Justifying "Fees for Fees" in Fiduciary Compensation Litigation

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ABSTRACT

All authorities agree fiduciaries and their counsel are entitled to reasonable compensation for their services, but there is no consensus on whether attorney's fees incurred defending this compensation are a reimbursable expense of a fiduciary's administration. Known as "fees for fees," some jurisdictions disallow these fees because they deplete the trust or estate rather than directly increasing or preserving it. Other jurisdictions allow these fees because challenges to a fiduciary's commissions and fees impugn the fiduciary's stewardship and require them to prove they acted in accordance with the duty of care. If successful, the fiduciary's defense indirectly benefits the trust or estate because it vindicates the propriety of the fiduciary's administration.

Aside from a handful of trial court decisions, Pennsylvania has yet to wrestle with fiduciary fees for fees and the direct-indirect benefit dichotomy. Nevertheless, well-settled precedent recognizes a fiduciary's successful defense of a surcharge action as reimbursable from a trust or an estate for the same reasons invoked by jurisdictions that allow fees for fees. The successful defense of a surcharge action does not increase or preserve any assets, but it eliminates doubts about whether the fiduciary properly administered the trust or estate. This Article asserts the principles governing surcharge actions apply with equal force to fiduciary compensation litigation. Accordingly, this Article urges Pennsylvania courts to adopt the surcharge analogy as the basis for awarding fees for fees where a fiduciary successfully defends challenges to their commissions and attorney's fees.

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Table of Contents

> And since this business so fair is done,
> Let us not leave till all our own be won.
> —William Shakespeare[1]

I. INTRODUCTION

All authorities agree fiduciaries[2] and their counsel are entitled to reasonable compensation for their services.[3] However, no consensus exists on whether attorney's fees incurred to defend this compensation are a reimbursable expense of a fiduciary's administration.[4] Colloquially known as "fees for fees" or "fees on fees,"[5] several jurisdictions disallow such fees because they diminish the trust or estate rather than directly increasing or preserving it.[6] The availability of fees for fees may also

1. WILLIAM SHAKESPEARE, HENRY IV, PART ONE act 5, sc. 5, ll. 43–44.

2. This Article uses the words "fiduciary" and "fiduciaries" to refer to personal representatives of decedents' estates and trustees, both individual and corporate.

3. *E.g.*, 34 C.J.S. *Executors and Administrators* § 970 (2022); RESTATEMENT (THIRD) OF TRUSTS § 38(1) (AM. L. INST. 2003).

4. *See generally* Martin A. Heckscher, *Fees, Fees, Fees: A Blessing and a Bane, How to Charge, Collect and Defend Them*, 31 ACTEC J. 21, 32–36 (2005).

5. *E.g.*, 34 C.J.S. *Executors and Administrators* § 536 (2022).

6. *E.g.*, *In re* Sloan Estate, 538 N.W.2d 47, 49 (Mich. Ct. App. 1995).

discourage beneficiaries[7] from raising valid challenges to compensation claims for fear of depleting the trust or estate.[8] Thus, the bar on fees for fees acts as a much-needed tourniquet. Conversely, some jurisdictions maintain compensation litigation impeaches a fiduciary's stewardship and requires the fiduciary to prove they acted in accordance with the duty of care imposed on them by law.[9] If successful, the fiduciary's defense indirectly benefits the trust or estate because it vindicates the fiduciary's administration.[10] A fees-for-fees award in those cases prevents the unjust dilution of the compensation claimed by the fiduciary, their counsel, or both.[11]

In Pennsylvania, neither statute nor appellate decision have addressed fiduciary fees for fees.[12] Nonetheless, well-established precedent recognizes a fiduciary's successful defense of a surcharge action as reimbursable from a trust or an estate for the same reasons used to justify fees for fees. A "surcharge" is the "penalty for failure to exercise common prudence, common skill[,] and common caution in the performance of the fiduciary's duty and is imposed to compensate beneficiaries for loss caused by the fiduciary's want of due care."[13] The most common surcharge actions fiduciaries face involve claims of mismanagement,[14] self-dealing,[15] and failing to vouch their accounts.[16] A fiduciary's successful defense of a surcharge action neither increases nor preserves any assets, but it is a reimbursable expense because it eliminates doubts about whether the fiduciary properly administered the trust or estate.[17] After all, whenever a fiduciary's "administration of the

7. This Article uses the words "beneficiary" and "beneficiaries" to refer to beneficiaries named in a trust instrument or will as well as heirs under intestate succession.

8. *E.g.*, *Sloan*, 538 N.W.2d at 50.

9. *See, e.g.*, *In re* Estate of Trynin, 782 P.2d 232, 235 (Cal. 1989) (in bank).

10. *See, e.g.*, Cottini v. Berggren, 420 P.3d 1255, 1267 (Alaska 2018) (holding agent's successful defense of their actions, expenditures, and fees equals "a determination that the agent fulfilled his fiduciary duties," and this "serve[s] the interests of the principal, even if the defense in the end also benefits the agent" (internal quotation marks omitted)).

11. *See, e.g.*, *Trynin*, 782 P.2d at 238.

12. The issue of fees for fees has been addressed in other contexts. *E.g.*, Richards v. Ameriprise Fin., Inc., 217 A.3d 854, 871–72 (Pa. Super. Ct. 2019) (holding a prevailing party is entitled to reasonable fees for fees under the Unfair Trade Practices and Consumer Protection Law because the award achieves "the legislature's aim of encouraging experienced attorneys to litigate such cases, even where the damages are small").

13. *In re* Miller's Estate, 26 A.2d 320, 321 (Pa. 1942).

14. *E.g.*, *In re* Estate of Denlinger, 297 A.2d 478, 481 (Pa. 1972).

15. *E.g.*, *In re* Estate of Harrison, 745 A.2d 676, 680 (Pa. Super. Ct. 2000).

16. *E.g.*, *In re* Strickler's Estate, 47 A.2d 134, 136 (Pa. 1946).

17. *See, e.g.*, *In re* Biddle's Appeal, 83 Pa. 340, 346 (1877).

assets is *unjustifiedly* assailed[,] it is part of his duty to defend himself."[18] Forcing a fiduciary to bear the cost of their successful defense guarantees none of the fiduciary's good deeds go unpunished.[19] In the words of Justice Benjamin Cardozo: "The law is too far-sighted to invite such consequences."[20]

This Article claims little daylight exists between the above surcharge principles and the realities of fiduciary compensation litigation. Compensation litigation centers on unreasonable or excessive compensation, and excessive compensation improperly dilutes the trust or estate.[21] The remedy for this loss is a surcharge.[22] The successful defense of the compensation claimed by a fiduciary and their counsel signals no loss occurred and eliminates the possibility of a surcharge.[23] This outcome is indistinguishable from the successful defense of a more general surcharge action. Accordingly, this Article urges Pennsylvania courts to adopt the surcharge analogy as the basis for awarding fees for fees in fiduciary compensation litigation.

This Article proceeds in four parts. Part II outlines the law of Pennsylvania governing fiduciary commissions and attorney's fees. It also details the murkiness surrounding fees for fees in fiduciary compensation litigation. Part III explores the leading case in support of allowing fees for fees, which is limited by the trial court's discretion and analysis of the fees' reasonableness. Part IV examines those jurisdictions that have adopted a per se rule barring fees for fees. Part V argues analogous precedent regarding the successful defense of surcharge actions provides ample justification for Pennsylvania courts to allow reasonable fees for fees where fiduciaries, in whole or in part, prevail in compensation litigation. Given that developments in the case law may be slow to materialize, this Article concludes by proposing a new statute authorizing fees for fees in appropriate cases as outlined in Part V.

18. Weidlich v. Comley, 267 F.2d 133, 134 (2d Cir. 1959) (emphasis added).

19. *See id.*

20. Jessup v. Smith, 119 N.E. 403, 404 (N.Y. 1918).

21. *See, e.g.*, *In re* Strickler's Estate, 47 A.2d 134, 135 (Pa. 1946) (affirming the trial court's reduction of the trustee's compensation from an "excessive" 20.44% to a "reasonable" 5% of the gross receipts).

22. *E.g.*, *id.*

23. *See, e.g.*, *In re* Jerome Markowitz Trust, 71 A.3d 289, 304 (Pa. Super. Ct. 2013) ("[A]n essential element of surcharge is proof of loss.").

