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From Trusts & Estates | A Prism Business Media Publication

June 1, 2006 | Volume 1 Number 5

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FEATURE STORY

Perspectives

Fiduciary Professions

TRUST NEW HAMPSHIRE

The granite state mines for trust gold

By David Adler, freelance journalist, New York

Hoping to join the ranks of the Caymen Islands and Guernsey, or more realistically, to compete effectively for trust business with South Dakota, Nevada, Wyoming, Delaware, Alaska and other states, New Hampshire is in the process of radically revising its trust laws. The New Hampshire "Trust Modernization and Competition Act of 2006," was signed into law in late May.

"Our explicit goal is to make New Hampshire the most attractive place for trusts and providing trusts services in the country, insofar as you can do it by statutes," says the act's primary draftsman, John Duncan of Duncan Associates in Chicago.

The act, at its core, contains several novel -- proponents say revolutionary -- provisions, which are making waves in the trust world.

First, trustees won't be liable for "reasonably determining" to diversify or concentrate as long as the decision is made in good faith. "As things go in trust law, this good faith provision for diversification decisions is dramatic," Duncan claims. Second, the act insists that all trustees and fiduciaries communicate





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information, something currently lacking from common law or even the Uniform Trust Code. Additionally, though the Uniform Trust Code has sanctioned the fiduciary power of nontrustees, only the New Hampshire act clarifies they have duties to the beneficiaries that correspond to their powers.

"In our view the breadth of this act is really what makes it different," says Duncan. "We have looked at all the other states, adopting what is best. And no other state has all of our provisions." (*continued below ad*)

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(continuation of article)

Hope...or Hype?

This quest for the best is based on an underlying economic hope: that New Hampshire can be the "go to" state for those seeking to establish trusts. The overall project is the brainchild of the Trust New Hampshire First, LLC, a consortium of individuals, corporations and business groups that wanted to modernize the state's trust laws to catapult the Granite State to the forefront of the trust business.

The economic rationale for such a project is bolstered by an analysis prepared by RKG associates, which the consortium commissioned. RKG found that if New Hampshire adopted trust laws similar to those of North Dakota or Delaware, it would generate between 900 and 3,000 new jobs, with new tax revenues of up to \$3.6 million--relatively large numbers for a small state.

This analysis rests on key assumptions: New Hampshire will have the best statutes for a minimum of 18 months, and will revisit them when needed.

The changes by New Hampshire may trigger a legislative arms race as other states revise their laws to leapfrog New Hampshire's efforts. As these countermoves ripple across the country, experts in competing states are monitoring New Hampshire's move, offering their view of the likely fallout in their own states, as well as the public policy implications for the nation. (*continued below ad*)

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STATES RESPOND

So what's the reaction in the three states known for their beneficial trust laws: Delaware, Alaska and South Dakota?

Delaware, known as the "first state" because it was the first to ratify the constitution, could have equally earned this nickname for its historic role in the trust world. The reason is obvious: "Delaware has been pioneering because of the DuPont family," says Peter Gordon of Gordon, Fournaris & Mammarella, PA, in Wilmington.

Delaware has lagged a bit in the private trust company arena for families. Out-of-state critics point to requirements -- for capital and the need to have an office in Delaware -- that are generally tailored to institutions not individuals. But in terms of commercial or institutional trusts, Delaware remains first-tier, allowing trustees unusual freedom to write agreements and to invest how they want. Most notably, according to Gordon, the settler of a Delaware trust can dictate the terms of the trust, and know that a trustee will implement those terms without fear of liability.

Thomas R. Pulsifer, partner at Morris, Nichols, Arsht & Tunnell LLP in Wilmington, offers details of what this flexibility can mean in practice. If the settler desires, "trustees don't have to be constrained by 'prudence' in Delaware trusts. In most states trustees have to act financially prudently. In Delaware if you want to put all the assets in lottery tickets, you can do that." Pulsifer points out that the DuPonts invested in the new and once unsafe technology of gunpowder and did quite well.

Pulsifer isn't commenting on the specifics of New Hampshire's move. But he does note that the Delaware legislature meets frequently and remains committed to keeping its jurisdiction attractive for trusts. "If we think they have made an improvement, we will match it."

