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From: Steve Leimberg's Estate Planning Newsletter
Subject: Gary Flotron & Randy Whitelaw: A Comprehensive Perspective on Four UPIA-TOLI Cases, Plus One That Includes the UTC, and Their Astounding Implications for ILIT Trustees, Part 1 of 2

May marked the eighth anniversary of the trial court decision while March marked the seventh anniversary of the appellate court decision of the first case dealing with the Uniform Prudent Investor Act (UPIA) and trust-owned life insurance (TOLI) – namely the Cochran v. KeyBank, N.A., which is more formally known as In re Stuart Cochran Irrevocable Trust. Since that time we have had three more cases involving UPIA and TOLI, with one of those cases also incorporating the Uniform Trust Code (UTC) – namely Paradee v. Paradee, French v. Wachovia Bank, and Rafert v. Meyer. Each of these cases has provided guidance to trustees – both professional and amateur – and astonishing implications as to what constitutes prudent trustee behavior. Of course, there will, undoubtedly, be more cases in the future which will provide us with further refinements in the drafting, duties of trustees, administration and operation of ILITs and TOLI.

Now, **Gary Flotron** and **Randy Whitelaw** present a comprehensive review of these four cases and interpret the lessons learned from each case and their consequences as to prudent behavior to be adopted by trustees. Part 1 will describe and analyze in detail the Cochran v. KeyBank case in which co-author **Randy Whitelaw** was the lead expert witness for the plaintiffs. Part 2 will describe and analyze the subsequent three UPIA-TOLI cases, including in detail the last case of Rafert v. Meyer which also applies the UTC in addition to UPIA to TOLI.

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Now, here is Part 1 or their commentary:

EXECUTIVE SUMMARY:

David Burdette published an article in the **American Bankers Association *Trusts & Investments*** magazine in 2002 titled "Pay Attention to TOLI."[1] While the admonition in Mr. Burdette's article was primarily addressed to corporate trustees, the warning is just as appropriate to the approximately over 90% of trustees who are the amateur trustee that have been solicited – and some even drafted - by the trust creators and grantors to serve as an

accommodation and favor to the trust settlors of their newly created irrevocable life insurance trusts (ILITs). Very few of these trustees have been instructed or trained in the duties of a trustee, let alone have any expertise in the life insurance policies that they now have a duty to manage and monitor whether they realize it or not.

Since Mr. Burdette's article, there are now four cases that have gone to trial – and there are reportedly numerous cases that have been settled out of court before going to trial – where the beneficiaries of the ILITs have sued the trustee for breach of fiduciary duties as trustees. All of these cases involve the application of the Uniform Prudent Investor Act (UPIA) – and one also involves the application of the Uniform Trust Code (UTC) – to trust-owned life insurance (TOLI). Two of these cases involved skilled corporate trustees, one involved of what appears to be a series of unskilled accommodation trustees, and, the last and most recent case, involved the attorney who drafted the ILIT serving as trustee. In the two cases involving the corporate trustees the court found for those corporate trustees. In the other two cases the court found for the beneficiary plaintiffs.

All four of the cases have lessons and practical guidance for both the professional, corporate trustee and the amateur, accommodation trustee. This newsletter will do a comprehensive review and analysis of each of the four cases as to the case facts, issues, court opinions, analysis and decisions, and what are the implications and lessons that can be gleamed from the cases for the trustee, both professional and amateur. Of course, while each of these cases give us some guidance, there still remain questions that need to be answered. Additionally, there is no guarantee that future courts may not come to different conclusions - particularly with respect to the Cochran v. KeyBank case, which was the first case concerning UPIA and TOLI, with which we will begin this discussion.

Cochran v. KeyBank[2] - The First of the Four UPIA-TOLI Cases

The very first and, indeed, watershed court case applying the Uniform Prudent Investor Act (UPIA) to trust-owned life insurance (TOLI) was the Indiana case of Cochran v. KeyBank. In this case, KeyBank was the successor trustee that approved the recommendation made by Cochran's insurance advisor[3] to replace two variable universal life policies providing $8 million of death benefit - that hypothetical inforce policy illustrations projected to lapse long before the insured's life expectancy – with a guaranteed universal life

insurance policy providing $2,536,000 of death benefit after underwriting considerations.

In the evaluation process for this transaction, KeyBank employed an independent insurance consultant who was not licensed to sell variable insurance products[4] and had limited inforce VUL policy risk management evaluation capabilities. This limited scope fact was disclosed in the reports that eventually advocated the proposed replacement.

Cochran died unexpectedly of a heart attack at the age of 53, shortly after the replacement. Cochran's two daughters, the beneficiaries of the ILIT, sued KeyBank for breach of fiduciary duties. From the point of view of choosing the appropriate and applicable portions of Indiana law – namely the precedent Indiana court cases and the Indiana version of UPIA – the trial and appellate courts properly affirmed the importance of delegation to an outside independent, third-party entity, having a documented process, adherence to the intentions of the trust grantor, trustee discretion, and, beneficiary communications. On the other hand, from the point of view of determining the facts relative to the properly chosen applicable law the Cochran trial court[5] determined a questionably low[6] set of standards for prudence and for compliance with the chosen applicable laws.

The court ignored the limited scope policy evaluation report[7] and its questionable process, and stated the issue in the case as: "Was it prudent for the trustee to move trust assets from insurance policies with significant risk and likelihood of ultimate lapse into an insurance policy with a smaller but guaranteed death benefit?" Noting that "the process was certainly less than perfect," especially considering the available policy evaluation analytics for variable universal life policies and market outlook available from Key Bank's Chief Investment Officer, there was a documented process. Both the trial court and the appeals court found in favor of KeyBank based on their reliance on guidance from "an outside, independent entity with no policy to sell or any other financial stake in the outcome."

FACTS:

On December 28, 1987, Stuart Cochran created an irrevocable life insurance trust (ILIT) naming his two daughters, Chanell and Micaela, who were two and four years old at that time, respectively, as beneficiaries of the trust. A parallel trust was also created at that time by Mr. Cochran's wife, Mary Kay Cochran,

who in 1989 filed for divorce and was awarded full custody of the children, and is now known as Mary Kay Vance. The trust was funded with life insurance policies and insurance advisor Art Roberson assisted in the transaction. Elkhart National Bank was named as the initial trustee of the trust and, subsequently, Pinnacle Bank was named as successor trustee and served as the trustee until 1999.

On December 11, 1998, Steven Krieger, Senior Vice President of Pinnacle Bank, advised Cochran that Pinnacle Bank was no longer willing to serve as trustee due to Cochran's insistence on having third parties involved in the trustee's decision making process. Mr. Krieger specifically noted the continued involvement of Cochran, his sister and insurance advisor Art Roberson. Krieger subsequently called Vance on January 22, 1999 to inform her of the intended immediate resignation of Pinnacle Bank as trustee and advised her that pursuant to the provisions of the trust that in the event of the resignation of a trustee, Vance had the power to appoint a successor trustee.

Immediately prior to January 1999, Roberson initiated his own review of the existing policies in the trust and in January 1999 Roberson contacted Vance by telephone and suggested that Vance authorize the replacement of the three life insurance policies and one annuity then held in the trust with two new life insurance policies: a Manulife Variable Universal Life Policy and an American General Variable Universal Life Policy. As a consequence of her discussion with Roberson, Vance retained an attorney, Kenneth Sheetz, to represent her in dealing with the issues surrounding the selection of a successor trustee and trust investment strategies. Vance's parallel trust at this time was being administered by KeyBank, N.A. and Vance and Sheetz met with Mike Nicolini, a representative of KeyBank, to discuss moving the successor trusteeship for Stuart Cochran's trust to KeyBank.

The trial court's "Findings of Fact, Conclusions of Law and Order" addressed in great detail the issue of the exact arrangements and nature of the trustee agreement entered into by KeyBank and the duties KeyBank had assumed as trustee. However, the appellate court never addressed or even mentioned these issues. One can only conclude that both the appellant-petitioners and appellee-respondent were satisfied with the trial court's findings and decision on these matters, or, at least, did not question the trial court's decision on these particular issues. Essentially the second paragraph of the "Acceptance of Trust" document given to Vance and her attorney Sheetz by Nicolini - along with the "Resignation of Successor Trustee" and "Appointment of Successor

Trustee" documents, all of which were approved by Sheetz with two minor corrections – limited substantially KeyBank's duties with respect to the management, periodic reviews and monitoring of performance of the life insurance policies. This paragraph stated:

> The Trustee shall not be required to perform any periodic reviews with respect to the policy or policies held in trust. No review of the insurance carrier, the performance of the policy or policies, their appropriateness or amount, or any other aspect of them, shall be required. The Trustee's only duties with respect to the insurance shall be to hold the policy(ies) and pay the premiums (if any). It is recognized that this limits the duties of the Trustee and it is acknowledged that the Trustee has discounted it [sic] fees to reflect these limited duties.

However, the trust agreement itself conferred broad powers and responsibilities with respect to investments and management of assets. "In the administration of the trusts, the Trustee shall have the following powers and discretion, in addition to those now or hereafter conferred upon trustees generally," and including "all of the rights of the owner of such [life insurance] policies . . . and generally including all of the incidents of ownership of such [life insurance] policies." The court noted "[a]ny document which purports to modify or limit the duties of the trustee in any substantive way would, of necessity constitute a modification of the trust. The Beneficiaries assert that the Acceptance of Trust document signed by KeyBank was such a document, and that KeyBank was attempting to modify its duties without modifying the terms of the trust document." The Cochran Trust was an irrevocable trust which could not be modified without court approval and KeyBank did not apply for court approval to modify or amend its duties under the trust. Nor did KeyBank apply for court approval to accept only a portion of the duties to the trust.