II. FIDUCIARY COMMISSIONS AND ATTORNEY'S FEES IN PENNSYLVANIA

A. Reasonable Compensation

A fiduciary's many responsibilities are complex and time-consuming. A personal representative's duties include, in part, inventorying the decedent's assets,[24] paying creditors and taxes,[25] locating beneficiaries,[26] and making the necessary distributions.[27] Likewise, trustees must, among other things, assert control over the assets that form the corpus,[28] invest and reinvest those assets to ensure their preservation and productivity for present and future beneficiaries,[29] collect and disburse income and principal according to the trust's terms,[30] prepare periodic statements of account,[31] and stay in regular contact with the beneficiaries.[32] Much rests on fiduciaries' competence and skill, and courts hold them to the most scrupulous standards of loyalty and care.[33] In order to entice the hesitant to assume the mantle of responsibility, and reward attentive and thorough administration during their tenure, a fiduciary's services entitle them to reasonable commissions.[34]

Whether the lure of commissions attracts and retains diligent fiduciaries is beyond the scope of this Article. But it is uncontroverted that even the most capable fiduciaries are unlikely to possess *all* the knowledge and skills needed to administer a trust or an estate.[35] Luckily,

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24. *E.g.*, 20 PA. CONS. STAT. § 3301(a) (2022).

25. *See, e.g.*, *In re* Gardner's Estate, 185 A. 804, 807 (Pa. 1936).

26. *See, e.g.*, *In re* Estate of Alexander, 758 A.2d 182, 187 (Pa. Super. Ct. 2000).

27. *See, e.g.*, *In re* Estate of McCrea, 380 A.2d 773, 776 (Pa. 1977).

28. *E.g.*, 20 PA. CONS. STAT. § 7779 (2022).

29. *See, e.g.*, *id.* § 7774 ("A trustee shall administer the trust as a prudent person would, by considering the purposes, provisions, distributional requirements and other circumstances of the trust and by exercising reasonable care, skill and caution."). *But see, e.g.*, *id.* § 7203(a) ("A fiduciary shall invest and manage property held in a trust as a prudent investor would, by considering the purposes, terms and other circumstances of the trust and by pursuing an overall investment strategy reasonably suited to the trust.").

30. *See, e.g.*, *id.* § 7705(a) ("Except as provided in subsection (b) [listing certain mandatory rules], the provisions of a trust instrument prevail over any contrary provisions of [Pennsylvania law].").

31. *See, e.g.*, *id.* § 7780(a).

32. *See, e.g.*, *id.* § 7780.3(a).

33. *E.g.*, *In re* Estate of Lohm, 269 A.2d 452, 454 (Pa. 1970) (discussing the duty of care); *In re* Noonan's Estate, 63 A.2d 80, 83 (Pa. 1949) (discussing the duty of loyalty).

34. *See* 20 PA. CONS. STAT. § 3537 (2022); *id.* § 7768(a); *see also In re* Loutsion Estate, 4 Fiduc. Rep. 2d 224, 231 (Pa. Orphans' Ct. 1984) (noting that, where a fiduciary lacks expertise and depends primarily on an attorney for guidance, the fiduciary's commissions measure the responsibility assumed since their actual duties are "negligible").

35. *Cf., e.g.*, *In re* Wallace Ott Inter Vivos Trust, 10 Fiduc. Rep. 3d 281, 309 (Pa. Orphans' Ct. 2020) (noting trustees must "possess ample knowledge of the governing trust instrument, the law affecting its interpretation, fiduciary administration, regulatory

fiduciaries are not expected to be polymaths; they may enlist the help of others. Of all the professionals a fiduciary might employ, an attorney is the most likely because a "prudent man may not have the technical knowledge or skill to prepare an estate tax return or even an income tax return, and so would properly rely on [an attorney who is] more knowledgeable."[36] Counsel's advice does not provide blanket immunity, but, in those cases where a fiduciary "acts in good faith, under the advice of a competent lawyer, [the fiduciary] is not liable for mistakes of law, if such there be, or for errors in judgment."[37] A contrary rule would deter prospective fiduciaries from "accepting so necessary an office [and] throw the execution of trusts [and estates] into the hands of knaves or fools."[38]

Those attorneys hired to aid in trust and estate administration are, like the fiduciaries they serve, entitled to reasonable fees for their services.[39] That said, it is not entirely clear which legal services are compensable. Case law speaks of a reasonable fee for "services actually rendered."[40] Taken literally, this rule requires courts to perform a quantum meruit analysis to determine the value of the legal services provided,[41] but the subtext is clear: the only compensable legal services are those that benefit the trust or estate.[42]

The above rule is not ironclad. Notably, attorney's fees related to a fiduciary's successful defense of a surcharge action are reimbursable from a trust or an estate—even though the defense confers no direct benefit—because the surcharge action places a fiduciary "in the position to be sued because of duties they had performed for the [trust or] estate . . . . [I]t would be unjust to require [the fiduciary] personally to bear the reasonable costs of the defense of [unsuccessful] suits brought against

compliance, accounting, taxation, and investment strategy"). These hurdles are less imposing for a corporate fiduciary given that fiduciary administration is its *raison d'être*. *See, e.g.*, Murray L. Jacobs & Edmond Nathaniel Cahn, *The Fiduciary of the Future*, 5 ST. JOHN'S L. REV. 32, 39 (1930).

36. *Lohm*, 269 A.2d at 455.

37. *In re* Estate of Dempster, 162 A. 447, 448 (Pa. 1932); *see also Lohm*, 269 A.2d at 455 (stating the advice of counsel may be a defense to a surcharge if the choice of counsel was "prudent under all the circumstances then existing" and the decision to rely on counsel's advice was a "reasonably wise and prudent choice").

38. *In re* Appeal of During, 13 Pa. 224, 235 (1850) (internal quotation marks omitted).

39. *See, e.g.*, *Lohm*, 269 A.2d at 454.

40. *E.g.*, *In re* Estate of Rees, 625 A.2d 1203, 1206 (Pa. Super. Ct. 1993).

41. Dorsett v. Hughes, 509 A.2d 369, 371 (Pa. Super. Ct. 1986) (citing Sundheim v. Beaver Cnty. Bldg. & Loan Ass'n, 14 A.2d 349, 351 (Pa. Super. Ct. 1940)).

42. *See, e.g.*, *In re* Estate of Pitone, 413 A.2d 1012, 1015 (Pa. 1980) (holding attorney's fees related to executrix's failed attempt to establish joint ownership of the decedent's bank account were not expenses of the estate because the legal services were "rendered for her personal benefit" and "conflicted with the general interests of the estate").

them solely by reason of their position[]" as a fiduciary.[43] Stated another way:

> "If [fiduciaries] perform their duties faithfully, and are guilty of no unjust, improper, or oppressive conduct, they ought not in justice and good conscience to be put to any expense out of their own moneys. If, therefore, they are brought before the court without blame on their part, they should be reimbursed all the expenses that they incur, and allowed their costs as between solicitor and client."[44]

The surcharge indemnity principle also applies to the successful defense of removal actions.[45]

Generally, fiduciaries and their attorneys assert compensation claims when winding up the trust or estate administration by filing an account alongside a petition for adjudication and a statement of proposed distribution.[46] These compensation claims may take the form of "a claim directly against the [trust or] estate in favor of the person who has rendered such services, or by allowing the [fiduciary] credit in his or her accounts for the amount expended by him or her for services."[47] Following notice of the account filing,[48] the procedure for challenging the reasonableness of the compensation claimed is for an interested party to file timely objections to the account.[49] The trial court may also sua

43. *In re* Estate of Browarsky, 263 A.2d 365, 366 (Pa. 1970). *But see, e.g.*, *In re* Price's Estate, 81 Pa. 263, 272–73 (1876) (holding the expense of a successful surcharge action "ought not to be thrown upon the estate," but "borne by the unsuccessful party by whom it was occasioned"—i.e., the trustee).

44. Saulsbury v. Denton Nat'l Bank, 335 A.2d 199, 201 (Md. Ct. Spec. App. 1975) (quoting 2 JAIRUS WARE PERRY, A TREATISE ON THE LAW OF TRUSTS AND TRUSTEES § 894 (7th ed. 1929)).

45. *E.g.*, *In re* Francis Edward McGillick Found., 642 A.2d 467, 472 (Pa. 1994).

46. *See* PA.O.C. RULE 2.1, 2.4. Interestingly, the number of accounts filed with the courts has steadily declined over time. *See* ADMIN. OFF. OF PA. COURTS, CASELOAD STATISTICS OF THE UNIFIED JUDICIAL SYSTEM OF PENNSYLVANIA 120 (2017) [hereinafter CASELOAD STATISTICS] (noting the number of accounts filed annually with courts statewide between 2008 and 2017 fell from 4,136 to 2,589, a decrease of 37.4%). Instead, many fiduciaries rely on informal accountings to settle trust and estate administration on a receipt-and-release basis. An executed settlement agreement is the equivalent of a final confirmation of a fiduciary's account. *Compare* Heaney v. Riddle, 23 A.2d 456, 459 (Pa. 1942) ("Fiduciaries who distribute funds in their hands without an accounting and an audit of their accounts do so at their own risk . . . ."), *with In re* Cannon's Estate, 199 A. 135, 136 (Pa. 1938) ("Family settlements are preferred by the law. And when such settlements exist . . . , an accounting is unnecessary." (citation omitted)). Informal accountings have several benefits, not least of which is avoiding the kind of burdensome filing and attorney's fees that accompany a formal audit and risk cannibalizing the parties' interests. *See, e.g.*, Joel C. Dobris, *Ethical Problems for Lawyers upon Trust Terminations: Conflicts of Interest*, 38 U. MIAMI L. REV. 1, 11 (1983).

