1966

# Fiduciary Power to Compromise Claims

Thomas L. Shaffer
*Notre Dame Law School*, thomas.l.shaffer.1@nd.edu

# FIDUCIARY POWER TO COMPROMISE CLAIMS

THOMAS L. SHAFFER

THE sorry state of fiduciary administrative powers in American trust law is an old but healing wound. Our English brothers, who began repair on a similar lesion in the nineteenth century, are still well ahead of us.[1] A few state legislatures poured on balm of varying degrees of efficacy years ago, but they were not many.[2] The Commissioners on Uniform State Laws seemed to promise a cure in the early 1930's,[3] then abandoned the effort for a generation.[4] They have lately returned to their patient, and the Uniform Trustees' Powers Act shows promise of increasing adoption. The incorporation-by-reference treatment is now in use in three states;[5] and a number of other jurisdictions—most notably that great aggravator of trust diseases, New York[6]—are showing tardy concern with remedies.

It may be timely to assess the effect of statutory cure on the centuries of case-made powers rules and the double handful of antiquated statutes to which the cure will be added. I have chosen to do that within the narrow context of one prosaic example of fiduciary activity—the power to compromise claims. But some of what is developed here—most importantly the effect of the new statutes on the existing case law of administrative discretion—may deserve broader focus.

## I

## INTRODUCTION

A fiduciary has a duty to prosecute claims to collection,[7] and to defend the fiduciary estate from claims against it.[8] Because a

Thomas L. Shaffer is Professor of Law, Notre Dame Law School.

1. See Married Women's Property Act, 1882, 45 & 46 Vict. c. 75, § 11; Settled Land Act, 1925, 15 & 16 Geo. 5, c. 18, § 64; Trustee Act, 1925, 15 & 16 Geo. 5, c. 19; Variation of Trusts Act, 1958, 6 & 7 Eliz. 2, c. 53; Fratcher, Fiduciary Administration in England, 40 N.Y.U.L. Rev. 12, 26-36 (1965).

2. Statutes in Florida, Illinois, Oklahoma, and Texas are examples and are discussed at pp. 541-42 infra.

3. See the first tentative draft of the Uniform Trust Administration Act, in The National Conference of Commissioners on Uniform State Laws, 1932 Handbook 244-48.

4. The National Conference of Commissioners on Uniform State Laws, 1933 Handbook 80, 312-36. The powers reform was revived in 1961 with the appointment of a committee to draft a Uniform Trustees' Powers Act. The National Conference of Commissioners on Uniform State Laws, 1961 Handbook 14. See also 1962 Handbook 14; 1963 Handbook 14, 72; 1964 Handbook 15, 92, 96, 133, 265-72. The last reference contains the text of the act with a prefatory note.

5. Arkansas, North Carolina, and Tennessee, whose statutes are discussed in text accompanying notes 110-18 infra. See Trautman, Decedents' Estates, Trusts and Future Interests, 17 Vand. L. Rev. 1027, 1031-33 (1964).

6. N.Y. Deced. Est. Law § 127 (Supp. 1965). See New York Temporary Comm'n on Estates, Third Report 18, 350 (1964).

7. Restatement (Second), Trusts § 177 (1959).

8. Id. § 178.

fiduciary's powers "are at least as extensive as his duties,"[9] he also has a *power* to prosecute claims held by the estate and to defend the estate from claims asserted against it.[10] Duties to prosecute and defend suggest duties to compromise claims, or to submit them to binding arbitration, or to abandon them, and it is not too much to suppose—as the Restatement (Second), Trusts does—that they imply *powers* to compromise, arbitrate, and abandon.[11] The inquiring purpose here is to look at the extent to which that reasoning is borne out in cases and statutes, and at the limits of fiduciary discretion applicable to the exercise of that power, if there is a power.

The history of the power to compromise claims centers on a stubborn eighteenth century farmer. James Blue left part of his estate in trust; income was to be paid to his widow for life, remainder to his children. The administrators of his estate were his daughter, Ann Marshall, and her husband. Marshall was judicially ordered to sell a leasehold Blue had held as lessor and to pay the proceeds of sale to the testamentary trustees. The real estate involved was occupied by an adamant tenant who was in arrears on his rent, as he had been for years, and who compounded his neglect by refusing to leave when asked. Marshall, like Elwood P. Dowd,[12] elected to be pleasant rather than smart and offered the tenant twenty pounds to leave. The tenant refused to leave unless the offer included Marshall's waiver of all back rent, which covered a period before Blue's death, as well as all of Marshall's tenure, and which amounted to 225 pounds. Marshall agreed, and waived, and paid, and the tenant left.

Marshall's mother-in-law then demanded that Marshall pay over the proceeds of sale of the leasehold to the testamentary trustees. Marshall answered that the costs of his gentle eviction had exhausted the proceeds. When the insensitive mother-in-law sued to surcharge Marshall for the waived rent, and to deny him allowance for his out-of-pocket bribery, the Lord Chancellor (Talbot) vindicated Marshall.[13] In the first place, he said, equity was not so mechanical that it could hold Marshall for every asset in his hands at its paper value. Whatever his inventory said or might have said, the fact was that Marshall never received any rents. Since the estate received no rents, and since the rents owed

9. Id. § 186, comment e.

10. Id. § 192, comment a.

11. Id. § 192.

12. "Dr. Chumley," replies Elwood, "my mother used to say to me, 'In this world, Elwood, you must be oh, oh, so smart or oh, so pleasant.' For years I was smart. I recommend pleasant. You may quote me."
Chase, Harvey, in The Best Plays of 1944-45, 176, 187 (Mantle ed. 1945).

13. Blue v. Marshall, 3 Peere Wms. 381, 24 Eng. Rep. 1110 (Ch. 1735).

were not collectible, the estate could hardly have suffered by their release.

In the second place, Lord Talbot said, Marshall had acted prudently. There are times—and this was one—when waiver and even bribery are a small price to pay for a little peace.

> A vexatious tenant may put his landlord to great trouble and delay by a wrongful detainer of the possession, and by damaging the estate in the mean time; and may force the landlord to ejectments, writs of error, and bills in equity, by means of which he may lose not only his accruing rent, but his costs of suit . . . .[14]

All this was in 1723. Prior to that, it had not been denied that a fiduciary could release claims and even compound them, but there were dicta in a couple of early cases[15] that suggested he remained accountable for receivables whether he received them or not. "For the law presumeth that he hath so much as he doth release . . . ."[16] There was also some inconclusive authority to the contrary.[17] *Blue v. Marshall,* therefore, settled a doubtful question, at least in equity.

In the Exchequer, more than a century later, the law courts were invited to recognize the principle. The decedent there had set out for America from Lincolnshire with between 700 and 800 pounds in his pocket. When he reached Liverpool, where he found no ship for America, he arranged to wait in the house of a pilot named Jones. Shortly after he moved in with Jones, he died. Jones appropriated the contents of his pocket, and spent it before anyone discovered what he had done.

Healey, the administrator, entered on his office with a knowledge of what was in his decedent's pocket; he sued Jones, recovered judgement for 750 pounds, then sued out mesne process and had Jones imprisoned on the debt. Healey was then approached by friends of Jones, who suggested they could raise 150 pounds if Healey would take that and let Jones out of prison; Healey accepted the offer. The next of kin then sued to surcharge Jones, arguing that, at law, he had to account for the full amount of the indebtedness.

Healey's counsel suggested that the only question was "whether the defendant has acted fairly, honestly, and bona fide."

---

14. Id. at 382-83, 24 Eng. Rep. at 1111.

15. Brightman v. Keighley, Cro. Eliz. 43, 78 Eng. Rep. 307 (K.B. 1585-86); Russel's Case, 5 Coke 27a, 77 Eng. Rep. 91 (K.B. 1584).

16. Brightman v. Keighley, supra note 15.

17. Kniveton v. Latham, Cro. Car. 490, 79 Eng. Rep. 1023 (K.B. 1638); Russel's Case, 5 Coke 27a, 77 Eng. Rep. 91 (K.B. 1584). Equity relieved against surcharge for a substitution of debts in Armitage v. Metcalf, 1 Ch. Cas. 74, 22 Eng. Rep. 701 (Ch. 1666).

Counsel for the next of kin denied that that was the question and stated that the only issue was whether the debt was an estate asset. Baron Bayley asked the latter lawyer: "Is there any case where it has been held, that where an executor arrests a debtor, and gets all he can from him, or is likely to get, he makes himself personally liable?"[18] That biased question got no answer, and Baron Bayley held for Healey.

"The administrator," he said, "has here adopted the course most likely to obtain payment of the debt by pressure and suing the debtor; and I should say that it would be monstrous, if the law were as contended for on behalf of the plaintiff." If strict accounting for paper assets was necessary, every indebtedness had to be accounted for, he said, and a fiduciary would be bound "either [to] keep the debtor in gaol all his life, or be liable to any creditor to the amount of the debt . . . ." Baron Bayley said he found no authority in England "which supports so monstrous a proposition." And, he added, "I should be sorry if I had." [19]

The test set down in *Pennington v. Healey* was whether the fiduciary exercised "a reasonable and honest discretion in making the compromise." If so, the court held, he is protected in making his compromise, and his account is entitled to reflect it, whether the proceeding is legal or equitable. "The general rule of law is, that the executor is accountable for all which he has received, or which, in the honest discharge of his duty, he could or might obtain."[20] With some express reservation applicable to trusts for the benefit of creditors,[21] this was, by 1860, the law as to trustees, who, in that year, were also held able to abandon claims.[22]

American authorities on the question recognized the principle of *Blue v. Marshall,*[23] and even extended it to cases of submission of claims to arbitration,[24] but the question over here was soon involved in early statutes providing for judicial approval of fiduciary compromises.[25]

18. Pennington v. Healey, 2 L.J. Ex. 98, 99, 149 Eng. Rep. 455, 457 (Ex. 1833).

19. Id. at 100, 149 Eng. Rep. at 457-58.

20. Ibid. See Matter of Loper, 2 Red. 545 (N.Y. Surr. Ct. 1877).

21. Shephard v. Adlington, Turn. & R. 379, 37 Eng. Rep. 1147 (Ch. 1823).

22. Hobday v. Peters, 28 Beav. 603, 54 Eng. Rep. 498 (Ch. 1860). But see Kingdon v. Castleman, 46 L.J. Ch. 448 (Ch. 1877).

23. Murray v. Blatchford, 1 Wend. 583 (N.Y. Ct. Err. 1828); Chouteau v. Suydam, 21 N.Y. 179 (1860); In re Scott, 1 Red. 234 (N.Y. Surr. Ct. 1847) (rejecting any distinction between the rule on the point in law and the rule in equity).

24. Powers to submit to arbitration were recognized as inherent in personal representatives in Bean v. Farnam, 23 Mass. (6 Pick.) 269 (1828), and Wood v. Tunnicliff, 74 N.Y. 38 (1878). See Chadbourn v. Chadbourn, 91 Mass. (9 Allen) 173 (1864). Section 192 of the Restatement of Trusts recognizes this power as on the same footing as powers to compromise or abandon.

25. Matter of Parker, 1 Barb. Ch. 154 (N.Y. 1845); Chouteau v. Suydam, 21 N.Y. 179 (1860).

The following discussion will explore, first, the sources of fiduciary power to compromise and the effect of statutory powers on the propriety and validity of what fiduciaries do in compromising claims. It will, second, look at the power to compromise as illustrative of a broader problem which new powers legislation raises on the exercise of administrative discretion.

## II

## SOURCES OF THE POWER TO COMPROMISE

### *A. Inherent and Implied*

There is an analytical distinction between fiduciary powers that are inherent and those that are implied, but it seems to make little difference in the cases involving fiduciary powers to compromise. The cases generally hold that fiduciaries have power to compromise and that they need neither express language nor statutory statement of the power. This is true of all jurisdictions except those that have construed their statutes on judicial approval of compromises to take away the power[26]—and even those jurisdictions admit by implication that, at common law, a fiduciary had power to compromise.

#### *1. Personal Representatives*

Executors and administrators are generally held to have an inherent power to compromise,[27] which extends to abandonment[28] and to submission of claims to arbitration.[29] These powers are necessary corollaries of the powers (duties) to defend and prosecute;[30] the opinions affirming them trace, usually, to the English

26. These are discussed at pp. 542-45 infra.

27. Arledge v. Ellison, 247 Ala. 190, 23 So. 2d 389 (1945); Lynn v. McDaniel, 210 Ala. 474, 98 So. 287 (1923); Carr v. Illinois Cent. R.R., 180 Ala. 159, 60 So. 277 (1912); Wunderlich v. Bowen, 193 Ark. 284, 100 S.W.2d 80 (1936); In re Richards' Estate, 103 P.2d 1033 (Cal. Dist. Ct. App. 1940), aff'd, 17 Cal. 2d 259, 109 P.2d 923 (1941); Wallin v. Smolensky, 303 Mass. 39, 20 N.E.2d 406 (1939); Jones v. Jones, 297 Mass. 198, 7 N.E.2d 1015 (1937); Cook v. Richardson, 178 Mass. 125, 59 N.E. 675 (1901); Matter of Estate of Corbin, 227 App. Div. 87, 236 N.Y. Supp. 653 (1st Dep't 1929). See also MacDonald v. Gough, 327 Mass. 739, 101 N.E.2d 124 (1951). But see older California authority to the contrary. Siddall v. Clark, 89 Cal. 321, 26 Pac. 829 (1891); See v. Joughin, 18 Cal. App. 2d 414, 64 P.2d 149 (Dist. Ct. App. 1937); Taylor v. Sanson, 24 Cal. App. 515, 141 Pac. 1060 (Dist. Ct. App. 1914).

