



# WRN Newswire

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**TOPIC: Court Overrules Trustee Disclaimer Provisions**

**CITES:** [\*Jlee Rafert, et al v. Robert J. Meyer\*](#), 290 Neb. 219 (S. Ct. Neb, Feb 27, 2015); [Neb. Rev. Stat. Sections 30-3805, 30-3866, and 30-3897.](#)

**SUMMARY:** The Nebraska Supreme Court held that general principles of the duties of a trustee, as enunciated in Nebraska state statutes, overrule a specific article in the trust which exonerated the trustee from paying any premiums or being responsible for the payment of life insurance premiums. The trustee had used a false address on the policy applications, so that the policy notices were sent to this false address and the policies ultimately lapsed.

**RELEVANCE:** The duties of a trustee are scrupulously reviewed by the courts. Self-serving disclaimers of key fiduciary duties will be disregarded. The egregious facts in this case emphasize the importance of a careful trustee selection process—and the potential need in some cases for a trust protector to remove a rogue trustee or override a decision or inaction by a trustee who is not performing appropriately.

This case also supports the idea that a trustee owes a duty to the beneficiaries to preserve and protect the value of trust assets—including life insurance assets.

**FACTS:** The plaintiff, Jlee Rafert, hired attorney Robert Meyer to create an irrevocable life insurance trust, for the benefit of her four daughters. Meyer named himself as trustee. Meyer, as trustee, purchased three policies, totaling \$8.5 million in face amount.

Meyer executed all three insurance policy applications, each identifying the trust as owner of the policy. On each policy application executed by Meyer, he provided the insurer with a false address for the trust.

The initial premiums were paid in 2009, but in 2010, the policies lapsed for nonpayment of the premiums due. Rafert, Meyer, and the beneficiaries did not receive notice from the insurers until August 2012 that the policies had lapsed. Rafert paid \$252,841.03 to an insurance agent who did not forward the payment to the insurers, but absconded with the payment.

The trust provided that:

The Trustee shall be under no obligation to pay the premiums which may become due and payable under the provisions of such policy of insurance, or to make certain that such premiums are paid by the Grantor or others, or to notify any persons of the non-payment [sic] of such premiums, and the Trustee shall be under no responsibility or liability of any kind in the event such premiums are not paid as required.

The beneficiaries of the trust sued Meyer for breach of fiduciary duty.

The lower court found that the exculpatory language was effective, and dismissed the beneficiaries' complaint. The beneficiaries appealed, and the Nebraska Supreme Court overturned the decision and held that the duties of a trustee, provided for in state statutes, were applicable in spite of the disclaimer language.

The court held that Nebraska law provides deference to the terms of the trust, but this deference does not extend to all the trustee's duties. Those duties to which the Nebraska code does not defer are:

- A trustee has the duty to administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with the code. A violation by a trustee of a duty required by law, whether willful, fraudulent, or resulting from neglect, is a breach of trust, and the trustee is liable for any damages proximately caused by the breach.
- A trustee has a duty to keep the beneficiaries reasonably informed of the material facts necessary for them to protect their interests. Notice of nonpayment of the premiums might have caused the beneficiaries to act to keep the policy in force.
- A term of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent that it relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries.
- An exculpatory term drafted or caused to be drafted by the trustee is invalid as an abuse of a fiduciary or confidential relationship unless the trustee proves that the exculpatory term is fair under the circumstances and that its existence and contents were adequately communicated to the settlor.
- A trustee has a duty to furnish annual reports to the beneficiaries. Annual reporting is a minimum requirement in the ordinary administration of the trust. The court held that "A reasonable person acting in good faith and in the interests of the beneficiaries would not wait until such annual report was due before informing the beneficiaries that the trust assets were in danger of being lost. Meyer's duty to report the danger to the trust property became immediate when the insurers issued notices of nonpayment of the premiums. As trustee, Meyer had a statutory duty 'to keep the qualified beneficiaries of the trust reasonably informed.' "

The court held that the beneficiaries' complaint had stated a valid claim against Meyer for breach of duties as trustee. The court remanded the case to the lower court to proceed with a trial on the merits.

Finally, the court's opinion is also interesting because of the questions that it does not address:

- Why would the trustee, who is also a lawyer, make up an address for the trust?
- Why would the insured pay premiums to an agent instead of directly to the insurers?
- What motivated the agent to keep the premium instead of sending it to the insurers?

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