47. 34 C.J.S. *Executors and Administrators* § 535 (2022).

48. *See* PA.O.C. RULE 2.5.

49. *See id.* 2.7.

sponte question the compensation's reasonableness.[50] Once challenged, the fiduciary and their counsel bear "the burden of establishing facts which show the reasonableness of their fees and entitlement to the compensation claimed."[51] The initial burden is placed on the fiduciary and their counsel because they are best positioned to explain the "character of the services rendered, the responsibility incurred, and the zeal and fidelity" with which they served.[52]

In particular, the facts adduced by the fiduciary's attorney in support of their fees should touch on most, if not all, of the factors enumerated by the Pennsylvania Supreme Court in the seminal case *In re LaRocca Estate*.[53]

> The facts and factors to be taken into consideration in determining the fee or compensation payable to an attorney include: the amount of work performed; the character of the services rendered; the difficulty of the problems involved; the importance of the litigation; . . . the degree of responsibility incurred; whether the fund involved was "created" by the attorney; the professional skill and standing of the attorney in his profession; the results he was able to obtain; the ability of the client to pay a reasonable fee for the services rendered; and, very importantly, the amount of money or the value of the property in question.[54]

The *LaRocca* factors are neither exclusive nor exhaustive,[55] and "any one or combination of [these] factors may convince the [trial] court that a different fee is justified."[56] In the end, the trial court will either confirm the commissions and attorney's fees as stated in the account or adjust the compensation as specified in its adjudication or decree of distribution.[57] Confirmation of the account then discharges the fiduciary of liability for the transactions shown in their account.[58]

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50. *E.g.*, *In re* Thompson's Estate, 232 A.2d 625, 628 (Pa. 1967). *But see, e.g.*, *In re* Estate of Loutsion, 496 A.2d 1205, 1206 (Pa. Super. Ct. 1985) (per curiam) (stating the trial court may raise the issue of reasonableness only where "the will is silent as to the amount of compensation to be paid the executor," otherwise a compensation clause in a will "is binding on all parties, both the executors themselves and the estate, unless some misconduct or mismanagement of the estate by the executor warrants reduction of the commission by surcharge" (citations omitted)).

51. *In re* Estate of Rees, 625 A.2d 1203, 1206 (Pa. Super. Ct. 1993).

52. *In re* Estate of Taylor, 126 A. 809, 810 (Pa. 1924).

53. *See In re* LaRocca Estate, 246 A.2d 337, 339 (Pa. 1968).

54. *Id.*

55. *See* PA. R. PRO. CONDUCT 1.5(a)(1)–(8) (providing additional factors to consider when determining an appropriate attorney's fee, including several factors that overlap with the *LaRocca* factors).

56. Gilmore v. Dondero, 582 A.2d 1106, 1110 (Pa. Super. Ct. 1990).

57. *See* PA.O.C. RULE 2.9(a); *see also In re* Estate of Sonovick, 541 A.2d 374, 376 (Pa. Super. Ct. 1988) (noting the trial court "has the authority to reduce to a reasonable and just level those fees and commissions claimed by the fiduciary and her counsel"

Given all the variables, any attempt to map the contours of "reasonable" compensation is like drawing a fine line in loose sand—it can be done, but only with painstaking effort. Even then, the fact-intensive determination tends to produce the proverbial ticket good for one day and one trip only. This is because "concrete cases" hinge on "a judgment or intuition more subtle than any articulate major premise."[59] Consequently, appellate courts review the trial court's allowance or disallowance of a fiduciary's commissions and attorney's fees for abuse of discretion or clear error.[60] The wide latitude afforded trial courts in fashioning reasonable compensation helps explain the popularity of informal accountings;[61] better to select a result than to get a result.

A fee schedule would be most helpful in alleviating some of the uncertainty around the question of reasonable compensation. Alas, none exists. The venerable *In re Johnson Estate* sets forth a fee schedule for estate administration,[62] and judges have been known to consult it from time to time.[63] Yet the case represents, at best, a helpful starting point.[64] Strict adherence to the *Johnson* fee schedule is ill-advised as Pennsylvania courts have consistently admonished lower courts not to employ the kind of percentage formula delineated in *Johnson* or any other metric that skirts the required reasonableness analysis.[65] Even so, percentages may factor into a holistic reasonableness inquiry.[66]

(internal quotation marks omitted)). In some cases, the court may adjudicate the objections to the account but withhold confirmation pending the filing of an amended account that conforms to the adjudication. *E.g.*, *In re* Jones Estate, 9 Fiduc. Rep. 3d 321, 328 (Pa. Orphans' Ct. 2019).

58. PA.O.C. RULE 2.9(b).

59. Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

60. *E.g.*, *In re* Estate of Rees, 625 A.2d 1203, 1206 (Pa. Super. Ct. 1993). *But see, e.g.*, *In re* Estate of Wallis, 218 A.2d 732, 736 (Pa. 1966) (reversing award of additional compensation for executor's piecemeal to selling stocks, which was "tantamount to an additional investment in the market," violated his duty to marshal the assets "as soon as possible," and "unnecessarily exposed the estate to losses in the event the market declined").

61. *Cf.* CASELOAD STATISTICS, *supra* note 46, at 120.

62. *See In re* Johnson Estate, 4 Fiduc. Rep. 2d 6, 8 (Pa. Orphans' Ct. 1983). The *Johnson* court referred to the fee schedule appended to its opinion as "approved by the Attorney General," *id.* at 7, but the Pennsylvania Office of Attorney General ("OAG") later "disavowed" this claim. *Decedents' Estates and Trust Laws*, 56 PA. BAR ASS'N Q. 118, 121 (1985). Subsequent decisions clarify the OAG never promulgated any such fee schedule. *See In re* Estate of Preston, 560 A.2d 160, 163 (Pa. Super. Ct. 1989) (stating a fee schedule similar to the *Johnson* schedule "may have actually originated in the [Pennsylvania] Department of Revenue and relates to the valuation of estates for the purposes of inheritance taxation").

63. *E.g.*, *In re* Shearlds Estate, 10 Fiduc. Rep. 3d 257, 260 (Pa. Orphans' Ct. 2020).

64. *See, e.g.*, *In re* Nix Estate, 8 Fiduc. Rep. 2d 179, 180 (Pa. Orphans' Ct. 1988).

65. *See In re* Estate of Burch, 586 A.2d 986, 988 (Pa. Super. Ct. 1991) ("The determination of reasonable compensation . . . is not relegated to a clock and computer."); *Preston*, 560 A.2d at 165 ("Egregious error is committed when a court awards

B. Fee-shifting in Compensation Litigation

Nothing invites controversy quite like the payment of money. It is for this reason that, of all the services a fiduciary's attorney provides, perhaps the most important is the defense of the fiduciary's commissions and attorney's fees. This defense naturally yields attorney's fees in addition to those already incurred in the administration of the trust or estate. Who bears this added cost? "The general rule is that each party to adversary litigation is required to pay his or her own counsel fees."[67] Conventional wisdom thus dictates a fiduciary finances their own defense in compensation litigation. This paradigm, known as the "American rule," also applies to the objectors who initiate the challenge.[68] However, the American rule does not apply when "there is express statutory authorization, a clear agreement of the parties[,] or some other established exception."[69] Fiduciaries and beneficiaries are welcome to enter into fee agreements with fee-shifting provisions,[70] but such mechanisms are more at home in the arm's-length world of business, not the more intimate sphere of trust and estate administration.[71] The mere mention of a fee agreement with a fee-

commissions and fees simply on a percentage basis without inquiry into the reasonableness of the compensation . . . .").

In addition to the arbitrariness of its percentage formula, the *Johnson* fee schedule is problematic for another reason: it applies that formula to probate *and* nonprobate assets. *Johnson*, 4 Fiduc. Rep. 2d at 8. Given that nonprobate assets pass outside a decedent's estate, such assets require little, if any, administration by the decedent's personal representative or their counsel. *See generally Fiduciary Compensation and Legal Fees with Respect to Nonprobate Assets*, 8 REAL PROP., PROB. & TR. J. 1, 2–4 (1973) (arguing that, save for tax-related services, nonprobate assets entail minimal work that should not be compensated). Therefore, contrary to *Johnson*, nonprobate assets are often irrelevant when computing commissions and fees. *But see Preston*, 560 A.2d at 164 n.10 (stating commissions and fees may be imposed on nonprobate assets where the services are appropriate and the compensation is reasonable); *accord* Cloutier v. Lavoie, 177 N.E.2d 584, 585–86 (Mass. 1961) (affirming the trial court's decision to equitably apportion estate counsel's fee between probate and nonprobate assets because the nonprobate assets occasioned significant tax-related services that benefited the recipient of those assets, the decedent's will did not specify the source of payment for administration costs, and total payment from the probate assets would have left the estate insolvent).

