond step three is the signed statement by all parties that nothing arising directly or indirectly as a result of the resolution process will be used for any purpose in any other context. Id. at 57-60.

Since the 1970s, the number of offshore trusts in international financial centers, known as tax havens, has risen because of their high degree of confidentiality and lack of taxes on trusts held for non-residents. To combat language barriers and a general distrust of financial institutions, offshore trust proponents created a trust protector to resolve any conflicts that may arise between the trustee and the beneficiary. See John H. Lahey, International and Offshore Trusts: Resolving Conflicting Beneficiary and Fiduciary Interests, SE87 ALI-ABA 277, 279 (June 2000) (asserting that the concept of a trust protector may be a useful addition to domestic trust law because it adds flexibility to trust governance structures, especially when competing with offshore trusts).

The rise in global competition for the delivery of trust services has not gone unnoticed by the American fiduciary community. While an attitude of resistance to working toward new techniques for resolving beneficiary complaints often is widely expressed, the author has met some who acknowledge the long range benefits that could come from reducing the need for formal litigation.

See Barton H. Thompson, Jr., Judicial Takings, 76 VA. L. REV. 1449, 1497 (1990)
resolution procedures, bearing in mind the concern for the long-term goal of
global leadership, should speed this process. Furthermore, the Restatement
(Third) and the Uniform Trust Code ("UTC") will help expedite the needed
changes.

II. DRAFTING A RESOLUTION PROCEDURE
INTO A GOVERNING INSTRUMENT

To focus on the idea of proper resolution procedures, the author would
suggest language that could be included in the governing document:

In the event that any beneficiary shall complain to the trustee re-
garding any matter, and that complaint cannot be resolved, the

("Where a change seems to be a natural step in a slow but continuous evolution in the
common law, one feels relatively assured that the change was not motivated by current
political pressures and has been carefully considered."). However, in the last part of the
twentieth century, “[T]rust law in the United States has experienced a period of rigorous,
comprehensive reexamination. Some of this reexamination has involved adaptation to the
gradual evolution of trust practice, and of related tax law and planning, over a considerably
longer period of time.” Edward C. Halbach, Jr., Uniform Acts, Restatements, and Trends in
trust laws’ concern for finding balanced rules leading to the pursuit of the best interests of the
trust beneficiaries).

9 See Lahey, supra note 7.
10 The UTC requires the trustee to administer the trust in accordance with
its terms and purposes and the interest of the beneficiaries. UTC § 801. It
also requires that a trust and its terms be for the benefit of its benefici-
aries. UTC § 404. These requirements are mandatory and cannot be
waived by the settlor. UTC § 105.

Joseph Kartiganer & Raymond H. Young, The UTC: Help for Beneficiaries and Their
Attorneys, PROB. & PROP., Mar.-Apr. 2003, at 18, 18-19 (explaining that the UTC aids
beneficiaries by providing for a bill of rights for beneficiaries and requiring trustee educa-
tion). For an example of a beneficiary’s bill of rights, see Robert Whitman,
Commentary: A Law Professor’s Suggestions for Estate and Trust Reform, 12 QUINNIPIAC PROB. L.J. 57, 61-
63 (1997) (citing the need for greater beneficiary protection since the modern corporate
fiduciary has been pressured to become more concerned with profit).

The UTC was drafted in coordination with the revision to the Restatement (Third) in an
effort to intertwine the statutes of the UTC with the background materials of the Restatement.
See David M. English, The Uniform Trust Code (2000), SJ001 ALI-ABA 285, 293-94 (July
which was prepared in close coordination with the drafting of the Third Restatement, absorbs
this benefi-the-beneficiaries requirement.” John H. Langbein, Mandatory Rules in the Law of
[American trust law] into two groups: intent-defeating rules that restrict the settlor’s auton-
omy, and intent-serving rules whose purpose is to discern and implement the settlor’s true
intent”).
trustee shall provide a reasonable procedure for complaint resolution.

Notice this language is fairly open-ended, yet places the obligation for providing reasonable complaint resolution procedures with whom it belongs—the trustee. Thus, depending on the particular facts of the matter involved, a trustee who refuses to offer mediation, arbitration, or any other reasonable alternative to formal litigation may be breaching a fiduciary duty to the beneficiary—quite apart from the ultimate determination

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11 "The settlor and the drafting attorney can, however, anticipate and minimize the furor of the disappointed beneficiary. There is, of course, no one solution that will fit each situation." Steven M. Fast, Structuring Trusts to Avoid Beneficiary Dissatisfaction, SG012 ALI-ABA 29, 31 (July 2001) (suggesting that the attorney and the settlor may look to avoid future conflicts with the beneficiary by creating a clear explanation of the trust’s structure as well as providing a provision for an ombudsman to resolve disputes).

12 Under the agency theory of trusts, the trustee acts as the agent of both the settlor and the beneficiary and must balance the needs and rights of each principal. Allowing the trustee to formulate the resolution procedures allows for a fair process that should balance both the needs of the settlor and beneficiary—as the trustee is uniquely in tune to both parties’ preferences and wishes. In such a situation, the conflict can be exploited to produce a positive result. See Robert H. Sitkoff, An Agency Costs Theory of Trust Law, 89 CORNELL L. REV. 621, 626 (2004) ("[A] further benefit of the agency costs approach is that it provides a framework for evaluating the competing Anglo-American views."); see also Robert Whitman, Fiduciary Accounting After Arthur Andersen and Enron, 16 QUINNIPAC PROB. L.J. 289, 295 (2003) (regarding resolution procedures: “Corporate fiduciaries must organize trust departments to insure that this will happen and they must advertise their understanding that this is a necessary part of the proper execution of their fiduciary duties”).

13 See Robert Whitman, Invitation to Discussion, SJ001 ALI-ABA 1, 4 (July 2003) (suggesting that to ensure that the trustee maintains his fiduciary duty in time of conflict with the beneficiary, the trustee should offer the beneficiary choices in dispute resolution).

14 The American Arbitration Association has created rules for wills and trusts to provide for dispute resolution between fiduciaries and beneficiaries. See Fast, supra note 11, at 36. See also Whitman, supra note 13.

15 See Whitman, supra note 13.

16 See 4 SCOTT ON TRUSTS, supra note 2 § 282.1, at 31. “Effective risk management requires a trustee to focus on carrying out his, her or its fiduciary duties with great diligence and integrity. The result of these efforts will be that the trustee will effectively serve the beneficiaries. . . . Proper risk management should make for happier beneficiaries and . . . minimize fiduciary litigation.” William C. Weinsheimer, Risk Management for Trustees: Happy Beneficiaries Equal Empty Court Rooms (Part 1), SJ001 ALI-ABA 155, 157 (July 2003) (asserting that proper education, qualification, and preparation by the trustee will ensure proper administration of the trust and best serve the needs of the beneficiary).
regarding the merits of the claim. For so-called “powerless beneficiaries,” including the suggested language in the governing instrument would provide a mechanism for dispute resolution that would take into account the inability of a beneficiary to retain a lawyer at large expense or to attract a lawyer who would serve on a contingent fee basis. One would hope that appropriate resolution procedures in a governing document would reduce substantially the need for costly formal litigation (which, win or lose, will include ill will toward the fiduciary on the part of the beneficiary). Even when the claim is found to be without merit (and this might occur in a substantial

17 “Just because a complaint is lodged, does not mean that the fiduciary is free to relax her obligation to act in good faith and in the best interest of the beneficiary.” Whitman, supra note 13, at 3.

18 A powerless beneficiary is a beneficiary that lacks adequate resources to resolve a complaint through formal litigation. See Whitman & Paturi, supra note 4, at 70. See also Robert Whitman, Disclosure Strategies to Settle Complaints and Avoid Formal Litigation, CK089 ALI-ABA (forthcoming 2005) (stating that powerless beneficiaries literally have no opportunity to be heard).

19 See id.

20 A “contingent fee” is [a] fee charged for a lawyer’s services only if the lawsuit is successful or is favorably settled out of court. Contingent fees are usually calculated as a percentage of the client’s net recovery (such as 25% of the recovery if the case is settled, and 33% if the case is won at trial). BLACK’S LAW DICTIONARY 315 (7th ed. 1999); see also supra note 18 and accompanying text.

21 Often, after a decision has been reached through the litigation process, the relationship between the beneficiary and the trustee has been irreparably damaged. In many cases, the next step may be an application for trustee removal. If removal is granted, the trustee is usually replaced by a successor, as provided for by the terms of the governing instrument or by court appointment. This successor now has the responsibility to understand the terms of trust, as well as to establish a productive relationship with the beneficiary. While a trustee may be brought up to speed on the trust rather quickly, establishing a relationship with the beneficiary takes time. If a proper resolution procedure had been in place, this valuable time, as well as any extra fees involved, may have been saved. See Jo Ann Engelhardt & Robert W. Whitman, Administration with Attitude: When to Talk, When to Walk, PROB. & PROP., May-June 2002, at 12, 16 (“Sometimes, knowing when to walk is as important as knowing how to talk. If the trustee has made its best efforts to ensure good communication and effective administration without meeting the beneficiaries’ requirements, the best course may be to resign.”); see also DiCarlo, supra note 1.

