Delaware Banker

Spring 2017
Vol. 13 No. 2

Build It and They Will Come

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Having begun my legal career in 1999, I had the good fortune of occupying a dug-out seat to witness the Delaware trust industry's amazing expansion over the past two decades. While this period wasn't necessarily Delaware's "first pitch" in the trust field, it arguably marked the "early innings" of exponential growth which has attracted an all-star roster of trust companies affiliated with the worlds most prominent financial institutions that is unparalleled anywhere else in the country (except perhaps New York).

While I may just sound like a "hometown" fan, I think it is fair to say that Delaware has been recognized as the preeminent jurisdiction for trusts. It leads the league with its innovative laws while continuing to evolve to meet client needs. However, the last several years have produced a wave of jurisdictions (and even Uniform Laws) that are also evolving to replicate what Delaware has done. But I posit that the reason why clients and their advisers choose Delaware has as much to do with Delaware's trust infrastructure as it does with the laws on the books. Beyond the innovative solutions found in the black letter law, the well-developed infrastructure of Delaware's trust industry provides consistency, reliability, flexibility and depth that is not found anywhere else.

Delaware's trust industry is the "seasoned veteran" among trust jurisdictions. It's a mature industry, thus enabling it to focus on putting the finishing touches on its infrastructure, completing its line-up and solidifying its place atop the standings. Two examples of these infrastructure enhancements have been notable "home runs" for the industry. The first example is the Delaware Trust Conference. In collaboration with the industry, the Delaware Bankers Association hosts the annual Delaware Trust Conference at the Chase Riverfront Center, attracting well-known national speakers and boasting more than 450 attendees (a number that increases every year). There is literally no other Delaware-based conference of its kind that educates and promotes a local industry and attracts out-of-town visitors to our State, including attendees, sponsors and exhibitors, and no other trust jurisdiction has anything like it. I am personally aware of several new Delaware trust companies that have opened their doors as a direct result of their founders attending this conference. Second, this fall, students at the University of Delaware will begin studies in a new, first-of-its-kind, accredited Trust Management Minor program in the Lerner College of Business. This program was made possible by the efforts and resources of a partnership between the University of Delaware, the Delaware Bankers Association, financial institutions, law firms, accounting firms and the State of Delaware. It will provide mentoring and internships within the Delaware trust industry and will ensure an ongoing supply of well-trained personnel (a talented "farm team" if you will) to support the growing industry and ensure that the people providing Delaware trust administration services will be skilled and experienced.

As we mark the 20th anniversary of the enactment of Delaware's asset protection trust statute, and we recently passed the 30th anniversary of the repeal of Delaware's common law rule against perpetuities and the enactment of Delaware's first directed trust statute, it is a good time to reflect on just how far Delaware's trust industry has come and how we got here. And as the baseball season is now beginning, it also seems like an appropriate time to bring a merciful end to the baseball metaphors in this article.

Importance of the Industry

The trust industry has become a vitally important part of Delaware's economy, sustaining hundreds of professionals in the trust management field, including trust officers, fiduciary risk specialists, in-house counsel, tax advisers, accountants, attorneys and other skill positions. In 2011, an economic impact study conducted by Professor Max Schanzenbach, of Northwestern University School of Law, concluded that, conservatively, the non-Delaware trust business that flows into Delaware contributes between $600 million and $1.1 billion annually to Delaware's economy, accounting for nearly 2% of the state's economic output. That report concluded that Delaware has taken a much larger share of national trust business, amounting to at least 10 to 20 times the trust assets and fiduciary fees that would be predicted for a state of Delaware's size, and this excess trust business alone generates between $19 million and $33 million in state income tax revenue. It is notable that all those figures preceded the incredible run-up of trust assets flowing into Delaware at the end of 2012 and the exponential growth that has occurred since then.

How Was It Built

Of course, Delaware has been the preeminent jurisdiction in the world for businesses to incorporate since the early 1900's. More than one-half of the Fortune 500 companies are incorporated in Delaware and toward the latter half of last century, Delaware also became a favored jurisdiction for alternative entities. Many of the same reasons why businesses have turned to Delaware as their jurisdiction of choice are the same factors that make Delaware so appealing to settlors of trusts.

The Delaware Court of Chancery, the court recognized worldwide for its reputation in corporate and commercial matters, is the same court with primary jurisdiction over Delaware trusts. Matters are presented to sophisticated judges on the Chancery Court who are appointed (not elected) by the Governor of Delaware, at the recommendation of a nominating committee, for 12 year terms. The Chancellor and Vice Chancellors hold the reputation of the Court in the highest regard and are accustomed to routinely deciding cases of national importance. Delaware trust cases are never tried before a jury and cases are appealed directly to the Delaware Supreme Court, also a preeminent court recognized around the world for its thoughtful and sophisticated decisions. Because of Delaware's sizable and experienced bar, litigants in Delaware are generally represented by lawyers who are knowledgeable about trust law issues. Delaware also has a large and long-standing body of trust-related case law. Many of the decisions cited in the major treatises are Delaware cases. Delaware's well-developed jurisprudence addresses many issues with clarity, and assures trustees and trust beneficiaries that they can predict, with a fair degree of certainty, how the Delaware courts likely will rule upon trust law matters.