66. *See* 20 PA. CONS. STAT. § 3537 (2022); *id.* § 7768(d). *But see, e.g.*, *In re* Williamson's Estate, 82 A.2d 49, 52 (Pa. 1951) ("While as a matter of convenience the compensation of a fiduciary may be arrived at by way of percentage, the true test is always what the services were actually worth and to award a fair and just compensation therefor.").

67. *In re* Estate of Wanamaker, 460 A.2d 824, 825 (Pa. Super. Ct. 1983).

68. *E.g.*, *In re* Estate of Lux, 389 A.2d 1053, 1061 (Pa. 1978).

69. Mosaica Acad. Charter Sch. v. Pa. Dep't of Educ., 813 A.2d 813, 822 (Pa. 2002).

70. *E.g.*, *In re* Schropfer's Estate, 281 N.W. 139, 143 (Iowa 1938).

71. *See* John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U.L. REV. 1567, 1578 (1993).

shifting clause in anticipation of future litigation is bound to raise beneficiaries' eyebrows and leave plenty of signature lines blank.[72] This leaves only statutory authorization and established exceptions as the most dependable grounds for awarding fees for fees.

1. Statutory Authorization for Fee-shifting

Pennsylvania's Judicial Code[73] prescribes the most common statutory bases that permit a fiduciary to recover fees for fees. Section 2503 of the Judicial Code states reasonable attorney's fees are a taxable cost of litigation against a "participant" for "dilatory, obdurate[,] or vexatious conduct" in bringing or sustaining an action.[74] This type of sanction usually requires the party to display fairly egregious behavior[75] because the rationale for attorney's fees as a sanction has more to do with punishing abuse of process than compensating a prevailing party.[76] Thus, Section 2503 permits recovery of fees for fees only in extreme cases, saddling the vast majority of fiduciaries who prevail in compensation litigation with significant out-of-pocket costs.

So what other statutes authorize fees for fees? None as far as estate administration is concerned, but the legal landscape is more complicated for counsel to trustees. Specifically, Subsection 7769(a)(1) of the Uniform Trust Act ("UTA")[77] provides: "A trustee is entitled to be reimbursed out of the trust property . . . for[] expenses that were properly incurred in the administration of the trust . . . ."[78] Subsection 7769(a)(1) is silent on what constitutes a "properly incurred" expense, but the Joint State Government Commission comment that accompanies the statute sheds some light on the matter. The comment states: "Subsection (a)(1) authorizes the reimbursement of expenses that the trustee incurs to defend the trustee's administration absent the trustee's breach of trust."[79]

72. Even if the parties reach some fee-shifting arrangement, the attorney's fees awarded pursuant to the agreement are subject to judicial scrutiny. McMullen v. Kutz, 985 A.2d 769, 776–77 (Pa. 2009).

73. 42 PA. CONS. STAT. §§ 101–9913 (2022).

74. *Id.* § 2503(7); *id.* § 2503(9); *see also id.* § 102 (defining "participant" to mean "[l]itigants, witnesses[,] and their counsel").

75. *See, e.g.*, *In re* Estate of Mumma, 125 A.3d 1205, 1220 (Pa. Super. Ct. 2015) (affirming the trial court's sanction of attorney's fees where the objector "engaged in repetitive questioning of witnesses, consuming days of hearing time with examinations regarding irrelevant entities and matters," and "serially arrived late for scheduled sessions, stormed out of the proceedings[,] and disregarded instructions that he be prepared with copies of documents he intended to introduce as exhibits").

76. *See, e.g.*, *In re* Estate of Liscio, 638 A.2d 1019, 1022 (Pa. Super. Ct. 1994).

77. 20 PA. CONS. STAT. §§ 7701–7790.3 (2022).

78. *Id.* § 7769(a)(1).

79. *Id.* § 7769, Joint St. Gov't Comm'n cmt.; *see also In re* Jackson, 174 A.3d 14, 28 n.11 (Pa. Super. Ct. 2017) ("The Statutory Construction Act authorizes [courts] to

The verb "defend" denotes attorney's fees as a potential proper expense of trust administration reimbursable from a trust.[80] This interpretation of Subsection 7769(a)(1) mirrors the interpretation advanced by the drafters of the Uniform Trust Code ("UTC") on which Subsection 7769(a)(1) is based.[81] Consequently, this interpretation of the statute controls because, absent authority to the contrary, "it would be extraordinary for lawmakers to attempt to impose a materially different connotation on borrowed terminology without saying so," especially when the statute's plain language "is wholly consistent with the[] authors' developed explanation."[82] In sum, Subsection 7769(a)(1) authorizes the reimbursement of a trustee's attorney's fees from the trust if (1) the fees were properly incurred in the administration of the trust, and (2) the trustee commits no breach of trust. Any alternative reading would contravene legislative intent.[83]

Nevertheless, are fees for fees a "properly incurred" expense of trust administration? This question was recently addressed in *In re Wallace Ott Inter Vivos Trust*.[84] There, the corporate trustee contacted the beneficiaries in the hopes they would consent to a one-time principal commission—approximately half of what the trustee would have earned under its standard fee schedule. The beneficiaries did not consent, and the trustee proceeded to file a petition for adjudication, seeking confirmation of its account and its request for full compensation according to its fee schedule. The trustee also sought a reserve for attorney's fees and expenses in connection with the preparation and filing of the account. The beneficiaries objected to, among other things,

consult Joint State Government Commission reports in construing [ambiguous] statutes . . . ." (citing 1 PA. CONS. STAT. §§ 1921(c), 1939 (2022))).

80. *See Defend*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "defend" to mean "to act as legal counsel for someone who has been sued"). Although the Joint State Government Commission's comment is not a statute subject to the same rules of construction provided in the Statutory Construction Act, 1 PA. CONS. STAT. §§ 1501–1991 (2022), this reading of the word "defend" is consistent with the Act's dictate that words and phrases "be construed . . . according to their common and approved usage." *Id.* § 1903(a).

81. *See* UNIF. TR. CODE § 709 cmt. (UNIF. L. COMM'N 2000). Because the legislature identified Section 7769 of the UTA as based on Section 709 of the UTC, *see* 20 PA. CONS. STAT. § 7769 (2022), the comment to Section 709 is relevant when interpreting its equivalent UTA section. *See In re* McKinney, 67 A.3d 824, 831 (Pa. Super. Ct. 2013).

82. Commonwealth v. H.D., 247 A.3d 1062, 1067 n.5 (Pa. 2021).

83. *See* 1 PA. CONS. STAT. § 1921(a) (2022) ("The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly."); *id.* § 1927 ("Statutes uniform with those of other states shall be interpreted and construed to effect their general purpose to make uniform the laws of those states which enact them.").

84. *See generally In re* Wallace Ott Inter Vivos Trust, 10 Fiduc. Rep. 3d 281 (Pa. Orphans' Ct. 2020).

the requested attorney's fees, and argued corporate funds, not trust funds, should pay for the trustee's defense of the account.

In addressing the issue of attorney's fees, the trial court noted Subsection 7769(a)(1) of the UTA "expressly authorizes payment of a trustee's attorney's fees out of a trust" where the fees are properly incurred and the trustee commits no breach of trust.[85] Although the beneficiaries did not allege breach of fiduciary duty or the defense of an account is an illegitimate part of trust administration, the court found the compensation litigation to be an "unnecessary" expense brought on by the trustee's "imprudent conduct."[86] The court explained:

> [T]he fact [the trustee] never had a full and honest conversation with [the beneficiaries] on the subject of compensation—then sought a fee significantly higher than what it originally told [the beneficiaries]—guaranteed a long and costly legal fight resulting in a Pyrrhic victory. The [c]ourt will not reward that outcome, nor the folly that precipitated it, by allowing [t]rust funds to pay [the trustee's] attorney's fees.[87]

Thus, the trial court awarded the trustee its attorney's fees incurred during the accounting period, but not the fees incurred defending the account. The trustee appealed, and the Pennsylvania Superior Court affirmed. However, the court affirmed the denial of attorney's fees not on the merits—i.e., the trial court's interpretation and application of Subsection 7769(a)(1)—but because the trustee's brief failed "to cite relevant legal authority and provide fact-specific legal analysis" on the fee question.[88] Accordingly, the court held the issue was waived.[89]

The *Ott* adjudication is the first and only reported decision to wrestle with whether Subsection 7769(a)(1) authorizes fees for fees. A close reading of the adjudication reveals the trial court would have awarded the trustee fees for fees pursuant to Subsection 7769(a)(1) but for the trustee instigating the compensation litigation. The *Ott* court's decision to restrict fees for fees to those instances where the trustee has clean hands not only harmonizes with other jurisdictions,[90] but comports with Subsection 7769(a)(1)'s emphasis on "properly incurred" expenses of any type. However, sans interpretative guidance from the appellate

85. *Id.* at 311.