Furthermore, the trust agreement provided that no person other than the trustee shall have or exercise the power to control the investments of the trust either by directing investments or vetoing proposed investments, or to require or exchange any property of the trusts by substituting other property of equivalent value. The trial court specifically referred to the common usage in the banking industry of the terms "directed account" and "full responsibility account" and noted the testimony of one KeyBank senior vice president that the determination as to whether a trust is a full responsibility account or a directed account is determined by looking at the trust agreement. This KeyBank senior

vice president along with one other KeyBank official testified that the Cochran Trust was coded in KeyBank's computer database as a full responsibility account.

The court found that Vance made the decision to select KeyBank as the successor trustee, and that Cochran did not have any involvement or input in Vance's decision, and that on February 3, 1999, KeyBank was appointed as successor trustee by Vance. On that same date, KeyBank accepted appointment as successor trustee and on February 4, 1999, Pinnacle Bank resigned as successor trustee.

At the time KeyBank assumed the duties of successor trustee the trust's assets consisted of three life insurance policies and one annuity with a collective net death benefit of $4,735,539. As already noted, Roberson had recommended an exchange of policies replacing the four existing policies with the two variable universal life (VUL) policies with a new total death benefit of $8 million. The trial court noted that "[a]ccording to insurance experts, unlike a whole life policy, a VUL policy requires a more active management and monitoring." When KeyBank assumed its duties, the underwriting for the exchange of policies had been approved and Stuart Cochran had already submitted to the physical exams. In February and March of 1999 KeyBank approved the transaction and the exchange of policies was executed.[8]

Neither the trial court nor the appellate court described or discussed the asset allocations for the separate mutual fund-like accounts for the VUL policies. We, therefore, do not know what percentage of the VUL cash value accounts were invested in equities as opposed to fixed income like accounts. However, it was noted that following the terrorist attacks on New York and Washington on September 11, 2001 the stock market took a dramatic decline and that that decline had an adverse effect on the value "of the mutual fund investments contained in the VUL policies held by the Trust." In fact, in 2001 the policies lost money, which meant that the cost of insurance and the carrier's administrative charges were greater than the income generated by the investments, and, in 2002, the losses were even greater. It was reported that for the American General VUL policy that "[t]he net investment loss for the period 1/1/2001 to 3/31/2001 was $12,189.39," and, for the ManuLife VUL policy "[t]he net investment loss for the policy year ending on January 4, 2003 was $36,672.43." Why the court opinions only mentioned the losses for these specific time periods, which were inconsistent and different for each of the two

policies, is unknown.

In the spring of 2003, KeyBank retained Oswald & Company (Oswald), an independent outside insurance consultant, to audit the existing VUL policies with American General and Manulife, which were held by the trust. At that time Stuart was 52 years of age and the VUL policies had a combined death benefit of $8,007,709.

Oswald's review of the American General VUL policy found in pertinent part that "[w]e feel the financial strength ratings for the carrier are excellent. . . . Based on a hypothetical gross interest rate of 8% and current cost of insurance, the policy is shown to remain in force through Stuart's age 71. Based on a hypothetical gross interest rate of 0% and the guaranteed cost of insurance the policy is shown to remain in force to Stuart's age 58." Oswald's recommendation was the following: "The policy is rated as a Category Three (3) policy (on a scale from one to five, with one being the best). This is due to the fund performance of the policy and the fact that additional future premiums many be required. The policy should be audited every two to three years or more often if the underlying fund performance remains lower than projected, the carrier's financial strength ratings decline or there are policy loans or withdrawals taken."

Oswald's review of the Manulife VUL policy was very similar, with finding that "[w]e feel the financial strength ratings for the carrier are very good to excellent. . . . Based on a hypothetical gross interest rate of 8% with current cost of insurance, the policy is shown to remain in force through policy year 22 [Stuart's age 70]. Based on the guaranteed cost of insurance and a hypothetical gross interest rate of 0%, the policy is shown to remain in force through policy year 12 [Stuart's age 60]." Other than not containing the sentence "[t]his is due to the fund performance of the policy and the fact that additional future premiums many be required," Oswald's recommendation for the Manulife VUL policy was identical to the recommendation for the American General VUL policy.

The trial court noted "[t]he Oswald review indicated that it was likely that the two existing policies would lapse before Cochran reached his life expectancy of 88 years." Additionally, because Stuart's "financial fortune had also taken a negative turn by this point in time, he had no financial wherewithal to supplement the trust with additional resources or through the purchase of

additional policies of life insurance."

As Oswald conducted its review of the VUL policies, Roberson completed his own review of alternative policies and, eventually, proposed to KeyBank that a John Hancock policy be purchased to replace the two existing VUL policies. However, while the proposed policy was guaranteed to age 100, the total death benefit would be reduced to $2,787,624.

KeyBank requested Oswald to review the proposed John Hancock policy. Representatives of those companies [the phrase "those companies" was used in the appellate court opinion and was referring to KeyBank and Oswald] exchanged some emails, in which an Oswald employee noted that the John Hancock policy "drastically reduces" the expected death benefit, and asking KeyBank, "[i]s this . . . . what [your] client wants to do?" The KeyBank representative [unspecified who was the representative] replied in the affirmative, stating that "[i]t is [Stuart's] intention to reduce his life insurance coverage to the amount seen on the John Hancock illustrations." Oswald found after reviewing the proposed John Hancock policy and comparing it to the two existing VUL policies as follows:

> We feel the financial strength ratings for John Hancock are very good. . . The proposed John Hancock illustration shows no further premiums and projects coverage at current mortality and interest rates, to remain inforce [sic] to Stuart's age 100. At guaranteed morality and interest rates the policy is projected to remain inforce [sic] to age 100.
>
> <u>Pros of exchanging to John Hancock Policy:</u>
>
> - Since proposed John Hancock is a non-[VUL] policy, there will [be] less fluctuation in the cash values.
> - The proposed John Hancock policy offers guaranteed coverage to age 100 of $2,787,624.
> - No ongoing premiums are required to maintain the proposed policy coverage of $2,787,624.
>
> <u>Cons of exchanging to John Hancock Policy:</u>
>
> - There will be a new contestability period and suicide period in

> the new policy.
>
> • There will be new expense charges, including commissions . . .
>
> • There will be a surrender charge incurred of . . . $107,764.
>
> RECOMMENDATION
>
> If the client feels comfortable with the points referenced in this report and feels comfortable with the proposed John Hancock policy and the concomitant results associated with this transaction, then purchase is recommended.
>
> Our recommendation is contingent upon underwriting. Should his underwriting come back other than Super Preferred Nontobacco, as illustrated, then we will need to review the resultant changes.
>
> If purchased, the John Hancock policy will be rated as a Category One (1) policy (on a scale of one to five, with one being the best). No further audits are necessary unless this carrier's ratings decline.

In an email, an Oswald employee summarized its conclusion:

> We're sure the guarantees in this John Hancock product have a lot of appeal to [Stuart] given the fact of his substantial investment losses in the current [VUL] policies.
>
> Given the facts that he is moving to a fixed product with the death benefit guaranteed to age 100 and $0 future outlay, our recommendation would be to move forward with the proposed John Hancock coverage if the client is comfortable with the reduction in death benefit.

After reviewing Oswald's analysis of the respective policies and considering the recommendations contained in the reports, in June 2003, KeyBank decided to effectuate a Section 1035 exchange replacing the American General VUL policy and the Manulife VUL policy with the John Hancock policy that would insure Cochran until age 100. After Stuart completed a medical exam, the John Hancock underwriters rated him as a preferred risk rather than as a super preferred risk. The result on the change in risk classification was to reduce the guaranteed death benefit to $2,536,000 from the $2,787,624 originally proposed death benefit. The Oswald employee who had performed the

analysis testified that this change in the death benefit would not have altered Oswald's ultimate recommendation.

It should be noted that in the trial court's "Findings of Fact," item number 37, the trial court stated that "[w]hile no evidence was introduced showing that KeyBank sent regular financial statements to the Beneficiaries or to their mother, Vance, it was uncontroverted that KeyBank transmitted an account statement to Chanell [Stuart Cochran's oldest daughter who recently turned age 18 and requested documents from KeyBank] for the period April 1, 2003 – June 30, 2003." The information received by Chanell would have been after the replacement of the two VUL policies with the John Hancock policy.

In January, 2004, while shoveling snow at his home, Stuart Cochran died unexpectantly at the age of 53. The trust received the sum of $2,536,000 in life insurance proceeds, tax free, and these proceeds were distributed to the beneficiaries of the trust – Cochran's daughters.

In April of 2004 the beneficiaries of the trust began legal proceedings against KeyBank, eventually claiming, among other things, that KeyBank breached its fiduciary duties as trustee of the trust. A bench trial was held on August 28-30, 2007. On May 29, 2008 the trial court entered findings of facts and conclusions of law, ruling in favor of KeyBank. The beneficiaries appealed the trial court decision but the Court of Appeals of Indiana affirmed the trial court decision.