22 See Engelhardt & Whitman, supra note 21. Often, another unfavorable byproduct of trust litigation is family conflict. When family members have conflicts concerning a trust, family discord because of the strain of litigation is another cost to factor. See also Daniel Bent, My Bequest to My Heirs: Years of Contentious, Family Splitting Litigation . . ., HAW. B.J., Feb. 2004, at 28, 28-31 (asserting that alternative dispute resolution procedures provide a vehicle to settle disputes without damaging the family dynamic).
number of cases), the beneficiary still could feel that the claim had been fairly heard and fairly decided.

III. PROPOSED LANGUAGE FOR A CORPORATE FIDUCIARY POLICY MANUAL

Assuming that the corporate fiduciary’s policy manual already has a reasonable process for resolving trust beneficiary complaints, the following additional language is suggested for the policy manual to handle a situation in which the trust department has been unable to resolve a beneficiary complaint:

In the event that the issue remains unresolved, the beneficiary (or beneficiaries) shall be informed of the opportunity to refer the matter to a resolution officer who shall either be a neutral party or, if employed by the corporate fiduciary, a party charged with the duty of acting as a neutral officer. The trust department may refer the matter to the resolution officer as well. The resolution officer,

\[23\] See Whitman, supra note 13.
\[24\] Mediation involves a neutral third party working with all parties individually in an effort to find a common ground on which a resolution can be achieved. The mediator also has a responsibility to maintain positive and non-aggressive negotiations. Arbitration is also beneficial because the proceedings can be private, so the public record does not contain a decision. See Bent, supra note 22.
\[25\] See Whitman, supra note 12. It makes sense that a corporate fiduciary would have alternate dispute resolution procedures in its manual. When a corporate fiduciary establishes an independent evaluation department . . . with the duty to examine the complaint and make an independent finding, that corporate fiduciary has gone further in meeting the duty than another that simply provides that complaints are to be sent to and adjudged by the same folks being complained about. Whitman, supra note 13, at 3.
\[26\] As a rule of thumb, an effective trustee should attempt to resolve complaints early via prompt oral or written communication. In the correspondence, the trustee should explore the cause of the conflict and, if it is related to the administration of the trust, accept and discuss suggestions from the beneficiary. If the correspondence is not effective, the trustee should schedule a face to face meeting. The ultimate responsibility of the trustee is to exhaust every possible method of resolving the conflict in-house before sending the matter to a third party. See Mary Clements Pajak, Counseling Fiduciaries on How to Avoid Beneficiary Complaints and Quickly and Fairly Settle Complaints, SC85 ALI-ABA 21 (June 1998) (explaining that effective communication with the beneficiary not only reduces the amount of conflict, but also can serve to resolve the conflict in a timely manner without referring the matter to a third party).
\[27\] See supra text accompanying note 25.
\[28\] See DiCarlo, supra note 1.
charged to carry out the duties of a neutral party, shall meet with the respective parties in order to attempt to reach an agreed upon resolution or a proper resolution procedure.

“Depending on the circumstances of the case, the Resolution Officer can suggest a number of procedures for resolving the matter, including mediation, arbitration, a decision by the resolution officer, or any other reasonable procedure, short of formal litigation.” All suggestions and decisions made by the resolution officer shall be in writing and made available to the trust department and the beneficiary (or beneficiaries) within a reasonable amount of time.

“Questions such as (but not limited to) who bears the expense of the resolution procedure, which parties are to be involved in the process, and the finality of the decisions reached, shall be subject to good faith negotiation between the trust department, the . . . beneficiary [(or beneficiaries)], and the Resolution Officer.”

Under this policy statement, the resolution officer would be the equivalent of an ombudsman. At the choice of the trustee, the resolution officer could be a completely independent person or, with a corporate trustee, a specifically designated employee. Although the resolution officer might be

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29 Resolution by a resolution officer provides a cost effective and private solution. See Whitman, supra note 1, at 45.
30 See DiCarlo, supra note 1; see also infra Appendix.
31 DiCarlo, supra note 1, at 59. Litigation, mediation, and arbitration are all possible avenues that a beneficiary can choose, and each has its own strengths and weaknesses. Mediation provides a less formal approach because of the lack of formal rules or hearings, but unless the mediation is binding, it may not resolve the issue quickly. Binding arbitration is more formal, but it does not rise to the level of formal civil litigation. Litigation provides a structured proceeding but is costly and all decisions are a matter of the public record. See Bent, supra note 22. Because each dispute is unique, the resolution officer should have some freedom to decide which resolution procedure best fits the particular case.
32 See supra note 2 and accompanying text.
33 DiCarlo, supra note 1, at 59.
34 “An ombudsman serves as an alternative to the adversary system for resolving disputes . . . [and is usually] independent and nonpartisan.” BLACK’S LAW DICTIONARY 1115 (7th ed. 1999). Designation of an ombudsman may be the simplest way to resolve a conflict, especially if the person chosen is a trusted family friend or relative who has the respect of the beneficiaries. See Fast, supra note 11, at 35.
35 In an effort to assuage a beneficiary’s fear of impropriety on the part of the resolution officer, it may be better to have an independent person fill the position. If a beneficiary lacks faith in the resolution officer, the officer merely serves as a speed bump on the road to litigation.
an employee of the corporate fiduciary, the desired results likely could still
be achieved.\textsuperscript{36} If a resolution officer appeared to be blatantly partial to the
corporate fiduciary, the resolution officer’s actions would be subject to court
scrutiny in connection with a case alleging breach of fiduciary duty to
provide a proper resolution procedure.\textsuperscript{37} The trust of a beneficiary and a
Corporate trustee may be placed in a resolution officer,\textsuperscript{38} even if the resolu-
tion officer is an employee of the corporate fiduciary, because of the factor
that the author considers to be the most important one in this entire area: it is
good business to have a proper resolution procedure.\textsuperscript{39}

\textbf{IV. ANALYSIS}

The four main complaints by trust beneficiaries against trustees are:

1. The payments are too small.\textsuperscript{40}
2. The fees are too high.\textsuperscript{41}
3. The investment performance is not good enough.\textsuperscript{42}
4. Putting the money into a trust was stupid, because if I, the benefi-
ciary, had it outright, I could do a lot better with it.\textsuperscript{43}

\textsuperscript{36} While I like your idea of a resolution officer, I think that it is important
that the beneficiary have some input as to the selection of that officer. If
it is simply an employee of the corporate fiduciary, then I think the
beneficiary may have the impression (rightly or wrongly) that the resolu-
tion officer is biased in favor of the fiduciary and, as a result, your goal
of giving your beneficiary their “day in court” without the expense will
not be accomplished. I think having a panel of officers (not affiliated
with the fiduciary) from which the beneficiary can choose is more
appropriate and serves the interests of both the fiduciary and the benefi-
ciary.

E-mail from Rhonda Griswold, Esquire to Robert Whitman, Professor of Law, University of

\textsuperscript{37} See supra note 2 and accompanying text; see also Whitman, supra note 13.

\textsuperscript{38} See DiCarlo, supra note 1, at 57.

\textsuperscript{39} See Whitman, supra note 13.

\textsuperscript{40} Telephone Interview by Anthony Cenatiempo with Standish Smith, Founder, Heirs,

\textsuperscript{41} Id.; see also Susan S. Locke, Counseling Fiduciaries on How to Avoid Beneficiary
Complaints and Quickly Settle Complaints, SE87 ALI-ABA 139, 148 (June 2000) (outlining
the internal decision-making structure as well as the common complaints and resolutions
employed by a bank organization).

\textsuperscript{42} See Telephone Interview with Standish Smith, supra note 40; see also Locke, supra
note 41, at 145.