86. *Id.* at 312.

87. *Id.* at 313 (footnote omitted).

88. *In re* Trust Under Deed of Ott, 271 A.3d 409, 421 (Pa. Super. Ct. 2021), *appeal denied*, No. 15 EAL 2022, 2022 WL 3366914 (Pa. Aug. 16, 2022).

89. *Id.*

90. *See* Lattuca v. Robsham, 812 N.E.2d 877, 883 (Mass. 2004); *In re* Estate of Stowell, 595 A.2d 1022, 1027 (Me. 1991); Citizens & S. Nat'l Bank v. Haskins, 327 S.E.2d 192, 203 (Ga. 1985).

courts, it is unclear whether Subsection 7769(a)(1) considers fees for fees to be a properly incurred expense at all.

2. Established Exceptions for Fee-shifting

Albeit far from "established" in the usual sense, there exists a recognized exception to the American rule that permits a fiduciary to recover fees for fees: the surcharge analogy.[91] "A surcharge is the penalty imposed for failure of a [fiduciary] to exercise common prudence, skill[,] and caution in the performance of [their] fiduciary duty, resulting in a want of due care."[92] But, "whenever there is an *unsuccessful* attempt by a beneficiary to surcharge a fiduciary[,] the latter is entitled to an allowance out of the [trust or] estate to pay for counsel fees" because the fees were "necessarily incurred by [the fiduciary] in the administration of the trust [or estate]."[93] In other words, a fiduciary qua fiduciary wrongfully hauled into court does not bear the cost of their exoneration.

In a similar vein, fiduciaries and their attorneys are entitled to reasonable compensation for their services. If a fiduciary disburses unreasonable (i.e., excessive) compensation, these payments result in a loss to a trust or an estate due to the fiduciary's want of due care.[94] This loss warrants a surcharge against the fiduciary to compensate the beneficiaries for the loss, which is exactly what courts have imposed when reducing unreasonable compensation.[95] On the other hand, the successful defense of a fiduciary's commissions and attorney's fees negates the possibility of a surcharge.[96] As a result, some courts have discerned no meaningful difference between the successful defense of a more general surcharge action and the successful defense of a fiduciary's commissions and attorney's fees.[97]

Notably, in *In re Fishel Land Co.*,[98] the trustee successfully defended objections to the compensation claimed in its account. The trustee then petitioned the court for allowance of attorney's fees incurred to defend the objections. The objector admitted the amount of compensation was reasonable, but they claimed the fees "should be paid

91. *E.g.*, *In re* Smith Estate, 52 Pa. D. & C.2d 363, 379 (Pa. Orphans' Ct. 1971).

92. *In re* Estate of Pew, 655 A.2d 521, 541 (Pa. Super. Ct. 1994).

93. *In re* Wormley's Estate, 59 A.2d 98, 100 (Pa. 1948) (emphasis added); *accord* Jessup v. Smith, 119 N.E. 403, 404 (N.Y. 1918) (stating a fiduciary "owe[s] a duty to the [trust or] estate to stand his ground against unjust attack").

94. *E.g.*, *In re* Estate of Albright, 545 A.2d 896, 904 (Pa. Super. Ct. 1988).

95. *E.g.*, *In re* Estate of Rees, 625 A.2d 1203, 1207 (Pa. Super. Ct. 1993).

96. *See, e.g.*, *In re* Estate of Warden, 2 A.3d 565, 573 (Pa. Super. Ct. 2010) ("[W]here there is no loss, there is no basis for a surcharge.").

97. *E.g.*, *In re* Rudy Estate, 18 Fiduc. Rep. 2d 135, 148 (Pa. Orphans' Ct. 1997).

98. *In re* Fishel Land Co., 27 Fiduc. Rep. 237 (Pa. Orphans' Ct. 1976).

out of the trustee's individual pocket and not out of the trust estate."[99] The court disagreed:

> The court does not accept the contention of the objector that the objections to the trustee's account did not involve items of possible surcharge against the trustee. The services of the trustee were directly related to the preservation, protection, administration[,] and distribution of the trust property. The court does not perceive any distinction between this case and similar cases where a surcharge is sought because of a dereliction of duty on the part of a fiduciary.[100]

Therefore, the court ordered the fees for fees paid from the trust.[101]

Fishel's reliance on the surcharge analogy is not entirely novel—it appeared almost two decades earlier in *In re Powers' Estate*.[102] There, the auditing judge awarded the trustee, among other things, attorney's fees related to a compensation award. The auditing judge based this decision "upon the analogy that a fiduciary is entitled to fees for successfully defending him[self] against a surcharge."[103] Beneficiaries filed exceptions to the auditing judge's adjudication.[104] The Orphans' Court, sitting en banc,[105] sustained the beneficiaries' exceptions to the attorney's fees because they were "special" and unsupported by any "exceptional and unusual facts" justifying their allowance.[106] The court concluded "no fee should be paid to counsel beyond the fee for general services."[107]

The surcharge analogy is caught between the horns of *Fishel* and *Powers*. Both trial court decisions are diametrically opposed and neither received appellate review. Presented with two conflicting, but seemingly valid, answers to the question of fees for fees, trial courts are free to follow *Fishel* and award fees for fees based on the surcharge analogy, or, pursuant to *Powers*, treat fees for fees as a "special" type of cost not

99. *Id.* at 238.

100. *Id.*

101. *Id.*

102. *In re* Powers' Estate, 58 Pa. D. & C. 379 (Pa. Orphans' Ct. 1947) (en banc).

103. *Id.* at 386.

104. Motions for reconsideration have since replaced the filing of exceptions. PA.O.C. RULE 8.1, 8.2.

105. Traditionally, an en banc panel of the Orphans' Court would convene to hear exceptions to a single judge's order or adjudication and determine whether it should be confirmed, amended, or vacated. *See, e.g.*, *In re* Appeal of Gannon, 631 A.2d 176, 180–81 (Pa. Super. Ct. 1993); *see also* Charles Klein, *Orphans' Court Practice*, 36 PA. BAR ASS'N Q. 16, 18 (1964) (stating the Orphans' Court en banc "has no special respect for the decisions of any of its individual judges" and "[e]ach case is studied *de novo* as if the [c]ourt *en banc* was an independent appellate court"). The practice was eventually abolished, *see supra* note 104, placing Orphans' Court and other civil matters on the same appellate track.

106. *Powers*, 58 Pa. D. & C. at 386.

107. *Id.*

reimbursable from a trust or an estate (absent "exceptional" circumstances). This freedom of action in a precedential vacuum demands a definitive answer as the status quo risks arbitrary and inconsistent results, which undermines the rule of law.[108] Fortunately, the issue of fees for fees has generated a great deal of litigation in other jurisdictions. These persuasive authorities are instructive, even if the results are just as schismatic.

III. ALLOWING FEES FOR FEES

One thing is certain: for a fiduciary's attorney's fees to be paid from a trust or an estate, the legal services provided must benefit the trust or estate. But the way each jurisdiction determines which services are beneficial differs greatly. While several jurisdictions rely on an expansive understanding of "benefit" to permit fees for fees, only one has provided an in-depth discussion of its rationale: the California Supreme Court in *In re Estate of Trynin*.[109] Other jurisdictions offer only cursory remarks[110] or piggyback on *Trynin*.[111] Thus, this Part focuses on the thorough decision of the high court of California.

In *Trynin*, the co-administrators of the decedent's estate retained the law firm of Pachter, Gold and Schaffer ("Pachter") as estate counsel. The firm unsuccessfully defended the co-administrators in a civil suit brought by a creditor whose claim against the estate had been rejected. The co-administrators appealed. For purposes of the appeal, the co-administrators secured the representation of Richard W. Eckardt. The appeal resulted in the reversal of the judgment in the creditor litigation. The probate court awarded Attorney Eckardt his attorney's fees for the performance of extraordinary services on appeal. Pachter continued to serve as estate counsel.

The creditor litigation proceeded to a second trial, and the co-administrators retained Attorney Eckardt to represent them. Attorney Eckardt successfully settled this second round of creditor litigation. Attorney Eckardt and Pachter then petitioned the probate court, pursuant to the probate code, for costs and fees for extraordinary services in defending the creditor litigation. The co-administrators contested these claims, but the probate court granted the fee requests. Afterward, Attorney Eckardt and Pachter filed additional fee petitions for extraordinary services. They sought compensation for the time spent

108. *See, e.g.*, Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989).

109. *See In re* Estate of Trynin, 782 P.2d 232 (Cal. 1989) (in bank).

