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Expert Analysis

Decanting and Compulsory Accounting Under New York Law

On Nov. 13, 2013, Governor Andrew Cuomo signed into law a bill making a number of clarifying amendments to EPTL §10-6.6, New York's decanting statute.¹ By so doing, New York solidified its status as a leading state championing trust decanting legislation. Decanting is a technique whereby a trustee exercises its discretion to distribute some or all of the corpus of an existing trust to another trust or trusts for the benefit of one or more of the original trust beneficiaries. Depending on the changes the trustee wishes to effectuate through the decanting, the administrative and/or dispositive provisions of the new trust or trusts may be nearly identical or markedly different from those of the initial trust. While decanting is a powerful tool that has become increasingly popular in recent years among estate planners, the use of this device implicates other legal issues that must be considered.

Among the areas potentially affected by the treatment of trust decanting is the commencement of the statute of limitations for a beneficiary to bring a proceeding to compel an accounting by a fiduciary. The 2013 amendment to the New York decanting statute raises this issue for consideration, but how trust decantings will impact the statute of limitations remains far from certain.

Six-Year Statute of Limitation

New York law provides that a trust beneficiary may compel any trustee to file an account of such trustee's proceedings for any period which hasn't already been judicially or informally settled.² Such proceedings are governed by the six-year statute of limitations of CPLR §213(1), which begins to run against the trustee when "the trust relation is at an end, and the trustee has yielded the estate to a successor."³ The seminal cases on this issue, *Matter of Barabash*⁴ and *Tydings v. Greenfield, Stein & Senior*,⁵ stand for the proposition that a trust relation "is at an end"



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when there has been either a "repudiation" of the fiduciary's obligation to administer the trust or a "termination" of the trust relationship. While the court in *Tydings* stated that this rule is "easy to understand and easy to apply," determining with certainty whether a trust decanting triggers the running of the statute of limitations in CPLR §213(1) can be far from simple.

An area potentially affected by the treatment of trust decanting is the commencement of the statute of limitations for a beneficiary to bring a proceeding to compel an accounting by a fiduciary.

There are certain situations where application of this rule is relatively obvious. In *Tydings*, for example, the trustee of a trust resigned and a successor was appointed on that same date. The former trustee did not render an accounting within six years after the change in trustee, and ultimately the trust's beneficiary sought a compulsory accounting from both the former and current trustee. The Court of Appeals held that when a trustee resigns, the statute of limitations governing an action to compel her to account runs from the date the trusteeship is turned over to a successor and not, for example, from the time the former trustee is asked to give an accounting and refuses to do so.

Another clear example can be found in *Barabash*, where the decedent's administrator

distributed the entirety of the decedent's estate to himself. Seventeen years later, the decedent's children, who had only just then learned of the decedent's death, sued to compel an accounting by the administrator. The Court of Appeals noted that "the law requires proof of a repudiation by the fiduciary which is clear and made known to the beneficiaries."⁶ Thus, the court held that the statute of limitations had never run because the administrator had not openly repudiated his obligation to account to the decedent's children in a clear fashion at the time of the distribution.

While the situations presented in those cases seem relatively straightforward, what is the effect on the statute of limitations when a trustee pours assets from one trust into a nearly identical, but separate, successor trust? Is such a decanting equivalent for CPLR §213(1) purposes to a trust termination that starts the running of the statute? Or, is the new trust treated as an extension of the old trust that does not cause the statute of limitations to run? Very different treatment may result depending on the answers to these questions.

Trust Decanting's Effect

When it comes to a trust decanting's effect on the statute of limitations for compulsory accountings of a fiduciary, the recent amendment to the New York decanting statute sets forth a clear rule that, well, nothing is clear. Indeed, the legislative memorandum accompanying the amendment (the memo) notes that it would be unwise to attempt to statutorily qualify which decantings should cause the statute to run and which should not. As a result, the memo concludes that a decanting's effect on the running of the statute of limitations should be analyzed on a case-by-case basis.

The memo does, however, provide two examples that attempt to explain when the statute may begin to run. In the first example, a trustee decants trust assets into a new trust with the same trustee and all of the same provisions of the old trust, with the exception of the addition of a minor administrative provision. In that case, the memo concludes that it would be unreasonable to consider such a decanting to be a "repudiation" or "termination" of the old trust despite the

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fact that the corpus has been technically transferred into a new trust. Accordingly, it would be unlikely that a court would rule that the statute of limitations began to run at the time of the trust decanting.

In contrast, in the second example the trust assets are decanted into a new trust with a new trustee and substantially different dispositive provisions. The memo states that in this case “it would not be unreasonable to expect the beneficiaries to consider that the old trust relationship was ended.” While the memo does not definitively state that the changes contemplated in the second example would be treated as a “repudiation” or “termination” of the trust, it concludes that a trust decanting may have the effect of starting the running of the statute of limitations depending, of course, upon how different the new trust is from the old one.

Appropriately, the new amendment to the New York trust decanting law requires the instrument effectuating the decanting to state that “in certain circumstances the appointment will begin the running of the statute of limitations that will preclude persons interested in the invaded trust from compelling an accounting by the trustees after the expiration of a given time.”