Trial Court's Conclusions of Law and Analysis

The trial court first cited the appropriate Indiana court cases and statutes to be applied to the case. These included from the Indiana Code the definitions of a trust, settlor, minor and trustee. The court noted from the case of Goodwine v. Goodwine, 819 N.E.2d 824, 829 (Ind. App. 2004 [citing In re Hanson Revocable Trust, 779 N.E.2d 1218, 1221 (Ind. App. 2002), trans denied] that "[i]n construing a trust instrument, the primary objective is to ascertain and carry out the settlor's intent." The court noted the Indiana Trust Code specifically provides that the rules of law contained there shall be "interpreted and applied to the terms of the trust so as to implement the intent of the settlor and the purposes of the trust." Ind. Code § 30-4-1-3. Citing from the Goodwin case noted above which was citing Stowers v. Norwest Bank Indiana, N.A., 624 N.E.2d 485, 489 (Ind. App. 1993), "i[n] determining the intent of the settlor, the courts look first to the language used in the trust document. If the

terms of the trust document are not ambiguous, a court may examine only the four corners of the instrument to determine the settlor's intent. If the settlor's intent is clear from the plain language of the instrument and not against public policy, the court must give effect to that intent." Quoting from Indiana Code § 30-4-1-3, the court noted that in fact, where the rules of law and the terms of the trust conflict, the terms of the trust shall control "unless the rules of law clearly prohibit or restrict the article which the terms of the trust purport to authorize."

Noting from Indiana Code § 30-4-3-11 "that a trustee who commits a breach of trust may be held liable to the beneficiary of the trust," and, "that in considering the action of an [sic] trustee, Indiana law provides it is the duty of a trustee to comply with the Indiana Prudent Investor Rule," the court cited the following sections of the Indiana Prudent Investor Rule, which are essentially the same as the Uniform Prudent Investor Act (UPIA) Sections 1, 2, 8 and 9:

Indiana Code Section 30-4-3.5-1 (UPA Section 1).

> (a) Except as otherwise provided in subsection (b), a trustee who invests and manages trust assets owes a duty to the beneficiaries of the trust to comply with the prudent investor rule set forth in this chapter.
>
> (b) The prudent investor rule, a default rule, may be expanded, restricted, eliminated, or otherwise altered by the provisions of a trust. A trustee is not liable to a beneficiary to the extent that the trustee acted in reasonable reliance on the provisions of the trust.

Indiana Code Section 30-4-3.5-2 (UPA Section 2).

> (a) A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill and caution.
>
> (b) A trustee's investments and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as part

of an overall investment strategy having risk and return objectives reasonably suited to the trust.

(c) Among circumstances that a trustee shall consider in investing and managing trust assets are those of the following that are relevant to the trust or its beneficiaries:

(1) General economic conditions.

(2) The possible effect of inflation or deflation.

(3) The expected tax consequences of investment decisions or strategies.

(4) The role that each investment or course of action plays within the overall trust portfolio, which may include financial assets, interests in closely held enterprises, tangible and intangible personal property, and real property.

(5) The expected total return from income and the appreciation of capital.

(6) Other resources of the beneficiaries.

(7) Needs for liquidity, regularity of income, and preservation or appreciation of capital.

(8) An asset's special relationship or special value, if any, to the purposes of the trust or one (1) or more of the beneficiaries.

(d) A trustee shall make a reasonable effort to verify facts relevant to the investment and management of trust assets.

(e) A trustee may invest in any kind of property or type of investment consistent with the standards of this chapter.

(f) A trustee who has special skills or expertise, or is named in reliance upon the trustee's representation that the trustee has special skills or expertise, has a duty to use the special skills or

expertise.

Indiana Code Section 30-4-3.5-8 (UPA Section 8).

> Compliance with the prudent investor rule is determined in light of the facts and circumstances existing at the time of a trustee's decision or action and not by hindsight.

Indiana Code Section 30-4-3.5-9 (UPA Section 9).

> A trustee may delegate investment and management functions that a prudent trustee of comparable skills could properly delegate under the circumstances. The trustee shall exercise reasonable care, skill and caution in:
>
> (1) Selecting an agent.
>
> (2) Establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust; and.
>
> (3) Reviewing the agent's actions periodically in order to monitor the agent's performance and compliance with the terms of the delegation.

In again citing Goodwine, 819 N.E.2d at 831, the court stated the Indiana Prudent Investor Act has been interpreted by the Court of Appeals to act as a limitation on the actions of a trustee, and not as a "set of rules giving him permission to act in ways in which he otherwise could not."

The trial court first addressed the issue of KeyBank's limiting the duties of the trustee by the Acceptance of Trust document, contrary to the duties imposed on the trustee by the trust agreement itself. Indiana Code Section 30-4-3-26 provides that an irrevocable trust may be modified only upon court approval. While neither Vance nor the beneficiaries objected to the Acceptance of Trust document, and, under certain circumstances, silence may be considered as acceptance or ratification, the court declared that the Acceptance of Trust document represented an attempted modification of the trust agreement, and such modification may be made only with court approval pursuant to Indiana Code Section 30-4-3-26 as noted above. In addition, Indiana Code Section 30-4-3-5 provides that if the duty of the trustee in the exercise of any power conflicts with the trustee's individual interest, the power may be exercised only

with notice to interested persons and authorization of the court.

However, the court noted, under Indiana law, a duty may be imposed on one who undertakes to act even though the person may not otherwise have a duty to act. By undertaking the evaluation of the policies as part of its duties and making the decision to execute the exchange of policies in June of 2003, KeyBank assumed the obligation to act in a prudent manner. So, the court concluded, that, "KeyBank undertook to act and therefore had a duty to act prudently, without regard to any limitations upon its duty that the second paragraph of the Acceptance [of Trust] Document purports to impose."

The court cited that both the Restatement (Third) of Trust § 227(c)(2) and the Indiana Prudent Investor Rule provisions for delegation and noted, additionally, that "due to lack of regular financial reports and as a consequence of the process of selecting KeyBank as the successor trustee, KeyBank placed itself in the position of undertaking responsibility to make prudent decisions for the investment of the corpus of the trust."

The court narrowed down what it considered to be the key issue and essence of the case as follows:

> The ultimate question facing this Court, however, is whether the actions of the Trustee, KeyBank, were consistent with the Settlor's intent as expressed in the Trust document and met its fiduciary duties to the Beneficiaries. In essence, based on the circumstances facing the Trust in 2003, was it prudent for the Trustee to move the trust assets from insurance policies with significant risk and likelihood of ultimate lapse into an insurance policy with a smaller but guaranteed death benefit? The Court concludes that this conduct was consistent with the standard established by the prudent investor rule.

In support of the decision and conclusion of the court, the court noted that:

> KeyBank and its representatives acted in good faith to protect the corpus of the Trust based on the downturn in the stock markets and the prospect that the existing policies would lapse before the expected life expectancy of the Settlor.
>
> In hindsight, due to the unexpected demise of the Settlor at age 53, KeyBank's decision resulted in a significant reduction in the death

> benefit paid to the beneficiaries. However, from the perspective of the Trustee at the time of its decision, it was prudent to protect the Trust from the vagaries of the stock market and from predicted lapse of the existing policies. It might also have been prudent to take a "wait and see" approach, however the prudent investor standard gives broad latitude to the Trustee in making these types of decisions.
>
> Had the VUL insurance policies lapsed, the Beneficiaries would have received no distribution from the Trust. Certainly, that outcome was not within the intent of the Settlor at the time he established the Trust.
>
> Frankly, financial trends outside of the control of the Trustee or the Beneficiaries were the direct and proximate cause of the problem facing the Trust in 2003. While it would have been preferable for the Trustee to provide regular accountings to the Beneficiaries, the receipt of timely financial reports by the Beneficiaries would not have changed the negative financial condition of the Trust.

In commenting on the prudence of KeyBank's process of decision making and lack of financial reporting directly to the trust beneficiaries the court stated and concluded:

> The Beneficiaries want this Court to focus to the defects in KeyBank's decision-making process, and while the Court recognizes that this process was certainly less than perfect with respect to the Cochran Trust, the Court concludes that it would need to engage in sweeping conjecture, which is not supported by the evidence, to find that damages resulted to the Beneficiaries based on the circumstances presented here.
>
> Accordingly, this Court concludes that KeyBank did not breach its fiduciary responsibilities to the Trust or the Beneficiaries, and the lack of financial reporting to the Beneficiaries and the decision to the reinvest [sic] the corpus of the Trust in a guaranteed insurance policy was not the proximate cause of damages to the Beneficiaries.

Finally in summarizing the Conclusion of Law and Analysis and the trial court's decision the court stated:

> In conclusion, by insuring that the Trust was funded by a guaranteed death benefit in the sum of $2,536,000.00, KeyBank acted in good faith

to protect the interests of the Beneficiaries and to comply with the directives of the Settlor as contained in the Trust document.

The Indiana Court of Appeals' Discussion and Decision

In the "Discussion and Decision" portion of the appellate court opinion, the court first discussed the "Standard of Review." In citing the case of Menard, Inc. v. Dage-MIT, Inc., 726 N.E.2d 1206, 1210 (IND. 2000), the court observed that "[i]n conducting our review we give due regard to the trial court's ability to access the credibility of witnesses. While we defer substantially to findings of fact, we do not do so to conclusions of law." Citing the case of Yoon v. Yoon, 711 n.e.2d 1265, 1268 (Ind. 1999), the court continued with "[w]e do not reweigh the evidence; rather, we consider the evidence most favorable to the judgment with all reasonable inferences drawn in favor of the judgment."

The court's next "Discussion and Decision" section considered "The Prudent Investor Act" and whether the trial court had erroneously concluded that KeyBank's actions leading to the exchange of policies in June of 2003 did not violate the Indiana Uniform Prudent Investor Act (PIA).

