Fall 12-19-2019

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Uniform Trust Code section 1002(a) provides as follows:

> (a) A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of:
>
> (1) the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or
>
> (2) the profit the trustee made by reason of the breach.

As stated by Professor David M. English (the UTC Reporter),

> The measure of damages for breach of trust is designed to restore the trust property and distributions to what they would have been had the breach not occurred. But it also serves another purpose—to prevent the trustee from profiting from the breach. Consequently, under the Code, the trustee is liable for the higher of the two amounts: the profit made by the trustee or the loss to the trust.[1]

This "greater of" formula is non-problematic when there is either (1) a loss to the trust but no profit to the trustee or (2) no loss to the trust but profit to the trustee. In many cases, however, there is both a loss to the trust *and* profit to the trustee.

In such cases, the "make whole"/restorative objective of section 1002(a)(1) is fully accomplished, since the trustee will always be liable for an amount at least equal to the amount of the loss. The question has been raised, however, whether the same can be said for the restitution/disgorgement objective of section 1002(a)(2). It is true that, as in the case of loss to the trust, the trustee will always be liable for an amount at least equal to the amount of the profit. But, it has been argued, since the

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* Professor, Emeritus (SUNY/Buffalo Law School). Special thanks for their thoughtful assistance to Professors Andrew Kull (University of Texas Law School) and Douglas Laycock (University of Virginia Law School) (Respectively Reporter and Adviser for the Restatement, Third, of Restitution and Unjust Enrichment), and Ira Bloom (Albany Law School) (a major architect of the proposed New York Trust Code).

[1] David M. English, *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 67 Mo. L. Rev. 143, 203 (2002).

trustee would have been liable for the full amount of the section 1002(a)(1) loss if there had been no section 1002(a)(2) profit, the restitution/disgorgement objective can only be fully accomplished by making the trustee liable for *both* the loss *and* the profit.

This issue was raised in a recent decision by the Supreme Court of New Mexico, *Miller v. Bank of America*,[2] where the trustee, in violation of the express trust terms, maintained an investment in unproductive realty which lost substantial value. In addition, the trustee, in an attempt to refurbish the realty, made loans to the trust and earned a profit in interest and loan fees.

Miller is especially notable because New Mexico enacted the UTC in 2003 and, in 2007, added, verbatim, section 1002(a). The *Miller* court, however, held that section 1002(a) did not govern because it interpreted section 1002(a)(2) as applying only to "profit accruing to the trust" and not to profit made by the trustee personally: *"The alternatives in Section 46A–10–1002 do not apply to a trustee's wrongful personal profit."*[3]

Thus holding section 1002(a) inapplicable, the *Miller* Court determined that the New Mexico Uniform Trust Code codified the common law[4] and that under the common law the trustee was liable for *both* the loss to the trust *and* the trustee's personal profit, except to the extent that it could be shown, on remand, that the trustee's profit had been included in calculating the loss to the trust.

As stated by the *Miller* Court:

> Loss to Beneficiaries and profit by the Bank are distinct harms that traditionally give rise to different types of damages: restoration and disgorgement. Each has its own remedial purpose, and both may be awarded if necessary to satisfy each purpose fully by compensating the trust and removing all profit from the Bank's self-dealing.[5]

Ironically, *Miller's* interpretation of section 1002(a)(2), which led to this holding, stemmed from the following UTC Official Comment to section 1002(a):

> Subsection (a) is based on Restatement (Third) of Trusts: Prudent Investor Rule 205 (1992).

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[2] 352 P.3d 1162, 1164 (N.M. 2015).

[3] *Id.* at 1168.

[4] *Id.* at 1167. *See also* UNIF. TRUST CODE § 106 (UNIF. LAW COMM'N 2010) ("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.").

[5] *Miller*, 352 P.3d at 1168-69.