28. See, e.g., the line of Pennsylvania cases. Hartje's Estate, 320 Pa. 76, 181 Atl. 497 (1935) (involving a trustee); Coates's Estate, 273 Pa. 201, 116 Atl. 821 (1922); Provident Life & Trust Co. v. Fidelity Ins. Trust & Safe Deposit Co., 203 Pa. 82, 52 Atl. 34 (1902); Reynolds v. Cridge, 131 Pa. 189, 18 Atl. 1010 (1890).

29. Chadbourn v. Chadbourn, 91 Mass. (9 Allen) 173 (1864), and cases cited in note 24 supra.

30. Carr v. Illinois Cent. R.R., 180 Ala. 159, 165, 60 So. 277, 279 (1912): An administrator has the full, legal title to all choses of action due the

authorities. The questions raised under a personal representative's power to compromise go, not to the existence of the power, but to such things as the possibility of surcharge for improper exercise of the power; the validity of the settlement transaction in the face of fiduciary imprudence; and the amount of discretion the fiduciary has in refusing or insisting upon compromises contrary to the beneficiary's wishes or the probate judge's view of allowable discretion. All of these issues are discussed below.

*2. Trustees*

The folklore of analytical trust scholarship has it that trustees have no inherent administrative powers.[31] This has very little support in cases on trustee powers to compromise claims,[32] but, the pressures of traditional analysis being what they are, it may be useful to treat the sources of *trustee* power to compromise in terms of (1) those cases that treat the power as inherent, and (2) those that treat it as implied from the provisions of the instrument or from the specific trust relationship.

*Inherent.*—There is a good deal of warrant for saying that trustees have an inherent power to compromise claims—and, indeed, the purport of the Restatement (Second), Trusts on compromise[33] seems inconsistent with the purport of the same authority on powers generally.[34] While Professor Scott seems generally to support the view that trustees are without inherent powers,[35] his brief discussion of powers to compromise is consistent with the view that they are inherent,[36] that "trustees" have certain duties " 'incident to the *office* of trustee . . . .' Among such general duties is the power to compromise doubtful claims for or against the trust estate."[37] If this sort of power is to be considered implied, it is an inference taken from the fact of legal title,

---

estate . . . and he may, in the absence of fraud or collusion, release, compromise or discharge them as fully as if he were the absolute owner. . . . Underwood v. Sample, 70 Ind. 446 (1880); Gill v. Anglo-American Ass'n, 21 Ky. L. Rep. 690, 52 S.W. 929 (1899); Manns v. A.E. Sanford Co., 82 N.J.L. 124, 81 Atl. 491 (Sup. Ct. 1911); Denney v. Parker, 10 Wash. 218, 38 Pac. 1018 (1894). Cf. Harwood-Yancey Co. v. Lawrenceburg Warehouse Co., 167 Tenn. 14, 65 S.W.2d 192, cert. denied, 292 U.S. 645 (1933).

31. 2 Scott, Trusts § 186 (2d ed. 1956). See Restatement (Second), Trusts § 186 (1959). Cf. Fratcher, Trustees' Powers Legislation, 37 N.Y.U.L. Rev. 627 (1962).

32. Possibly because it is the sort of power that is readily *implied* from the purpose of the trust, and therefore falls within what Professor Scott considers implied powers.

33. Restatement (Second), Trusts § 192 (1959).

34. Id. § 186, comment d.

35. See Scott, Trusts § 186 (2d ed. 1956).

36. Id. § 192, at 1454.

37. Butler v. Butler, 180 Minn. 134, 144, 230 N.W. 575, 579 (1930).

not an implication contained either in express powers or directions on other matters, or in express statutory powers.[38] It is, in other words, not implied at all, but inherent. This was held to be true of trustees to collect rents in a village devoted to the ideals of Henry George;[39] it was the case also in Missouri, where, by statute, personal representatives cannot compromise without court approval;[40] it is true of personal representatives who act as statutory trustees in wrongful death actions;[41] and of trustees in more orthodox circumstances.[42] But there is some authority to the effect that compromises cannot be made without court approval, which would suggest a requirement of judicial augmentation of power,[43] and there is at least some conjecture to the effect that a dry trustee has no power to compromise claims.[44] This last contains dicta and treatise citations for the proposition that trustees of active trusts lack inherent power.

A few cases extend the inherent power to compromise to cases of abandonment of trust assets. In *Hobday v. Peters*,[45] for instance, a trustee whose asset was a policy of life insurance was held to have the power to abandon it when the settlor ceased making payment of premiums. A more recent Pennsylvania case[46] supports the same conclusion, on similar facts, and appears to be consistent with other authority in that state.[47] These cases are significant where the fiduciary has realized nothing on a claim he holds. Beyond that the distinction between abandonment and compromise seems fairly semantic. Every compromise involves abandonment. A compromised claim is one not worth the time and

38. See, e.g., Maynard v. Cleveland, 76 Ga. 52, 74 (1885): "Here, because the trustee had the legal title to the note, his right or authority to receive payment that way was sufficient to protect the debtor. . . ."

39. See Broeker v. Ware, 27 Del. Ch. 8, 29 A.2d 591 (Ch. 1942).

40. See Selleck v. Hawley, 331 Mo. 1038, 56 S.W.2d 387 (1932). For a discussion of the Missouri statute on personal representatives, see text accompanying notes 132-37 infra.

41. Manns v. A.E. Sanford Co., 82 N.J.L. 124, 81 Atl. 491 (Sup. Ct. 1911).

42. Second Nat'l Bank v. Woodworth, 66 F.2d 170 (6th Cir. 1933) (applying Michigan law); Kinion v. Riley, 310 Mass. 338, 37 N.E.2d 984 (1941); Suffolk County Nat'l Bank v. Licht, 256 App. Div. 1080, 11 N.Y.S.2d 124 (2d Dep't 1939). See also Burgess v. Nail, 103 F.2d 37 (10th Cir. 1939); Ingalls Iron Works Co. v. Ingalls, 177 F. Supp. 151 (N.D. Ala. 1959), aff'd, 280 F.2d 423 (5th Cir. 1960); Brackett v. Middlesex Banking Co., 89 Conn. 645, 95 Atl. 12 (1915); Rahe v. Jobusch, 197 Ill. App. 200 (1915); Matter of Estate of Ives, 248 N.C. 176, 102 S.E.2d 807 (1958); McGill v. Bison Fast Freight, Inc., 245 N.C. 469, 96 S.E.2d 438 (1957).

43. Morris v. Boyd, 110 Ark. 468, 162 S.W. 69 (1913) (dicta).

44. Belcher v. Cobb, 169 N.C. 689, 86 S.E. 600 (1915). See Spencer v. Harris, 70 Wyo. 505, 252 P.2d 115 (1953).

45. 28 Beav. 603, 54 Eng. Rep. 498 (Ch. 1860).

46. Provident Life & Trust Co. v. Fidelity Ins. Trust & Safe Deposit Co., 203 Pa. 82, 52 Atl. 34 (1902).

47. See note 28 supra.

expense of collection, and a claim abandoned totally is one not worth even the time and expense of compromise. The same principles should govern the existence and exercise of fiduciary power in both situations—and, apparently, they do.[48]

*Implied.*—Where the trustee has express power to invest trust assets, or to grant loans, or to borrow funds, it is not remarkable that courts imply a power to compromise claims. The Alabama court, for instance, once implied such a power from the fact that the trustee was vested with legal title.[49] Executors and administrators acting as statutory trustees under wrongful death legislation are generally held to have power to settle their statutory claims, either by analogy to the powers they have to settle claims involving estate assets,[50] or because the legislation creating their status as plaintiffs is held to imply power to settle the suits.[51]

Authorities affirming powers to compromise in personal representatives are more numerous than those on trustees,[52] and most statutes also provide statutory apparatus for handling personal representative compromises.[53] These circumstances lead to a preference for personal representative status in those rare cases where it is up to courts to decide whether the fiduciary was acting as a personal representative or a testamentary trustee. *Rahe v. Jobusch*[54] is such a case and involved, as they often do, a fiduciary who was bonded as personal representative, but not as testamentary trustee. The court thought that compromise was more properly a function of the personal representative because the statutory provision for compromise by personal representatives included procedural apparatus for probate court approval of the compromise. The statutory procedure, the court said, "would be of much advantage to an estate and the courts are inclined to adopt that rule which would be most advantageous

48. Restatement (Second), Trusts § 192 (1959); Uniform Trustees' Powers Act § 3(c)(19), in The National Conference of Commissioners on Uniform State Laws, 1964 Handbook 269. Neither the new New York statute nor the Uniform Trust Administration Act specifically mentions the power to abandon claims, but the breadth of the statutory powers to compromise doubtless covers abandonment. See notes 4, 6 supra.

49. Carr v. Illinois Cent. R.R., 180 Ala. 159, 165, 60 So. 277, 279 (1912). See Maynard v. Cleveland, 76 Ga. 52 (1885).

50. Pittsburgh C., C. & St. L. Ry. v. Gipe, 160 Ind. 360, 65 N.E. 1034 (1903); Manns v. A.E. Sanford Co., 82 N.J.L. 124, 81 Atl. 491 (Sup. Ct. 1911).

51 Williams v. Louisville & N.R.R., 246 F. Supp. 758, 760 (E.D. Tenn. 1965): "The personal representative acts . . . by virtue of the federal statutory designation as trustee for the surviving beneficiaries."

52. Compare Annot., 72 A.L.R.2d 191, 200-02 (1958), with Annot., 35 A.L.R.2d 967, 970 (1953).

53. These statutes are discussed at pp. 537-40 infra.

54. 197 Ill. App. 200 (1915).

in the settlement of estates."[55] The inference is possible that powers to compromise are more readily found to inhere, and even more readily implied, in personal representatives than in trustees.

*3. Guardians*

The generally accurate observation that a guardian's fiduciary powers are more limited than the fiduciary powers of personal representatives and trustees[56] seems not to obtain with respect to powers to compromise claims. In *Stevens v. Meserve*,[57] for instance, a guardian took mortgages on real estate in settlement of a claim he held in behalf of his ward. The ward attacked the transaction as an improper investment (which it apparently was); the guardian defended on the ground that it was not an investment, but the compromise of a claim. His distinction was sustained, the New Hampshire court noting that "it would be a novel and unreasonable rule of law that would not allow a guardian to save for his ward all that could be saved . . . ."[58] The power to compromise was considered inherent, as corollary to the guardian's duty "to use reasonable care and diligence . . . ."[59] Other cases on guardians are not numerous, but tend to recognize the power to compromise claims as inherent.[60] Guardians, of course, may be subject to statutory provisions on judicial approval of compromises and, when they are, are treated the same way personal representatives are under similar statutes.[61] There is also some authority for implying a power to compromise in guardians from express powers to sue and defend.[62]

*B. Express Statutory Power To Compromise*

Virtually every jurisdiction has a statute granting power to compromise claims to fiduciaries, or granting power to local courts to direct fiduciaries to compromise. The broadest division of these statutes seems to be into two classes: (1) Older, single-purpose statutes which grant fiduciary power, or confer jurisdic-

55. Id. at 206.

56. See, e.g., Fratcher, Powers and Duties of Guardians of Property, 45 Iowa L. Rev. 264 (1960); Note, 45 Iowa L. Rev. 360 (1960).

57. 73 N.H. 293, 61 Atl. 420 (1905).

58. Id. at 304, 61 Atl. at 425.

59. Id. at 304, 61 Atl. at 426.

60. Griffin v. Sturges, 131 Conn. 471, 40 A.2d 758 (1944); Maynard v. Cleveland, 76 Ga. 52 (1885). Cf. Hutchins v. Johnson, 12 Conn. 376 (1837).

61. See, e.g., Moss v. Moose, 184 Ark. 798, 44 S.W.2d 825 (1931); Campbell v. Atlanta Coach Co., 58 Ga. App. 824, 200 S.E. 203 (1938). Compare the personal representative cases discussed at pp. 542-49 infra.

62. Johnson's Appeal, 71 Conn. 590, 42 Atl. 662 (1899). See Union & New Haven Trust Co. v. Sherwood, 110 Conn. 150, 147 Atl. 562 (1929). Cf. Hutchins v. Johnson, 12 Conn. 376 (1837).

tion, narrowly; these are often tied to procedural provisions for obtaining judicial approval of compromises and are not typically related to other statutes on fiduciary powers. (2) Broad, modern statutes on fiduciary powers, which include power to compromise claims, to abandon them, and to submit disputes to binding arbitration, usually without special provision for judicial approval of compromises. The statutory structure in Alabama is a fair illustration of the first category; the new New York Fiduciaries' Powers Act is a fair illustration of the second.