\textsuperscript{43} See Telephone Interview with Standish Smith, supra note 40; see also Locke, supra
note 41, at 147.
Also, another complaint is that the attorney who drafted the trust instrument should be shot because no one ever thought things would work this way—and so on.44

Believing that trustees do not have difficulty dealing with some trust beneficiaries is unrealistic.45 Imagine being a trust officer for the plaintiff in United States v. Satan and His Staff.46 In that case, the plaintiff alleged “that Satan ha[d] on numerous occasions caused [the] plaintiff misery and unwarranted threats, against the will of plaintiff, that Satan has placed deliberate obstacles in his path and ha[d] caused plaintiff’s downfall.”47

However, believing that all trust beneficiary complaints lack merit would be equally foolish.48 Those who doubt that wrongdoing can, and does, occur in the trust system and that injustices can, and do, occur are in denial.49 For example, consider the plight of RK, a trust beneficiary who sought an accounting from her out-of-state trustees. RK believed she was entitled to approximately $30,000. After consistent stonewalling, RK sent the trustees a letter in which, because of her total frustration, she accused them of being “crooks” (which they may well have been). The trustees counterclaimed for defamation and received a default judgment against RK in their home state. RK could not afford to travel to court to defend herself. The judgment, by an allegedly “friendly” judge, was for $2,000,000.50

44 See Telephone Interview with Standish Smith, supra note 40.
45 See Engelhardt & Whitman, supra note 21, at 16.
47 Id. at 283.
48 See Whitman & Paturi, supra note 4, at 67-68.
49 For example, accountant Gary Mallows of Longmeadow, Massachusetts, was the trustee for the estate of Judge Vine Parmelee of Connecticut. Obviously, he was appointed because people believed he was honest and well-qualified. However, appearances may be deceiving. State investigators found that Mr. Mallows had drained the trust’s assets ($163,000) by investing them in his personal business ventures. The probate court required him to post bond for the assets upon his appointment, but he failed to do so. Today the trust holds $108,000 and some costume jewelry. See Kim Martineau, Handling of Judges’ Estates Probed, HARTFORD COURANT, July 14, 2004, at A1. In a system that involves a good deal of money, a lack of formal policing, and a good amount of self-discipline, wrongdoing likely occurs.
50 This presents a clear example of a powerless trust beneficiary who, because of a lack of funding and expertise, is unable to have her complaint addressed effectively by the legal system. See Whitman & Paturi, supra note 4, at 77-79. See generally Raymond H. Young, The Trustee’s Right to Defend Itself: Is There Restraint on Alienation?, SK004 ALI-ABA 345, 347-48 (July 2004) (outlining situations in which excessive litigation may have occurred between the trustee and beneficiary).
Beneficiaries raise many types of complaints.\footnote{See Telephone Interview with Standish Smith, supra note 40.} These include:

1. My trustee has run away with my money.\footnote{Id.}
2. My trustee’s actions are motivated by self-interest.\footnote{Id.}
3. My trustee does not give a straight answer to any question I ask.\footnote{Id.}
4. My trustee never returns my phone calls.\footnote{Id.}
5. When I get an accounting, I cannot understand it.\footnote{Id.}
6. My local bank has merged with an impersonal giant institution with offices far away.\footnote{Id.}
7. The trust company keeps putting in a new trust officer every three months and each new officer is younger and knows less than the one before.\footnote{Id.}

Further, all that is needed to create tensions in the system is a discretionary distribution power among a class of beneficiaries and an unanticipated second marriage after the death of the settlor.\footnote{See Patrick J. Collins et al., Financial Consequences of Distribution Elections From Total Return Trusts, 35 REAL PROP. PROB. & TR. J. 243, 268 (2000) ("[T]he wholly discretionary trust not only fails to alleviate the conflicting claims to the trust estate of the two beneficiary classes, but also may place the trustee squarely in the middle of the distribution tug-of-war."); see also Philip H. Suter & Susan L. Repetti, Trustee Authority to Divide Trusts, PROB. & PROP., Nov.-Dec. 1992, at 54, 55.}

No matter how trust administration is improved, the same basic rules still apply:

In many instances the settlor should leave some discretion in the trustees as to whether and when to divide a trust. The decision may rest on some future event, such as an accident rendering a beneficiary incapable of earning, a beneficiary’s marriage to a wealthy person or a spendthrift, unexpected exposure of an intended beneficiary to creditors, changes in the domicile of beneficiaries, changes in the tax law (e.g., throwback rules for accumulation trusts), and other unanticipated future events.
1. Those who question the basic soundness of the system and its overall satisfactory performance are overacting and are not realistic.  

2. Determining whether the complaint has merit is an impossible task at the outset.  

3. No matter how we better the system, some people will abuse it and subvert it. There will always be cases that need formal court litigation.  

Given the above, if a complaining beneficiary cannot be satisfied by the trustee, a proper resolution procedure is required to get a handle on whether a trust beneficiary’s claim has merit. If the claim does have merit, the complaint needs to be resolved quickly, cheaply, and properly. Yelling and screaming between beneficiaries and trustees does nothing to improve the system.

The focus of this Article is not on the merits of any particular complaint. Instead, the author puts forward a suggestion regarding the process that needs to take place when a trust beneficiary complains to a trustee—specifically, the importance of the fiduciary’s having a proper resolution procedure in place. A reasonable modification is needed in the present system to allow beneficiaries to assert more easily the merits of their complaints and allow fiduciaries the chance to evaluate these complaints in an efficient manner and, if appropriate, to satisfy the complainant without costly drawn-out proceedings.

If that change does not come voluntarily, the Restatement (Third) and the UTC allow an equity court to require an appropriate change.

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60 Today, most trusts are administered fairly and by competent, hard-working fiduciaries. See generally Whitman, supra note 12.

61 See Whitman & Paturi, supra note 4, at 67-68.

62 See supra text accompanying note 49.

63 Only in a very rare case should it be necessary for a trust beneficiary to formally litigate with a corporate fiduciary. Even when that litigation is required, there should be a concern on the part of a corporate fiduciary that counsel for the fiduciary does not act in an overzealous manner.

64 Whitman, supra note 12, at 295; see also Young, supra note 50.

65 See DiCarlo, supra note 1; see also Whitman, supra note 13, at 3.

66 See Whitman, supra note 13, at 4.

67 UTC section 105(b)(2) (Supp. 2004) states: “The terms of a trust prevail over any provision of this [Code] except: . . . the duty of a trustee to act in good faith and in accordance with the purposes of the trust.” (alteration in original) If the trust authorizes bad faith trusteeship, the trust would be deemed illusory. See Langbein, supra note 10, at 1123-24; see
resolution procedures are not only good for the trust business, but they also will place the American system of trust administration in a better position to compete for trust business on a global scale.68

V. THE BASIC HISTORY SURROUNDING THE DEVELOPMENT OF THE TRUST MODEL

Those who deal with trusts are proud of the flexibility that trusts provide.69 Sir Frederic Maitland said: “Of all the exploits of Equity the largest and the most important is the invention and development of the Trust.”70 “If we were asked what is the greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence I cannot think that we should have any better answer to give than this, namely, the development from century to century of the trust idea.”71 Actually, some questions exist as to whether the groundwork for the trust was laid by Englishmen at all (but that is a topic for another day).72

The modern trust grew out of the common law’s feoffment to uses.73 In
the thirteenth century, shortly after the Norman Conquest, people (nearly always men) began to enfeoff land to another “to the use” of a third (A to B to the use of C). The one to whom the land was enfeoffed, B, was called the “feoffee to uses.” Today, B is known as the “trustee.” The one for whose benefit the land was held, C, was called the “cestui que uses.” Today, C is known as the “beneficiary,” or, less commonly, the “cestui que trust.”


The modern trust is an outgrowth of the ancient use. There have been four more or less clearly defined stages in its development. The first period began when uses were first employed not long after the Norman Conquest. Although it had become increasingly common to convey land to a feoffee to the use of a third person, or more frequently to the use of the feoffor, these uses were not enforced by the courts until the fifteenth century. See SCOTT ON TRUSTS, supra note 2, §§ 1.2-1.4, at 12-14.

A “feoffor” is “[t]he transferor of an estate in fee simple.” BLACK’S LAW DICTIONARY 634 (7th ed. 1999).

“The settlor of a trust is the person who intentionally causes it to come into existence. He is often called the trustor, grantor, founder, donor, or creator of the trust.” GEORGE G. BOGERT & GEORGE T. BOGERT, THE LAW OF TRUSTS & TRUSTEES § 1, at 4 (rev. 2d ed. 1984) (footnote omitted) [hereinafter BOGERT ON TRUSTS AND TRUSTEES].

In the middle ages in England conveyancers of land invented the “use” which is the ancestor of the modern trust. The owner of land enfeoffed another to the use of the feoffor or another. The transferee was called a “feoffee to uses” and the intended beneficiary of the use a “cestui que use.”

Id. § 2, at 13-14 (footnote omitted).

The feoffee to uses of the early English law corresponds point by point to the salman of the early German law, as described by Beseler fifty years ago. The salman, like the feoffee, was a person to whom land was transferred in order that he might make a conveyance according to his grantor’s directions.

Oliver Wendel Holmes, Early English Equity, in COLLECTED LEGAL PAPERS 1, 4 (1920) (footnotes omitted); see also BOGERT ON TRUSTS, supra note 72, § 2, at 7.

“The trustee is the individual or entity (often an artificial person such as a corporation) which holds the trust property for the benefit of another.” BOGERT ON TRUSTS AND TRUSTEES, supra note 76, at 4-5. See also RESTATEMENT (THIRD) § 2 cmt. f(2003).