110. *See* Cleveland Tr. Co. v. Wilmington Tr. Co., 258 A.2d 58, 66 (Del. 1969); W. Coast Hosp. Ass'n v. Fla. Nat'l Bank of Jacksonville, 100 So.2d 807, 812 (Fla. 1958).

111. *See In re* Estate of Bockwoldt, 814 N.W.2d 215, 226 (Iowa 2012).

establishing and defending their previous fee claims. The probate court denied these petitions because, in its view, the probate code did not authorize compensation for an attorney's time reasonably spent to establish and defend a fee claim.

Ultimately, the California Supreme Court reversed, holding extraordinary services compensable under its probate code "include work reasonably performed by the attorney to establish and defend the fee claim."[112] California's probate code provided a statutory basis for recovery of attorney fees for both ordinary probate proceedings and extraordinary services to an estate.[113] Despite the fact "benefit to the estate" was a factor to be weighed in determining the amount of an estate attorney's compensation, the court noted earlier decisions held an attorney may be entitled to compensation even though the extraordinary services rendered "turn out to be entirely valueless."[114] Although a service may not "directly benefit the estate in the sense of increasing, protecting, or preserving it," a service was still compensable "if the estate's attorneys or representatives in performing the service[] were 'acting in consonance with the fiduciary duties imposed upon them.'"[115] The court cited the costs related to the successful defense of an executor's account as one example of a "valueless" expense chargeable against an estate.[116]

In reaching its conclusion, the court relied upon the public policy favoring the recovery of fee-related services:

> [I]f counsel is not compensated for expenses reasonably incurred in fee litigation, the compensation awarded for the underlying services may be effectively diluted or dissipated, and the fee will vary with the nature of the opposition. While fee litigation confers no immediate or direct benefit on the estate, it becomes a necessary incident to the attorney's work for the estate, and so compensable, when unjustified challenges are raised to a fee claim. Probate attorneys can hardly be expected to work for nothing and, if they have no reasonable assurance of full and fair compensation, they will be reluctant to undertake extraordinary services on behalf of decedents' estates.[117]

The court stated a contrary rule was "deleterious to decedents' estates and heirs because attorneys would be reluctant to perform services

112. *Trynin*, 782 P.2d at 239.
113. *Id.* at 234.
114. *Id.* at 235.
115. *Id.* (quoting Ludwig v. Super. Ct., 19 P.2d 984, 984–85 (Cal. 1933)).
116. *Id.*; *accord In re* Estate of Beach, 542 P.2d 994, 1008 (Cal. 1975) ("[E]xpenditures for an executor's or administrator's successful defense against exceptions to his account are chargeable against the estate.").
117. *Trynin*, 782 P.2d at 238.

necessary to the proper administration of decedents' estates if the compensation awarded for their services could be effectively diluted or dissipated by the expense of defending against unjustified objections to their fee claims."[118]

Nevertheless, the court's decision did not guarantee recovery of fees for fees:

> Where the trial court reasonably concludes that the amounts previously awarded the attorney for both ordinary and extraordinary services are adequate, given the value of the estate and the nature of its assets, to fully compensate the attorney for all services, including fee-related services, denial of a request for fee-related fees would not be an abuse of discretion.[119]

Moreover, the court noted a rule allowing fees for fees did not prevent the trial court, "in the exercise of sound discretion and after consideration of the various factors relevant to the fee determination, to make an additional award of fees in *some* amount."[120] Therefore, the court held fees for fees are recoverable, but not as a matter of course.

IV. DISALLOWING FEES FOR FEES

Unlike *Trynin*, several jurisdictions take a much narrower view of what benefits a trust or an estate. These jurisdictions view the fiduciary or their attorney defending a challenge to their compensation as the real party in interest, not the trust or estate, and disallow fees for fees because the litigation only benefits their pecuniary interests.[121] Germane to the focus of this Article are those jurisdictions that considered and, ultimately, rejected the rationales advanced in *Trynin*.[122]

118. *Id.* at 233.

119. *Id.* at 239.

120. *Id.* (emphasis added) (citation omitted).

121. *See, e.g.*, *In re* Estate of Larson, 694 P.2d 1051, 1059–60 (Wash. 1985) (en banc).

122. Of course, there are jurisdictions that once disallowed fees for fees but now permit them. *E.g.*, *id.* at 1060, *abrograted by* WASH. REV. CODE § 11.96A.150(1) (2020), *as recognized in In re* Estate of McCuen, No. 57452-3-I, 2007 WL 512541, at *4 (Wash. Ct. App. Feb. 20, 2007). Additionally, some jurisdictions disallowed fees for fees then permitted them only to revoke that authorization later. *E.g.*, *In re* Estate of Painter, 628 P.2d 124, 126 (Colo. App. 1980), *abrogated by* COLO. REV. STAT. § 15-12-720(3) (2020), *as recognized in In re* Estate of Ligon, 160 P.3d 361, 364 (Colo. App. 2007), *repealed by* 2011 Colo. Sess. Laws 317. Lastly, some jurisdictions either disallow or are skeptical of fees for fees, but this Article does not discuss them because the relevant decisions rely on bald assertions, cite equally unenlightening precedent, or predate the present jurisdictional split initiated by *Trynin*. *See In re* Estate of Halas, 512 N.E.2d 1276, 1285 (Ill. App. Ct. 1987); *In re* Estate of Bush, 230 N.W.2d 33, 44–46 (Minn. 1975); *In re* Estate of Rodken, 768 N.Y.S.2d 521, 523 (N.Y. App. Div. 2003).

The Michigan Court of Appeals declined to follow the California Supreme Court's lead in *In re Sloan Estate*.[123] There, the co-executors of the decedent's estate petitioned the trial court for various fees and costs, including expert witness fees. The co-executors retained the expert witness to testify regarding the reasonableness of the claimed fees. Beneficiaries objected to the fee petition, arguing the fees were excessive and most of the legal services were unnecessary to protect the best interests of the estate. After a hearing, the trial court reduced the requested fees and costs on the grounds that "ordinary fee-related fees and costs were not compensable under [the Michigan probate code]."[124] Following two subsequent hearings, the trial court disallowed the co-executors' requested fees for fees. The court asserted "the ordinary fees and costs incurred in establishing and defending a fee petition are inherent in the normal course of doing business as an attorney, and the estate may not be diminished to pay those fees and costs."[125] The co-executors appealed.

The Michigan Court of Appeals affirmed. The court stated the Michigan probate code authorized reasonable compensation for estate attorneys in exchange for services that were "necessary and provided in behalf of the estate."[126] Assuming the co-executors' attorney's fees were necessary, the court found the co-executors "failed to establish that these services were provided in behalf of the estate."[127] The court explained:

> Petitioners have not claimed that the legal services rendered in the furtherance of the prior petitions for fees resulted in a direct benefit to the estate. Instead, petitioners assert that their legal services resulted in an indirect benefit to the estate because, as a policy matter, a contrary rule would jeopardize the ability of estates to retain competent counsel if there were no assurance that counsel would receive adequate compensation where litigious beneficiaries raise unjustified objections to their fee claims. Without rejecting the validity of this argument, we find that petitioners have failed in this case to establish that the . . . fee-related services were beneficial to the estate, as that term has been construed by the appellate courts of this state. "Fees for fees" claims are brought in behalf of the attorney seeking the fees and clearly do not benefit the estate because they do not increase or preserve the estate's assets.[128]

123. *In re* Sloan Estate, 538 N.W.2d 47, 49–50 (Mich. Ct. App. 1995).
124. *Id.* at 48.
125. *Id.* at 49.
126. *Id.* (internal quotation marks omitted).
127. *Id.*
128. *Id.*

The court concluded by acknowledging the validity of the *Trynin* court's "policy argument that precluding 'fees for fees' claims may have a deleterious effect on the ability of an estate to retain qualified and competent counsel."[129] However, the *Sloan* court found the opposite "to have coextensive validity: routine allowance of such claims might inhibit a beneficiary or other interested person from raising valid objections to fee petitions out of concern that the estate's assets will be diminished."[130] Thus, the court disallowed fees for fees.[131]

Similarly, the Indiana Court of Appeals declined to follow *Trynin* in *In re Estate of Inlow*.[132] There, the trial court awarded an interim fee to the law firm representing the estate's personal representative. Beneficiaries appealed the portion of the fee awarded for time spent preparing and defending the fee petition. To resolve this claim, the Indiana Court of Appeals first turned to the section of the probate code governing estate attorneys' fees. The relevant provision of the Indiana probate code authorized reasonable compensation to an attorney performing "services for the estate."[133] Thus, the court had to determine, as a matter of statutory interpretation, whether "services for the estate" included preparing and defending a fee petition.