*1. Single-Purpose Statutes*

Most states have statutes of the single-purpose variety. These are usually directed only to the compromise of claims; they are not part of broader powers statutes. They are typically confined to claims *on behalf of* the estate, although many extend to claims *against* the estate. They are often exercisable—at least in terms—only after the compromise is judicially approved. There are two models of the single-purpose statute in existence; one confers power on fiduciaries, the other confers jurisdiction on courts to grant power to fiduciaries. Alabama has both models. Its *fiduciary power* statute, which is quite typical of the species, provides:

> Whenever a debtor of the decedent is unable to pay all his debts, the executor or administrator, with the approbation of the court or judge thereof, may compound with him and give him a discharge, upon receiving a fair and just dividend of his effects. A compromise may also be authorized when it appears to be just, and for the best interest of the estate.[63]

Another Alabama statute is typical of the *court power* species:

> The probate court having jurisdiction of the estate may authorize any executor or administrator to compromise or sell any bad or doubtful claim due the estate . . . .[64]

Except for the last sentence in the Alabama *fiduciary power* statute, three limitations are apparent: (1) It is confined to personal representatives.[65] (2) It requires that the debtor be in

63. Ala. Code tit. 61, § 227 (1960).

64. Ala. Code tit. 61, § 223 (1960). Sections 126 and 147 of the Model Probate Code are *fiduciary power* statutes in form, but both rather clearly require court approval—an indication borne out by the construction of § 147 in Missouri and Indiana. See text accompanying note 136 infra and the Indiana Probate Commission's comments to Ind. Ann. Stat. § 7-818 (1953).

65. Alabama has a statute, similar in terms to § 227, covering trustees. Ala. Code tit. 58, § 27 (1960). However, this is not typical of single-purpose jurisdictions.

distressed circumstances. (3) It is confined to claims held by the fiduciary. The last sentence is apparently directed to family settlements of disputes over distribution, but it may be subject to a construction that would extend it to compromises of claims *against* the estate.[66]

The *fiduciary power* form of statute is in force, in terms identical to the Alabama statute, or nearly so, in fourteen other jurisdictions.[67] In those jurisdictions, in other words, statutory power to compromise is limited to personal representatives, to debtors who are in distressed circumstances, and to cases where the fiduciary holds the claim. Statutes in this form also appear to make prior court approval of the compromise necessary, although that apparent requirement has largely been construed away.[68] The Maryland[69] and Georgia[70] statutes, however, contain a uniquely emphatic requirement of prior court approval for valid agreements of compromise. Those statutes, and somewhat less emphatic statutes in Missouri,[71] Indiana,[72] and Texas,[73] have been construed to require prior judicial approval.[74]

Idaho, Washington, and Wyoming have added the Uniform Trustees' Powers Act in recent legislative sessions,[75] but that statute is apparently not intended to affect personal representatives, who continue to operate under the old statutes or under their common-law powers. Oregon provides for jurisdiction in local judges to augment fiduciary powers, but that statute, too, is confined to trustees.[76]

California, whose original single-purpose statute has been

66. The issue appears not to have come up in Alabama, probably because the courts there do not construe the *fiduciary power* statute to abrogate a fiduciary's common-law power to compromise. Arledge v. Ellison, 247 Ala. 190, 23 So. 389 (1945). See Lynn v. McDaniel, 210 Ala. 474, 98 So. 287 (1923).

67. Ariz. Rev. Stat. Ann. § 14-474 (1956); Ark. Stat. Ann. § 62-2403 (Supp. 1965); Guam Prob. Code § 578 (1953); Idaho Code Ann. § 15-809 (1948); Mo. Rev. Stat. § 473.277 (Supp. 1957); Mont. Rev. Codes Ann. § 91-3208 (1947); Neb. Rev. Stat. § 30-410 (1943); Nev. Rev. Stat. § 143.140 (1963); N.D. Cent. Code § 30-13-09 (1960); Ore. Rev. Stat. § 116.130 (1965); S.D. Code § 35.1105 (Supp. 1960); Utah Code Ann. § 75-11-12 (1953); Vt. Stat. Ann. tit. 14, § 1410 (1958); V.I. Code Ann. tit. 15, § 570 (1964).

68. See pp. 545-49 infra.

69. Md. Ann. Code art. 93, § 286 (1964); Md. R.P. V77, § a (1961).

70. Ga. Code Ann. §§ 108-422, 113-1514 (1959).

71. Mo. Rev. Stat. § 473.277 (Supp. 1957).

72. Ind. Ann. Stat. § 7-705 (1953). See Ind. Ann. Stat. § 7-818 (1953), which is based on § 147 of the Model Probate Code. The latter has not been construed on the present question.

73. Tex. Rev. Civ. Stat. Ann. art. 7425b-125 (1960).

74. See pp. 542-45 infra.

75. Idaho Code Ann. §§ 68-104 to -113 (Supp. 1965); Wash. Rev. Code Ann. §§ 30.99.070-.910 (1961); Wyo. Stat. Ann. §§ 4-36 to -45 (Supp. 1965).

76. Ore. Rev. Stat. §§ 128.110, 128.160 (1963).

influential in western legislatures,[77] recently amended its fiduciary power statute to cover both claims against the personal representative and claims held by him.[78] The California statute also broadens the sort of claims it covers by keying compromise to the "best interest of the estate," rather than to debtor distress.[79] These two liberalizations of single-purpose, fiduciary power statutes are fairly common. Eleven jurisdictions extend the power to compromise to all kinds of claims.[80] All of these statutes, and three others,[81] dispense with the requirement that debtors of the estate be in distress. Virginia adds a special provision permitting submission of claims to binding arbitration, without court approval, which covers personal representatives, guardians, and trustees.[82] The Illinois[83] and Michigan[84] statutes cover guardians as well as personal representatives.

Several jurisdictions make express provision for compromise by personal representatives acting as statutory trustees in actions for wrongful death,[85] and statutes[86] or rules of court[87] in several other states are probably broad enough to cover wrongful-death claims, if statutory power to settle them is necessary.[88] The New Hampshire statute has a single-purpose, *fiduciary power* cast, but neither provides for nor requires court approval.[89] The New Jersey statute confers jurisdiction to approve on the court, but

77. See historical note following the Arizona and Guam statutes cited in note 67 supra.

78. Cal. Prob. Code § 718.5 (Supp. 1965).

79. Cal. Prob. Code § 578.

80. Fla. Stat. § 733.21 (1965); Ga. Code Ann. §§ 108-422, 113-1513 (1959); Ill. Ann. Stat. ch. 3, § 215 (Smith-Hurd 1961); Ind. Ann. Stat. § 7-818 (1953); Iowa Code Ann. §§ 633.114, 633.115 (1964); La. Code Civ. Proc. Ann. art. 3198 (1961); Ohio Rev. Code Ann. § 2117.05 (Page 1954); S.C. Code Ann. § 19-482 (1962); Tex. Rev. Civ. Stat. Ann. art. 7425b-25(E) (1960); Tex. Prob. Code Ann. § 234(d) (1960); Va. Code Ann. § 8-171 (1950); W. Va. Code Ann. § 4211 (1961).

81. Kan. Gen. Stat. Ann. § 59-1714 (1964); Minn. Stat. Ann. § 525.36 (1947); Mo. Rev. Stat. § 473.277 (Supp. 1957).

82. Va. Code Ann. § 8-507 (1950).

83. Ill. Ann. Stat. ch. 3, § 215 (Smith-Hurd 1961).

84. Mich. Comp. Laws § 707.9 (1948).

85. See, e.g., Ky. Rev. Stat. Ann. § 395.240 (1963); Me. Rev. Stat. Ann. ch. 18, § 2403 (1964); S.C. Code Ann. § 19-482 (1962); W. Va. Code Ann. § 5476 (1961).

86. Ga. Code Ann. §§ 108-422, 113-1513 (1959); La. Code Civ. Proc. Ann. art. 3198 (1961); N.J. Stat. Ann. § 3A:14-2 (1953); Ohio Rev. Code Ann. § 2117.05 (Page 1954); Pa. Stat. Ann. tit. 20, §§ 320.513, 320.945 (1964); R.I. Gen. Laws Ann. § 33-18-16 (1956); Tex. Prob. Code Ann. § 234 (1960).

87. Md. R.P. V77, § a (1961).

88. See Williams v. Louisville & N.R.R., 246 F. Supp. 758 (E.D. Tenn. 1965), which implies that statutory authority is not necessary, but finds it in the Federal Employers' Liability Act.

89. N.H. Rev. Stat. Ann. § 554:12 (1955). See Wyman's Appeal, 13 N.H. 18 (1842).

does not in terms require court approval.[90] Broad fiduciary power statutes in Florida[91] and Illinois[92] cover trustees and do not appear to affect older statutes[93] in those jurisdictions covering personal representatives.

The Alabama *court power* model is similar to statutes in a few states that also limit the court's power to personal representatives and to claims that are "bad or doubtful,"[94] or are due from insolvent debtors.[95] But the more common form of *court power* statute extends to all claims, for and against the estate, and does not require debtor distress.[96] Five of these statutes cover guardians,[97] and four cover trustees.[98] Some cover arbitration[99] and some cover abandonment of assets.[100] The Arkansas incorporation-by-reference statute[101] covers only trustees and apparently leaves personal representatives to the older *court power* statute.[102]

### 2. *Fiduciary Powers Statutes*

The new New York Fiduciaries' Powers Act,[103] like the English Trustee Act, 1925,[104] and unlike Section 3(a) of the Uniform Trustees' Powers Act,[105] covers both personal representatives and trustees. It contains a broad, comprehensive list of statutory powers, including the power to compromise or abandon claims or to submit them to arbitration.[106] It differs from the uniform act principally in its coverage of personal representatives and in the fact that the New York statute does not contain

90. N.J. Stat. Ann. § 3A:14-1 (1953).
91. Fla. Stat. § 691.03 (1965).
92. Ill. Ann. Stat. ch. 148, § 35 (Smith-Hurd 1961).
93. Fla. Stat. § 733.21 (1965); Ill. Ann. Stat. ch. 3, § 215 (Smith-Hurd 1961).
94. Ala. Code tit. 61, § 223 (1960).
95. Colo. Rev. Stat. Ann. § 153-10-35 (1963).
96. Conn. Gen. Stat. Rev. § 45-231 (1958); Me. Rev. Stat. Ann. ch. 18, § 2403 (1964); Mass. Gen. Laws Ann. ch. 204, §§ 13-14 (1955); Pa. Stat. Ann. tit. 20, § 320.513 (1964); R.I. Gen. Laws Ann. § 33-18-16 (1956).
97. Colo. Rev. Stat. Ann. § 153-10-35 (1963); Conn. Gen. Stat. Rev. § 45-231 (1958); Md. Ann. Code art. 93, § 286 (1964); Mass. Gen. Laws Ann. ch. 204, § 13 (1955); R.I. Gen. Laws Ann. § 33-18-16 (1956).
98. Conn. Gen. Stat. Rev. § 45-231 (1958); Md. R.P. V77, § a (1961); Mass. Gen. Laws Ann. ch. 204, § 14 (1955); Pa. Stat. Ann. tit. 20, §§ 320.932, 320.945 (1964).
99. E.g., Me. Rev. Stat. Ann. ch. 18, § 2403 (1964).
100. Pa. Stat. Ann. tit. 20, § 320.932 (1964); R.I. Gen. Laws Ann. § 33-18-16 (1956).
101. Ark. Stat. Ann. §§ 58-114 to -116 (Supp. 1965).
102. Ark. Stat. Ann. § 62-2403 (Supp. 1965).
103. N.Y. Deced. Est. Law § 127(1) (Supp. 1965).
104. 15 & 16 Geo. 5, c. 19, § 15.
105. The National Conference of Commissioners on Uniform State Laws, 1964 Handbook 267-68.
106. N.Y. Deced. Est. Law § 127(2)(q) (Supp. 1965).

the "prudent man" catch-all[107] suggested by Professor Fratcher.[108] The New York act, unlike the English statute, contains no provision permitting courts to relieve trustees for breaches of trust in good faith[109]—a provision that may be relevant to the express statutory power to compromise claims.

Arkansas,[110] North Carolina,[111] and Tennessee[112] have broad incorporation-by-reference statutes, but these are less pervasive than statutes that confer statutory powers because they depend on the advertence of the draftsman.[113] The Arkansas statute covers only trustees; the North Carolina and Tennessee statutes cover both executors and trustees.[114] Oregon's judicial-augmentation statute,[115] less pervasive than statutes that confer statutory powers in that judicial action is necessary to its application,[116] covers only trustees; as to trustees, however, Oregon's provision justifies judicial augmentation of a power to compromise. Virginia[117] and Oklahoma[118] have special statutes on fiduciary powers to submit claims to arbitration.

