

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: The Professional Staff of the Committee on Banking and Insurance

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BILL: CS/SB 826

INTRODUCER: Judiciary Committee and Senator Joyner

SUBJECT: Trusts

DATE: March 24, 2014

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Munroe</u>	<u>Cibula</u>	<u>JU</u>	<b>Fav/CS</b>
2.	<u>Billmeier</u>	<u>Knudson</u>	<u>BI</u>	<b>Pre-meeting</b>
3.	_____	_____	<u>RC</u>	_____

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**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/SB 826 limits the liability of excluded trustees for consequences from acting in compliance with a directive from a directing cotrustee. Under existing law, the excluded trustee may be liable for complying with a directive by the directing cotrustee, if an excluded trustee has actual knowledge of the willful misconduct of the directing cotrustee. Under the bill, an excluded trustee is not liable for complying with a directive by a directing cotrustee unless the excluded trustee's conduct constitutes willful misconduct.

Similarly, under existing s. 736.0808(2), F.S., if a revocable trust authorizes a person other than the settlor to direct the actions of a trustee, the trustee must act in accordance with the directions unless the directions are manifestly contrary to the trust or the trustee knows that the directions are a serious breach of a fiduciary duty. Under the bill, the statute does not apply if the person directing a trustee is another trustee.

**II. Present Situation:**

“A trust is a fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it.”<sup>1</sup> A trust involves

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<sup>1</sup> 55A FLA. JUR.2D *Trusts* § 1. See also, s. 731.201(38), F.S., “trust” means an express trust, private or charitable, with additions to it, wherever and however created. It also includes a trust created or determined by a judgment or decree under which the trust is to be administered in the manner of an express trust.

three interest holders<sup>2</sup>: the settlor or grantor who establishes the trust;<sup>3</sup> the trustee who holds legal title to the property held in the benefit of the beneficiary;<sup>4</sup> and lastly, the beneficiary who has an equitable interest in property held subject to the trust.<sup>5</sup>

A trustee has a fiduciary duty to the beneficiary for proper administration of trust assets and is liable for any breach of that duty.<sup>6</sup> Cotrustees are generally jointly and severably liable to the beneficiary for any breach of trust, without special trust terms changing their duties or liabilities.<sup>7</sup> Clauses in a trust exonerating a trustee from liability are called exculpatory terms.<sup>8</sup> Exculpatory terms in a trust document providing for the release of a trustee who breaches his or her fiduciary duties may be unenforceable.<sup>9</sup>

Frequently, a trust will contain assets for which one of multiple trustees wishes to have no responsibility. In such case, the settlor may designate the trustee as the “excluded trustee” required to follow the direction of the directing trustee who is given sole authority to give direction over the subject trust property at issue.<sup>10</sup> Cotrustees are governed by the trust document and s. 736.0703(9), F.S. Section 736.0703(9), F.S., provides that:

If the terms of a trust instrument provide for the appointment of more than one trustee but confer upon one or more of the trustees, to the exclusion of the others, the power to direct or prevent specified actions of the trustees, the excluded trustees shall act in accordance with the exercise of the power. *Except in cases of willful misconduct on the part of the trustee with the authority to direct or prevent actions of the trustees of which the excluded trustee has actual knowledge, an excluded trustee is not liable, individually or as a fiduciary, for any consequence that results from compliance with the exercise of the power, regardless of the information available to the excluded trustees.* The excluded trustees are relieved of any obligation to review, inquire, investigate, or make recommendations or evaluations with respect to the exercise of the power. The trustee or trustees having the power to direct or prevent actions of the trustees shall be liable to the beneficiaries with respect to the exercise of the power as if the excluded trustees were not in office and shall have the exclusive obligation to account to and to defend any action brought by the beneficiaries with respect to the exercise of the power (emphasis added).

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<sup>2</sup> 55A FLA. JUR.2D *Trusts* § 1.

<sup>3</sup> A “settlor” is one “who makes a settlement of the property; esp.[ecially], one who sets up a trust.” BLACK’S LAW DICTIONARY (9th ed. 2009).

<sup>4</sup> A “trustee” is “one who stands in a fiduciary or confidential relation to another; esp.[ecially], one who, having legal title to property, holds it in trust for the benefit of another and owes a fiduciary duty to that beneficiary.” BLACK’S LAW DICTIONARY (9th ed. 2009).

<sup>5</sup> A “beneficiary” is a person for whose benefit property is held in trust. BLACK’S LAW DICTIONARY (9th ed. 2009).

<sup>6</sup> See s. 736.1011, F.S.

<sup>7</sup> 55A FLA. JUR.2D *Trusts* § 155.

<sup>8</sup> See ss. 736.1011, and 736.0105(2)(u), F.S.

<sup>9</sup> Section 736.1011, F.S.

<sup>10</sup> 12 FLA. PRAC., ESTATE Planning § 17:50.

There have been complaints that the directed trust statute, s 736.0703(9), F.S., does not provide sufficient level of protection to excluded trustees.<sup>11</sup> The excluded trustee has to oversee, monitor, and intervene in the actions of a directed cotrustee to avoid liability. As a result, trustees have been reluctant to accept appointments where the trustees are subject to the directions of another trustee (the directing trustee).<sup>12</sup>

Section 736.0703(9), F.S., provides that the excluded trustee is protected from liability when following the instructions of the directing trustee unless the excluded trustee has “actual knowledge of willful misconduct” on the part of the directing trustee.

### **III. Effect of Proposed Changes:**

The bill amends s. 736.0703(9), F.S., to limit the liability of an excluded trustee for misconduct under certain circumstances. Under the bill, the excluded trustee is not liable, individually or as a fiduciary, except in cases of willful misconduct for any consequence that results from compliance with exercise of power by the directing cotrustee. Under existing law, the excluded trustee may be liable for complying with a directive by the directing cotrustee, if an excluded trustee has actual knowledge of the willful misconduct of the directing cotrustee.

Similarly, under existing s. 736.0808(2), F.S., if a revocable trust authorizes a person other than the settlor of to direct the actions of a trustee, the trustee must act in accordance with the directions unless the directions are manifestly contrary to the trust or the trustee knows that the directions are a serious breach of a fiduciary duty. Under the bill, the statute does not apply if the person directing a trustee is another trustee.

The bill takes effect on July 1 2014.

### **IV. Constitutional Issues:**

#### **A. Municipality/County Mandates Restrictions:**

None.

#### **B. Public Records/Open Meetings Issues:**

None.

#### **C. Trust Funds Restrictions:**

None.

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<sup>11</sup> Communication between committee staff of the Senate Judiciary Committee and the Trust Law Committee of the Real Property, Probate, and Trust Law Section of The Florida Bar.

<sup>12</sup> *Id.*

**V. Fiscal Impact Statement:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

By limiting the liability of excluded trustees, institutions and individuals may be more willing to serve as excluded trustees.

**C. Government Sector Impact:**

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends section 736.0703 of the Florida Statutes.

**IX. Additional Information:****A. Committee Substitute – Statement of Substantial Changes:**  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)**CS by Judiciary on March 11, 2014:**

The committee substitute revises the way an excluded trustee's liability is limited for consequences resulting from compliance with the directions of a directing trustee.

**B. Amendments:**

None.