After analyzing the holdings of other jurisdictions, including *Sloan* and *Trynin*, the *Inlow* court concluded fees for fees were not recoverable[134]:

> To be paid, an attorney must first tell a client what he owes. Requiring a client to pay an additional amount for being told what he owes in the first instance is neither good business nor good law. The preparation of a fee petition, as of any billing statement, is clearly a service performed for the attorney seeking to be paid, rather than a service performed for the estate. Thus, time spent preparing the fee petition is a routine cost of doing business that must be factored into an attorney's hourly rate, as is universally done with non-probate clients, and cannot be considered a separate expense to be subsidized by the estate as part of the compensation awarded pursuant to [the Indiana probate code].[135]

Although this rule would likely dilute the underlying fee award, the court dismissed this concern by emphasizing proper planning and precise

129. *Id.* at 49–50.
130. *Id.* at 50.
131. *Id.*
132. *In re* Estate of Inlow, 735 N.E.2d 240, 253–54 (Ind. Ct. App. 2000).
133. *Id.* at 250.
134. *Id.* at 252–53.
135. *Id.* at 253.

recordkeeping by estate attorneys as ways to mitigate the fallout from a contested fee petition.[136]

Finally, the court stated its ruling did not bar fees for fees in *all* cases. The court recognized the "acrimony and litigiousness" common in estate cases may require attorneys to "defend their fee petitions against baseless challenges brought by contentious heirs."[137] In those cases, other Indiana statutes authorized the recovery of attorney's fees from the losing party where the claim was prosecuted in bad faith.[138] Otherwise, fees for fees were not recoverable.[139]

V. THE CASE FOR FEES FOR FEES IN PENNSYLVANIA

As the preceding survey shows, the fees-for-fees debate centers on two key points. First, regardless of the rule adopted, someone's actions will be chilled. Either attorneys will refuse to represent fiduciaries for fear of not receiving full compensation for their services, or beneficiaries will forego legitimate challenges to fiduciary commissions and attorney's fees rather than hazard more of a trust's or an estate's assets. Second, there exists profound disagreement over whether a fiduciary's defense of their commissions and fees is a reimbursable expense of administration. This Part argues courts' reliance on the chilling effect, both to support and refute fees for fees, is unavailing because it implicates idiosyncratic notions of the social good better resolved by the legislature. Further, this Part contends objections to a fiduciary's commissions and attorney's fees are a direct challenge to a fiduciary's stewardship. Accordingly, a fiduciary's successful defense of their commissions and fees is reimbursable from a trust or an estate for the same reason the successful defense of a surcharge action is reimbursable: it is an administrative "necessity" occasioned by the beneficiary's "own unsuccessful litigation."[140]

A. Balancing the Incommensurables of the Chilling Effect

Suppose, as *Trynin* claimed, a rule barring fees for fees chills the ranks of trust and estate attorneys.[141] Alternatively, suppose, as *Sloan* argued, a rule allowing fees for fees chills good faith challenges brought by beneficiaries.[142] In both scenarios, one is apt to ask several questions. Who exactly would be chilled? Some shadowy, ill-defined "they"? Or

136. *Id.* at 254.
137. *Id.*
138. *Id.*
139. *Id.*
140. *See In re* Biddle's Appeal, 83 Pa. 340, 346 (1877).
141. *See In re* Estate of Trynin, 782 P.2d 232, 238 (Cal. 1989) (in bank).
142. *See In re* Sloan Estate, 538 N.W.2d 47, 50 (Mich. Ct. App. 1995).

someone more specific? Perhaps the ubiquitous reasonable person? And even if a court could pinpoint those attorneys or beneficiaries who would be chilled by either rule, how then does a court measure the extent and severity of the chilling? Is an iota of chilling enough, or is something more required? And, assuming the chilling effect is quantifiable, how does one triage these harms? A judge invokes the chilling effect and one is expected to believe they have said something meaningful or leveled a resounding charge. But what have they really said?

Courts employ the chilling effect to suggest dire consequences no one can refute—at least not in the abstract. When confronted with concerns of possible chilling, intellectual honesty insists both sides of the fees-for-fees debate concede, regardless of the rule adopted, a certain amount of chilling is *possible*. Any fee-shifting regime will likely affect some party's willingness to litigate, but this is an inevitable consequence of deviating from the American rule.[143] Every decision, from whether to initiate a suit to whether to proceed to trial or settle, entails, among other things, a Gradgrindian assessment of the attorney's fees involved. But to say attorney's fees are the deciding factor in most, if not all, cases requires telepathy. Barring that, litigants' minds remain a black box; there are simply too many unknowns.[144]

Indeed, it is telling how none of the case law, either allowing or disallowing fees for fees, contains so much as a single specific and verifiable anecdote regarding the chilling of attorneys' desire to represent fiduciaries or the chilling of beneficiaries' willingness to challenge fiduciaries' commissions and fees. The absence of empirical evidence is especially egregious in *Sloan* and *Inlow*, as those decisions came six and eleven years after *Trynin*, respectively, and both fail to cite or discuss a single California beneficiary chilled by *Trynin*'s holding. Then again, "[t]he law has traditionally moved from one doctrinal peak to another through the misty vales of fiction."[145]

As noted above, monetary concerns undoubtedly weigh on attorneys' and litigants' minds, but other considerations exist and may take precedence. A prime example is the age-old will contest. Aside from the costs involved, it is said "no form of civil litigation [is] more acrimonious and more conducive to the public display of soiled linen and

143. *See, e.g.*, John C. Hause, *Indemnity, Settlement, and Litigation, or I'll Be Suing You*, 18 J. LEGAL STUD. 157, 158 (1989) (concluding "the English type of indemnity is more likely to lead to settlement than the American rule").

144. *But see generally* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97–100 (1974) (arguing the legal system consists of "repeat player[s]" who choose to "play the odds" and "one-shotters" who seek to "minimize the probability of maximum loss").

145. Louis L. Jaffe, *Res Ipsa Loquitur Vindicated*, 1 BUFF. L. REV. 1, 13 (1951).

the uncloseting of family skeletons than is the will contest."[146] Yet this unpleasantness, in the main, does not appear to have chilled will contestants—at least in Pennsylvania.[147] Why then should anyone reasonably expect the awarding of fees for fees to chill possible objections from beneficiaries for fear of depleting a trust's or an estate's assets? If personal and familial embarrassment regularly prove inadequate restraints on will contestants, only a naïf could suggest economic self-interest alone holds enough sway to deter beneficiaries from objecting to a fiduciary's commissions and attorney's fees. Trust and estate litigation is a notorious breeding ground for "strike suits" and other frivolous claims brought by disgruntled parties in hopes of reaching a favorable settlement.[148] Moreover, the idea legacies can fuel inter- and intra-familial strife is not a recent phenomenon.[149] Such rancor is alive and well in this century.[150] Trust and estate litigation was, is, and ever shall be, at times, a proxy battle waged, or not waged, for a host of reasons, none of which necessarily hinge on a dispassionate cost-benefit

146. David F. Cavers, *Ante Mortem Probate: An Essay in Preventive Law*, 1 U. CHI. L. REV. 440, 441 (1934).

147. *See generally, e.g.*, *In re* Estate of Fabian, 222 A.3d 1143 (Pa. Super. Ct. 2019); *In re* Estate of Powell, 209 A.3d 373 (Pa. Super. Ct. 2019); *In re* Estate of Brumbaugh, 170 A.3d 541 (Pa. Super. Ct. 2017); *In re* Estate of Maddi, 167 A.3d 818 (Pa. Super. Ct. 2017); *In re* Mase Estate, 10 Fiduc. Rep. 3d 120 (Pa. Orphans' Ct. 2020); *In re* Walden Estate, 10 Fiduc. Rep. 3d 95 (Pa. Orphans' Ct. 2020); *In re* Shepley Estate, 10 Fiduc. Rep. 3d 1 (Pa. Orphans' Ct. 2019); *In re* Fluellen Estate, 9 Fiduc. Rep. 3d 130 (Pa. Orphans' Ct. 2019); *In re* Marinucci Will, 9 Fiduc. Rep. 3d 95 (Pa. Orphans' Ct. 2018); *In re* Pedersen Estate, 9 Fiduc. Rep. 3d 29 (Pa. Orphans' Ct. 2018); *In re* Estate of Citino, 9 Fiduc. Rep. 3d 11 (Pa. Orphans' Ct. 2018). These cases represent only those Pennsylvania will contests reported in recent volumes of the *Atlantic Reporter* and *Fiduciary Reporter*. This list does not, and indeed cannot, reflect the total number of will contests (potential and actual) that arise each year—both in Pennsylvania and other jurisdictions. Such figures are elusive. The mere threat of litigation is a potent settlement tool. But the above sampling of reported will contests supports the reasonable inference that a good many litigious-minded persons appear undeterred by extra-judicial considerations like soiled linen and uncloseted skeletons. *See* David Horton & Reid K. Weisbord, *Probate Litigation*, 2022 U. ILL. L. REV. 1149, 1180–81 (2022) (finding, of 443 testate administrations in San Francisco, California, 11.5% yielded litigation, with will contests and fiduciary litigation as the most prevalent).

