The New Michigan Trust Code

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The new Michigan Trust Code (MCL §700.7101 et. seq., the “MTC”) became effective on April 1, 2010. It codified Michigan law related to trusts, much of which had been based on the common law without legislative direction. The MTC contains many important changes for settlors, trustees, beneficiaries and practitioners who work with trusts. It also contains an important change for financial institutions and others who enter into transactions with trustees. This article focuses on that change.

Third parties who deal with trusts or trust assets have always needed to confirm that: (A) the relevant assets are in fact held in trust by the trustee; (B) the person with whom they are dealing is in fact the trustee for such assets under the relevant trust agreement; and (C) the trust agreement (or other law) empowers and permits the trustee to enter into the relevant transaction including any relevant transaction documents.

Historically, third parties would seek to obtain a copy of the trust agreement and the trustee’s representation that the transaction was permitted under the terms of the trust. Sometimes, an attorney’s opinion that the transaction was permissible under the trust agreement would be sought. In real estate transactions, an instrument conveying an interest in real estate held in trust needs to be accompanied by either a copy of the trust agreement or a certificate of trust. MCL 565.431. These practices have not always worked well. For example, a trust agreement may be open to interpretation, the degree to which a third party could rely on a trustee’s certificate (particularly in a transaction regarding property other than real estate) was not clear under the common law, and parties in interest may have valid reasons to keep certain provisions of a trust agreement confidential.

To address these concerns, the MTC protects a third party, such as a lender, who relies on a certificate of trust and gives value in good faith without knowledge of a problem even if the third party did not review the trust agreement. At the same time, the MTC discourages third party review of trust agreements unless truly necessary. The MTC authorizes trustees to certify as to their powers and authority in trust certificates, allows third parties who act in good faith to rely on such certificates, and causes the trustee, the trust and the trust assets to be bound by the trustee’s actions.

Ability to Rely on New Certificate of Trust

MTC Section 7912 (MCL §700.7912) provides that a person other than a beneficiary who deals with a trustee for value and in good faith without knowledge that the trustee is exceeding or improperly exercising the trustee’s powers is protected from liability as if the trustee were acting properly. Section 7912 also provides that such a party is not required to inquire into the extent of the trustee’s powers or as to the propriety of the trustee’s exercise of such powers. While helpful to shield a third party from potential liability to others for a trustee’s improper acts, the section does not address the question of whether trust assets are bound by such acts.

Fortunately for third parties, MTC Section 7913 (MCL §700.7913) builds upon Section 7912. Section 7913 authorizes trustees to provide trust certificates in lieu of providing a copy of the trust agreement and protects a third party who relies on such a certificate in good faith without knowledge that the certificate is wrong. MCL §700.7913(1) and (6). In addition, Section 7913 provides that “[a] person who in good faith enters into a transaction in reliance upon a certificate of trust may enforce the transaction against the trust property as if the representations contained in the certificate were correct.” MCL 700.7913(7). Section 7913 further encourages the use of trust certificates and discourages examination of the trust agreement itself by providing that third parties who demand the trust agreement itself without being under a legal requirement to do so are liable for damages, costs, expenses and legal fees. MCL §700.7913(8). There is an exception for obtaining a copy in judicial proceedings concerning the trust. MCL §700.7913(9).

Section 7913 reflects a significant policy decision to help settlors and beneficiaries protect the confidentiality of trust agreements while giving trustees more “apparent authority” to bind trust assets even if they lack actual authority. As a result
of these new rules, prudent third parties in commercial transactions can be expected to require trust certificates under the
MTC. Section 7913 provides that such a certificate should be in the form of an affidavit signed by the settlor, any trustee or
an attorney for the settlor or any trustee and should contain all of the following information:

1. The name of the trust and the date of the trust instrument and any amendments.
2. The name and address of the currently acting trustee.
3. The powers of the trustee relating to the purposes for which the certificate is being offered.
4. The revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust.
5. The authority of cotrustees to sign or otherwise authenticate and whether all or less than all are required in order to
   exercise powers of the trustee.” MCL §700.7913(1).

A certificate of trust need not contain trust agreement terms, but the third party recipient of a trust certificate may require the
trustee to furnish copies of trust agreement excerpts “that designate the trustee and confer upon the trustee the power to
act in the pending transaction.” MCL §700.7913(5). The authors believe that, in many instances it may be necessary to
ascertain whether certain assets are held in trust under the trust agreement and, because it is unusual for trust agreements
to specify which assets are held in trust, one may have to use a certificate of trust to confirm that the “powers of the trustee”
indeed relate to the assets in question.

The upshot is that a third party should no longer request a copy of the trust agreement, but should instead request a
certificate of trust in accordance with the statutory requirements. If the certificate of trust confirms the identity, power and
authority of the trustee with respect to the relevant transaction, and the copied trust agreement excerpts are consistent with
that confirmation, the third party will be protected and trust assets will be bound by the transaction as long as the third party
is acting in good faith without knowledge that any of the confirmed matters are incorrect.

Real Estate Trust Certificate Law Survives

Unfortunately, the new certificate of trust procedure outlined in the MTC does not supplant the trust certificate rules set forth
in MCL §565.431 et. seq. regarding the recording of trust documents in Michigan real estate records. Under that statute, a
subsequent good faith purchaser of the relevant real estate may rely on a recorded trust certificate without further
examination of the trust agreement if the certificate contains all of the following:

1. The title of the trust.
2. The date of the trust agreement and any amendments to the trust agreement.
3. The name of the settlor or grantor and the settlor’s or grantor’s address.
4. The names and addresses of all of the trustees and successor trustees.=
5. The legal description of the affected real property.
6. Verbatim reproductions of provisions of the trust agreement, and any amendments to the trust agreement, regarding all of the
   following:
   1. The powers of the trustee or trustees relating to real property or any interest in real property and restrictions on the
      powers of the trustee or trustees relating to real property or any interest in real property.
   2. The governing law.
   3. Amendment of the trust relating to the trust provisions described in subdivision (a) to (f)(ii).
7. Certification that the trust agreement remains in full force and effect.
8. A list of names and addresses of all persons who, at the time the certificate of trust is executed, are trustees of the trust.

MCL 565.432. A trust certificate for real estate may only be signed by the settlor, an attorney for the settlor or trustee, or a
bank officer if a bank is acting as trustee. Unlike the MTC certificate of trust, a real estate trust certificate may not be signed
by the trustee per se. MCL 565.433.
Conclusions

The new MTC should help facilitate transactions between third parties and trustees. It provides a more reliable procedure for due diligence regarding trusts and establishes a stronger basis for reliance by third parties on trustees’ representations. In exchange, third parties will have to cease requiring complete copies of trust agreements in the absence of a specific legal requirement.

This should be a fair trade-off, given that fraud is impossible to prevent. Because certificates of trust will be in affidavit form, certifying parties will be liable for perjury. However, neither the new statute nor the recording act can completely protect a third party from fraud. Even though a trustee will have the power under the MTC to bind trust assets without actual authority by providing a fraudulent certificate of trust, third parties will need to have comfort that they are dealing with the real trustee.

Because of the specific rules in the recording statute that permit a third party to rely on a recorded real estate trust certificate, the authors expect that title companies and other interested parties will still require such recorded certificates in real estate transactions. Accordingly, it would be beneficial to have a form of trust certificate that meets the requirements of both the MTC and the recording statute, to permit the recipient to get the maximum benefit of both statutes. A form of such a trust certificate follows.

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