Most states have no statutes conferring power to compromise on trustees, although several have extended their single-purpose statutes to cover trustees,[119] and some few even to cover guardians.[120] The Uniform Trustees' Powers Act, where adopted,[121] covers trustees in the broadest terms. In a few other states, statutes[122] patterned on the Uniform Trust Administration Act, or

---

107. Section 3(a) of the uniform act, supra note 105, states: "[A] trustee has the power to perform, without court authorization, every act which a prudent man would perform for the purposes of the trust . . . ."

108. Fratcher, Trustees' Powers Legislation, 37 N.Y.U.L. Rev. 627, 660 (1962).

109. Trustee Act, 1925, 15 & 16 Geo. 5, c. 19, § 61. See text accompanying note 182 infra.

110. Ark. Stat. Ann. §§ 58-114 to -116 (Supp. 1965).

111. N.C. Gen. Stat. §§ 32-25 to -27 (Supp. 1965).

112. Tenn. Code Ann. §§ 35-616 to -619 (Supp. 1965).

113. See Fratcher, Trustees' Powers Legislation, 37 N.Y.U.L. Rev. 627, 659 (1962).

114. Neither the New York, North Carolina, nor Tennessee statute, however, covers guardians.

115. Ore. Rev. Stat. §§ 128.110, 128.160 (1965).

116. See Fratcher, Trustees' Powers Legislation, 37 N.Y.U.L. Rev. 627, 659 (1962).

117. Va. Code Ann. § 8-507 (1957).

118. Okla. Stat. Ann. tit. 58, § 348 (1965).

119. Ga. Code Ann. § 108-422 (1959); N.J. Rev. Stat. §§ 3A:14-1 to -4 (1953); Va. Code Ann. §§ 8-171, 8-507 (1957); statutes cited in note 98 supra.

120. Ga. Code Ann. § 108-422 (1959); N.J. Rev. Stat. §§ 3A:14-1 to -4 (1953); Va. Code Ann. §§ 8-171, 8-507 (1957); statutes cited in note 97 supra.

121. See note 75 supra.

122. Fla. Stat. § 691.03 (1965); Ill. Ann. Stat. ch. 148, § 35 (Smith-Hurd 1964); Okla. Stat. Ann. tit. 60; § 175.24 (1963); Tex. Rev. Civ. Stat. Ann. art. 7425b-25 (1960).

statutes[123] perhaps more *sui generis* than that, cover trustee power to compromise or abandon claims, or to submit them to arbitration, in broad terms and without any provision for court approval.

### C. *The Effect of Express Statutory Power*

The New York Commission on Estates treated its proposal to grant by statute express powers to compromise claims as a codification of existing case law.[124] That may or may not be the view that New York courts will take. In New York and in other states, in any event, courts have taken a more fundamental view of the purpose and effect of express statutory powers. There are one or more of three possible views of the effect of express statutory power to compromise claims: (1) the view that the statute imposes prior judicial review on compromise transactions; (2) the view that the statute, if complied with, protects the fiduciary from surcharge for imprudence; and (3) the view that the statute assures the validity of compromise transactions—in other words, that it protects third persons who compromise with the fiduciary.

#### 1. *The Mandatory-Review Position*

A few states have taken the position that their single-purpose statutes, which typically provide for judicial approval of compromises before they are made, or for local court jurisdiction to grant approval, operate to limit the common-law power of compromise which fiduciaries would otherwise have. Fiduciaries must, in these states, submit compromise transactions for prior judicial approval. To fail to do so is apparently a breach of trust in itself, and a breach that imperils the validity of compromise transactions and therefore jeopardizes the title of third persons who deal with the fiduciary. The statutes are construed, in other words, to be primarily supervisory, rather than primarily a protection against surcharge or invalidity.

The Maryland[125] and Georgia[126] statutes rather clearly compel prior judicial approval of compromises by fiduciaries, and the Maryland court has added to the statute, by way of court rule,[127]

123. Iowa Code Ann. § 633.699(1) (1964); La. Rev. Stat. Ann. § 9:2121 (1965). The legislative history of the Louisiana statute indicates that it is a codification of Restatement § 192 and is not intended to change existing law. La. Rev. Stat. Ann. § 9:2121, comments a, b (1965).

124. N.Y. Temporary Comm'n on Estates, Third Report 18-19 (1964). See Hendrickson, The New Fiduciaries' Powers Act, 37 N.Y. St. B.J. 338, 340 (1965), where the author states that the statutory power to compromise is a codification. The same judgment about the uniform act is made in Horowitz, Uniform Trustees' Powers Act, 41 Wash. L. Rev. 1, 22 (1966).

125. Md. Ann. Code art. 93, § 286 (1964).

126. Ga. Code Ann. § 108-422 (1959).

127. Md. R.P. V77 (1961).

an elaborate procedural apparatus. The Maryland statute extends to personal representatives and guardians *ad litem;* the Georgia statute extends to "all persons acting in a fiduciary capacity."

Maryland's provision was put squarely in issue in *Blum v. Fox*,[128] where an administrator, acting without judicial authorization, compromised a claim against the estate and claimed on his accounting credit for what he paid. The probate judge's denial of the credit was modified on appeal, to allow the administrator to file a new accounting to demonstrate that his compromise was prudent. The court said that the statute meant what it said; the only valid compromise is one approved in advance by the probate judge. But, the court held, the compromise might still be approved, on accounting, if the administrator could demonstrate that it was prudently made and that his delay in seeking judicial approval worked no prejudice to the estate. The burden of proof on this tardy issue of propriety, the court said, was on the executor—as to his good faith, as to the fact of the compromise, and as to its benefit to the estate. The opinion certainly encourages personal representatives in Maryland to seek immediate judicial approval of compromises, but it avoids the logical rigor of the statute. *Blum v. Fox* does not, in other words, put Maryland back to 1700. Dicta[129] from the Maryland court three years after *Blum v. Fox*, however, made it clear that an agreement without court approval is probably invalid, at least until compliance with *Blum v. Fox* gives the agreement *nunc pro tunc* validity.

The later Maryland case also involved a catch-all powers clause in a will, which, the court said, did not affect the requirement of prior judicial approval, although the statute can probably be waived by advertent language permitting compromise without statutory approval. The 1941 Maryland dicta referred to an estate debtor who claimed the benefit of the statute to fasten invalidity on a compromise agreement. In a recent and somewhat similar case, the federal district court in Maryland found valid a personal representative's agreement with a liability insurer, against the insurer's contention that the agreement was invalid if not approved by the probate court.[130] The Maryland statute, the federal judge said, "is intended for the benefit of

128. 173 Md. 527, 197 Atl. 117 (1938).

129. Turk v. Grossman, 179 Md. 229, 234, 17 A.2d 122, 124 (1941): "While this court has sanctioned approval after a good compromise has been made . . . it has never placed the action entirely within the discretion of the personal representative. . . ."

130. Neighbors v. Harleysville Mut. Gas. Co., 169 F. Supp. 638 (D. Md. 1959).

creditors and beneficiaries of the estate, and not for the benefit of insurers who have denied liability."[131]

The Missouri statute[132] has also been construed to require prior judicial approval,[133] although similar provisions in other states have been construed to leave unaffected the personal representative's common-law power to compromise claims.[134] The issue apparently arose for the first time in a 1925 opinion of the St. Louis Court of Appeals,[135] but it was definitely clarified by the Missouri Supreme Court ten years later. The judicial-approval statute, the court said, "is a limitation upon the power and authority of executors and administrators, and it contemplates safeguarding estates by requiring a satisfactory showing to the probate court . . . that any settlement for less than the full amount is, under the circumstances, beneficial to the estate."[136] The failure to obtain approval in that case rendered the agreement of compromise invalid. Dicta in a more recent case limits the application of the statutory apparatus to personal representatives and suggests that trustees in Missouri can compromise claims without prior judicial approval.[137]

Georgia,[138] Kentucky,[139] and Texas[140] authority parallels *Blum v. Fox* and comes to the same conclusion—that judicial approval is essential to valid compromise. The Texas decision recognizes that a prudent compromise can be approved and in effect validated *nunc pro tunc* on accounting. An early California opinion[141] said that prior judicial approval was essential to valid compromise in that state, but it has been disapproved in later opinions.[142] A sale-of-personal-property case in Oklahoma,[143] and a passing implication in an Arizona opinion,[144] suggest that those

131. This seems to beg the question, since the liability insurer appears to have stood in the same position as an estate debtor.

132. Mo. Rev. Stat. §§ 473.277, 473.427 (Supp. 1957).

133. Jasper v. Thomas, 124 Kan. 163, 257 Pac. 714 (1927) (applying Missouri law); Wayland v. Pendleton, 337 Mo. 190, 85 S.W.2d 492 (1935). Cf. Boatmen's Nat'l Bank v. Bolles, 356 Mo. 489, 202 S.W.2d 53 (1947).

134. See note 154 infra.

135. Scott v. Crider, 217 Mo. App. 1, 272 S.W. 1010 (1925).

136. Wayland v. Pendleton, 337 Mo. 190, 195, 85 S.W.2d 492, 495 (1935).

137. Memmel v. Thomas, 238 Mo. App. 403, 408, 181 S.W.2d 168, 170 (1944). But cf. Boatmen's Nat'l Bank v. Bolles, 356 Mo. 489, 202 S.W.2d 53 (1947).

138. Hartford Acc. & Indem. Co. v. Cohran, 106 Ga. App. 14, 126 S.E.2d 289 (1962).

139. Hudson's Adm'x v. Collins, 239 Ky. 131, 38 S.W.2d 975 (1931). But see Gill v. Anglo-American Ass'n, 21 Ky. L. Rep. 690, 52 S.W. 929 (1899).

140. Scott v. Taylor, 294 S.W. 227 (Tex. Civ. App. 1927).

141. Taylor v. Sanson, 24 Cal. App. 515, 141 Pac. 1060 (Dist. Ct. App. 1914).

142. See note 154 infra.

143. Warner v. Mason, 109 Okla. 13, 234 Pac. 747 (1925).

144. Matter of Estate of Hannerkam, 51 Ariz. 447, 451, 77 P.2d 814, 816 (1938).

two states may adopt a supervisory construction of their single-purpose statutes.

Several states, therefore, conceive of their single-purpose statutes as radically restricting the common-law power of fiduciaries, and replacing it with a firm demand for prior judicial approval of agreements of compromise. Without approval the agreements are invalid, and fiduciaries who make them are subject to surcharge. (The *Blum v. Fox* theory of *nunc pro tunc* validation affords some relief from this rigor without detracting from the theoretical integrity of a supervisory construction of the statute.) These opinions therefore construe powers statutes to replace fiduciary discretion with judicial discretion. It is worth noting that none of the statutes involved have been modern fiduciary-power statutes.

### 2. *The Freedom-From-Surcharge and Assured-Validity Positions*

Most courts, construing single-purpose statutes that provide procedural machinery for prior judicial approval of compromises, hold that the statutes do not affect the fiduciary's common-law power. This means that a fiduciary may proceed without judicial approval, but, if he does, the propriety of his action, and maybe even the validity of the transaction, are open on accounting. Judicial intervention, which usually can be invoked *ex parte*,[145] protects the fiduciary from any surcharge except surcharge for bad faith, and it assures the validity of the transaction if the third party has acted in good faith. The statutory construction in most courts, in other words, gives the fiduciary a choice; he can defend his compromise on a petition for approval, or in his accounting.[146]

New York, in *Chouteau v. Suydam*, had established this construction before the Civil War:

> The object of that statute was, not to confer upon executors and administrators powers which otherwise they would not possess, but to afford them additional protection, when acting in good

145. See, e.g., In re Patenotre's Estate, 138 N.Y.S.2d 899 (Surr. Ct. 1955).

146. A fiduciary who has decided to compromise a claim . . . may enter into the compromise on his own authority, without the prior approval of the court or the estate beneficiaries. . . . His action might be subject to challenge in a later accounting on the ground of imprudence, as well as bad faith. . . . The fiduciary may make an *ex parte* application to the court . . . for approval of the compromise. If the court authorizes the proposed compromise, the fiduciary can thereafter be held accountable only if the "claim was fraudulently compromised or compounded." . . . In that proceeding, the court, in the exercise of its discretion, might direct the fiduciary to give notice. . . . However, it is not essential to the jurisdiction of the court . . . .

Id. at 901.

> faith in the exercise of their common-law powers. Although they could compromise a claim, or compound a debt, without the aid of the statute, still they might perhaps be held responsible for any serious error in judgment, in so doing. The act in question enables them to obtain the sanction of the judgment of the surrogate, in addition to their own, and this affords them additional protection, if their conduct is fair and honest.[147]

This position was taken where an executor compromised a claim asserted against the estate, but it is also the law where the claim is asserted by the estate,[148] and where the agreement involved deals with distributees rather than debtors or creditors.[149] The New York cases abound with routine approvals of compromised claims,[150] as well as a few thorough discussions of the facts that bear on judicial approval.[151]

There is also in the New York cases a tendency to protect the validity of the settlement, as distinguished from its *propriety*, in any case in which the third party dealing with the fiduciary acts in good faith. Even where the fiduciary relies on his common-law power and fails to obtain judicial approval, the New York cases suggest that a third party is protected from a finding that the settlement is invalid because the fiduciary acted imprudently or fraudulently. *Scully v. McGrath*[152] illustrates the point. There an administratrix overpaid a distributee of the estate, whom the court treated, in effect, as a creditor. The transaction was, the court said, a clear wasting of estate assets. But the liability of the administratrix and the validity of the settlement were separate questions. "[H]er liability for the imprudent settlement . . . and his liability . . . to return the money received

147. 21 N.Y. 179, 183-84 (1860). See Matter of Estate of Leopold, 259 N.Y. 274, 181 N.E. 570 (1932); Scully v. McGrath, 201 N.Y. 61, 94 N.E. 195 (1911); Matter of Estate of Lester, 155 Misc. 536, 280 N.Y. Supp. 341 (Surr. Ct. 1935).