Peter Gordon is equally untroubled. He points to Delaware's other not-so-secret weapon: its courts. "Our judicial system is ranked number one in the nation," he claims. Delaware judges have a long experience applying trust law. "In New Hampshire, you may have to deal with judges who are new to this, you don't know what kind of decision you are going to get," Gordon says. "There is reason everyone is coming to Delaware."

Well, not everyone. Some head west -- far west.

Alaska jumped to the front of the trust-friendly pack when it enacted the landmark Alaska Trust Act in 1997. In doing so, Alaska became the first state to codify a "self-settled spendthrift trust" also known as the "Domestic Asset Protection Trust (DAPT)." The act provided breakthroughs in asset protection as well as tax reduction.

"Alaska's laws have been designed to attract persons who aren't Alaska residents who want to set up trusts in Alaska, as well as to benefit Alaskans," says David Shaftel of The Law Offices of David G. Shaftel, PC, in Anchorage.

Though no longer the only state with DAPT legislation -- Delaware and other states quickly copied it -- Shaftel claims that Alaska will remain competitive in designing laws to attract trust business.

"States -- particularly smaller states -- seem to be watching each other and changing their laws in response" he notes, adding: "We are going to study New Hampshire and see if we can find ways to improve on [its law]."

They won't be alone. Along with Delaware, South Dakota is particularly threatened by New Hampshire's play for trust business. New Hampshire is positioned to provide an alternative to Delaware for commercial trust institutions, and an alternative to South Dakota for private trust companies.
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"To be honest, when dealing with private family trust companies, catering to those families with over \$100 million in assets has been the bulk of our business, says Al W. King III, co-CEO of the South Dakota Trust Company, LLC. King points to specific aspects of South Dakotan law that make the state so attractive for these trusts: In addition to no state income tax and low tax on insurance premiums, he says that "light regulation" and resident board member requirements decrease the chance of the corporate veil being pierced, compared to unregulated or non-resident board member states. King asks, "Do families with that degree of wealth want to take any chances?"

Regulatory reform doesn't automatically translate into economic growth: There already were 23 dynasty trust jurisdictions, but the overwhelming majority of the dynasty business goes to just three or four states, like South Dakota, Nevada and Wyoming. Similarly, even if New Hampshire matches all of South Dakota's laws, King questions whether, given New Hampshire's relative lack of experience, the dynasty trust scenario will repeat itself in the family trust corporation arena, with South Dakota retaining most of its business.

However, King does concede that New Hampshire may be attractive for wealthy families from the region. Geography is destiny, and regionalism plays a role in the trust business. But, according to King, geography also may work against New Hampshire in the long, long run: "Do you really want to be in a coastal state, with the possible advent of global warming?" he quipped.

RACE TO THE BOTTOM?

Ultimately the quest to attract trust business is a zero-sum game. Or negative-sum for many of the attorneys involved, as trust lawyers will have to work with lawyers in other states, increasing the complexity of planning as well as cost to the clients, while decreasing individual advisor's control.

The larger issue is one of public policy: Is the competition essentially a race to the bottom, with damaging implications for the country on the whole?

John Duncan says no: "Everything being proposed here is really good law in addition to being good for trust companies, trustees, families and beneficiaries." He adds that any unsafe or lax law is a risk not worth taking by any state -- it could result in a disaster, destroying or damaging the relatively new private trust company industry.

And the new New Hampshire provisions, as other states copy from the best of them, could lead to improvements nationwide, resulting in modernized laws. William Ardinger, legal and legislative counsel to Trust New Hampshire First says, "New Hampshire isn't leading a race to the bottom, it's leading a race to reform that is long overdue."

The act's immediate goals are less high-minded -- and very realizable. Says Duncan, "every family looking for the best trust law, and every trust institution looking to deliver the best trust law, will need to consider New Hampshire."

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CORRECTION

June T&E Issue

The article "*Dumont* Stands" in the June 2006 Issue (which is now in the mail) incorrectly states that the New York Court of Appeals (the state's highest court) denied the motion for appeal of the appellate division's decision in *Dumont*. On April 28, the appellate division denied the petition for appeal of its decision in *Dumont*. The court of appeals has not yet decided whether to grant the appeal.

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