Noting the relevant portion of the Indiana Code section under the Indiana PIA that is concerned with trustee delegation, Indiana Code § 30-4-3.5-9(a) or Section 9(a) of UPIA, the court first addressed the appellant's contention that KeyBank violated the PIA by imprudently and improperly delegating certain decision making functions to Roberson and Stuart. Reiterating portions of the case facts, the court noted that "Roberson chose to monitor the Trust throughout its existence. He helped to create it and, in 1999, recommended an exchange of policies." In 2003, KeyBank began to review the viability of the current policies in the trust, hiring Oswald to analyze the current VUL policies. At the same time, and on his own volition, Roberson conducted his own review and eventually proposed to KeyBank that a John Hancock policy be purchased to replace the two VUL policies.

Upon receiving Roberson's proposal, KeyBank again engaged Oswald to conduct an independent review of the John Hancock proposed policy. The court declared that "[t]he fact that Roberson submitted the policy for review does not constitute a delegation of KeyBank's decision-making [sic] duties. Oswald was an outside, independent entity with no policy to sell or any other financial stake in the outcome. Under these circumstances, we do not find that

KeyBank delegated any investment or other duties to Roberson." The court further noted "[a]lthough the Beneficiaries direct our attention to evidence in the record supporting their contention that there was, in fact, a delegation, this is merely a request that we reweigh the evidence--a request we decline."

The court next addressed the beneficiaries' contention that KeyBank violated the PIA by disregarding Oswald's recommendations. The court first noted that KeyBank asked Oswald to review the existing VUL policies and that "[a]fter comparing the policies' respective hypothetical performances given hypothetical interest rates, Oswald rated both policies as a Category Three on a scale form one to five, noting that "additional future premiums may be required" and that the policies "should be audited every two to three years or more often" under certain circumstances. . . KeyBank then asked Oswald to review the proposed John Hancock policy. Oswald found that no further premiums would be required to maintain that policy until Stuart reached the age of 100. Ultimately, Oswald recommended the purchase of the John Hancock policy, rating the policy as a Category One on a scale from one to five, with one being the best. No further audits would be necessary."

Elaborating on the choices facing the trustee with respect to the Oswald reports and the selection of the John Hancock policy, the court concluded and decided:

> Having reviewed these reports, it is evident that Oswald found both options – the existing VUL policies and the John Hancock policy – to be palatable. Each had their own sets of pros and cons. The existing VUL policies may have lapsed before Stuart reached the age of 60 and would likely have required additional premiums to finance – money that Stuart no longer had. The John Hancock policy, on the other hand, offered a significantly reduced death benefit but was guaranteed to remain in force until Stuart reached the age of 100 and would require no additional financing. Oswald found the John Hancock policy to warrant the highest rating and concluded that no further audits would be necessary. Under these circumstances, we cannot say the KeyBank's decision to exchange the VUL policies for the John Hancock policy parted ways from Oswald's advice and recommendations. KeyBank merely chose between two relatively acceptable options – a decision it was entitled to make as trustee. We do not find that it acted imprudently on this basis.

The court then addressed the beneficiaries' faulting KeyBank for failing to investigate alternatives aside from retaining the existing VUL policies or

exchanging them for the John Hancock policy. In the appellate court's view "[i]t is very likely that, no matter what the circumstances, a trustee could always do more. Investigate further, engage in more brainstorming, expand the scope of it queries, etc. It is difficult, if not impossible, to draw a bright line demarcating the point at which a trustee has done enough from the point at which it must do more. Here, KeyBank was concerned about the state of the economy, the stock market, and Stuart's limited financial resources. It examined the viability of the existing policies and investigated at least one other option. Of course it could have done more, but nothing in the record leads us to second-guess the trial court's conclusion that, while KeyBank's "process was certainly less than perfect," it was adequate. . . Thus, it was not clearly erroneous for the trial court to conclude that KeyBank did not act imprudently for this reason."

Next the court addressed the beneficiaries' brief argument that the policy exchange that took place in 1999 shortly after KeyBank assumed successor trustee duties was a violation of the PIA by KeyBank. The court noted that at that time the underwriting for the exchange of policies had been approved and Stuart had already submitted to the physical exams, and, indeed, the exchange of policies had been contemplated since the summer of 1998. Additionally, the transaction nearly doubled the total death benefit that would be payable to the trust. The court further noted that at the trial the beneficiaries' experts testified that they had originally committed a calculation error with respect to the 1999 Exchange, and that once the error was corrected that they believed that the risk factors associated with the exchange of policies in 1999 were within the range of "defensible probabilities."[9] The court concluded that "[u]nder these circumstances, there is no evidence supporting the Beneficiaries' argument that KeyBank violated the PIA with its conduct in 1999."

Lastly, under the "Prudent Investor Act" portion of the appellate court's "Discussion and Decision" analysis, the court focused on the Indiana Code § 30-4-3.5-8 of the PIA, or UPIA Section 8, where "[c]ompliance with the prudent investor rule is determined in light of the facts and circumstances existing at the time of a trustee's decision or action and not by hindsight." Essentially elaborating on the trial court's analysis the appellate court stated that "[h]ere, at the time KeyBank was evaluating its options before the 2003 Exchange, it was working with the following facts and circumstances: (1) a rapidly declining stock market; (2) the most recent two years, in which the Trust had lost progressively more money, with every reason to believe that further erosion would occur with every day it held the VUL policies; (3) a

grantor in his early 50s with a life expectancy of 88 years; (4) a grantor who had lost a great deal of money because of the economic decline and, consequently, had no further funds to invest in the trust; and (5) a trust that consisted of two life insurance policies that an independent expert estimated could lapse within approximately five years if no further funds were invested."

Echoing the trial court's conclusions, the appellate court stated and concluded that "[u]nder these circumstances, KeyBank's decision to exchange the VUL policies for the John Hancock policy was eminently prudent, reduction in death benefit notwithstanding. That a "wait and see" approach may also have been a prudent course of action does not alter the propriety of the exchange. We now know, in hindsight, that the economy improved and Stuart died unexpectedly less than a year after the 2003 Exchange took place—given those facts, of course, we understand that the Beneficiaries wish that KeyBank had made a different decision. But keeping in mind only the facts and circumstances at the time KeyBank made its decision, we cannot say that its decision violated the PIA."

In the last section of the appellate court's "Discussion and Decision" – titled "Trustee's Duties" – the court first addressed two issues of "Relationship to Beneficiaries"- namely "Annual Reports" and "Duty of Loyalty." Then the court examined the issues of "Delegation" and "Grantor's Intent." The whole section on "Trustee's Duties" was brought about because of the beneficiaries' argument that even if KeyBank did not violate the PIA, it breached a number of fiduciary duties to the beneficiaries. Before analyzing the specific issues listed above, the court provided background on the applicable law relative to the trustee's duties.

Quoting Indiana Code § 30-4-1-1(a), the court stated that "[a] trust is a fiduciary relationship between a person, who, as trustee, holds title to property and another person for whom, as beneficiary, the title is held." The court next observed from the case of Davis v. Davis, 889 N.E.2d 374, 380 (Ind. Ct. App. 2008) that "[a] "breach of trust" is a violation by the trustee of any duty that is owed to the beneficiary, with the duties being established by statute and by the terms of the trust." The court then stated the relevant part of Indiana Code § 30-4-3-6 as follows:

> (a) The trustee has a duty to administer a trust according to its terms.

> (b) Unless the terms of the trust provide otherwise, the trustee also has a duty to do the following:
>
> > (1) Administer the trust in a manner consistent with [the PIA].
> >
> > * * *
> >
> > (3) Preserve the trust property.
> >
> > (4) Make the trust property productive for both the income and remainder beneficiary. As used in this subdivision, "productive" includes the production of income or investment for potential appreciation.
> >
> > * * *
> >
> > (7) Upon reasonable request, give the beneficiary complete and accurate information concerning any matter related to the administration of the trust and permit the beneficiary or the beneficiary's agent to inspect the trust property, the trustee's accounts, and any other documents concerning the administration of the trust.
> >
> > * * *
> >
> > (10) Supervise any person to whom authority has been delegated. . .

Quoting Indiana Code § 30-4-5-12(a), the court noted furthermore, "a trustee owes its beneficiaries a duty of accounting, which requires the trustee to deliver an annual written statement of the accounts to each income beneficiary or her personal representative." Finally, in quoting Indiana Code § 30-4-3.5-5, the court observed it is well established that a trustee "shall invest and manage the trust assets solely in the interest of the beneficiaries."

It appears the beneficiaries had two issues with regard to KeyBank as trustee providing timely reports to the beneficiaries. The first dealt with the providing of annual reports to the beneficiaries. The court noted that when the beneficiaries were minors – which they were for most of the relevant period of time – KeyBank sent its annual reports to Stuart, their father. Observing that

this was not a perfect solution, since Vance, their mother, was the custodial parent, the court concluded – comparing the case of Davis, 889 N.E.2d at 383-44, which dealt with finding a breach of trust where the trustee willfully withheld information from the beneficiaries and engaged in self-dealing – it never the less established "KeyBank's good faith, at the least."

Continuing to address the annual reports issue, the court again noted that one of the beneficiaries turned eighteen at some point before the 2003 Exchange of polices and KeyBank inadvertently failed to send her a copy of the annual report at that time. However, according to the appellate court, following her birthday she requested documents from KeyBank and a KeyBank representative contacted the beneficiary and Vance and indicated that the documents were ready at a local KeyBank office to be picked up. The court concluded "[y]et again, therefore, we cannot conclude that there is any evidence that KeyBank willfully withheld information from the Beneficiary."