148. Matter of Estate of Ballenzweig, 174 Misc. 1109, 22 N.Y.S.2d 541 (Surr. Ct. 1940) (claim against estate); In re Scott, 1 Red. 234 (N.Y. Surr. Ct. 1877) (claim by estate). Accord, Yates v. Cockerham, 156 Ore. 245, 67 P.2d 269 (1937) (dicta).

149. Griffin v. Sturges, 131 Conn. 471, 40 A.2d 758 (1944); Murdoch v. Murdoch, 418 Pa. 219, 210 A.2d 490 (1965). Contra, Protective Check Writer Co. v. Collins, 92 N.H. 27, 23 A.2d 770 (1942).

150. Haidacker v. Central R.R., 52 F. Supp. 713 (E.D.N.Y. 1943); Capasso v. Kingston Trust Co., 15 App. Div. 2d 976, 225 N.Y.S.2d 776 (3d Dep't 1962); Gomez v. Gomez, 33 App. Div. 379, 54 N.Y. Supp. 237 (1st Dep't 1898); Matter of Wheeler, 28 Misc. 2d 787, 217 N.Y.S.2d 815 (Surr. Ct. 1961); In re Purcell's Will, 26 N.Y.S.2d 353 (Surr. Ct. 1941); Matter of Estate of Hilpert, 165 Misc. 430, 300 N.Y. Supp. 886 (Surr. Ct. 1937).

151. See Matter of Estate of Hammer, 33 Misc. 2d 674, 224 N.Y.S.2d 717 (Surr. Ct. 1962); In re Ledyard's Estate, 21 N.Y.S.2d 860, 886-89 (Surr. Ct. 1939), aff'd mem., 259 App. Div. 892, 20 N.Y.S.2d 1006 (2d Dep't 1940). See also Jones v. Jones, 297 Mass. 198, 7 N.E.2d 1015 (1937).

152. 201 N.Y. 61, 94 N.E. 195 (1911).

by him are very different things," the court said. "He had the right to make the claim and he was not obliged to resort to law to enforce it if its justice was conceded by the administratrix. An . . . administrator has the power to . . . compromise claims . . . and a settlement made by him can be set aside only upon proof of bad faith or fraud." This left, as the only factual issue, bad faith on the part of the third party. That was a jury question, the court said, and it was sufficient in defense to show "a *bona fide* claim and its settlement."[153] Most jurisdictions follow New York's lead on both of these questions. The weight of authority is that single-purpose powers statutes which contain procedural apparatus for prior judicial approval of settlements do not disturb the fiduciary's common-law power.[154] New York's protection of third parties, under the *Scully* rule, is also probably followed in most jurisdictions,[155] although there are a few dis-

153. Id. at 64, 94 N.E. at 196.

154. Redmond v. Commerce Trust Co., 144 F.2d 140 (8th Cir.), cert. denied, 323 U.S. 776 (1944) (dicta); Moss v. Moose, 184 Ark. 798, 44 S.W.2d 825 (1931); Evans v. Tucker, 101 Fla. 688, 135 So. 305 (1931); In re Estate of Fleming, 228 Iowa 1137, 293 N.W. 511 (1940); Boxill v. Maloney, 342 Mass. 399, 173 N.E.2d 283 (1961); First & Am. Nat'l Bank v. Whiteside, 207 Minn. 537, 292 N.W. 770 (1940); Butler v. Butler, 180 Minn. 134, 230 N.W. 575 (1930). But see Penn Mut. Life Ins. Co. v. Roberts, 120 Fla. 392, 162 So. 881 (1935); Pangalos v. Halpern, 247 Minn. 80 76 N.W.2d 702 (1956); McGill v. Bison Fast Freight, Inc., 245 N.C. 469, 96 S.E.2d 438 (1957). See also Matter of Estate of Ives, 248 N.C. 176, 102 S.E.2d 807 (1958). This result was accomplished with clarity in the early New England cases. Blake v. Ward, 137 Mass. 94 (1884). See Wallin v. Smolensky, 303 Mass. 39, 20 N.E.2d 406 (1939); Jones v. Jones, 297 Mass. 198, 7 N.E.2d 1015 (1937). The Connecticut authorities limit exposure for fiduciary imprudence to surcharge. Johnson's Appeal, 71 Conn. 590, 595, 42 Atl. 662, 666 (1899); Hutchins v. Johnson, 12 Conn. 376 (1837). Cf. Marks' Appeal, 116 Conn. 58, 163 Atl. 600 (1932); Union & New Haven Trust Co. v. Sherwood, 110 Conn. 150, 147 Atl. 562 (1929). Both the Massachusetts and Connecticut cases suggest a generous open-door policy on judicial approval. See, e.g., Griffin v. Sturges, 131 Conn. 471, 40 A.2d 758 (1944). But the New Hampshire statute, which contained no provision for prior judicial approval, was construed to deny jurisdiction for approval, even when the settlement agreement called for it. Protective Check Writer Co. v. Collins, 92 N.H. 27, 23 A.2d 770 (1942). Cf. Phinney v. Cheshire County Sav. Bank, 91 N.H. 184, 16 A.2d 363 (1940). See also Burtman v. Butman, 94 N.H. 412, 54 A.2d 367 (1947). Early doubt that California would follow the majority rule should have been removed by In re Richards' Estate, 17 Cal. 2d 259, 109 P.2d 923 (1940). See also Hartman v. Bank of America, 137 F.2d 945 (9th Cir. 1943); Jenkins v. Southern Pac. Co., 17 F. Supp. 820 (S.D. Cal. 1937), rev'd on other grounds sub nom. Jenkins v. Pullman Co., 96 F.2d 405 (9th Cir. 1938), aff'd, 305 U.S. 534 (1939); Estate of Wilson, 116 Cal. App. 2d 523, 253 P.2d 1011 (Dist. Ct. App. 1953).

155. Arledge v. Ellison, 247 Ala. 190, 23 So. 2d 389 (1945); Wunderlich v. Bowen, 193 Ark. 284, 100 S.W.2d 80 (1936); Gill v. Anglo-American Ass'n, 21 Ky. L. Rep. 690, 52 S.W. 929 (1899); First & Am. Nat'l Bank v. Whiteside, 207 Minn. 537, 292 N.W. 770 (1940); Montgomery v. Mutual Life Ins. Co., 111 Miss. 6, 71 So. 162 (1916); Yates v. Cockerham, 156 Ore. 245, 67 P.2d 269 (1937); Denney v. Parker, 10 Wash. 218, 38 Pac. 1018 (1894). Cf. Estate of Shultz, 103 Colo. 184, 85 P.2d 736 (1938). Jones v. Jones, 297 Mass. 198, 7 N.E.2d 1015 (1937), made this result fairly clear in Massachusetts, but indicated that the third person

turbing judicial excursions into propriety in cases where the question is one of validity,[156] and judicial language in at least one important jurisdiction (Pennsylvania) has drastically muddled the distinction.

Early Pennsylvania authority was clear in indicating to third parties who settled in good faith with fiduciaries that, even without judicial approval, their settlements were valid. In *Struthers v. Peltz*,[157] for instance, the court held an estate bound by a release of a lien on land, as to a subsequent purchaser of the land. The case did not involve a debtor or creditor, but the language of the opinion could be applied to a compromised claim:

> If executors will cheat the estate they represent, we cannot help the matter at the expense of innocent persons. The testator trusted them to conduct his business, and if they abuse the trust and cannot make compensation themselves, it would be a violation of the dullest moral sense to repair the wrongs of the estate by making reprisals upon innocent strangers.[158]

Application of *Struthers* to a clear case of the fiduciary dealing for the estate with a third party was at least complicated, though, when in 1915 the same court held estate beneficiaries not bound by an executor's receipts for coal deliveries.[159] Doubt was compounded by the court's majority and dissenting opinions in *Pearlman's Estate*.[160]

Pearlman transferred assets to a trust created for the benefit of his creditors. The creditors had apparently agreed to keep in force certain life insurance on the transferor's life by making contributions toward the payment of premiums. However, one of the creditors itself later came upon evil days and was placed in receivership. Its liquidating trustee was without assets to continue contributions to the premium fund, and wrote the trustee for creditors, abandoning its interest in the policy. "[W]e specifically waive any possible participation . . . ," the letter said.[161]

---

was expected to prove sufficient consideration—possibly because a lack of consideration would be evidence of fraud. Blake v. Ward, 137 Mass. 94 (1884), would suggest that the only test is fraud. New Hampshire has muddled the validity-propriety distinction. Simes v. Ward, 78 N.H. 533, 103 Atl. 310 (1918). But later cases show hope of correction. See Burtman v. Butman, 94 N.H. 412, 54 A.2d 367 (1947); Protective Check Writer Co. v. Collins, 92 N.H. 27, 23 A.2d 770 (1942).

156. Belcher v. Cobb, 169 N.C. 689, 86 S.E. 600 (1915); Ellenberg v. Arthur, 178 S.C. 490, 183 S.E. 306 (1936) (involving fraudulently obtained letters of administration); Purcell v. Robertson, 122 W. Va. 287, 8 S.E.2d 881 (1940). Cf. Marks' Appeal, 116 Conn. 58, 163 Atl. 600 (1932).

157. 18 Pa. 278 (1852).

158. Id. at 280.

159. Tustin v. Philadelphia & Reading Coal & Iron Co., 250 Pa. 425, 95 Atl. 595 (1915).

160. 348 Pa. 488, 35 A.2d 418 (1944).

161. Id. at 491, 35 A.2d at 419.

After Pearlman's death, and after the policies had ripened into liquid cash, the creditor's liquidating trustee demanded participation in the proceeds and asserted that his waiver of participation was invalid. The case presented a clear opportunity to assert the *validity* of the fiduciary's abandonment of an estate claim, even though abandonment may have been *improper*.

The Pennsylvania court noted, first, that the fiduciary's common-law power to compromise and abandon claims was unfettered. But, the liquidating trustee argued, this was neither compromise nor abandonment; it was, he said, a gift of estate assets. The court did not agree, and held for the creditors' trust, but its opinion clearly implied that, if the liquidating trustee had acted imprudently, his waiver of participation would have been invalid.[162] The dissenters, in fact, argued that the waiver was invalid because the liquidating trustee should have borrowed money and continued participation in the life insurance arrangement—in other words, that the waiver was invalid because of the fiduciary's imprudent action.[163] Neither opinion suggests a distinction between validity and propriety, even though, in this case, the fiduciary obviously had power to waive participation. The court should have made that distinction, as it was made in New York; it should have held the waiver of the liquidating trustee binding and final, absent a showing of bad faith on the part of the trustee for creditors. Its failure to do so increased the confusion that had already been imposed on the language of the *Struthers* opinion. A later opinion from the same court fortunately suggests that invalidity of a settlement agreement is not established without clear and convincing evidence of fraud on the part of the third party,[164] but that opinion does not entirely remove the *Pearlman* confusion from Pennsylvania trust law.

By and large, though, it appears to be the law that validity is protected if the settlement is accomplished by good faith on the part of the third party. If the fiduciary acts imprudently, he is open to surcharge on accounting. This exposure can be eliminated by prior judicial approval of the settlement. If the fiduciary acts fraudulently, he is open to surcharge on accounting, and exposure to surcharge for fraud is not eliminated by prior judicial approval.[165]

162. Id. at 491-93, 35 A.2d at 419-20.

163. Id. at 494, 497-99, 35 A.2d at 421-23.

164. Murdoch v. Murdoch, 418 Pa. 219, 210 A.2d 490 (1965). See Yoffe Estate, 9 Pa. D. & C.2d 281 (Orphans' Ct. 1956).

165. Cases that directly involve either actions to enforce compromise agreements or actions that collaterally attack them generally support the valid-except-for-fraud conclusion where the agreements have had prior judicial approval, where they have been approved on accounting, and where they have not been judicially

### D. *Express Powers To Compromise Claims in Instruments*

*Dumaine v. Dumaine*[166] is to powers clauses in instruments what *Claflin v. Claflin*[167] is to trust termination or *Harvard College v. Amory*[168] to trust investment; it is a fiduciary beacon, shining out from Massachusetts, guiding almost everybody. *Dumaine* did not involve trustees' powers to compromise claims, but it opened the door for *Edelstein v. Old Colony Trust Co.*,[169] which did. In *Dumaine*, the Massachusetts court found that a broad power to allocate proceeds between income and principal dispenses with statutory guidelines for fiduciaries. "[W]hen a settlor reposes a discretion in a trustee, he does so because he desires the honest judgment of the trustee, perhaps even to the exclusion of that of the court."[170] The court held that it could not interfere with the trustee there, even though he had allocated a capital gain to the trust's income account.