Delaware's origins as a trust jurisdiction began in the early part of the 20th century when Delaware trust instruments were already being drafted to include directed trustees, and Delaware facilitated perpetual trusts by permitting the exercise of powers of appointment to begin a new perpetuities period, thus extending the duration of a trust beyond the common law rule against perpetuities. Of course, the latter gave rise to the Sections 2041(a)(3) and 2514(d) of the Internal Revenue Code, colloquially known as the "Delaware tax trap" because they were enacted to prevent estate and gift tax avoidance through the use of perpetual Delaware trusts. In 1985, Delaware enacted its original directed trust statute which provided that a trustee acting in accordance with an investment direction shall have no liability for any loss resulting from an action taken or omitted by reason of complying with the direction. Then, a year later in 1986, Delaware abolished the common law rule against perpetuities, thus truly enabling perpetual trusts which have come to be known as "dynasty trusts." But it was not until the late 90's when the influx of out-of-state trust business truly began to explode. In 1996, the State began chartering limited purpose trust companies under new laws that greatly reduced the capital and employee requirements previously applicable to banks and trust companies. This immediately resulted in an influx of Delaware trust company affiliates of major financial institutions seeking to offer their clients the Delaware advantage. Shortly after the Delaware trust company affiliates of New York-

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based financial institutions opened, a massive number of trusts that were paying New York income tax solely because they had a New York trustee, were migrated to Delaware to cease paying New York taxes. In 1997, Delaware enacted the country's second asset protection trust statute (immediately following Alaska). By the end of the late 90's, the stage was set for an expansion of the trust industry over the next two decades that few might have predicted.

Answering the needs of trust settlors and beneficiaries, Delaware's trust statutes have gradually developed into a very detailed and clear framework for the body of law that governs trusts. The answers to most questions can be found in Title 12 of the Delaware Code, and if there is an area of uncertainty or concern, it is often addressed with legislative updates. The Estates and Trusts Section of the Delaware State Bar Association maintains a standing legislative drafting committee that proffers new legislation annually. The new laws often respond to issues that require clarification, or the needs of settlors and beneficiaries. Delaware's legislature is quick to react to new developments and respond to concerns, and has attempted to create flexible trust laws that are best able to effectuate the wishes of trust settlors and meet the needs of trust beneficiaries. Many of the statutes enacted over the past 2 decades have been followed by other jurisdictions throughout the country and the notable developments are too numerous to recount. For example, Delaware's directed trust statute is inarguably the most successfully implemented directed trust regime in the country and has been copied by many jurisdictions. It is functionally the model for the Uniform Directed Trust Act that is being finalized by the Uniform Laws Commission. Delaware enacted the country's very first total return unitrust statute in 2000, and I could go on and on with other examples, like Delaware's statutes addressing decanting, merger, non-judicial settlement agreements, pet trusts and purpose trusts, designated representatives, pre-mortem validation, silent trusts, etc.

Now today, Delaware boasts over 60 trust companies, most of which are affiliates of the largest, most recognizable financial institutions in the world. This critical mass of corporate fiduciaries provides plenty of alternatives for clients and ensures that the trust infrastructure remains robust. The many prominent financial institutions that have invested in Delaware, and are committed to the continued success of the industry, provide solid stewardship, ensure stability and secure Delaware's future success as a trust jurisdiction.

Why Choose Delaware?

When we are setting up large, complex, long-term wealth transfer vehicles for clients (which often-times is the most important thing they will do for themselves and their family, and perhaps the only lasting legacy they leave), I think it is necessary to take a quality-based approach and not the cheapest, most expedient option. There are many scorecards in the form of charts, comparisons and rankings that compare Delaware's laws to other jurisdictions, but I believe the following factors are vitally important to consider when choosing among trust jurisdictions:

- Responsiveness and efficiency of the jurisdiction's legislature and the quality of updates
- Stability of the trust industry and the State's long-term commitment to the industry
- Quality of the court system
- Quality of the judges, how are they appointed/elected, and length of term
- Depth, breadth and quality of case law
- History and experience of the trust industry and its professional support infrastructure
- Different drafting styles
- Quality and depth of legal counsel
- Variety of options among trust companies and number and diversity of high quality options now and in the future
- Availability and stability of experienced, high-quality, well-trained trust officers and other trust professionals
- Different trust administration practices
- Taxation of trusts
- Last but certainly not least, never underestimate the importance of the trust industry's infrastructure.

Todd A. Flubacher works with national, international and local clients on the creation, migration, modification and administration of Delaware trusts. He represents Delaware trustees, beneficiaries, law firms and individuals throughout the country on all matters involving Delaware trusts and estates. His practice emphasizes the unique advantages of Delaware trust law, including directed trusts, dynasty trusts, tax planning, asset protection trusts, and all aspects of trust validity, construction and administration. Todd has substantial experience with migrating trusts to Delaware and modifying trusts by decanting, merger, non-judicial settlement agreements, Delaware Court of Chancery trust petitions, administrative amendments, and addressing issues pertaining to choice of Delaware governing law. He drafts, reviews and comments on Delaware trust documents and renders Delaware trust law opinions. For more than a decade, Todd has filed trust petitions with the Delaware Court of Chancery for instructions, reformations/modifications, transfer of trust situs, construction, choice of law and other trust-related matters.