“The beneficiary or cestui que trust is the person for whose benefit the trust property is held by the trustee.” BOGERT ON TRUSTS AND TRUSTEES, supra note 76, § 1, at 5; see also RESTATEMENT (THIRD) § 2 cmt. f(2003).
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For a modern definition of an express, or intentional, trust, we can turn to the Restatement (Third):

A trust . . . is a fiduciary relationship with respect to property, arising from a manifestation of an intention to create that relationship and subjecting the person who holds title to the property to duties to deal with it for the benefit of a charity or for one or more persons, at least one of whom is not the sole trustee.\footnote{\textit{Restatement (Third)} § 2 (2003) (emphasis added).}

The Restatement (Third) also outlines purposes for creating a trust, including that “[trust] administration must be for the benefit of its beneficiaries. . . .”\footnote{\textit{Id.} § 27(2) (emphasis added).}

Trust instruments commonly provide that the trustee hold the trust “property for the benefit of” the beneficiary.\footnote{\textit{Boidget on Trusts}, supra note 72, § 2, at 4 (emphasis added).} A long-standing rule, though recently reformulated, is that a trust must be for the benefit of the beneficiary.\footnote{A long-standing rule, though recently reformulated, is that a trust must be for the benefit of the beneficiary. See Langbein, supra note 10, at 1105; see also \textit{Boidget on Trust and Trustees}, supra note 76, § 1, at 7.} The obligation of the trustee is to benefit the beneficiary.\footnote{\textit{Id.} § 27(2) (emphasis added).} What does this mean? Does it include more than the obligation to deal properly with and to protect the trust property?\footnote{\textit{Boidget on Trusts}, supra note 72, § 2, at 4.}

The need to place the protection of the beneficiary and the beneficiary’s interests above the interests of the trustee grows out of the medieval idea of chivalry.\footnote{“Tenure held by knight-service” was a “tenure in which a person held land in exchange for military service.” \textit{Black’s Law Dictionary} 234 (7th ed. 1999). Under the tenures system, the landed classes did not own their estates, but in fact held them as tenants of the Crown and of the few select lords to whom the Crown had originally conveyed its land. . . . The most prestigious estates were held as tenures in chivalry. When a tenant in chivalry died leaving an heir under the age of maturity, the guardianship of that heir fell to the lord of the estate, regardless of whether the heir’s mother was still alive. The guardian in chivalry could control both the lands and the person of the ward until the infant reached the age of twenty-}
one, if male, and sixteen, if female. This control included the right to arrange the ward’s marriage, which, since the ward stood to inherit a considerable estate, was of significant value.


87 “Originally uses and trusts were not enforceable in any court but were purely honor-ary. The performance of his duties was voluntary on the part of the feoffee to uses and could not be enforced.” BOGERT ON TRUSTS, supra note 72, § 3, at 9; see also SCOTT ON TRUSTS, supra note 2, § 1.3, at 13.

88 “At early common law, a corporation could not serve as trustee. This is no longer the case. A corporation may act as trustee in furtherance of and as an adjunct to its corporate purpose.” CHARLES E. ROUNDS, JR., LORING: A TRUSTEE’S HANDBOOK § 3.1, at 33 (2003) [hereinafter LORING].

89 As a general rule, however, a corporation now needs statutory authority to have as its purpose the administration of trusts. Thus, absent trust powers conferred by statute, an automobile manufacturing company, for example, may act as trustee of its own employee benefit plan but not as trustee of the plans of other corporations.

LORING, supra note 88, § 3.1, at 33.

90 The great contribution made by America to the development of the trust is in the employment of the corporate trustee. In England as late as 1743 the Attorney-General argued that a corporation could not be a trustee. Lord Chancellor Hardwicke, however, told the Attorney-General that nothing was clearer than that corporations might be trustees. The earliest instance in the United States of a specific grant to a corporation of the power to act as trustee seems to have been that of the Farmers’ Fire Insurance & Loan Company, chartered in New York in 1822. Since that time the creation of corporations with power to administer trusts has become increasingly common. The Congress finally found it necessary to permit national banks to enjoy similar powers. Although the corporate trustee is primarily an American institution, the institution is spreading to other countries, and even in the more conservative mother country the corporate trustee is becoming common. . . . In England the individual trustee receives no compensation for his work, unless it is otherwise provided by the trust instrument. In the United States, however, he receives compensation.

SCOTT ON TRUSTS, supra note 2, § 1.8, at 27-28.
The statutes also brought about the lobbying of legislators by banking interests to enact statutes that were helpful to corporate fiduciaries. These statutes emphasized the relationship between the settlor and the trustee and downgraded the position of the beneficiary.91 For example, because of statutory enactments, removal of a trustee became extremely difficult unless trustee conduct was tantamount to intentional wrongdoing.92 Trustee duties were narrowed to the duty of loyalty and the duty of prudent investment. The goal became a purely business-type relationship between trustees and beneficiaries.93

VI. IMPORTANT IDEAS TO BEAR IN MIND REGARDING TRUSTS

The ancestor of the modern trust was the “use.”94 Legal historians trace the use back to the middle of the thirteenth century, when the Franciscan...
The Mortmain Acts prohibited alienation of land to religious orders, and that, coupled with the vow of poverty taken by mendicant orders, provided the framework for the introduction of the use. See Avisheh Avini, The Origins of the Modern English Trust Revisited, 70 Tul. L. Rev. 1139, 1143-44 (1996) (addressing the influence of Roman, English, German, and Middle Eastern influences in the creation of the modern trust).

When the holder of the legal title proved faithless to his trust, as was sometimes the case, the Church itself imposed sanctions of penance, public condemnation or even excommunication. These remedies were sometimes applied also to private uses which were occasionally set up. With the development of Chancery as a court, legal remedies superseded the ecclesiastical ones.

RALPH A. NEWMAN, LAW OF TRUSTS 14 (1949).

English uses existed long before a court of chancery existed to enforce them. The earliest expression of the word “use” was employed in the seventh century, yet the earliest mention of a court of chancery is in the fourteenth century. See id. at 12-13.

“For many years uses and trusts existed as honorary obligations but had no legal standing. If the [feoffee to uses] saw fit to deny that he held the property [of another], and to appropriate it to his own use, he might do so with impunity.” BOGERT ON TRUSTS AND TRUSTEES, supra note 76, § 3, at 9.

Common-law courts lacked the procedures to examine the parties, and as a result, the courts refused to take the cases involving breach of trust. See NEWMAN, supra note 96, at 16.

The lack of common-law court intervention bred an environment ripe for fraud. See id.

As keeper of the king’s conscience, the rules of the equity courts were different from the rules of the common-law courts.

It was comparatively speedy—the Chancery was not tied down to the law terms, nor was there any undue delay in getting the defendant before the court. This in itself meant that it was less expensive. Moreover, the chancellor always professed to have a special regard for the interests of the poor. It was the reverse of technical,
and it was eminently calculated to get at the real facts by the most direct methods. . . . Finally, the fact that the chancellor, by reason of his close connection with the Council, could act with the whole force of the executive government, enforcing his orders in the last resort by a commission of rebellion, prevented abuses of the machinery of the Chancery, similar to those abuses of the machinery of the common law courts, which were facilitated both by the weakness of their executive power and the technicality of their procedure.

5 SIR WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 286 (3d ed. 1945).

102 Originally the only pledge for the due execution of the trust was the faith and integrity of the trustee; but the mere feeling of honour proving, as was likely, when opposed to self-interest, an extremely precarious security, John Waltham, Bishop of Salisbury, who was Lord Keeper in the reign of Richard the Second, originated the writ of subpoena, by which the trustee was liable to be summoned into Chancery, and compellable to answer upon oath the allegations of his cestui que trust. No sooner was this protection extended, than half the lands in the kingdom became vested in feoffees to uses, as trusts were then called. Thus, in the words of an old counsellor, the parents of the trust were Fraud and Fear, and a Court of Conscience was the Nurse.


103 Id.

104 Examples of the benefits provided by uses included avoiding dower, avoiding creditors (because at common law the creditors only could attack the legal title holder), avoiding forfeiture of title due to criminal acts, and helping the mortmain acts, which prevented alienation of land to religious organizations. See BOGERT ON TRUSTS, supra note 72, § 3, at 7-8.

105 Primogeniture began sometime in the early thirteenth century; it treats the eldest son as the sole heir. The assumption was that the eldest male was the best candidate to perform the services necessary to satisfy feudal obligations. See Mark A. Senn, English Life and the Law in the Time of the Black Death, 38 REAL PROP. PROB. & TR. J. 507, 558-59 (2003) (stressing the importance of the Black Death in the development of English property law).

106 For example, a settlor would use powers of appointment to give the first remainder to a son more capable than the oldest child. See David A. Thomas, Anglo-American Land Law: Diverging Developments from a Shared History—Part II: How Anglo-American Land Law
during A’s lifetime and then to the use of such persons as A might appoint by will. The chancellor enforced the use in favor of A’s devisees. Particularly because of its success in evading feudal death taxes, the use became a popular planning device in England. The employment of the use to avoid taxes brought on the Statute of Uses.