---

approved. See, as to the proposition that the agreements are valid unless fraudulent, Dockery v. Central Ariz. Light & Power Co., 45 Ariz. 434, 45 P.2d 656 (1935); Jasper v. Thomas, 124 Kan. 163, 257 Pac. 714 (1927) (applying Missouri law); Boxill v. Maloney, 342 Mass. 399, 173 N.E.2d 283 (1961); Beede v. Old Colony Trust Co., 321 Mass. 115, 71 N.E.2d 882 (1947); Matter of Estate of Gardiner, 204 Misc. 884, 126 N.Y.S.2d 121 (Surr. Ct. 1953). See also Anderson v. Clough, 191 Ore. 292, 230 P.2d 204 (1951). On the use of specific enforcement and other forms of equitable relief see Cook v. Richardson, 178 Mass. 125, 59 N.E. 675 (1901); Burtman v. Butman, 94 N.H. 412, 54 A.2d 367 (1947); Matter of Estate of Finkelstein, 1 Misc. 2d 1067, 148 N.Y.S.2d 217 (Surr. Ct. 1955), aff'd mem., 6 App. Div. 2d 1055, 179 N.Y.S.2d 662 (2d Dep't 1958). Cf. Beede v. Old Colony Trust Co., 321 Mass. 115, 71 N.E.2d 882 (1947); Coffin v. Cottle, 21 Mass. (4 Pick.) 454 (1827). But see Bartlett v. Slater, 211 Mass. 334, 97 N.E. 991 (1912); Amato v. City of New York, 36 Misc. 2d 899, 233 N.Y.S.2d 951 (1962). Fraud vitiates an agreement of settlement. Alabama Co. v. Brown, 207 Ala. 18, 92 So. 490 (1921); Pittsburgh, C., C. & St. L. Ry. v. Gipe, 160 Ind. 360, 370, 372, 65 N.E. 1034, 1038-39 (1903) (dicta). Cf. Guthrie v. Gaskins, 184 Ga. 537, 192 S.E. 36 (1937); Campbell v. Atlanta Coach Co., 58 Ga. App. 824, 826, 200 S.E. 203, 205-06 (1938). Several cases indicate a rigorous definition of fraud for these purposes. Jones v. Jones, 297 Mass. 198, 7 N.E.2d 1015 (1937); Matter of Estate of Bush, 53 Wash. 2d 67, 330 P.2d 573 (1958), cert. denied, 360 U.S. 911 (1959). See Matter of Estate of Trapani, 21 Ill. App. 2d 19, 157 N.E.2d 83 (1959); Kinion v. Riley, 310 Mass. 338, 37 N.E.2d 984 (1941). There are a few disturbing examples of judges going deeper than the fraud issue in an action to enforce or to attack agreements of compromise. Carr v. Illinois Cent. R.R., 180 Ala. 159, 60 So. 277 (1912) (validity of fiduciary's letters); Morris v. Boyd, 110 Ark. 468, 162 S.W. 69 (1913) (comparison of terms of settlement with terms of will); Moeller v. Poland, 80 Ohio St. 418, 89 N.E. 100 (1909) (reviewing prudence of agreement). See Upton v. Dennis, 133 Mich. 238, 94 N.W. 728 (1903) (discussing adequacy of consideration). Morris v. Boyd, 110 Ark. 468, 162 S.W. 69 (1913), and Belcher v. Cobb, 169 N.C. 689, 86 S.E. 600 (1915), distinguish between a compromise and a gift by the fiduciary to a third person. See also Pullins' Adm'r v. Smith, 106 Ky. 418, 50 S.W. 833 (1899).

166. 301 Mass. 214, 16 N.E.2d 625 (1938).
167. 149 Mass. 19, 20 N.E. 454 (1889).
168. 26 Mass. (9 Pick.) 446 (1830).
169. 336 Mass. 659, 147 N.E.2d 193 (1958).
170. 301 Mass. at 222, 16 N.E.2d at 629.

*Edelstein,* twenty years later, was a dispute between a decedent's executor and widow and his other distributees. The underlying issue involved an antenuptial agreement, but the specific issue centered around the executor's compromise with the widow on claims arising from the antenuptial agreement and on the valuation of an insurance business which was the estate's principal asset. Distributees other than the widow petitioned to remove the executor for an imprudent compromise. The executor countered with a petition to the trial court to approve the compromise. He pointed to a sentence in the will: " 'My executor and trustees . . . shall have the power to compound or compromise any debts owing to the executor or trustees or any other claims, and to pay any debts or claims against the executor or trustees upon any evidence which to them shall seem sufficient.' "[171]

The Massachusetts court thought that *Dumaine* compelled recognition of the principle that this express language made it inappropriate to substitute judicial discretion for fiduciary discretion on the propriety of the compromise. Only dishonesty or fraud would justify interference with that discretion. The court went on to note that the trial judge had approved the compromise, and that the compromise had been found reasonably prudent within the guidelines set in Section 192 of the Restatement of Trusts, and that these circumstances made the compromise appropriate even in the absence of express fiduciary power in the instrument.

The consequence of *Edelstein*'s extending the *Dumaine* principle to powers to compromise claims seems to be that the fiduciary with an express power has the same protection—and can give the same protection to third parties dealing with him—as he would have with prior judicial approval of the compromise. I have been able to find no authority expressly making that transference, but there are a number of cases,[172] from a number of jurisdictions, which are consistent with it, and obviously place significant weight on the fact that instruments involved in those cases contained express powers. Cases from the few jurisdictions that hold that prior judicial approval of compromises is essential seem to indicate that express powers in the instrument would dispense with the statutory requirement and restore to the fiduciary

171. 336 Mass. at 662, 147 N.E.2d at 196-97.

172. Burgess v. Nail, 103 F.2d 37 (10th Cir. 1939); Second Nat'l Bank v. Woodworth, 66 F.2d 170 (6th Cir. 1933) (applying Michigan law); Brackett v. Middlesex Banking Co., 89 Conn. 645, 95 Atl. 12 (1915). See Sargent, Sins of Oversight in Wills and Trusts, 30 B.U.L. Rev. 301, 305 (1950), in which a Massachusetts estate-planner finds an express power to compromise claims essential to a well-drafted will.

his common-law power to compromise.[173] Whether those opinions can be stretched so far as to say that an express-power clause has the same effect judicial approval would have in those states is probably debatable.[174]

### *E. Preliminary Conclusion and Some Conjecture on the New Fiduciary Powers Statutes*

Enough has been developed from the cases to justify a preliminary conclusion on the two immediate consequences of a fiduciary's power to compromise claims—validity and propriety:

1. At common law, a compromise is *proper* only if prudently made, in good faith, for the best interests of the fiduciary estate. If the settlement is imprudent, or made in bad faith, or not in the best interests of the estate, the fiduciary is exposed to surcharge. Absent bad faith in the person with whom the fiduciary compromised, however, the compromise is valid.

2. If the jurisdiction has a statute providing for prior judicial approval of the compromise, and if the fiduciary complies with the statute, the compromise is *valid* if the third party entered it in good faith, even in those jurisdictions which make its validity subject to prudence and estate benefit when prior judicial approval is not obtained. The third party is protected from anything except his own participation in a breach of trust. And the fiduciary is protected from surcharge if *he* acted in good faith. He need not fear surcharge for imprudence or lack of estate benefit; the compromise, judicially approved in advance, is *proper.*

3. Despite the existence of statutes providing for judicial approval of settlements, the fiduciary who acts without judicial approval is no worse off than he would be at common law. That is, both the *validity* and the *propriety* of the settlement are open on accounting. Even in those jurisdictions which require prior judicial approval, courts will approve settlements *nunc pro tunc*, if the fiduciary, on accounting, demonstrates good faith, prudence, and benefit to the estate.

---

173. Turk v. Grossman, 179 Md. 229, 17 A.2d 122 (1941); Wayland v. Pendleton, 337 Mo. 190, 85 S.W.2d 492 (1935).

174. Wayland involved an express power to sell assets to pay legacies; the court held this inapplicable to the compromise it was considering because the legacies had already been paid. Turk involved a catch-all powers clause, about which the court said:

> An authorization in the will to the executors to do all that the testator might do personally could not, as the court interprets it, be taken to authorize their making any addition to a debt by the estate. There are many acts which a testator might do personally, such as the complete release of a debt, which nobody would include within that authority, and we think the addition to the claim here is equally outside of it.

179 Md. at 234-35, 17 A.2d at 124.

4. Fiduciaries who are not included in statutes on prior judicial approval may, in most states, submit compromises for judicial approval. Approval operates in their cases the same as it operates on fiduciaries who are under the statutes. However, states that require prior judicial approval of some fiduciary compromises apparently treat fiduciaries who are not under the statute as they would be treated at common law.

5. Procedural machinery for prior judicial approval is typical of single-purpose, fiduciary-power statutes. Modern comprehensive fiduciary-power statutes contain no provisions for prior judicial approval of compromises. Modern statutes adopting or similar to the Uniform Trustees' Powers Act, however, often contain express protection of third persons, and thus apparently assure validity to those persons who act in good faith.

6. Clauses in instruments that expressly confer broad powers of compromise operate the same way prior judicial approval operates—that is, a fiduciary who acts within an express power is assured of *validity* and *propriety*, if he acts in good faith. (There is a certain compelling logic about this conclusion, and no authority dead against it. However, authorities directly supporting it are something less than overwhelming.)

The question remaining for discussion here is whether express powers in modern, comprehensive powers statutes have the same effect express powers in instruments have. In other words: *Will the* Edelstein *principle extend to compromises under an express statutory power thereby assuring validity and propriety to all compromises in the absence of bad faith?*

It is radical, but safely radical, to predict that the power to compromise stated in the Uniform Trustees' Powers Act will be construed to extend the *Edelstein* principle. That act, now that Professor Fratcher is finished with it, contains a broad prudent-man standard, conferring undefined trustee powers in addition to those stated—"a trustee has the power to perform, without court authorization, every act which a prudent man would perform for the purposes of the trust . . . ."[175] In addition to that, it contains broad language protecting third parties when they deal in good faith with the fiduciary.[176] The express power to compromise

175. Uniform Trustees' Powers Act § 3(a), in The National Conference of Commissioners on Uniform State Laws, 1964 Handbook 267.

176. With respect to a third person dealing with a trustee or assisting a trustee in the conduct of a transaction, the existence of trust powers and their proper exercise by the trustee may be assumed without inquiry. The third person is not bound to inquire whether the trustee has power to act or is properly exercising the power; and the third person, without actual knowledge that the trustee is exceeding his powers or improperly exercising them, is fully protected in dealing with the trustee as if the

claims,[177] plus the prudent man power, plus third-party protection, ought surely to be as broad in effect as the express clause in the *Edelstein* instrument was—that is, it ought to protect fiduciaries and third parties alike from any defect except bad faith.

The new New York Fiduciaries' Powers Act[178] lacks the prudent-man power and the broad third-party protection. Extension of *Edelstein* in New York therefore may appear more debatable. However, the *Scully* rule obtains in New York, under which third parties are protected when they deal in good faith, and that judge-made standard would seem to cover most of what, for present purposes, Section 7 of the Uniform Trustees' Powers Act covers. In addition, the language of the power to compromise claims in the New York act is broad, and it covers all kinds of fiduciaries.[179] Also, the New York courts have held for a long time that fiduciary power to compromise claims at common law is intact there.[180] These factors point at least to the protection of third parties, if not to the equivalent of a prudent-man standard protecting fiduciaries.[181]

From the standpoint of facilitated compromises and the security of transactions, it may be regrettable that neither the uniform act nor the New York act contains something equivalent to Section 61 of the English Trustee Act, 1925,[182] which provides:

> If it appears to the court that a trustee . . . is or may be personally liable for any breach of trust . . . but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which he committed such breach, then the court

---

trustee possessed and properly exercised the powers he purports to exercise. A third person is not bound to assure the proper application of trust assets paid or delivered to the trustee.

Uniform Trustees' Powers Act § 7, supra note 175, at 271.

177. A trustee has power . . .
(19) to pay or contest any claim; to settle a claim by or against the trust by compromise, arbitration, or otherwise; and to release in whole or in part, any claim belonging to the trust to the extent that the claim is uncollectible.

Uniform Trustees' Powers Act § 3(c)(19), supra note 175, at 269.

178. N.Y. Deced. Est. Law. § 127(2)(q) (Supp. 1965).

179. In the absence of contrary or limiting provisions in the order or decree appointing a fiduciary or the will, deed or other instrument, or a subsequent court order or decree, every fiduciary is authorized . . .
(q) to compromise, contest or otherwise settle any and all claims in favor of the estate, trust or fiduciary or in favor of third persons and against the estate, trust or fiduciary.

Ibid.

180. See notes 145-51 supra.

181. But see Hendrickson, The New Fiducuaries' Powers Act, 37 N.Y. St. B.J. 338, 341-42 (1965), where it is suggested that express powers clauses in New York instruments will henceforth be strictly construed.