That section 205 provided as follows:

> A trustee who commits a breach of trust is
> (a) accountable for any profit accruing to the trust through the breach of trust; or
> (b) chargeable with the amount required to restore the values of the trust estate and trust distributions to what they would have been if the trust had been properly administered.
>
> In addition, the trustee is subject to such liability as necessary to prevent the trustee from benefiting personally from the breach of trust (see § 206).[6]

The Comment to section 205 further explained:

> a. Alternatives available to the beneficiaries. If a trustee commits a breach of trust, the beneficiaries may affirm the transaction and accept the results of the trustee's improper conduct. In such a case the trustee is accountable for any profits accruing to the trust as a result of the breach.

Comparing this 1992 Restatement language with section 1002(a) reveals that the UTC drafters, first, eliminated the reference to *"profit accruing to the trust"* (which, as noted in the Restatement Comment, referred to the beneficiaries' choice of ratifying the breach instead of surcharging the trustee for the loss), and then translated the Restatement's provision regarding the "trustee . . . benefiting personally" into the "greater of " formula of UTC section 1002(a). Therefore, if *Miller* had viewed section 1002(a) in its proper historical context it would have held that the section 1002(a)(2) reference was to the trustee's *personal* profit and not to the *"profit accruing to the trust."*[7]

In this regard, however, it should be noted that in *Miller* ten law professors (including the author) filed an Amicus Brief, drafted by Professor Melanie Leslie (presently Dean of Cardozo Law School) in which

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[6] This section was superseded in 2012 by Restatement (Third) of Trusts § 100 (Am. Law Inst. 2012), i.e., after the UTC was adopted in 2000. *See infra* note 7.

[7] Further evidence of the Court's misinterpretation of section 1002(a)(2) can be seen in the Comment to UTC section 1003 (which requires disgorgement of trustee profit even absent a breach) stating that the UTC section 1003 phrase "profit made by the trustee", which mirrors the language of section 1002(a)(2), refers to the rule that "a trustee should not be allowed to use the trust as a means for *personal* profit." See also Restatement (Third) Trusts § 100, promulgated 12 years after the UTC was adopted ("A trustee who commits a breach of trust is chargeable with (a) the amount required to restore the values of the trust estate and trust distributions to what they would have been if the portion of the trust affected by the breach had been properly administered; or (b) the amount of any benefit to the trustee *personally* as a result of the breach." (emphasis added)).

they argued that the Court should, as it did, hold that the trustee should be liable for *both* the loss *and* the profit.[8] The Amici so argued, however, not because they agreed with the *Miller* view that section 1002(a)(2) did not apply to the trustee's *personal* profit, but rather because they viewed *Miller* as really involving two separate breaches, each to be tested by a separate application of section 1002(a)(1) and section 1002(a)(2) [which the Amici agreed referred to the trustee's *personal* profit].

Close analysis of the Amicus Brief, however, indicates that the Amici's basic position would apply even if only one breach was involved. That position, alluded to at the outset of this article, proceeds as follows:

> Since the trustee would have been liable for the full amount of the 1002(a)(1) loss if there had been no profit to the trustee, under the "greater of" formula the trustee's "bottom line/out of pocket" liability for the 1002(a)(1) loss is diminished (and possibly entirely eliminated) by the amount of the 1002(a)(2) profit and, therefore, full accomplishment of both the restorative/"make whole" and the restitution/disgorgement objectives requires that the trustee be held liable for *both* the loss *and* the profit.[9]

To view this argument as a balance sheet, assume a trustee bank with personal assets of 500 sells Greenacre (trust property) worth 100 to a bank customer for 80, and as part of the plan, the customer takes out a loan from the trustee bank and pays 10 in interest. There is thus a loss to the trust of 20 and a profit to the trustee of 10 and the profit is not included in the loss.