While this does nothing to alleviate the uncertainty surrounding what circumstances will cause the statute of limitations to run, it provides the beneficiaries of the invaded trust with notice that (1) they have the right to compel the trustee of the invaded trust to account and (2) such right may expire after a time certain. As a result, persons interested in the invaded trust may now be more prone to seek to compel trustees to account at the time of the decanting to alleviate any doubts as to whether the statute of limitations has commenced.

If, however, an accounting is not requested at the time of a decanting, the following examples—which are informed by the new amendment and the examples in the memo to the extent indicated below—may assist practitioners in determining whether the statute of limitations has commenced.

Changing Trustee. A trust decanting that changes the trustee should begin the running of the statute of limitations. As *Tydings* noted, the statute of limitations will begin to run once “the trust relation is at an end, and the trustee has yielded the estate to a successor.”⁷ This is further made clear in the second example in the memo.⁸

Changing Beneficial Interests. If a trust decanting results in the removal of a beneficiary, it is likely that the trust relationship will be terminated. The statute of limitations should therefore begin to run, at least with respect to the removed beneficiary, as the trustee no longer has any obligation to administer the trust with regard to such removed beneficiary.

Likewise, a decanting may split a single trust with multiple beneficiaries into numerous

trusts, each with a single beneficiary. In that case, the initial trust relationship will arguably be treated as terminated, at least as to the portion of the trust in which the beneficiary no longer has an interest. The statute of limitations may therefore begin to run with regard to the initial trust, just as if the trustee had made distributions for the benefit of the various beneficiaries.

Adding Powers of Appointment. A decanting that adds a power of appointment would not seem enough to cause the running of the statute of limitations, as there has been no change in the relationship between the trustee and the current beneficiaries that would alter the trustee’s obligation to administer the trust on their behalf. Obviously, however, if a power of appointment is exercised, the statute of limitations would likely start to run in the same manner as it would have if there were a trust distribution. Partial exercises, however, may bring added complexities.

When it comes to a trust decanting’s effect on the statute of limitations for compulsory accountings of a fiduciary, the recent amendment to the New York decanting statute sets forth a clear rule that, well, nothing is clear.

Extending or Shortening the Trust Term. The statute of limitations likely would not begin to run after a decanting that simply extends or shortens the trust term because this change does nothing to alter the relationship between the trustee and the current beneficiaries other than to potentially prolong or shorten such relationship. This presumes, of course, that the shortening of the trust term does not have the effect of terminating the trust.

Changing Governing Law or Place of Administration. If a decanting changes the governing law or place of administration of a trust, the statute of limitations may begin to run. Frequently, changes of governing law are accompanied by a change in trustee. In such instances, the statute would clearly begin to run for the reasons discussed above.

A change of governing law or place of administration without a change of trustee is a more interesting situation, as such a change might be deemed to be a “repudiation” pursuant to *Barabash* or a “termination” pursuant to *Tydings*. While a detailed discussion of the conflict of law rules is beyond the scope of this article, practitioners should carefully consider the effect of a change of governing law or place of administration on the statute of limitations prior to a decanting.

Changing Grantor Trust Status. A decanting may have the intended (or unintended) consequence of affecting the grantor trust status of the trust for income tax purposes. This, by itself, would not appear to cause the statute of limitations to run because it would not inherently have affected the beneficial interests or identity of the trustee. However, if the grantor trust status of the trust changed because of a change of beneficiaries or trustee, the statute of limitations may then begin to run, and should be analyzed in the manner discussed in the prior sections.

Changing Administrative Provisions. Pure administrative changes should not start the triggering of the statute of limitations because the relationship of the trustee to the current beneficiaries remains unchanged. This is directly addressed in the first example of the memo.⁹

By analyzing the above, a pattern begins to emerge. Changes to beneficial interests or the identity of trustees should cause the statute of limitations to run. Purely administrative or tax-driven changes should not. Of course, complicating matters is the fact that a decanting is rarely used to make just one change to a trust.

Conclusion

Despite the attempt in the recent amendment to the New York decanting statute to clarify the decanting rules and consequences, it remains difficult to conclude with certainty whether a given decanting is the equivalent of a “repudiation” under *Barabash* or a “termination” under *Tydings* for purposes of the running of the statute of limitations governing a beneficiary’s right to compel the trustee to account. Therefore, trustees and practitioners should carefully contemplate the potential effects of a trust decanting prior to undertaking the decanting. They should also be on notice that persons interested in the invaded trust may now be more inclined to seek to compel trustees to account at the time of the decanting to alleviate any doubt as to when the running of the statute of limitations has commenced.

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1. New York A7061 (2013).
2. EPTL §2205.
3. *Tydings v. Greenfield, Stein & Senior*, 11 N.Y.3d 195, 201 (2008), quoting *Spallholz v. Sheldon*, 216 NY 205, 209 (1915).
4. *Matter of Barabash*, 31 N.Y.2d 76 (1972).
5. *Tydings v. Greenfield, Stein & Senior*, 11 N.Y.3d 195 (2008).
6. *Barabash*, 31 N.Y.2d at 80.
7. *Tydings*, 11 N.Y.3d at 201 quoting *Spallholz*, 216 NY at 209.
8. Memorandum in Support of New York A7061, at (2).
9. Memorandum in Support of New York A7061, at (2).