182. 15 & 16 Geo. 5, c. 19.

> may relieve him either wholly or partly from personal liability for the same.

Professor Fratcher brought that provision to the attention of the Uniform Commissioners, but the final draft of the uniform act did not contain it.[183]

The reasoning by which the New York act might be held to require the extension of the *Edelstein* principle would seem to obtain in those states which adopted the old Uniform Trust Administration Act, or some sort of broad powers statute equivalent to it.[184] In those states, to be sure, the extension will require equating express statutory power—which is broad—with express power in the instrument. *Edelstein* only equates express power in the instrument with prior judicial approval. But the equation in the first case is no greater than the equation in the second case, and will be made if at all in states which have already held that the common-law power to compromise claims is intact.[185]

If the radical conjecture that would extend *Edelstein* in New York and in states with the uniform act is plausible, it should be a small matter to add to it the incorporation-by-reference statutes in Tennessee, North Carolina, and Arkansas. There a simple adoption of *Edelstein* would accomplish the extension, since the purpose of the incorporation-by-reference statutes is simply to save the draftsman time.[186] When powers under the statutes are incorporated, they are, for all purposes, express powers in the instrument.

The conclusion that all these varieties of modern statutes will be construed to extend the *Edelstein* principle to all fiduciaries covered by the statutes is logically compelling. If they are not construed that way, two untoward results—results that are not consistent with the aspirations of these new statutes—will follow:

First, in states that have had judicial-approval statutes covering the same fiduciaries, the fiduciary will have less protection than he used to have (where the old statutes are repealed), or will have no more power with the same opportunity for prior approval (where the old statutes are not repealed). In other words—as to powers to compromise claims—the statutes will either reduce fiduciary protection or accomplish nothing at all.

Second, in states where the new statutes cover one kind of

183. Professor Fratcher discussed his efforts during the summer workshop for trust teachers at the New York University School of Law, August 1965.

184. See notes 122-23 supra.

185. See note 154 supra.

186. See Trautman, Decedents' Estates, Trusts and Future Interests, 17 Vand. L. Rev. 1027, 1031 (1964).

fiduciaries (trustees, for instance), and older statutes cover others (personal representatives, for instance), fiduciaries under the new statutes will have less protection than fiduciaries under the old.

Yet, as untoward as these results may seem to be, they may be preferable to immunizing fiduciaries from any prudential review of their compromise of claims—and by that I mean, in plain language, any say-so from the real "owners" of the trust, the beneficiaries. That result, given the present state of allowable administrative discretion in fiduciaries, is likely to follow if the *Edelstein* principle is extended to powers to compromise in the modern powers statutes. The possibility of some happier resolution is the subject of what follows.

## III

### Powers To Compromise Claims and the Owners of the Trust Property

In a way, the fiduciary's power to compromise claims can be stretched onto a descending scale of fiduciary discretion, ranging from the common law of *Blue v. Marshall* to the broadest probable construction of Section 3(c)(19) of the Uniform Trustees' Powers Act. At any point, though, it is fair to say that the fiduciary has a significant amount of discretion. (This is true even in those states where prior judicial approval is required but may be given *nunc pro tunc.*) The remaining question is the extent to which this discretion may be controlled—by judges, by beneficiaries, and by beneficiaries who resort to judges.

Any discussion of the allowable discretion of fiduciaries should make a preliminary distinction between *dispositive discretion* and *administrative discretion.* When the discussion centers on *dispositive discretion,* there is no doubt that courts review the use of fiduciary judgments, and that they do it, of course, at the behest of beneficiaries. This is a necessary corollary of the adoption of the *Claflin* rule.[187] Trusts on this side of the Atlantic are not subject to termination at the behest of adult beneficiaries; they may not be terminated as long as a "material purpose" of the trust remains to be accomplished.[188] Beneficiaries have therefore lost the most potent leverage they have over the conduct of the trustee—the threat to terminate the trust. Trusts in this country are in a much more immediate sense subject to the dead hand of the settlor. (It is, usually, dead.)[189]

187. See Claflin v. Claflin, 149 Mass. 19, 20 N.E. 454 (1889).
188. 3 Scott, Trusts § 337, at 2446-47 (2d ed. 1956).
189. See Friedman, The Dynastic Trust, 73 Yale L.J. 547 (1964).

But the fact remains—and I take it that it is enough more than a theory to be called a fact—that the property in the trust "belongs" to the beneficiaries; it is their property.[190] This has been elementary to the trust for five centuries, and, indeed, the whole concept depends upon its being elementary. Therefore the trustee cannot deal with the property as if it were his own. The beneficiaries must have some voice in what is done with it. The rubric protecting beneficiaries in this country is abuse-of-discretion and the forum in which the rubric has been invoked is equity. Judges, that is, have a right to overrule fiduciary discretion when it is abused.

This is, according to the Restatement of Trusts and Professor Scott, an imposition upon the trustee of a duty to act "in that state of mind in which it was contemplated by the settlor that he should act."[191] The formula has been invoked often enough in courts of last resort that it can now be considered more than simply a scholarly conclusion.[192] It is one of Professor Scott's monumental contributions to the law of trusts. And it obtains whether the instrument vests discretion in limited terms or in absolute terms. Professor Halbach's study of judicial control of fiduciary discretion demonstrates that the fiduciary is almost always limited—regardless of what the instrument says.[193]

But an investigation of the cases in which this formula has been invoked, and in which fiduciaries have been forced to act against their own discretionary decisions, discloses that they are *dispositive discretion* cases. They involve things like invasion of principal and discretionary allocation of income. They do not involve decisions on investment, or decisions on sales or mortgages of trust property, or decisions on whether or not to compromise claims. The state-of-mind principle, in other words, tends to be ignored or only invoked theoretically when the discussion is one involving *administrative discretion;* it is irrelevant in a discussion of fiduciary discretion in compromising claims, which is clearly a matter, not of dispositive but of administrative discretion. Neither the state-of-mind rubric nor Professor Halbach's somewhat broader formulation has been given any bearing in these cases. Decisions from three significant jurisdictions—New York, California, and Pennsylvania—illustrate the distinction.

190. Cf. the distinction between "ownership" and "title" in Restatement (Second), Trusts § 2, comment d (1959).

191. 2 Scott, Trusts § 187, at 1375-76 (2d ed. 1956).

192. Id. § 187 n.2.

193. See Halbach, Problems of Discretion in Discretionary Trusts, 61 Colum. L. Rev. 1425 (1961).

### A. New York

Helen D. Geffen left her entire estate in trust for her daughter, Melinda. Melinda was life beneficiary and remainderman; no one else had any possibility of sharing in Helen's estate, except through Melinda. The executor of Helen's estate, a bank, entered into litigation with Melinda's father over an income-tax contribution claim which, the executor said, might have involved the recovery for the estate of as much as $521,800. Melinda's father offered to settle this litigation for $12,500, but the executor refused. Melinda then brought a petition in surrogate's court to compel the compromise; the executor moved to dismiss, which motion the surrogate granted in *Matter of Estate of Geffen.*[194]

The reason Melinda petitioned, the surrogate noted, was noneconomic; it arose from the "normal and affectionate relationship" she had with her father. The litigation between him and the estate had "placed a strain upon this relationship" and Melinda concluded that the family advantages of accepting her father's offer of compromise were greater than the purely economic advantages, if any, of continuing it. Not only that, but Melinda offered to release the executor from any liability it might incur for accepting the compromise.

The surrogate obviously sympathized with Melinda, but found, on good authority, that his power to control the conduct of fiduciaries "does not permit the Surrogate to substitute his judgment and discretion for that of the fiduciary." It was, he said, a "well established rule" in New York that "the court may not interfere with the exercise of judgment and discretion on the part of a fiduciary."[195]

The surrogate made it clear, however, that he dismissed the petition only because of the certain fate of his ruling on appeal. "This decision is based upon the lack of authority to grant such relief and is not to be construed as in any way approving of the action of the executor." He added that his ruling was "without prejudice to the right of the beneficiary to hold the fiduciary accountable for its acts and transactions and to object to any loss or expense that might result to this estate by reason of the litigation."[196] He finished his written opinion with a lecture to the executor on its duty to ignore the possibility of greater fees for itself in continuing the litigation.

The surrogate in *Geffen* read the New York authorities on the matter well. The first indication that the fiduciary's discretion

194. 25 Misc. 2d 734, 202 N.Y.S.2d 599 (Surr. Ct. 1960).
195. Id. at 736, 202 N.Y.S.2d at 601-02.
196. Id. at 737, 202 N.Y.S.2d at 603.

in compromising claims was not subject to judicial interference appears in an 1828 opinion of what was then the New York Court of Errors.[197] The rule was clearly stated in an 1845 chancery opinion, which emphasized that "the only proper course . . . is to leave it to the executor, under his oath of office faithfully and honestly to discharge the duties of executor."[198] The chancellor, like the surrogate in *Geffen*, then lectured the fiduciary before him on his duties, noting that unwise compromises and unwise refusals to compromise would be open on accounting. He said, without citation of authority, that his decision was consistent with the decisions of "the ecclesiastical courts in England."[199]

In 1866, the court of appeals refused to allow the statute on removal of trustees to be used to force an executor to exercise his discretion.[200] More direct authority in 1929 denied to a surrogate the jurisdiction to force a fiduciary to submit a proposed compromise for prior judicial approval. The prior-approval statute, the court there said, "creates a privilege for executors and trustees, not an obligation upon them. . . . The surrogate has no authority upon the petition of a claimant to compel executors to petition for the consummation of a settlement which they disapprove."[201]

The court of appeals extended the principle to cases, where co-fiduciaries disapproved of compromises in 1932,[202] and a surrogate applied it where beneficiaries objected to a compromise three years later;[203] in both cases the court refused to prevent a compromise. The latter opinion noted that the surrogate "is wont on occasion to adopt a somewhat paternalistic attitude toward the administration of estates . . . ."[204]

The issue was central to a 1942 case in the appellate division, in which an administrator refused to take a deed in lieu of foreclosure, over the protestations of one of the estate beneficiaries.[205]

197. Murray v. Blatchford, 1 Wend. 583 (N.Y. Ct. Err. 1828).

198. Matter of Parker, 1 Barb. Ch. 154, 156 (N.Y. 1845).

199. Id. at 155.

200. Wood v. Brown, 34 N.Y. 337 (1866). Cf. In re Scott, 1 Red. 234 (N.Y. Surr. Ct. 1877). Accord, May v. Sansberry, 119 Ind. App. 523, 86 N.E.2d 88 (1949).

201. Matter of Estate of Corbin, 227 App. Div. 87, 90, 236 N.Y. Supp. 653, 656 (1st Dep't 1929).

202. Matter of Estate of Leopold, 259 N.Y. 274, 181 N.E. 570 (1932). See In re Slifka's Will, 205 N.Y.S.2d 395 (Surr. Ct. 1960).

203. Matter of Estate of Lester, 155 Misc. 536, 280 N.Y. Supp. 341 (Surr. Ct. 1935).

204. Id. at 537, 280 N.Y. Supp. at 343. See Matter of Estate of Van Valkenburgh, 164 Misc. 295, 298 N.Y. Supp. 819 (Surr. Ct. 1937), one of a series of cases in which New York surrogates refuse to give fiduciaries "business advice." See also Brown v. Brown, 72 N.J. Eq. 667, 65 Atl. 739 (Ch. 1907) (adopting a similar position).

205. Matter of Tompkins, 264 App. Div. 612, 35 N.Y.S.2d 880 (2d Dep't 1942).

In that opinion, which formed the principal basis of the surrogate's judgment in *Geffen*, the court pointed to the nineteenth century New York discussion of the question, and concluded that the surrogate was "without power to enjoin the administrator . . . and to direct him to dispose of the controversy . . . ." The statutory power of surrogates "does not extend to control of . . . fiduciaries in the orderly discharge of their duties to the extent of compelling them to prosecute or defend actions. . . ."[206] One member of that court dissented, and another concurred specially with a warning to the fiduciary of his exposure to surcharge on accounting.[207] It appears, therefore, that a surrogate's only power over compromises is consequent to petitions by the fiduciaries, and it stops at mere consideration, in that proceeding, of whatever objections are raised by beneficiaries.[208] The beneficiary's only other recourse in New York is a petition for surcharge which will, typically, arise long after the compromise is concluded, or the opportunity to compromise lost, and in which his only relief is economic—the sort of relief that Melinda Geffen was willing to surrender in favor of family harmony.

### *B. California*

The California authorities focus in a 1965 opinion of the appellate court, which held probate courts in that state without jurisdiction to impose a compromise at the behest of an estate creditor.[209] "The case law holds that the power is restricted to the administrator or executor," the court said,[210] with good support from a line of cases reaching back to a 1934 decision of the California Supreme Court.[211] These authorities hold that the statute in California restricts probate court power to approval of compromises at the petition of the fiduciary. The rule is to some extent bound up with a judge-made restriction on the probate court's power to *enforce* agreements of settlement—a problem somewhat tangential to the court's power to compel settlement[212] —but it extends to the exaltation of fiduciary discretion where

206. Id. at 613, 35 N.Y.S.2d at 881. See Matter of Estate of Amo, 264 App. Div. 516, 35 N.Y.S.2d 808 (4th Dep't 1942); In re Stella's Estate, 81 N.Y.S.2d 579 (Surr. Ct. 1948).