Because the profit is not part of the loss, the following obtains:

	Assets	Liabilities	Net Worth
Before the breach	500	0	500
If the breach had caused only loss (20)	500	20	480
But			
(a) The breach caused loss (20) and profit (10)- so, under "greater of"	510	20	490
(b) The breach caused loss (20) and profit (10)- so, under *Miller*	510	30	480

[8] Brief of Trust Law Professors as Amici Curiae in Support of Plaintiffs-Petitioners at 7-8, Miller v. Bank of Am., 352 P.3d 1162 (2015) (No. 34,554).
[9] *Id.*

What this example shows, argued the Amici, is that, if the trustee is liable for only the greater of the loss and the profit, the trustee is "relatively better off" with the profit than without. And thus "the [trustee] has been allowed to profit from its own wrong."[10] If, on the other hand, the trustee is liable for both the loss and the profit, it ends up in the same position as when there is a loss but no profit.

Suppose, on the other hand, that the trustee bank and its customer buy Greenacre jointly for 80 (each contributing 40). Again, there is 20 of loss to the trust and 10 of profit to the trustee, but because here the loss includes the profit, the following obtains:

	Assets	Liabilities	Net Worth
Before the breach	500	0	500
The breach causes loss (20) and profit (10)-so, under "greater of"	510	20	490
The breach causes loss (20) and profit (10)-so, under *Miller*	510	20	490

Because the amount of the loss will always be equal to, or greater than, the profit when the loss includes the profit, the restorative and restitution objectives will be fully accomplished by making the trustee liable only for the loss. As *Miller* held, there is no reason to make the trustee pay back the profit twice.

Conclusion

It is submitted that the above discussion suggests that consideration should be given to whether UTC section 1002(a) should be amended as follows:

(1) Inserting the word "personal", to make it clear that [as in section 205 of Restatement, Third, Prudent Investor Rule (1992) and section 100 of Restatement, Third, of Trusts (2012)] the profit "made by the trustee" refers to *personal* profit and not to *"profit accruing to the trust",* and

(2) to reflect the *Miller* approach in order to accomplish fully the section 1002(a) goal, stated above by the UTC Reporter Professor David M. English, "*to prevent the trustee from profiting from the breach.*"

[10] *Id.* at 23-24.

The following illustrates these possible amendments:

1002(a)

A trustee who commits a breach of trust is liable to the beneficiaries affected for ~~the greater of:~~

(1) the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; ~~or~~ *and*

(2) the *personal* profit the trustee made by reason of the breach *to the extent that such amount is not included in the amount determined under subsection (a)(1)*.[11]

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[11] The proposed New York Trust Code, available at https://digitalcommons.law.buffalo.edu/other_scholarship/46, currently reflects such a *Miller* approach, providing:

> [A] trustee who commits a breach of trust by breaching the duty of loyalty is chargeable with
>
> (1) the greater of:
>
> (A) the value of the capital lost by reason of the breach plus prejudgment interest as determined by the court; or
>
> (B) the amount required to restore the values of the trust property to what they would have been if the portion of the trust affected by the breach had been properly administered; *and*
>
> *(2) the amount of any benefit to the trustee personally as a result of the breach to the extent that such amount is not included in the amount determined under subparagraph (1)(A) or (1)(B).*

(proposed N.Y. Trust Code § 7-A-10.2(c) (emphasis added)).

In addition, it should be noted that section 409 of ERISA (Employee Retirement Income Security Act of 1974), 29 U.S.C. 1109, and its legislative history also reflect the *Miller* position that in certain cases the fiduciary should be liable for both the loss and any personal profit caused by the breach. Section 1109(a) provides:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, ***and*** to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

29 U.S.C. 1109(a) (2012) (emphasis added). *See* H.R. Conf. Rep. No. 93-1280 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 5038, 5100 ("[A] fiduciary who breaches the fiduciary requirements of the bill is to be *personally liable for any losses* to the plan resulting from this breach. *Such a fiduciary is* ***also*** *to be liable for restoring to the plan any profits which he has made through the use of any plan asset.*" (emphasis added)). *See also* Bricklayers & Allied Craftworkers Local v. Penn Valley Tile, Inc., 175 F. Supp. 3d 487 (E.D. Pa. 2016). Cf. Moitoso v. FMR LLC, No. 18-12122-WGY, 2019 WL 4980390 (D. Mass. Oct. 8, 2019).