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TRUSTS AS PARTIES TO BUSINESS AGREEMENTS

Sir Walter Scott wrote, "Oh what a tangled web we weave." Buyers seeking to purchase a business that is partially held in a trust may face this tangle more than others. They wonder, "With whom am I actually doing the deal?" and, "What are my legal rights should the deal fall through?"

On the flip side, if you are looking to sell your business, and part of the stock in your business is held by a trust, you might wonder how you can accomplish the goals you seek without substantial risk that the sale could be undone later in the event all legal requirements were not strictly followed.

Questions around trusts as shareholders of businesses can be complicated, but Wisconsin recently modified its statutes to include some very clear and specific parameters for buying and selling business interests held in a trust.

This article will help people on both sides of the coin to assess their rights and risks when engaging in business transactions where trusts are parties in one way or another.

Overview of Trusts as Parties to Business Contracts

In contemplating a business contract involving a trust, there are three main questions you should ask:

1. Does the trustee have the authority to do what I need him or her to do?
2. What is required for the trustee to exercise his or her authority?
3. What is my risk if it turns out after the fact that the requirements above were not met?

Let's consider each of these questions in turn:

1. **Does the trustee have the authority to do what I need him or her to do?**

Wisconsin law gives certain powers to a trustee, but those powers can be trumped by the powers granted in the actual trust. This simply means that you need to know what the trust itself says. There are two documents that should lay everything out for you: the trust agreement or a Certification of Trust. As a buyer, you do not always have a legal right to see

a trust agreement in its entirety, but you do have the legal right to receive a Certification of Trust.

Therefore, when you are in a business transaction involving a trust, you will want to ask for a copy of the trust agreement itself or a Certification of Trust.

In a Certification of Trust, the trustee certifies, or swears to, the following information:

- That the trust exists, and the date on which it was created
- The identity of the settlor
- The identity and address of the currently acting trustee
- The trustee's powers (This is the section that will tell you whether a trustee has authority to complete the type of transaction you seek)
- Whether the trust is revocable or irrevocable
- That the trust has not been revoked, modified, or amended in any manner that would cause the representations in the certification to be incorrect
- The authority of a co-trustee to sign and whether all co-trustees are required to sign in order to exercise the powers of the trustee
- The manner in which title to trust property may be taken

Again, Wisconsin law provides certain "default" rules regarding trusts, but those can be changed in the actual trust agreement. Therefore, you need the details from the trust agreement or a Certification of Trust to understand whether and how to accomplish your goals.

2. What is required for the trustee to exercise his or her authority?

You will also want to ask, "Is there more than one trustee?"

Wisconsin's default rule is that there must be consent by a majority of the trustees in order to conduct a business transaction, however, the trust agreement may preempt that rule by stating that it is possible for one trustee to delegate a function to a co-trustee, or require more or less than consent by a majority of the trustees to act.

As a buyer, you are mostly concerned with whether there are multiple trustees. What if there are two trustees and one of them says "yes" to your business transaction and one says "no"? Do both trustees need to sign off? If there are three trustees, there may be a majority or unanimous consent rule in the trust agreement. You should know from the Certification of Trust how many trustees are responsible for the trust and how many it will take to get the deal done.

3. What is my risk if it turns out after the fact that the requirements above were not met?

From a buyer's perspective, one of the biggest concerns about conducting a business transaction that involves a trust is whether they will ultimately have someone to hold accountable should the transaction fail or should there be other issues. From a seller's perspective, you need to keep this in mind so that you understand a trustee's risk in engaging in business transactions.

Legally, usually a trustee who signs off on a transaction as trustee cannot be held personally liable by the buyer on that contract. However, the buyer does have legal protections.

If you, as a buyer, enter into a transaction in good faith, you can enforce any legal issues against the trust property, but not against the trustee personally. If you have requested a Certificate of Trust and conducted the transaction properly based on that information, then you can show that you did your due diligence and worked in good faith. These are your remedies:

- A person who in good faith enters into a transaction in reliance upon a Certification of Trust may enforce the transaction against the trust property as though the representations made in the Certification of Trust were correct.
- A person who in good faith deals with a trustee is not required to inquire into the extent of a trustee's powers, or the propriety of the trustee's exercise of those powers.
- A person who in good faith and for value deals with a trustee without knowledge that the trustee is exceeding or improperly exercising his powers is protected from liability as though the trustee properly exercised his powers.

If you have any questions, please contact Attorney Megan O. Harried at O'Neil Cannon at 414-276-5000.