207. 264 App. Div. at 614, 35 N.Y.S.2d at 882.

208. See In re Patenotre's Estate, 138 N.Y.S.2d 899, 904 (Surr. Ct. 1955).

209. In re Estate of Majtan, 46 Cal. Rptr. 561 (Dist. Ct. App. 1965).

210. Id. at 570.

211. McPike v. Superior Court, 220 Cal. 254, 30 P.2d 17 (1934).

212. See Estate of Boyd, 212 Cal. App. 2d 634, 28 Cal. Rptr. 258 (Dist. Ct. App. 1963).

beneficiaries object to settlement,[213] and in a number of other situations.[214]

### C. *Pennsylvania*

Pennsylvania authority centers in two recent decisions, one from the Pennsylvania Supreme Court, one from a trial judge. Neither presents as aggravated a factual situation as one finds in *Geffen* and in some of the California cases, and the indication in the Pennsylvania opinions is that facts like those in *Geffen* are open to contrary decision in that state. The supreme court case, *Bailey Estate*,[215] was a petition in the alternative—either to remove the administratrix or to force her to settle a claim. The administratrix was a one-fifth estate beneficiary; the compromise offer was $14,000, on a doubtful and doubtfully collectible debt of $300,000 owed the estate. The court affirmed, per curiam, on the trial court's opinion,[216] an orphans' court decree removing the administratrix. The orphans' court judge thought removal was indicated and said he did not have to reach the question of compromise approval. He did, however, comment that a petition for approval of compromise was "premature" because brought by four-fifths of the distributees, and not by the administratrix.

On the removal point, the trial judge in *Bailey* said the administratrix was shown to be incapable of an independent judgment on the offer of compromise. It is not entirely clear why the compromise was so advantageous to the estate that a denial of it indicated clouded judgment, but the judge said he was "satisfied that she cannot exercise the objective judgment required of her . . . ."[217] The decision is therefore explainable as holding that no fiduciary judgment was exercised, rather than that judicial discretion had to be substituted for fiduciary discretion.

The later Pennsylvania decision, *Trumbauer Estate*,[218] arose out of a business-purchase contract between the decedent and his grandson. The decedent's will provided that, if the grandson was unable to pay the balance due under the contract, the executor should grant him an interest-free purchase money mortgage. The

213. Estate of Wilson, 116 Cal. App. 2d 523, 253 P.2d 1011 (Dist. Ct. App. 1953); Estate of Newmark, 67 Cal. App. 2d 369, 154 P.2d 20 (Dist. Ct. App. 1944).

214. Estate of Green, 145 Cal. App. 2d 25, 301 P.2d 889 (Dist. Ct. App. 1956); Estate of Vedder, 121 Cal. App. 2d 402, 263 P.2d 59 (Dist. Ct. App. 1959). See also Bryne v. Harvey, 211 Cal. App. 2d 92, 27 Cal. Rptr. 110 (Dist. Ct. App. 1962); Estate of Coffey, 161 Cal. App. 2d 259, 326 P.2d 511 (Dist. Ct. App. 1958); In re Lucas' Estate, 137 P.2d 709 (Cal. Dist. Ct. App.), aff'd, 23 Cal. 2d 454, 144 P.2d 340 (1943).

215. 409 Pa. 222, 186 A.2d 1 (1962).

216. Reported at 186 A.2d 2-4.

217. Id. at 3.

218. 33 Pa. D. & C.2d 335 (Orphans' Ct. 1964).

grandson claimed the mortgage was appropriate; the executor contended the grandson was able to pay the balance due and that the will clause was therefore not applicable. The distributees of the estate, who were before the court, were divided on the issue. The grandson petitioned for a decree compelling the compromise, under Section 513 of the Fiduciaries Act,[219] which permits such a petition by "any party in interest." Despite the standing provision, however, the trial judge held that the statute did not permit judicial interference with fiduciary discretion. The fiduciary must either *join* in the petition for approval or *consent to it*, the court said. "It was never intended that the privileges provided by this section should inure to any third party either directly or indirectly, but they are solely for the protection of the fiduciary."[220]

In any event, the court said, a judicial decree authorizing the compromise would be only permissive; the fiduciary would not be bound to follow it. From *Bailey*, the court took warrant for a stern warning to the executor; he may not be subject to compulsory settlement, but he is subject to removal if he acts improperly. "If a personal representative refuses to enter into a compromise and such refusal appears to be arbitrary, unreasonable and clearly contrary to the best interests of the estate, such circumstances in themselves may be sufficient ground for the fiduciary's removal."[221]

The Pennsylvania cases are not so rigorous as are the New York and California cases. *Bailey* leaves open the possibility of removal as an alternative to compulsory settlement—a potent lever which both New York[222] and Indiana[223] authorities seem to have foreclosed. *Trumbauer* can be explained on the ground that not all of the beneficiaries agreed on the proposed settlement, and on the further ground that the decedent arguably delegated to the executor a special discretion in deciding when the alternative means of payment should be invoked.

The general tenor of American case authority—what there is of it—seems to be consistent with these three lines of cases. A couple of cases seem directly in point;[224] most of the others found only imply or state in dicta that judges must not interfere with fiduciary discretion in compromising claims,[225] and there is a cer-

219. Pa. Stat. Ann. tit. 20, § 320.513 (1964).

220. 33 Pa. D. & C.2d at 341.

221. Id. at 343-44. See also Prusak Estate, 29 Pa. D. & C.2d 329 (Orphans' Ct. 1963); Crawford's Estate, 20 Pa. D. & C. 186 (Orphans' Ct. 1933), aff'd, 321 Pa. 131, 184 Atl. 1 (1936) (vacating approval of compromise).

222. Wood v. Brown, 34 N.Y. 337 (1866).

223. May v. Sansberry, 119 Ind. App. 523, 86 N.E.2d 88 (1949).

224. Bankers Trust Co. v. Hess, 2 N.J. Super. 308, 314, 63 A.2d 712 (Ch. 1949) (power to compromise given in will); Bingham v. Walker Bros., 75 Utah 149, 283 Pac. 1055 (1929).

225. Oles v. Furlong, 134 Conn. 334, 343, 57 A.2d 405, 409 (1948); Slusher

tain amount of authority that tends—but only tends—to an opposite conclusion,[226] some of it in the same jurisdictions.[227] Some of the authority that seems to support a relatively rigorous position against judicial interference can be explained as in part protection of broad express powers;[228] and some of the authority tending in the other direction may be no more than a rigid insistence on the rights of the beneficiaries to raise questions of proper compromise in the fiduciary's accounting.[229]

A pair of cases from Minnesota indicate that a position in favor of beneficiaries may be taken in that state. The most conspicuous is the *Mayo* trust case,[230] in which the court permitted deviation from express restrictions on investment, at the suit of the *beneficiaries*, which suit was resisted by the trustees. That case is not a compromise-of-claims case, but it is arguably an administrative-discretion case. The other Minnesota case, *In re Estate of Parcker*,[231] is quite complex on its facts and seems finally to decide only a small point of pleading. A settlement made by the sole heir of an estate was upheld, but possibly only because objection to the settlement had been waived in the trial court. For whatever force it has, the headnote writer thought the case stood for the proposition that an administratrix could not object to a settlement that had been ratified by the sole heir;[232] if that were true—and it exaggerates the holding to say it is—Minnesota could be said to have decided directly contrary to *Geffen*.

## IV

## CONCLUSION

Whatever the faint judicial murmuring to the contrary, most of the case law points unmistakably to the conclusion that courts

v. Weller, 151 Ky. 203, 151 S.W. 684 (1912); May v. Sansberry, 119 Ind. App. 523, 86 N.E.2d 88 (1949); Brewer v. King, 212 Iowa 665, 237 N.W. 508 (1931).

226. McCullum v. Gavin, 206 Miss. 151, 39 So. 2d 859 (1949). A line of Massachusetts cases is fairly promising. Price v. Price, 204 N.E.2d 902 (Mass.), cert. denied, 382 U.S. 820 (1965); Steward v. Commissioner of Corps. & Taxation, 200 N.E.2d 460 (Mass. 1964); Price v. Price, 341 Mass. 390, 170 N.E.2d 346 (1960).

227. Griffin v. Sturges, 131 Conn. 471, 482, 40 A.2d 758, 762 (1944); Bourne's Ex'r v. Edwards, 223 Ky. 35, 2 S.W.2d 1053 (1928) (heirs' compromise enforced over objection of executor); In re Estate of Fleming, 228 Iowa 665, 293 N.W. 511 (1940).

228. See Dumaine v. Dumaine, 301 Mass. 214, 16 N.E.2d 625 (1938).

229. In re Hutton's Estate, 92 Mo. App. 132 (1901); Protective Check Writer Co. v. Collins, 92 N.H. 27, 32, 23 A.2d 770, 774 (1942).

230. In re Trusteeship Under Agreement With Mayo, 259 Minn. 91, 105 N.W.2d 900 (1960).

231. 178 Minn. 409, 227 N.W. 426 (1929).

232. "A settlement in the probate court of certain claims having been ratified by the sole heir, the administratrix of the estate may not question the authority of the attorney who acted for the heir in making the settlement." Ibid.

will not interfere with fiduciaries who refuse to settle claims, or refuse to desist from settlements, at the behest of beneficiaries. The only certain remedy for bad settlements, or bad refusals to settle, is the accounting, which always comes too late to save anything but economic loss—and often too late for that. Aside from accounting, the judiciary has come up with nothing better than an occasional lecture.

The state of case law on administrative discretion raises a difficult dilemma for the new fiduciary powers statutes. On the one hand, logic and good sense (never precisely the same) indicate that the new statutes should be construed as the express power in *Edelstein* was construed. Fiduciaries who make good-faith compromises under the new statutes should not be surchargeable. In addition, third parties who make agreements with the fiduciaries should be assured of valid transactions.

On the other hand, judges refuse to let beneficiaries interfere with fiduciary compromises—even in cases where all equitable ownership is in the interfering beneficiary, an extreme that *Geffen* illustrates with painful clarity. This has been done by courts with the tacit or express assumption that stubborn insistence on compromise, or stubborn refusal to compromise, would be open on accounting.[233] But, if *Edelstein* is extended to statutory powers, as it should be, the assumption disappears. The result, unless *Geffen* and its kin are reconsidered, will be an airtight, unreviewable

233. A parallel can be found in cases involving settlements of personal injury claims by liability insurers. It occasionally happens that the insurer refuses to settle for an amount at or below the limits of the liability policy, with the result that the case goes to trial and judgment for an amount in excess of policy limits, which excess is a judgment against the insured. The insured may then have a cause of action against the insurer for its failure to settle the claim in such a way as to avoid the excess judgment. The courts seem to be divided on what the insured must show to sustain such a cause of action. Some courts have held that negligence in failure to settle is enough. Anderson v. St. Paul Mercury Indem. Co., 340 F.2d 406, 408 (7th Cir. 1965):

> [T]he liability issue was weak, the injuries were substantial and the demands made in the face of such extreme exposure were reasonable. These facts were sufficient to justify a jury in finding as this jury did that the liability insurer in handling the claim was negligently unreasonable in obdurately failing to negotiate a settlement and that its conduct created an undue risk to its insured.

The court there found for the insured, applying Indiana law. A year before it had held for the insurer, applying Illinois law. Both states, in the opinion of the federal court, key recovery to negligence. General Cas. Co. v. Whipple, 328 F.2d 353 (7th Cir. 1964). It is clear from these opinions, and earlier authority discussed in them, that the insurer is under a sort of fiduciary obligation to act for the best interests of the insured. If that analogy is not too far-fetched, it indicates a duty to compromise in a proper case, comparable to the duty that might be asserted on a trustee's accounting, as a ground for surcharge. Quaere: Would an action in equity lie to compel settlement when the underlying personal injury action is pending?

control of compromises by the fiduciary. As the surrogate in *Geffen* indicated, that is undesirable.

The alternative, if the *Edelstein* principle is not held back, is to permit beneficiaries to compel or forbid compromise—that is, to force the fiduciary to defend his judgment on the matter, at the time it arises, before a judge, and to leave final decision in the judge. This probably does not require that *Geffen* and the Pennsylvania and California cases be overruled. The new powers statutes so radically change the climate of powers to compromise that the precedents are simply no longer applicable.

One critical conclusion cannot be avoided, despite one's admiration for a noble legislative effort: The conclusion of the New York Commission on Estates, that section 127(2)(q) merely codified existing law,[234] underestimates the effect of the Commission's work.[235] That section and its counterparts outside New York promise someday to ask again an old and new question: Whose property is in the trust?

234. N.Y. Temporary Comm'n on Estates, Third Report 18-19 (1964).

235. See Hendrickson, The New Fiduciaries' Powers Act, 37 N.Y. St. B.J. 338 (1965); Horowitz, Uniform Trustees' Powers Act, 41 Wash. L. Rev. 1 (1966).