Searching for a way to restore his feudal revenue and replenish his treasury, Henry VIII set out to abolish the use. Henry interested himself personally in a lawsuit in the courts, which resulted in a decision that put the legality of the use into doubt. Fearing that uses might become unenforceable (with drastic consequences for the cestuis), Parliament, at Henry’s urging, reluctantly enacted the Statute of Uses in 1535, which became effective in 1536. By this Statute, uses were not made illegal. On the contrary, legal title was taken away from B, the feoffee to uses, and given to C, the cestui que use. In the words of that time, the use was executed—that is, converted into a full legal interest. C, the former cestui—now clothed with full legal title—could breathe easy in terms of having proper title to the property, but C was required to pay the king’s

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\textit{Diverged after American Colonization and Independence, 34 REAL PROP. PROP. \\ & TR. J. 295, 315 (1999) (tracing the development of land law in England and in the original thirteen colonies).}

\textsuperscript{107} Uses were used by tenants to avoid claims made by the feudal lords. The lord was entitled to relief when the tenant died, and if no heir existed, the land escheated back to the lord. If the land was conveyed to feoffees to the use of the tenant, many of the incidents could be avoided. “The cestui que use owed homage or fealty to no overlord.” \textit{SCOTT ON TRUSTS, supra} note 2, § 1.4, at 16.

\textsuperscript{108} See \textit{LEWIN, supra} note 102.

\textsuperscript{109} “Widespread evasion of feudal dues by conveyance to uses had swept over the majority of English land by the sixteenth century, prompting passage of the Statute of Uses.” See Thomas, \textit{supra} note 73, at 188.

\textsuperscript{110} See \textit{NEWMAN, supra} note 96, at 23.

\textsuperscript{111} Henry largely backed the Statute of Uses because as a land owner, his feudal rights were being deflected by uses. See \textit{id.} at 24.

\textsuperscript{112} Many land-owning members and lawyers in the House of Commons valued the benefits of uses and were reluctant to endorse the King’s proposal. However, the King was persistent and used his royal authority to threaten the land claims of the land owners and began to hear claims regarding attorney malpractice. See 4 \textit{SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW} 454 (3d ed. 1945).

\textsuperscript{113} See \textit{SCOTT ON TRUSTS, supra} note 2, § 1.5, at 18-19.

\textsuperscript{114} See \textit{id.} § 1.5, at 19.

\textsuperscript{115} See \textit{id.} § 1.5, at 19-20.

\textsuperscript{116} See \textit{id.} § 1.5, at 19.

\textsuperscript{117} As holder of legal title, the former cestui now no longer had to worry about fraud on the part of the trustee, which ran rampant when many trustees disregarded their pledge to act
loyal to the trust. See generally supra note 102 and accompanying text.

118 See Newman, supra note 96, at 24.

119 Courts strictly construed the Statute of Uses and only applied it to real property. Therefore, the Statute did not affect gifts of money or chattels. The Statute only applied to passive trusts, not active trusts, and it did not affect a use upon a use. See Bogert on Trusts, supra note 72, § 5, at 12-13.

120 Duties of administration required the legal title in the trustee. Thus, if land was conveyed to A for life, to collect the profits thereof and pay them to B and his heirs, the trust would be active, and the Statute would not execute the use but leave the legal estate in A and the equitable interest in B, separately. Id. § 5, at 13.

121 A passive trust is one in which legal title is transferred to one person for the benefit of another, and the trustee has no duties. This type of trust was more prevalent than the active trust before the passage of the Statute of Uses. See Bogert on Trusts, supra note 72, § 2, at 6.

122 See id. (giving a history of uses and trusts).

123 The Statute of Uses also was held inapplicable to a use on a use. If A conveyed to B to the use of C to the use of D, the statute executed the first use, so that C got legal title, but did not execute the second use, even though both uses were passive. See Sambach v. Dalston, 21 Eng. Rep. 164 (1634). Lord Chancellor Hardwicke remarked in a later case that this doctrine reduced the Statute’s effect to “adding at most, three words to a conveyance.” Hopkins v. Hopkins, 26 Eng. Rep. 368, 372 (Ch. 1738). Clearly from the statutory language, the Statute did not apply to personal property but only to a case in which the feoffee was “seized of land.” In current American law, exemptions from the Statute of Uses, especially the exemptions for active trusts and for trusts of personal property, still are recognized. See Restatement (Third) § 6 cmt. a (2003).
Today, a trust is seen as a property arrangement under which ownership of the property is divided: the trust property’s legal title goes to the trustee and its equitable, or beneficial, title goes to the beneficiary or beneficiaries. Beneficiaries may be divided into income beneficiaries and beneficiaries with future interests or remainders. A trust may be totally discretionary, an annuity trust, or a unitrust. In any event, a class of persons, designated as beneficiaries, will be entitled to protection by the trustee.

VII. ENFORCEMENT OF TRUSTS

American case law and English case law are very different. In Amer
ica, if the highest court decides that its previous decision is wrong, the court overrules itself.\textsuperscript{130} So, if over time a previous decision appears to society to create unjust results, the highest court may overrule itself and establish a new rule that is seen as more just.\textsuperscript{131} In England, until 1966 (when it gave itself the right to do so),\textsuperscript{132} the House of Lords, the highest court,\textsuperscript{133} could not overrule itself. Since 1966, the House of Lords rarely has overruled itself, although older cases are distinguished and rulings are narrowed.\textsuperscript{134}

In England, the law still is seen as coming from the sovereign and from God.\textsuperscript{135} In the United States, courts, especially an equity court, are more concerned with reaching a just result.\textsuperscript{136} Yet, that will not always be the

embody are widely thought to be right and good, and if they are not right and good, they are less likely to be treated as binding.


\textsuperscript{130} \textit{Id.}

\textsuperscript{131} \textit{Id.}

\textsuperscript{132} In 1966, the House of Lords decided that it was free to depart from prior precedent when it was deemed correct to do so. Lord Gardiner, L.C., speaking for the Lords, said:

Their lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose therefore to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so. Re Dawson’s Settlement, 3 All E.R. 68, 77 (H.L. 1966).

\textsuperscript{133} In England, the House of Lords is the only court of last resort, while in America, each state and territory has a court of last resort, along with the federal Supreme Court. See ATIYAH & SUMMERS, supra note 129, at 267.

\textsuperscript{134} Both today and prior to the 1966 practice statement, a case commonly will be distinguished from case law to avoid the precedent that is still rigidly adhered to in comparison to American case law. See R.J. WALKER & RICHARD WARD, WALKER & WALKER’S ENGLISH LEGAL SYSTEM 70-72 (7th ed. 1994).

\textsuperscript{135} Upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these. There are, it is true a great number of indifferent points, in which both the divine law and the natural leave a man at his own liberty; but which are found necessary for the benefit of society to be restrained within certain limits. And herein it is that human laws have their greatest force and efficacy; for, with regard to such points as are not indifferent, human laws are only declaratory of, and act in subordination, to the former.

1 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES 42 (Augustus M. Kelley 1969) (1803).

\textsuperscript{136} “[C]ommon law principles of equity leaven the law, softening its rigors so that the law’s aim of administering justice fairly is not lost.” Cleveland v. Beltman N. Am. Co., 30
result. In some cases, broad, overriding policies may prevent a just result. But, even if the matter is not directly addressed in the court’s opinion, it is not unusual for an American judge to want to do the just thing in a case, if possible.

The tendency of the American equity court to seek a just result can be seen in early American jurisprudence. In *Rice v. Polly & Kitty*, the crew of the ship alleged that they had been beaten cruelly by the captain and the mate. Accordingly, the crew left the ship in a foreign port in the midst of the voyage, returned to Philadelphia on another ship, and instituted suit for lost wages against the ship owners. By way of defense, the ship owners asserted that by signing the articles for the voyage, the crew had put themselves out of protection of the law. The court, sitting with the equivalent of equity powers, recognized that the law vested the master or the captain with a
great degree of discretionary power. Nonetheless, the court explained that “the law [the equity court] always watches the exercise of discretionary power with a jealous eye.” The court awarded the crew wages and ordered the ship owners to pay the costs of the suit.

Regarding the continuing importance of the common law, the text of UTC section 106 provides: “The common law of trusts and principles of equity supplement this [Code], except to the extent modified by this [Code] or another statute of this State.” The comment to section 106 of the UTC also states:

The Uniform Trust Code codifies those portions of the law of express trusts that are most amenable to codification. The Code is supplemented by the common law of trusts, including principles of equity, particularly as articulated in the Restatement of Trusts, Restatement (Third) of Property: Wills and Other Donative Transfers, and the Restatement of Restitution. The common law of trusts is not static but includes the contemporary and evolving rules of decision developed by the courts in exercise of their power to adapt the law to new situations and changing conditions.

UTC section 404 discusses trust purposes and provides: “A trust may be created only to the extent its purposes are lawful, not contrary to public policy, and possible to achieve. A trust and its terms must be for the benefit of its beneficiaries.”