For the second reporting issue, the beneficiaries argued that KeyBank breached its duties by failing to provide sufficient information regarding its plan to carry out the 2003 Exchange of policies. The court strongly disagreed noting that "inasmuch as the Trust itself gave the trustee the power to surrender or convert the policies without the consent of anyone." The court quoted the language from the trust document "[t]he Trustee shall have all of the rights of the owner of such policies and, without the consent or approval of the Grantor or any other person, may sell, assign or hypothecate such policies and may exercise any option or privilege granted by such policies, including . . . the right to . . . surrender or convert such policies . . ." (Emphasis added by the court.) The court declared "[t[here was no requirement, therefore, that KeyBank notify the Beneficiaries of the impending exchange, inasmuch as neither their consent nor approval were required to carry out the transaction."

The court further commented "[e]ven if we were to find that KeyBank's actions herein constituted a breach of its duty to the Beneficiaries, we cannot countenance the Beneficiaries' argument that the lack of receipt of an annual report or failure to provide information about the exchange, without more, supports an award of compensatory damages. For damages to be warranted, we can only conclude that causation must be established." Reiterating the trial court's finding that "the receipt of timely financial reports by the Beneficiaries would not have changed the negative financial condition of the trust" and that the "lack of financial reporting to the Beneficiaries was not the proximate cause of damages to the Beneficiaries," the court stated "[t]here is certainly

evidence in the record supporting those findings." The appellate court agreed with the trial court that "financial trends outside of the control of the Trustee or the Beneficiaries were the direct and proximate cause of the problem facing the Trust in 2003," and added that "another contributing problem beyond everyone's control was Stuart's tragic, untimely death." Summarizing the court said "[w]e simply cannot conclude that KeyBank's shortcomings vis-a-vis the provision of annual reports and other information to the Beneficiaries was a proximate cause of any damages to the Beneficiaries."

Addressing the beneficiaries' argument that KeyBank somehow breached its duty of loyalty to them, the court pointed out that the only evidence they pointed to in support of this argument is the fact that KeyBank had various contacts and communications with Stuart between 1999 and 2003. However, according to the beneficiaries, this evidence supports an inference that KeyBank was loyal to Stuart rather than to the beneficiaries as is required by law. The court did not agree with the beneficiaries' argument and stated that "[a] trustee must, as a practical matter, have contacts with the settlor. . . . For example, if changes are going to be made to an insurance policy, those changes generally require that the settlor submit to a physical exam; therefore, such a change cannot be effectuated without communication between a trustee and settler. . . Nothing in the law prohibits contact between a trustee and settlor, nor should it. Here, nothing in the record leads us to conclude that KeyBank breached its duty of loyalty to the Beneficiaries."

Next, the beneficiaries argued that KeyBank breached its duties to them by delegating certain decision making functions to Roberson without adequate oversight. The court declared to the contrary stating that "[a]s discussed above, however, the record supports a conclusion that, in fact, no such delegation occurred. Furthermore, KeyBank engaged its own independent expert to evaluate the VUL policies and the John Hancock policy that was suggested by Roberson. Under these circumstances, we do not find that KeyBank breached its duties to the Beneficiaries in this regard."

Finally, the last issue and argument raised by the beneficiaries was that the trial court erroneously concluded that the 2003 Exchange of policies was consistent with Stuart's intent. Citing Malachowski v. Bank One, 590 N.E. 2d 559, 565-66 (Ind. 1992), the court stated that "[t]he primary goal in construing a trust document is to ascertain and effectuate the intent of the settlor, which may be determined from the language of the trust instrument and matters surrounding the formation of the trust." Noting that "[t]he Beneficiaries suggest that the

trial court was improperly considering Stuart's acts or requests made after the trust was executed in reaching that conclusion," the court disagreed citing the trial court's conclusion as follows: "Had the insurance policies lapsed, the Beneficiaries would have received no distribution from the Trust. Certainly that outcome was not within the intent of the Settlor at the time he established the Trust." (Emphasis added by the appellate court.) Summing up the grantor's intent issue the court said, "[n]othing in the record suggests that the trial court was clearly erroneous in reaching that conclusion, and we decline to disturb its ruling for this reason."

The appellate court concluded their opinion by declaring:

> In sum, we find that the trial court did not erroneously conclude that, while KeyBank's decisionmaking process and communication with the Beneficiaries was not perfect, it was sufficient. Although it is tempting to analyze these cases with the benefit of hindsight, we are not permitted to do so, nor should we. KeyBank chose between two viable, prudent options, and given the facts and circumstances it was faced with at that time, we do not find that its actions were imprudent, a breach of any relevant duties, or a cause of any damages to the Beneficiaries.
>
> The judgment of the trial court is affirmed.

COMMENT:

There had to be a first case involving the Uniform Prudent Investor Act (UPIA) and trust-owned life insurance (TOLI) and Cochran v. KeyBank was that first case. This fact alone makes Cochran v. KeyBank a very significant case. However, just being the first case is not the only significant aspect of Cochran. The trial and appellate courts affirmed several significant aspects of both UPIA and trust law, namely, the importance of delegation to an outside independent, third-party entity; having a documented process; adherence to the intentions of the trust settlor as expressed in the trust document; trustee discretion; trustee communications with the trust settlor-insured; and beneficiary communications.

While not addressed or even mentioned by the appellate court, the trail court indirectly – if not directly – affirmed that the trustee cannot, without court approval, limit or modify the duties of the trustee as contained in the trust document. Although KeyBank tried to limit its trustee duties by the

"Acceptance of Trust" document, acting contrary to that document by undertaking the evaluation of the policies as part of its duties and making the decision to execute the exchange of policies in June of 2003 imposed on KeyBank the concept of "estoppel," thus, requiring the duty to act prudently. In the past, many corporate and professional trustees have attempted to exonerate themselves, or limit themselves severely or completely, from any duty connected with the management of the TOLI asset. The trial court makes it clear that, without court approval, the trustee cannot in any way limit the duties imposed on the trustee by the trust agreement – and this certainly includes the management of life insurance – and any attempt to do so is unenforceable.

From the point of view of choosing the appropriate and applicable law to apply to the case and to the facts, both the trial and appellate courts acted accordingly and exemplified the epitome of judicial discernment. On the other hand, from the point of view of weighting the evidence and determining the facts relative to the appropriately and properly chosen applicable law, the Cochran trial court[10] set a low bar and espoused a low set of standards for prudence and for compliance with the chosen applicable law.

Ostensively, the delegation to the Oswald firm for the life insurance policies evaluations was a delegation to "an outside, independent entity with no policy to sell or any other financial stake in the outcome." But were the policy evaluations truly independent and did Oswald have no financial stake in the outcome? Additionally, in evaluating the life insurance policies, did the Oswald firm demonstrate reasonable skill, care and caution, technical expertise and a prudent and thorough evaluation?

Randy Whitelaw, a co-author of this newsletter, was the fiduciary practices and life insurance management expert witness for the plaintiffs on the Cochran case. In examining the first question posed above concerning the Oswald firm independence and other aspects of the Cochran case his insights are invaluable. Much of the information described by Mr. Whitelaw was either gained through depositions provided by various witnesses or testimony at trial that was not reported in the case facts described in either the trial or appellate court opinions.

Mr. Whitelaw observed "that the Office of the Comptroller of the Currency (OCC) Regulation 9 provides guidance concerning acceptance of a trust or a trust investment the corporate trustee cannot manage – a Trustee is under no

obligation to accept such a trust or trust investment. In 1999, KeyBank's trust unit accepted two investment-linked life insurance policies owned in an Irrevocable Life Insurance Trust (ILIT). The ILIT department did not have the internal expertise to creditably evaluate policy performance and risk manage these policies, nor did the firm that was delegated the responsibility to evaluate those policies."

According to Mr. Whitelaw, the Oswald firm (Oswald) was hired by one of the banks acquired by KeyBank and retained by KeyBank. Oswald's qualifications for being hired as an insurance consultant are unknown. According to the record, Oswald did not have the analytic tools to creditably evaluate policy performance, premium adequacy and policy sustainability of variable universal life insurance products and, hence, its contract with KeyBank excluded evaluation of variable insurance products. Because of this exclusion, the record indicated that Oswald firm preferred not to evaluate the American General and Manulife VUL policies except to provide a 'limited scope' comparison of the originally illustrated cash accumulation account to the policy anniversary cash accumulation account. Additionally, it is unclear whether or not Oswald personnel were securities licensed. Thus, four questions warrant consideration concerning Oswald's VUL policy evaluations:

First, was it prudent for KeyBank to pursue a "limited scope" delegation when the record indicated that Oswald lacked the requisite expertise to creditably evaluate VUL policies and was reluctant to accept the request (and may not have possessed the appropriate securities licenses)? Further, given this product type and the insured's age, what is the relevance of a cash accumulation account comparison?

Second, since the record indicated that KeyBank's investment unit was available to the ILIT unit, why didn't KeyBank involve its investment unit in this analysis to obtain market outlook, asset allocation and Monte Carlo Simulation support assistance?

Third, was Oswald's evaluation of the proposed policy replacement truly independent or an accommodation to either support the results KeyBank wanted to achieve, or retain an attractive client relationship with Key Bank, or a combination?

Fourth, carrier illustrations and policy contracts for flexible premium non-

guaranteed products disclaim predictive value and use for policy comparisons, did the Oswald firm truly possess the qualifications, insurance knowledge and technical expertise to creditably provide the requested policy evaluation? In other words, did Oswald exercise reasonable skill, care and caution in their policy evaluation?

These prudent process and accommodation questions were not addressed in either the trial or appellate court opinions.

The Oswald firm's policy "evaluation" reports, as quoted in the trial and appellate court opinions, appear to be more like audits, or verification of facts as shown on existing carrier provided statements and annual reports, and inforce policy illustrations; plus verification of third-party independent rating services such as A.M. Best, Standards & Poor's® and Moody's®. In other words, the Oswald "evaluation" reports for the flexible premium, non-guaranteed VUL policies were primarily based on the use of carrier provided, constant assumption, inforce policy illustrations, which according to a 1992 report by the Society of Actuaries[11] and FINRA regulations[12] is an improper method of policy evaluation. The 1992 Society of Actuaries Task Force Report on Policy Illustrations makes it clear that "[i]llustrations which are typically used, however, to portray the numbers based on certain fixed assumptions – and/or are likely to be used to compare one policy to another - are an improper use of a policy illustration."[13]

<u>So what is the problem with the use of policy illustrations in evaluating non-guaranteed life insurance policies?</u> Again, the Society of Actuaries Task Force Report on Policy Illustrations says it best "…[h]ow credible are any non-guaranteed numbers projected twenty years in the future, even if constructed with integrity? How does the consumer evaluate the credibility of two illustrations if they are from different companies? Or even if they are from the same company if different products with different guarantees are being considered? Most illustration problems arise because the illustrations create the illusion that the insurance company knows what will happen in the future and that this knowledge has been used to create the illustration."[14]

Thus, any evaluation of non-guaranteed life insurance policies based on illustrations – as it appears were the Oswald "evaluation" reports, and, significantly, what the trial and appellate courts relied upon in reaching their decisions – are not credible, to say nothing of demonstrating reasonable care, skill and caution, technical expertise, or any attempt at prudence or a

creditable, thorough, complete policy evaluation. In the authors' opinion, a prudent evaluation would have required a life insurance product suitability analysis – based on risk tolerance, which with trust-owned life insurance (TOLI) should have been stated in a written TOLI investment policy statement (TIPS) – and determinations of policy adequacy based upon creditable, unbiased policy evaluation using fact-based, actuarially defensible evaluation techniques.

Actuarial evaluation uses generally accepted actuarial methods, impartial analysis and objective data – not contained in policy illustrations – to access the probability that a non-guaranteed, flexible premium, planned scheduled funding premium – as shown on the life insurance policy illustration – will successfully sustain the policy to contract maturity, or, at the very least, to the insured's life expectancy. If the probability of sustaining the policy is less than 100 per cent, or the trustee's comfortable risk tolerance percentage, then the actuarial evaluation should contain a risk-appropriate correcting premium adjustment.

Additionally, actuarial evaluation – which uses a process of actuarially certified policy bench mark standards combined with Monte Carlo simulation using 1,000 randomized trials[15] - should include: (1) the earliest age in which the policy is expected to lapse and the five year age range of the most concentrated policy lapses derived from the 1,000 randomized trials of the Monte Carlo simulation; (2) how do the inforce total policy expenses – namely the costs of insurance and other expenses of the policy – compare, or vary by percentage, to the product standard benchmark[16] for the product type; and, (3) policy restructure options, which would include the correcting premium adjustment mentioned above to sustain the policy to the selected duration considering the insured's life expectancy, and other options which would include asset reallocation for VUL policies and/or reduction of the death benefit.[17] The Oswald "evaluation" reports never approached this standard.

What is also very questionable, however, is that KeyBank and Oswald, an independent life insurance policy consultant, did not communicate in the VUL policies "evaluation" reports, the remedial and restructure options for the UL type policies of lowering the death benefit amounts and/or changing the asset allocation of the VUL cash value account from an allocation considered "significant risk" subject to "vagaries of the stock market" into a guaranteed principal and interest account that would have offered protection from "a rapidly declining stock market." At the time, VUL policies were paying

guaranteed interest of 4% and such reallocation could have been made at no charge. Of course, such reallocations would have to be suitable to the purposes of the trust based on "an overall investment strategy having risk and return objectives reasonably suited to the trust"[18] that would be based on a risk tolerance assessment, all of which would be contained in a written investment policy statement for the trust. It appears the Oswald "evaluation" reports never took into consideration suitability of the policies, the asset allocation of the policies or the policy remedial and restructure options mentioned above.

At the time of the reports, universal life insurance policies had been around for over 20 years and VUL policies for over 15 years. Thus, the flexible features of UL type policies should have been known to both KeyBank's ILIT unit and Oswald. Was it prudent to exclude these considerations from KeyBank reports to the insured and trust beneficiaries? Does a limited-scope report demonstrate a prudent process?

Shifting from the inforce VUL policies to the proposed guaranteed universal life (GUL) policy, KeyBank requested Oswald's opinion concerning the proposed replacement. Not surprising, Oswald did question the reasons and economic justification. After further KeyBank discussion, Oswald did provide the requested opinion conditioned upon the risk class rating assumed in the sales illustration. While this rating was not obtained, the parties, excluding the trust beneficiaries, agreed to pursue the exchange.

Both **Ben G. Baldwin**[19], and, **Barry D. Flagg** and **Patti S. Spencer**[20] have eloquently and succinctly written analyses concerning the Oswald "evaluation" reports and the consequences of ignoring the flexible restructure options available with the existing VUL policies. Both writings note the approximately 20 percent loss in the trust asset account investments represented by the cash values of the VUL policies because of the $107,764 surrender charges incurred with the exchange to the John Hancock Guaranteed Universal Life policy.

Noting that surrender charges typically reduce over time, [generally, reaching zero with most policies somewhere between the eighth and fifteenth policy years], Mr. Baldwin's analysis and calculations of restructure for the VUL polices would have maintained the $8,007,709 death benefit for the VUL policies until the surrender charges were reduced or reached zero. He would also have immediately reallocated the cash value account into a guaranteed interest, guaranteed principal general account investment option, noting that

the saved $107,764 surrender charges would have paid for about 31 months of the costs of insurance and policy expenses even without the supplemental interest from the guaranteed interest, guaranteed principal account, which probably, extrapolating from Mr. Baldwin's analysis would have amounted to four percent, per year, of the, at least, $500,000 VUL cash value accounts.[21] That interest would likely have paid for an additional year of coverage, thus, putting the policies into their eighth year where surrender charges would be significantly reduced and the death benefit could be lowered at that time.

If the trustee had followed the recommendations of Mr. Baldwin, they would have received a death benefit of $8,007,709 rather than the $2,536,000 they actually received – an additional amount of $5,471,709. Mr. Baldwin further makes the observation that "[i]f this Court knew how much essential and readily available information about the existing VUL policies was not obtained or used by the Trustees and advisors in this case, I expect the result would have been different. Such ignorance about the features, benefits and flexibility of variable universal life is not likely to be acceptable in future cases."[22]

Essentially Mr. Flagg and Ms. Spencer performed a similar analysis and reached the same conclusions as Mr. Baldwin. The approach in their article, however, paid particular attention to justifying expenses under the Indiana version of UPIA and setting reasonable rates of return expectations under the Indiana version of UPIA Section 2.

Indiana Code Section 30-4-3.5-7 (UPIA Section 7) states:

> In investing and managing trust assets, a trustee may only incur costs that are appropriate and reasonable in relation to the assets, the purposes of the trust, and the skills of the trustee.[23]

While noting that the Oswald report to the trustee on the exchange to the John Hancock Guaranteed Universal Life policy did note the surrender charges of $107,764 – and other new charges, including commissions – Mr. Flagg and Ms. Spencer examined the effect of the surrender charges on the total expenses of the John Hancock policy compared to their quoted "VUL Benchmark Averages" and "Best Available VUL Rates & Terms." They demonstrated and concluded that this exchange was not justified from an expense standpoint, and for other reasons, and noted that "simply reducing the death benefits of existing VUL holdings could likely have preserved between $3,000,000 to $5,000,000 of life insurance (versus $2,526,000 under the John Hancock

policy), depending upon just how well existing VUL holdings were priced, and upon the allocation of policy cash values appropriate to the risk and return objectives reasonably suited to the trust."[24]

They further observed that "[w]hile the exchange to the John Hancock policy did provide greater security in the form of premium and death benefit guarantees, knowing TOLI costs is essential to considering the cost/benefit as it relates to other forms of security, like reallocating existing VUL cash values to a fixed/guaranteed account generally allowable free of charge."[25]

Barry D. Flagg and **Steven S. Zeiger** made the astute observation that "the stock market correction in 2001 caused the cash values to decline by $37,000, a 7 percent *unrealized* loss." A 7 percent decline in cash values isn't unexpected from an aggressive asset allocation. We now know that the stock market rebounded, and policy cash values would have recovered if left alone.