Based on UTC sections 106 and 404, and backed up by the Restatement (Third), it appears that American courts will continue to work to create a well-balanced system of trust administration that will work equally well for settlors; trustees, both individual and corporate; and beneficiaries, both present and future. The name of the game today is working hard to achieve a balanced trust administration system that will avoid the costs of formal litigation whenever possible by informally solving problems and creating

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143 Rice, 20 F. Cas. at 667.
144 Id.
145 Id.
146 “The law of trusts is to be found for the most part in the decisions of the courts and not in the statutes.” SCOTT ON TRUSTS, supra note 2, § 1.10, at 31. The UTC is itself a codification of the common law of trusts and in no way restricts the ability of an equity court to exercise its discretion and adapt the law to new situations. See UNIF. TRUST CODE § 106 cmt., 7C U.L.A. 162 (Supp. 2004).
148 Id. § 601 cmt., at 162.
149 Id. § 404, at 183 (emphasis added).
workable solutions.\footnote{See Whitman, supra note 12, at 294-95.}

Despite the general merging of law and equity,\footnote{Although a uniform separation between the courts of law and courts of equity existed in England at the time of the American Revolution, the governments of the United States used various methods to administer equity. In most states, remedies both at common law and at equity were administered by a single court. In the federal realm, the courts had equity jurisdiction equivalent to that of the English chancery court. Today, a distinction between actions at law and actions at equity no longer exists in the majority of states, such actions having been replaced by a “civil action” in which all legal remedies are received.} we still speak of legal and equitable obligations because all the underlying distinctions between law and equity remain important.\footnote{Id.} In most states today, where law and equity have merged and are enforced by the same court, the equity judge is still (1) applying equitable procedures and remedies and (2) seeking the just result.\footnote{“The civil action procedurally eliminates the distinction between law and equity, but the substantive distinction still remains: in both the state and federal courts, remedies at law and remedies at equity are recognized as separate.” Hendel, supra note 151, at 643.}

Despite questions raised about the nature of the beneficiary’s interest,\footnote{See Bohac v. Graham, 424 N.W.2d 144 (N.D. 1988) (holding that the settlor’s intent is crucial in determining the beneficiary’s interest in the trust); see also Hays v. Harmon, 809 N.E.2d 460, 469 (Ind. Ct. App. 2004): As to the beneficiaries’ interest, the nature of this interest is to be determined from the terms of the trust. . . . In the case of a charitable trust, however, an otherwise indefinite devise is sufficiently ascertained if the trustee is empowered to devote the fund in such manner as he deems just and the purpose is not unlawful or against public policy. (internal citation omitted).} one point is clear: trusts are for the benefit of beneficiaries.\footnote{See infra note 156; see also RESTATEMENT OF TRUSTS § 3 (1935); BOGERT ON TRUSTS AND TRUSTEES, supra note 76, § 1, at 6; SCOTT ON TRUSTS, supra note 2, § 3.2, at 52.} Unless the settlor is also a beneficiary, the settlor has no standing to enforce the trust.\footnote{See RESTATEMENT (SECOND) OF TRUSTS § 200 cmt. b (1959).}

While the law traditionally has not treated trusts as contracts,\footnote{See id. § 197 cmt. b: A trustee who fails to perform his duties as trustee is not liable to the beneficiary for breach of contract in the common-law actions of special assumpsit or covenant or in a similar action at law in States in which the common-law forms of action
legal scholars have acknowledged that trusts have a contractual aspect. The Restatement points out, however, that “[t]his ‘contractual approach’ . . . was certainly a limited one. . . .” Yet recently, Professor Langbein advocated extending the contract approach, arguing that “[t]rusts are contracts.” This suggestion should be evaluated against the practical changes that would come about if trusts generally were considered simply to be contracts between the settlor and the trustee. Today, action against a trustee for breach of duties essentially is not by contract or at law. Except in very limited circumstances, the jurisdiction of equity remains exclusive. The remedy against the trustee remains in the hands of the beneficiary. Conceivably, equity courts may embrace an allegation that a trustee has failed to establish a proper resolution procedure or has failed to implement it in good faith.

**VIII. TOWARD A PROPER RESOLUTION PROCEDURE**

Some years ago, the author founded and chaired a Law Professor
Advisory Group for Trusts and Estates ("Advisory Group"). 168 Thirty law professors banded together to suggest improvements in the system that would be in the public’s interest. The Advisory Group believed that powerful forces were shaping trust and estate law to meet their own short-sighted ends. 169 For example, the Advisory Group was aware that, historically, Charles Dickens had exposed corruption in the English probate system 170 and that in America, politicians like those in Tammany Hall in New York City 171 dispensed patronage from the New York Surrogates Court. 172 The Advisory Group wanted to find identifiable areas of present practice that appeared to invite suggestions for improvement.

When the Advisory Group opened for business, it received a wide variety of complaints from trust beneficiaries. Common concerns expressed included: (1) unwillingness of trustees to cooperate with requests for infor-

\footnote{168 The Advisory Group was composed of some thirty law professors and additional members of collateral boards who all pledged to attempt to improve the administration of trusts. The most recent chair of the Advisory Group was Professor Ronald Chester of New England Law School.}

\footnote{169 The Uniform Trust Act is an example. The banking industry has always been involved in the evolution of the Uniform Trust Act. It was first suggested "by the Trust Division of the American Bankers Association (ABA)[] in order to, in part, relax a few equity rules regarding trust administration . . . in order to facilitate convenience in the (corporate) administration of trusts." The ABA continues to advise the Commission as to whether its state banking affiliates (lobbies) will provide the support that can be so critical for its enactment. Standish H. Smith, Reforming the Corporate Administration of Personal Trusts—The Problem and a Plan, 14 QUINNIPIAC PROB. L.J. 563, 564 (2000) (footnote omitted) (calling for reforms in the corporate fiduciary system that will level the playing field between the trustee and beneficiary).}

\footnote{170 See CHARLES DICKENS, BLEAK HOUSE (Norman Page ed., Penguin Books 1971) (1853) (providing a scathing criticism of the drawn-out probate process of the nineteenth century English Court of Chancery).}

\footnote{171 See Joseph E. Ritch, They'll Make You an Offer You Can’t Refuse: A Comparative Analysis of International Organized Crime, 9 TULSA J. COMP. & INT’L L. 569, 593 (2002) (stating that Tammany Hall is widely recognized as the symbol of political corruption throughout the world and laid the foundation for organized crime groups to gain protection from law enforcement activities).}

\footnote{172 “Critics in New York have long contended that the surrogate’s courts power to appoint guardians has been abused.” Mayor Fiorello H. LaGuardia called the surrogate’s court “the most expensive undertaking establishment in the world” when, during his anti-Tammany administration, he found himself unable to cut off that source of patronage to Tammany lawyers. JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, & ESTATES 212 n.4 (6th ed. 2000) (quoting Tom Goldstein, Once More, Surrogate Talk, N.Y. TIMES, Sept. 4, 1977, at E5).}
mation,\(^{173}\) (2) unwillingness to admit any wrongdoing,\(^{174}\) (3) lack of resolution procedures short of litigation,\(^{175}\) and (4) difficulty accessing the courts for powerless trust beneficiaries.\(^{176}\)

The Advisory Group had no statistical data (and still does not)\(^{177}\) on the subject of trust beneficiary satisfaction. The Advisory Group assumed (and the author thinks it likely remains true)\(^{178}\) that the American trust system worked fairly well overall. The Advisory Group also assumed that most trustees, individual and corporate, were honest and hard working and that most trust beneficiaries appreciated the efforts made on their behalf.\(^{179}\) But cases repeatedly came up in which what appeared to be meritorious complaints were not dealt with in any way other than by forcing formal litigation.\(^{180}\) The Advisory Group was not concerned so much with the merits, or lack thereof, of any particular complaint, but rather with the set up for resolving complaints. The Advisory Group found that resolution procedures varied dramatically depending on who was the trustee,\(^{181}\) the circumstances of the case,\(^{182}\) the probate court rules and procedures,\(^{183}\) and the expectations of the parties.\(^{184}\)

Most corporate fiduciaries interviewed by the Advisory Group reported that the following resolution procedures were available to beneficiaries presenting a complaint:

1. Speaking with the trust officer.
2. Failing resolution, speaking with a senior trust officer.

\(^{173}\) See Telephone Interview with Standish Smith, supra note 40.
\(^{174}\) See Whitman & Paturi, supra note 4, at 70.
\(^{175}\) See DiCarlo, supra note 1.
\(^{176}\) See Whitman & Paturi, supra note 4, at 70.
\(^{177}\) See id. at 68.
\(^{178}\) See Whitman, supra note 13.
\(^{179}\) See Whitman, supra note 12, at 291; see also David A. Baker & Mary K. McWilliams, Defending the Fiduciary, in ESTATE, TRUST, AND GUARDIANSHIP LITIGATION Ch. 1 (David A. Baker ed., Illinois Institute for Continuing Legal Education Main Handbook 2002 ed.) (stating that fiduciaries rarely breach the duties of loyalty, care, and impartiality).
\(^{180}\) See Whitman, supra note 13, at 3.
\(^{181}\) “The demands on the trustee often require tremendous skill in teaching, mentoring, motivating, and problem solving. In the most successful relationship, the trustee views its role as a partner, not as a custodian.” Hausner & Freeman, supra note 3, at 604.
\(^{182}\) See supra text accompanying note 31.
\(^{183}\) See Whitman & Paturi, supra note 4, at 70-71.
\(^{184}\) Reasonable expectations by both parties involved leads to proper administration of the trust. See Hausner & Freeman, supra note 3, at 607. “Beneficiaries who have a clearer understanding regarding trust administration are far less likely to complain.” Whitman, supra note 12, at 296.
3. Still failing resolution, speaking to the head of the trust department. Failure to reach resolution after this three-step process meant that the beneficiary needed either to abandon the complaint or retain a lawyer and move to formal litigation.\textsuperscript{185} The obvious weakness in this resolution procedure is that the person hearing the complaint often is the same person about whom the beneficiary is complaining.\textsuperscript{186} When this happens, the conflict of interest is clear.\textsuperscript{187} Furthermore, even if the executive department of the bank heard the complaint, upper management of the bank would be disassociated from any direct concern for the fiduciary obligation. Management normally is concerned more with the impact that adverse litigation could have on bank profits.\textsuperscript{188} In short, outside of the trust department, banking executives appear less concerned with fiduciary duty and more concerned with bottom-line profits.\textsuperscript{189}