"The stock market decline also precipitated a decline in the popularity of VULs. So in 2003, the agent recommended replacing the $8 million VUL with a $2.5 million guaranteed universal life policy. Ironically, in reaching its conclusion, the court observed that this replacement was intended to protect the trust assets from further stock market declines. In fact, it resulted in the trust realizing a 20 percent loss of assets due to a $107,000 surrender charge [the] Cochran [Trust] had to pay to exchange out of the VUL."[26]

While Mr. Whitelaw was the lead expert witness for the plaintiff on trust fiduciary, administration and management of TOLI, renowned life insurance expert **Richard M. Weber, MBA, CLU®, AEP® (Distinguished)** served as the plaintiff's expert witness on life insurance matters. In the authors' humble opinion, Mr. Weber is the conscience for the life insurance profession, having written articles in the hundreds and spoken numerous times to professional groups on the proper and ethical sale of life insurance. In addition, Mr. Weber is one of the best communicators in the life insurance profession who has the remarkable talent to explain the intricate workings, risks and concepts of life insurance products – both guaranteed products and non-guarantee, flexible premium products such as UL and VUL - in simple, yet exact and understandable terms. Contrary to various Cochran case articles alleging that the plaintiff failed to address all of these very basic considerations concerning the prudence of the 2003 exchange of policies, the Oswald "evaluation" reports, and the conduct of the trustee, while not mentioned in the trial or appellate court opinions, Mr. Whitelaw confirmed that all of these points were

addressed in their expert opinion report and trial testimony.[27] The trial court chose to not include their testimony in the trial court opinion.

William Campbell Ries, J.D., a well-known attorney in the legal and banking professions with expertise in investment management and fiduciary services, and a frequent expert witness, was the respondent's expert witness. The trial judge apparently weighted the testimony of Mr. Ries and Oswald more creditable than that of Mr. Whitelaw and Mr. Weber. Given the numerous facts mentioned in this article and various other Cochran case articles and commentaries on the Cochran case – some of which have been cited in this writing - such weighting is questionable at best. As noted in the appellate court opinion "[a]t trial, the Beneficiaries' experts testified that they had originally committed a calculation error with respect to the 1999 Exchange and, once the error was corrected, they believed that the risk factors associated with the 1999 Exchange were within the range of defensible possibilities." Could this admittance of a calculation error – although remarkably honorable and ethical – have marred the credibility of the plaintiff's expert witnesses?

Mr. Whitelaw confirmed that KeyBank did not have an investment policy statement (IPS) for the Cochran Trust. Key Bank did have an asset allocation statement apparently signed by the irrevocable life insurance trust (ILIT) unit member responsible for administration of the Cochran Trust, who was not investment licensed, had no investment experience, and had minimal life insurance education and training. As already explained, the asset allocation and fund selection could have been changed in 2001 given the known market downturn from the asset allocation at the time of the policies acquisition, but no such asset allocation change was made. However, the ILIT unit did not obtain investment fund management or asset allocation guidance from KeyBank's investment unit at any time.

According to the deposition of KeyBank's Chief Investment Officer, a "wait and see" strategy was recommended to its clients at the time of the Cochran Trust policy replacement. While KeyBank had full investment discretion, was it used in a prudent and reasoned manner? How could a trustee demonstrate compliance with the Indiana version of UPIA Section 2(b) that requires "investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as part of an overall investment strategy having risk and return objectives reasonably suited to the trust," without a written IPS that contains the risk

tolerance and return objectives?

Also of interest, again according to Mr. Whitelaw, it is questionable whether KeyBank trustees for the Cochran Trust followed internal procedures regarding the management and exchange of investment securities. VUL is an investment security by law. Given the limited scope arrangement with Oswald, the VUL asset allocation, fund selection and exchange decisions could have been reviewed by the investment department of KeyBank. Again, according to the deposition testimony of the chief investment officer (CIO), the investment department recommended a wait-and-see 'hold' strategy regarding equity investments because the investment department was forecasting a stock market rebound. Thus, would the investment department have concurred with an exchange resulting in such a significant loss of value to the trust beneficiaries?

Given this discussion of the range of VUL policy management options contractually available to the trustee, it is questionable why they were not considered. Did the ILIT department and Oswald, its third-party life insurance policy performance evaluation vendor, have the requisite expertise to prudently and reasonably accept and manage the VUL policies as well as assess the VUL management options as demonstrated by the policy exchange to the John Hancock Guaranteed Universal Life policy recommended by Stuart Cochran's life insurance advisor, Art Roberson, not to mention considering other carriers and product type options? Yet the appellate court, while acknowledging that "[o]f course it [the trustee] could have done more," declared that "nothing in the record leads us to second-guess the trial court's conclusion that, while KeyBank's "process was certainly less than perfect," it was adequate." As noted by Patrick J. Lannon and Barry D. Flagg "[i]t is difficult to imagine the court reaching the same conclusion had the trustee considered one mutual fund to replace two existing funds, without discussing the trustee's examination of fees, expenses and historical performance for either the universe of possible alternatives or at least a relative benchmark."[28]

While the appellate court properly stated that "[a] trustee must, as a practical matter, have contacts with the settlor. . . Nothing in the law prohibits contact between a trustee and settlor, nor should it." In the Cochran case there may have been a fine line between communications with the settlor-insured and, perhaps, control of the trust by that settlor. The record indicates that the prior successor trustee, Pinnacle Bank, resigned as trustee due to Stuart Cochran's insistence on having third parties involved in the trustee's decision making process – namely Cochran himself, his sister and his insurance advisor, Art

Roberson.

Based upon the case facts, it is implied that Mr. Roberson continued to serve as an advisor to both Mr. Cochran and the Trust. For example, in addition to proposing the two VUL policies, Mr. Roberson proposed the 2003 Exchange of the VUL policies to the John Hancock Guaranteed Universal Life policy (and each purchase generates for Mr. Roberson another first year commission). Stuart Cochran apparently agreed with these proposals, otherwise he would not have agreed to the related underwriting requirements. However, as noted by Mr. Whitelaw, Mr. Cochran's decision for the 2003 Exchange may have been influenced by an incorrect communication from the trustee that miss-quoted lapse at age 58 or 13 years sooner than age 71 indicated on policy statements from the carriers; notwithstanding that the communications should have been sent to the beneficiaries or their representatives.

In an email exchange regarding the proposed 2003 Exchange of policies between a representative of the Oswald firm and a KeyBank representative, the KeyBank representative stated that "[i]t is [Stuart's] intention to reduce his life insurance coverage to the amount seen on the John Hancock illustrations." The KeyBank representative never mentioned it was the trustee's or beneficiaries' desire to reduce the death benefit. In a similar vein, in an email to KeyBank an Oswald employee summarized its conclusion by saying "the guarantees in this John Hancock product have a lot of appeal to [Stuart] given the fact of his [emphasis added] substantial investment losses in the current [VUL] policies."

Again, it appears that the 2003 Exchange was based upon decisions made by Mr. Cochran and implemented by the trustee without consideration of the beneficiaries, although Mr. Cochran certainly understood the trust was for the benefit of his daughters. Given the questionable independence of the Oswald firm, as mentioned above, the delegation to and reliance upon this firm's conditional recommendation is procedurally prudent but "questionable," especially considering that the condition was not met. As a practical matter, the 2003 Exchange was initiated by Mr. Roberson, approved by Stuart Cochran, and implemented by the trustee. Thus, perhaps the trustee's independence and loyalty to the beneficiaries was not as cut and dry as the court concluded.

During the period when the beneficiaries were minors (which they were for

most of the relevant period of time under question), KeyBank sent its annual trust reports to Stuart Cochran, not to Mary Kay Vance, their mother, who was the custodial parent. While the court concluded that this was "not a perfect solution," it also opined that this communication never the less established "KeyBank's good faith, at the least." Given the trustee's duty to the beneficiaries and the trustee's ability to obtain address information from their father, it remains difficult to understand the court's opinion.

When the oldest daughter turned age 18, KeyBank failed to send her a copy of the annual report. The daughter then requested documents from KeyBank in which the appellate court stated that a KeyBank representative contacted the beneficiary and Ms. Vance, and indicated that the documents could be picked up at a local KeyBank office. However, according to Mr. Whitelaw, this KeyBank communication was in dispute because the information was not available for pick-up at the local KeyBank office because the administration of ILITs was consolidated in the Cleveland KeyBank office. This communication further brings into question KeyBank's ILIT administration practices and loyalty as a fiduciary to the trust beneficiaries.

Lastly, the role of life insurance advisor Art Roberson warrants consideration. Mr. Roberson was not a fiduciary to the trust, nor did he act as a fiduciary. His continued policy exchange recommendations poise both suitability and client's best interests questions, mindful that the trust is the client and the trustee is responsible for client decisions. Is it reasonable to ask whether his policy exchange recommendations were commission-motivated (first year commissions are significantly higher than subsequent year commissions) or client's best interests motivated? Without an investment policy statement, were his insurance recommendations based on sound risk and return objectives, and other criteria and philosophies typically contained within an investment policy statement and/or advocated by the trustee?

According to the case facts, the trust owned in 1987 whole life, universal life and an annuity with a combined death benefit of $4,753,539 sold by Mr. Roberson which were then the most popular policies at that time. In 1999, he replaced the policies sold in 1987 with two VUL policies, increasing the death benefit to $8,000,000. VUL policies were the popular product among agents and brokers due to the stock market performance at that time. Finally, in 2003 following the stock market downturn and the 9/11 attack, the two VUL policies were replaced by the John Hancock guaranteed product, which was the most popular product in 2003. Based upon his licensing, Mr. Roberson had to be

aware of the flexibility and options available with the two existing VUL policies – namely the option of lowering the death benefit and/or reallocating policy asset accounts to a guaranteed interest, guaranteed principal account. It is not clear from the record whether these options were considered or discussed with either Stuart Cochran, the trustee or the Oswald firm.