Once a complaint passes beyond a certain point, the overriding obligation of the fiduciary to the beneficiary often disappears.\textsuperscript{190} In formal litigation, should all overriding duties to the trust beneficiary be suspended?\textsuperscript{191} The Advisory Group discovered that when the litigation team arrived, a distinct shift from reasonableness and flexibility to hard ball litigation often occurred.\textsuperscript{192} The shift can be seen in the following example:

\textsuperscript{185} See generally Young, supra note 50.
\textsuperscript{186} While trustees owe a fiduciary duty to the beneficiary, imagining how trustees could be objective in this situation, especially when their reputation is on the line is difficult. A corporate fiduciary is further constrained because if the fiduciary acquiesces to the need of the beneficiary, the fiduciary may anger its other master, the employer, who is motivated by profit margins. Outside of the trust department, profit may trump fiduciary duty.
\textsuperscript{187} See Smith, supra note 169, at 567.
\textsuperscript{188} Banks often are more concerned with the negative opinion that comes with litigation. Compliance units at banks with fiduciary services assess the risk to earnings or capital arising from negative public opinion. See Locke, supra note 41, at 151.
\textsuperscript{189} See Whitman, supra note 12; see also Whitman & Paturi, supra note 4, at 69 n.7.
\textsuperscript{190} Litigation is usually left to the litigators. . . . Litigation is not an enjoyable process for most people, except the ones getting paid. There are lawyers who do it well and who are courteous, efficient and knowledgeable. However, most of the time, attorneys abuse the process with threats, intimidation and poor lawyering.
\textsuperscript{191} Some courts have held that the fiduciary duty should not be suspended. See In re Trust Created by Hill, 499 N.W.2d 475 (Minn. Ct. App. 1993) (denying the plaintiff’s claim of hostility on the part of the trustee and finding that the defendant trustee had not breached his fiduciary duties any time during the three year litigation process).
\textsuperscript{192} “Whether we like it or not, ‘hard-ball’ tactics, ‘scorched earth’ strategies, and so-
A Princess Diana memorial fund has stopped giving grants to charities because of financial problems linked to its bitter legal feud with the American collectibles maker, the Franklin Mint, the fund’s top administrator [explained]. . . . Until the court battle is resolved, the Diana, Princess of Wales Memorial Fund is asking other trusts to make good on the $16 million in grants it has already pledged to beneficiaries—including charities working with land mine victims and AIDS sufferers, said chief executive Andrew Purkis. . . . Fund trustees decided to freeze the fund’s $89.6 million in assets to ensure it could pay any legal bills.195

Viewing American-style litigation today, it does not seem coincidental that our English ancestors, the Normans, decided their disputes by armed combat.194 Arguably, the key mistake in legal theory today is that once the litigation stage is reached, the fiduciary, individual or corporate, no longer recognizes that the fiduciary still has an obligation to continue to protect the overriding interest of beneficiaries.195 Even before the formal litigation stage, to what extent should attorneys for the corporate fiduciary be focusing on protecting the fiduciary in the event of litigation?196 If the fiduciary is

called ‘take no prisoners’ litigation are not only in vogue these days, but often are required of lawyers in the aggressive pursuit of their clients’ interests.” Paul L. Friedman, Taking the High Road: Civility, Judicial Independence, and the Rule of Law, 58 N.Y.U. ANN. SURV. AM. L. 187, 191 (2001) (calling for a restoration of civility in the legal profession to safeguard the essential independence of the courts and sustain the rule of law).

194 See Jeffrey Robert White, Important Civil Trials of the Millennium: It’s Been a Long Road From Trial by Combat to Trial by Jury, TRIAL, Mar. 2000, at 62 (tracing the milestones in the development of the civil justice system from the Norman Conquest to modern times); see also Holdsworth, supra note 101, at 308-10.
195 In matters involving fiduciary duties outside of the trustee and beneficiary dynamic, it has been held that the obligation extends through the litigation. See Eugene R. Anderson et al., Procedural, Practical, Tactical, and Strategic Issues in Insurance Coverage Disputes Stemming from Mass Tort Claims, at 207, 232 (PLI Litig. & Admin. Practice Course, Handbook Series No. H4-5128, 1992) (“In a practical sense, the insurer occupies a position comparable to that of a trustee for the benefit of its insureds. This is the very essence of a fiduciary obligation. An insurance company’s fiduciary obligation continues even during litigation with its policyholder.”) (internal citation omitted).
196 There are two competing views on the duties an attorney owes a fiduciary. The majority holds that the fiduciary is the sole client of the attorney—fiduciary duties do not exist between the attorney and the beneficiaries. The minority holds that an attorney retained by the fiduciary for the purposes of trust administration actually represents the trust and its beneficiaries. In the minority jurisdictions, the attorney-client privilege will not prevent the disclosure of conversations with the trustee to the beneficiary, even if the two have a dispute. See Steven M. Fast, Walking the Line Between Protecting the Trustee and Protecting the Beneficiary,
overly concerned with its own protection, might that in itself be a breach of its fiduciary obligation? How should the trust officers be instructed to act?

In nineteenth century American jurisprudence, legal scholars and legislatures (clearly influenced by powerful corporate fiduciary interests) made a concerted effort to bury the fact that fiduciaries are continually obligated to beneficiaries until the fiduciary properly resigns. A proper resignation may be either court-approved, beneficiary-approved, or occur in connection with the proper termination of the trust. The attempt to hide fiduciary obligation to the beneficiaries was carried out by over-stressing the need to satisfy the intention of the settlor by viewing a fiduciary’s duties


"But if the trustee has once accepted the trust, he cannot relieve himself of his duties under the trust, unless he is permitted to resign.” 2 SCOTT ON TRUSTS, supra note 2, § 106, at 96. “If the trustee once accepts the appointment as trustee, he is under a duty to administer the trust as long as he continues to be trustee.” Id. § 169, at 310. “It is the duty of a trustee to administer the trust solely in the interest of the beneficiaries.” Id. § 170, at 311.

See 2 SCOTT ON TRUSTS, supra note 2, §§ 106-106.3, at 96-102.; 4A SCOTT ON TRUSTS, supra note 2, §§ 344, at 542; see also BOGERT ON TRUSTS AND TRUSTEES, supra note 76, §§ 511, 1010, at 4, 448.

In Claffin v. Claffin, 20 N.E. 454 (Mass. 1889), the Massachusetts Supreme Judicial Court held that a testator has a right to place restrictions on the property in trusts if the testator does not contravene public policy.

The *Claffin* rule therefore vests the power of termination, in trusts of this type, in the hands of the trustee rather than the beneficiary. The trustee wields that power as the earthly representative of the dead settlor. The rule has practical significance only if the trustee out of respect for the dead or some other motive, refuses the beneficiary’s request. Insofar as *Claffin* favors the settlor’s wishes over those of the beneficiary, it reflects the attitude of the dynastic trust.

Friedman, *supra* note 199, at 586.
as running to the trust property rather than directly to the beneficiaries, and by stressing the right of the fiduciary to protect itself before and while engaging in litigation.