With regard to the various policy replacements, Ben G. Baldwin observed that "[t]his was the third exchange of Cochran's trust holdings pursuant to the recommendations of the agent, whose methodology more closely resembles "flavor of the day" marketing rather than sound trust investment policy."[29] Similarly, Barry D. Flagg and Steven S. Zeieger noted "[t]he life insurance agent/broker appeared to have sold flavor-of-the-day products to the same client three times in 15 years, but wasn't liable for those recommendations."[30]

Summary

There had to be a first case involving the Uniform Prudent Investor Act (UPIA) and trust-owned life insurance (TOLI) and Cochran v. KeyBank was that case – making it both significant and a watershed case in setting out litigation-tested prudent and reasoned practices. From the point of view of choosing the appropriate and applicable portions of Indiana law – namely the precedent Indiana court cases and the Indiana version of UPIA – the trial and appellate courts properly affirmed the importance of delegation to an outside independent, third-party entity, having a documented process, adherence to the intentions of the trust grantor, trustee discretion, and, beneficiary communications.

On the other hand, from the point of view of determining the facts relative to the properly chosen applicable law, it can be argued that the Cochran trial court determined a low set of standards for prudence and for compliance with the chosen applicable laws. Whether future courts will raise the standards remains to be seen. However, the Cochran v. Key Bank matter has been the subject of many prudent and dispute defensible fiduciary practices and creditable policy evaluation discussions by informed commentators. Hence, the authors hope that both skilled and unskilled ILIT trustees adopt and adhere to a higher standard of care than was demonstrated in the Cochran case.

As a final comment, it is important to note that the Cochran matter identified policy performance monitoring and risk management evaluation issues specific

to flexible premium policies that were not directly resolved and should be a cause for concern to all advisors and trustees. While the Cochran offers excellent and dispute defensible fiduciary practices guidance, it offers no informed guidance concerning creditable policy evaluation of flexible premium products. Carrier illustrations do not serve this purpose.

Lastly, today there is a lapsing flexible premium policy crisis and it will get worse before it gets better. As cost of insurance (COI) charges increase, the scheduled annual premium must also be increased for the policy to sustain coverage for the originally planned duration period. Since most Irrevocable Life Insurance Trusts insure seniors and own higher death benefit policies, the COI increase warrants attentive monitoring, dispute defensible policy risk management evaluation,[31] and premium adjustment to avoid an unintended consequence with un-necessary dispute and litigation implications.

HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!

Gary Flotron

Randy Whitelaw

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CITES:

In re Stuart Cochran Irrevocable Trust, 901 N.E.2d 1128 (Indiana Court of Appeals, March 2, 2009)

CITATIONS:

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[1] David Burdette, "Pay Attention to TOLI," *ABA Trust & Investments*, American Bankers Association, 16 May/June 2002.

[2] In re Stuart Cochran Irrevocable Trust, 901 N.E.2d 1128 (Indiana Court of Appeals, March 2, 2009).

[3] This was the second series of replacements recommended by the insurance adviser. The trust was originally funded with three single premium whole life policies and an annuity as assets contained in the ILIT. These policies were replaced with two variable universal life insurance policies. This former replacement increased the total death benefit from $4,753,539 to $8 million.

[4] See Ben G. Baldwin, Jr., "The Cochran Case: Not Understanding VUL Can Be Costly," *Estate Planning Review-The Journal*, CCH, a Wolters Kluwer Business, March 24, 2011, which describes the serious flaws of the evaluation by the insurance consultant.

[5] In general, trial courts determine the case facts and the weighting of evidence and the applicable law to be applied to the case facts. Whereas, appellate courts review and properly determine the law applied to the case facts. It is rare for an appellate court to questions or overrule a trial court on the determination of case facts and the weighting of evidence presented at trial. See In re Stuart Cochran Irrevocable Trust, 901 N.E.2d 1128 (Indiana Court of Appeals, March 2, 2009), Discussion and Decision, I. Standard of Review, page 10.

[6] Authors Comment: In this two-part article, it is not the intent of the authors to criticize trial and appellate court opinions. But it is our intent to constructively question the weighting of the factual evidence in the Cochran case. The Cochran v. KeyBank matter is described as a 'watershed' matter because it was the first meaningful current-day litigation to provide meaningful Irrevocable Life Insurance Trust (ILIT) and Trust-Owned Life Insurance (TOLI) guidance in demonstrating "dispute defensible" practices. As a result,

a number of well-credentialed legal, tax, financial, investment and life insurance advisors have commented on the court opinion in the context of their expertise so that informed determinations are made that safeguard the interests of all trust parties. Currently there is a lapsing life insurance policy crisis that adversely impacts all flexible premium non-guaranteed death benefit policies, especially TOLI policies owned in an ILIT. Since Cochran v. KeyBank was the first current-day "watershed matter," our purpose is to identify matter-specific issues that warrant further "prudent process" consideration. That purpose with this two-part article, including end note references, offers excellent dispute defensible guidance to address the lapsing policy crisis and avoid a client crisis.

[7] Supra Note 4, and see Barry D. Flagg and Patti S. Spencer, "Cochran v. KeyBank – TOLI Case Law Guidance (Part 2 of 2)'" LISI Estate Planning Newsletter # 1499 (August 5, 2009).

[8] Interestingly, the Indiana version of the Uniform Prudent Investor Act did not take effect until July 1, 1999 after the appointment of KeyBank as trustee and the exchange of policies in 1999.

[9] For clarification purposes, following the correcting calculations for the 1999 transaction that resulted from a software bug, the experts confirmed that the revised calculations "in no way alters our opinions or conclusions regarding the 2003 transaction which is at the heart of this complaint." Further, there is no mention of this "defensible probabilities" comment being made in the Trial Court opinion nor recall by the experts of the context in which it may have been made.

[10] See Note 5.

[11] *Final Report of the Task Force for Research on Life Insurance Sales Illustrations under the Auspices of the Committee for Research on Social Concerns*, Transactions of the Society of Actuaries 1991-92 Reports, Society of Actuaries, 1992. Herein after this report will be referred to as the Society of Actuaries Task Force Report on Policy Illustrations.

[12] FINRA Rule 2210 – IM-2210-2. Communication with the Public About Variable Life Insurance.

[13] Supra Note 11 at pages 159-60.

[14] Ibid at page 140.

[15] Acknowledgement needs to be given to Richard M. Weber and Christopher Hause of Ethical Edge Insurance Solutions, LLC who are the inventors and developers of the Historical Volatility Calculator software and pioneers in the Monte Carlo simulation and actuarially certified policy standards technique.

[16] The product standards benchmark is compiled annually from the Society of Actuaries and other credible reports and sources data on the current mortality rates and policy expenses, broken down by gender, smoking and health status, policy type and size, etc., representing approximately 80% of all life insurance sold in the United States. Thus, this benchmark can be used as a standard to compare carrier mortality costs and expenses.

[17] For a more in-depth discussion of this subject see "Flexible Premium Non-Guaranteed Policy Evaluation Using Monte Carlo Simulation and Actuarially Certified Benchmark Policy Standards: Going Beyond the Linear Paradigm," co-authored by Gary L. Flotron and E. Randolph Whitelaw, which is included as an Appendix to Chapter 7 of *The Life Insurance Policy Crisis – The Advisors and Trustees Guide to Managing Risk and Avoiding a Client Crisis*, by E. Randolph Whitelaw and Henry Montag, American Bar Association, 2016.

[18] Indiana Code Section 30-4-3.5-2(b) and UPIA Section 2(b).

[19] Supra Note 4.

[20] Supra Note 7.

[21] Supra Note 4, pages 49-50.

[22] Ibid pages 50-51.

[23] It is interesting to note that neither the trial nor appellate court quoted or considered this code section of the Indiana version of UPIA.

[24] Supra Note 7.

[25] Ibid.

[26] Barry D. Flagg and Steven S. Zeiger, “A Shot Across the Bow,” *Trusts &Estates*, December 2010, trustandestates.com.

[27]Authors Comment: Some readers may question whether the trial and appellate court elected to ignore these VUL policy management options that are basic to any informed exchange decision. It is important to consider that this exchange was initiated by the insured and likely based upon the recommendation of his trusted life insurance agent. Equally important to consider, the trustee had full investment discretion and the ILIT lacked an Investment Policy Statement. The Trial and Appellant Court decisions combined with excellent and informed post-decision analysis set out the long overdue standard of care clarification appropriate to safeguard the interests of all ILIT parties. A thoughtful ILIT Investment Policy Statement accompanied by creditable (dispute defensible) annual policy performance monitoring and risk management are essential components of a prudent process that maximizes the probability of a favorable outcome to the trust estate. Said differently, a non-guaranteed liquidity funding program designed for a 10 to 50 year time horizon requires attention and asset management expertise.

[28] Patrick J. Lannon and Barry D. Flagg, “Cochran v. KeyBank – TOLI Case Law Guidance (Part 1 of 2)’” LISI Estate Planning Newsletter # 1486 (June 29, 2009).

[29] Supra Note 4, page 51.

[30] Supra Note 26, page 33.

[31] Supra Notes 11, 12, 13 and 14. Carrier illustrations for non-guaranteed flexible premium products disclaim predictive value as does the policy contract, FINRA guidance, and Society of Actuaries guidance. It should be noted that the Office of the Comptroller of the Currency Handbook on Unique and Hard to Value assets owned in trust provides questionable trustee guidance concerning the use of carrier illustrations for predictive value purposes.

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