The basic nineteenth century approach in trusts (and elsewhere) was to attempt to obliterate the need for an equitable result by framing theory exclusively in law. A good example is the classic Williston and Corbin debate in connection with the Restatement (First) of Contracts. The Restatement...
ment (First) of Contracts reporter was Professor Williston from Harvard.207 He proposed the concept of consideration as the sole basis for an enforceable contract.208 Professor Corbin209 from Yale offered up the doctrine of promissory estoppel as another route to an enforceable contract.210 Those familiar with the legal history of the 1930s understand that Harvard Law School was the bastion for the scientific calculation of law211 and Yale Law School212 was home of Corbin, Llewellyn,213 and Frank,214 who together created the foundation for the American Legal Realist School.215 Professor Austin Scott216 was from Harvard and designed the Restatement (First) of Trusts in a manner that scientifically categorized the legal doctrines.217

207 See GILMORE, supra note 206 and accompanying text.
208 See id. at 62.
209 See id. and accompanying text.
210 See id. at 64.
211 Dean Langdell of Harvard is credited with introducing the scientific study of the law as early as 1870. His case-based study of the law to extract legal principles is still in use today. See ALBERT J. HARNO, LEGAL EDUCATION IN THE UNITED STATES 53-59 (1953).
212 “The Yale Law School faculty was congenial, fun-loving, hardworking, and relentlessly intellectual . . . . [N]ot a person on it did not profess to be a realist.” LAURA KALMAN, LEGAL REALISM AT YALE 1927-1960 at 119 (2001).
213 Professor Karl Llewellyn was the true mastermind behind the American legal realist movement, which held as one of its tenets that the meaning of law was derived from its relation to laymen and not to courts. See N.E.H. HULL, ROSCOE POUND & KARL LLEWELLYN 171-72 (1997).
214 Jerome Frank argued in his book, LAW AND THE MODERN MIND, that individual factors often influenced judges when they made a decision. After reaching a decision, a judge would then rationalize the decision with a discussion of case law. Professor Frank considered Yale Law School his spiritual home and began his affiliation with the school in 1932. See KALMAN, supra note 212, at 6-7, 171-72.
215 Legal realism is the theory that law is based not on formal rules or principles but instead on judicial decisions that should derive from social interests and public policy. BLACK’S LAW DICTIONARY 907 (7th ed. 1999).
216 See supra text accompanying note 158.
217 Launched in 1923, the restatement project may well have represented the final effort to realize Langdell’s ideal of a science of law. By restating the law in a clear and simple fashion, the institute hoped to illuminate its correct principles. The institute selected Harvard law professors Beale, Williston, Francis Bohlen, and Warren Seavey as the reporters of its four restatements. Each was assigned a subject: Williston drew contracts; Beale, conflicts; Bohlen, torts; and Seavey, agency. Subsequently their colleague Austin Scott agreed to write the restatement of the law of trusts. The institute directed its reporters to “make certain much that is now uncertain and to simplify unnecessary complexities” and “to promote those changes which will tend better to adapt the laws to the needs of life.” As work progressed, the institute abandoned the second objec-
The Restatement (First) of Trusts might have been drafted differently if Scott had seen the fiduciary relationship to the beneficiaries in the way Justice Benjamin Cardozo saw it when he announced Meinhard v. Salmon.218

Many forms of conduct permissible in a workaday world for those acting at arm’s length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the “disintegrating erosion” of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.219

The introduction to the UTC220 explains that the purpose of the UTC is to fill in trust law missing from many states.221 Actually, it can be argued that creating the UTC makes no sense at all unless it helps to create a better functioning trust system that better balances the rights and needs of settlors, beneficiaries, and trustees.222 Realistically, however, a forthright statement to that effect might have doomed the adoption of the UTC, given the power of the banking lobby over state legislatures.223

KALMAN, supra note 212, at 14 (footnotes omitted).

218 164 N.E. 545 (N.Y. 1928).
219 Id. at 546 (internal citation omitted).
221 This greater use of the trust, and consequent rise in the number of day-to-day questions involving trusts, has led to a recognition that the trust law in many States is thin. It has also led to a recognition that the existing Uniform Acts relating to trusts, while numerous, are fragmentary. The Uniform Trust Code will provide States with precise, comprehensive, and easily accessible guidance on trust law questions. On issues on which States diverge or on which the law is unclear or unknown, the Code will for the first time provide a uniform rule.

Id. at 144.
222 See Halbach, supra note 8, at 1908.
223 Drafting the UTC, as well as drafting other uniform acts, is a highly
The author was privileged to be able to sit on the UTC drafting committee as an observer and advisor.\(^{224}\) This opportunity was an interesting experience. In the author’s view, not enough attention was paid to the idea that a major goal of the new legislation should be to protect the right of a trust beneficiary to complain, because allowing complaints to be properly heard is good for business.\(^{225}\) Although it may be that most complaints are spurious,\(^{226}\) some are not.\(^{227}\) Further, if a complaint is not fairly heard and if the beneficiary is given a hard time, the fallout is that the beneficiary walks away and tells everyone that our trust system is unfair.\(^{228}\)

Lest the author be misunderstood, he fully recognizes that many beneficiary complaints lack merit,\(^{229}\) many beneficiaries are unrealistic and hard to deal with,\(^{230}\) and that trust companies must be profitable.\(^{231}\) The reality is that if the law now changed course and took away that profitability, trust companies would close their doors and look for something else to do.\(^{232}\) From the author’s point of view, a balanced system can protect the settlor’s interests.
(as best as we can know them or think we know them), protect beneficiary rights, and keep trustees and trust companies operating with a reasonable amount of earned profits.\textsuperscript{233}

IX. CONCLUSION

Globalization of the trust business is a coming reality.\textsuperscript{234} If American trust companies are to retain their leadership role,\textsuperscript{235} a proper resolution procedure, short of formal litigation, should be made available by all fiduciaries.\textsuperscript{236} Not only is it beneficial for business because it reduces litigation costs, but this procedure also is beneficial for all parties involved because it encourages cooperation. The Restatement (Third) and the UTC have opened the door for change that will ensure America’s leadership role, but the fiduciary community must be willing to take up the challenge.

\textsuperscript{233} See generally id.

\textsuperscript{234} See supra note 7 and accompanying text; see also Alexander A. Bove, Jr., The Purpose of Purpose Trusts, PROB. & PROP., May-June 2004, at 34 (discussing the rise of purpose trusts in foreign jurisdictions); Steven M. Fast et al., Drafting to Excess, SJ001 ALI-ABA 109 (July 2003) (“As trust law has evolved, particularly through uniform laws, it has increasingly restrained the intent of settlors. This has resulted in some settlors choosing to establish their trusts offshore. . . .”); cf. O’Beirne, supra note 5 (discussing the impact of the European Union on the global market).

\textsuperscript{235} See generally Blattmachr & Hompesch, supra note 5.

\textsuperscript{236} See Whitman, supra note 13, at 3.
APPENDIX

Trust Company
Beneficiary Dispute Resolution Procedure

Introduction

TRUST COMPANY believes that good client relations are important to its future success as a professional administrator of trusts. In its role as a trustee, TRUST COMPANY recognizes its fiduciary responsibilities to provide to the client a means of resolving misunderstandings/disagreements/disputes that may arise from time to time between our clients (beneficiaries, settlors) and TRUST COMPANY. In this regard, TRUST COMPANY has made a commitment not only to increase its efforts to identify and deal with client issues in a timely manner but also to improve its policies/procedures to forestall the need for future remedial action. Clearly, TRUST COMPANY cannot guarantee that mediation (whether internal or external) will result in a solution that will fully satisfy any particular client. Nevertheless, it is believed that by becoming an active partner in the dispute resolution process, many issues can be resolved amicably as well as cost effectively. To this end, TRUST COMPANY has designated ____________ to serve as the neutral contact party and resolution officer (“Resolution Officer”) for clients who wish to offer suggestions or seek resolution of a complaint pursuant to the attached procedures. TRUST COMPANY sincerely believes that a majority of disputes can be resolved without the need to resort to litigation if both parties are willing to work together in a spirit of cooperation. TRUST COMPANY offers the following mediation procedure.

Procedure

1. Every beneficiary concern, whether made formally or informally, in the form of a casual remark or even in jest, is reported to the relationship manager’s staff manager, and the staff manager will then, through the relationship manager, craft a response.
2. The staff manager will determine whether a beneficiary concern should be classified as a “complaint,” as defined in ____________.
3. Every complaint is acknowledged within three days of receipt as directed by the staff manager.
4. The staff manager will attempt to resolve the complaint in a reasonable fashion. If the staff manager concludes at any time that the complaining party is not reasonably satisfied with the response, including any proposed or executed remedy, the complaining party shall be informed of the opportunity to refer the matter to the Resolution Officer. The staff manager may directly and immediately refer the matter to the Resolu-
tion Officer as well in his or her discretion.
5. If all beneficiaries then eligible to receive Trust distributions (“qualified beneficiaries”) are not aware of the complaint, the relationship manager will notify them upon referral to the Resolution Officer of the complaint and the initial suggested resolution to the complaint.
6. The Resolution Officer is designated from time to time by the Trust Administrative Committee (“TAC”) and is neither a member of TAC nor connected with the matter generating the complaint.
7. The Resolution Officer will make appropriate inquiry and advise TAC, with copy to the relationship manager, whether the initial response was appropriate and, if not, set out a recommended response.
8. In order to reach this recommended response, the Resolution Officer, as a neutral party, may meet with the respective parties in order to attempt to reach an agreed upon resolution or a proper resolution procedure. Depending on the circumstances of the case, the Resolution Officer can suggest a number of procedures for resolving the matter, including mediation, arbitration, a decision by the resolution officer, or any other reasonable procedure, short of formal litigation.
9. If TAC fails to object within thirty business days to the Resolution Officer’s proposed response, the Resolution Officer will direct the staff manager and relationship manager to respond according to the terms of the proposed response and so advise the qualified beneficiaries.
10. Questions such as (but not limited to) who bears the expense of the resolution procedure, which parties are to be involved in the process, and the finality of the decisions reached, shall be subject to good faith negotiation between the trust department, the qualified beneficiaries, and the Resolution Officer.