148. *E.g.*, Daniel B. Kelly, *Strategic Spillovers*, 111 COLUM. L. REV. 1641, 1685–86 (2011). *Contra* Horton & Weisbord, *supra* note 147, at 1157 ("[O]ur analysis of [settlement] agreements reveals that, on average, contestants received a respectable 62% of the amount they would have recovered if they had prevailed at trial. Because parties with frivolous claims are unlikely to negotiate favorable settlements, we gather that many [probate] contests do, in fact, have merit.").

149. *E.g.*, WILLIAM SHAKESPEARE, KING LEAR.

150. *E.g.*, Stern v. Marshall, 564 U.S. 462, 468 (2011).

analysis by the parties.[151] All too often the underlying causes of the dispute are unknown or unknowable.[152]

Nevertheless, assuming a rule allowing fees for fees chills beneficiaries and a rule disallowing fees for fees chills attorneys, who should don the figurative parka? The impasse does not present an easy or obvious answer as both options threaten to harden the law's already sclerotic arteries by narrowing either access to legal services or the right to seek redress in the courts. As Judge Learned Hand once wrote:

> [W]e are always faced with the insoluble problem of striking a balance between incommensurables, and that for the solution there are no standards or tests, save what will prove the most nearly acceptable compromise; what will most accord with existing conventions. Maybe at long last some fixed standards or tests will emerge . . . . [A]ll this comes out . . . when one examines our own constitutional system with the Supreme Court on top as the final negative authority.[153]

The "most nearly acceptable compromise" regarding fees for fees depends on who one asks. *Trynin* favored attorneys, while *Sloan* and *Inlow* sided with beneficiaries. The divergence of opinion reveals the absence of any "fixed standards or tests." This is especially true in Pennsylvania, where neither the General Assembly nor the appellate courts have exercised their "final negative authority" on the question of fees for fees. But, of the two, the General Assembly is better equipped to resolve the chilling dilemma. The legislature's ability to launch investigations and conduct hearings makes it the ideal forum for assessing rival public policies.[154] The alternative asks courts to "act as

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151. *See, e.g.*, Deborah S. Gordon, *Mor[t]ality and Identity: Wills, Narratives, and Cherished Possessions*, 28 YALE J.L. & HUMAN. 265, 291 (2016).

152. As Judge Learned Hand observed a century ago:

> [A] law-suit is an undertaking designed to settle a dispute; therefore it implies that there is a dispute, and that there is some means of reaching a conclusion. It would seem pretty clear, then, that the first requisite is to know what the dispute really is about. Let us at the outset disabuse ourselves of the notion that we are engaged in an impartial and disinterested inquiry into objective truth. We have no right to the fine detachment of spirt of the scientist. Our inquiry must stop as soon as the litigants are, or under the rules must be, satisfied on their differences.

Learned Hand, *The Deficiencies of Trials to Reach the Heart of the Matter*, *in* LECTURES ON LEGAL TOPICS: 1921–1922 89–90 (1926).

153. GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 423 (2d ed. 2011) (quoting letter from Learned Hand to Walter Lippman (Mar. 7, 1955)).

154. *See, e.g.*, *In re* Trust Under Will of Ashton, 260 A.3d 81, 92 (Pa. 2021). *But see, e.g.*, ROBERT E. WOODSIDE, PENNSYLVANIA CONSTITUTIONAL LAW 612 (1985) ("With an eye on political survival at the ever-approaching next election, congressmen and legislators have an almost irresistible urge to ignore those issues upon which the voters are sharply divided.").

legislators, not judges, and would result in nothing other than an 'unanalyzed exercise of judicial will' in the guise of a 'neutral utilitarian calculus.'"[155]

The jurisdictional split over chilling caused by fees for fees signals an insoluble problem. Courts cut this Gordian knot by framing the issue in public policy terms that most accord with that particular court's sense of justice. This results-oriented jurisprudence exposes the chilling effect argument for what it is: a paper tiger patched together with guesswork and predilections. This Article discounts the chilling effect in its entirety and suggests Pennsylvania jurists do the same lest their opinions resemble a "white paper more than a judicial decision."[156]

B. The Successful Defense of Commissions and Fees as Reimbursable Expense

True enough that "each state's pertinent statutory scheme is different,"[157] but the real difference between those jurisdictions that allow fees for fees and those that do not is less a matter of legislation (or the lack thereof) or differing modes of statutory interpretation. The disagreement has more to do with conflicting ideas of how a fiduciary's defense of their commissions and attorney's fees fits into trust and estate administration and who really benefits from compensation litigation.

1. Fiduciary Administration Subsumes Compensation Litigation

Just as "[a]ny given civil action can have numerous phases,"[158] the same holds for trust and estate administration. Whether one considers administration a series of "separate and distinct" acts with the same goal[159] or as a "single and continuous" unity,[160] administration proceeds from a fiduciary's appointment or acceptance of office until their discharge. Administration involves "all that may be done rightfully in preserving the [trust's or estate's] assets, and all that may be done legally by the [fiduciary] in his or her dealings with creditors [or beneficiaries], or that may be done by them in securing their rights."[161]

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155. June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2136 (2020) (Roberts, C.J., concurring) (quoting New Jersey v. T.L.O., 469 U.S. 325, 369 (1985)); *see also* Ladd v. Real Est. Comm'n, 230 A.3d 1096, 1123 (Pa. 2020) (Wecht, J., dissenting) ("[N]othing in the [Pennsylvania] Constitution envisions a system of government by judges . . . [who] sit as junior-varsity legislators . . . .").

156. *Ladd*, 230 A.3d at 1123 (Wecht, J., dissenting).

157. *In re* Sloan Estate, 538 N.W.2d 47, 49 (Mich. Ct. App. 1995).

158. Comm'r v. Jean, 496 U.S. 154, 161 (1990).

159. *In re* Estate of Jones, 588 P.2d 960, 962 (Kan. Ct. App. 1979).

160. Westcott v. Sharp, 54 So.2d 758, 760 (Ala. 1951).

161. 33 C.J.S. *Executors and Administrators* § 4 (2022).

With this definition in mind, it is hard to see how trust and estate administration does not encompass the defense of commissions and attorney's fees. Entitled to reasonable compensation for their services, a fiduciary and their counsel file an account in which they assert compensation claims against the trust or estate in an attempt to secure their rights. At the same time, in order to prevent what they see as a loss to the trust or estate, a beneficiary files objections to the account alleging the compensation claimed is unreasonable. If an amicable settlement is impossible, then litigation is unavoidable and, notwithstanding the *Inlow* court's claims to the contrary, far from a "routine" service whose necessity "will usually be apparent from the outset."[162] The amount of compensation giving rise to the controversy cannot be fixed *before* the performance of services, and "[n]o man can anticipate what will be required in the settlement and management of his estate."[163] So, absent settlement, litigation is essential. A fiduciary's administration cannot end until the court discharges the fiduciary by confirming their account, and adjudication of the objections to the compensation claimed in the account precedes confirmation.[164] Thus, compensation litigation is inseparable from a fiduciary's administration, but is it beneficial?

2. The Successful Defense of Commissions and Fees Confers an Indirect Benefit

"Benefit" to a trust or an estate may be reckoned in dollars and cents or in more intangible ways.[165] *Trynin* recognized an estate is only liable for those services that benefit the estate, but, in condoning fees for fees, the court relied on a nuanced idea of benefit. Not only can a fiduciary's services "directly benefit the estate in the sense of increasing, protecting, or preserving it," but an ostensibly "valueless" service is beneficial if "the estate's attorneys or representatives in performing the

162. *Contra In re* Estate of Inlow, 735 N.E.2d 240, 253–54 (Ind. Ct. App. 2000).

163. *In re* Clark's Estate, 10 Pa. D. 378, 379 (Pa. Orphans' Ct. 1901).

164. *See In re* Estate of Meininger, 532 A.2d 475, 477 (Pa. Super. Ct. 1987) (stating confirmation carries the "imprimatur of finality" because it is "conclusive as to any division of property" before the court); *accord* PA. R. APP. P. 342(a)(1) ("An appeal may be taken as of right from . . . [a]n order confirming an account . . . .").

165. *See In re* Estate of Flaherty, 484 N.W.2d 515, 518 (N.D. 1992) ("[W]e believe that a benefit to the estate is not to be measured solely in monetary terms, but can also include a personal representative's good faith attempts to effectuate the testamentary intention set forth in a facially valid will." (citations and internal quotation marks omitted)); Solimine v. Hollander, 19 A.2d 344, 347 (N.J. Ch. 1941) (stating a fiduciary's successful defense of a surcharge or removal action is "invariably paid out of the [trust or] estate being administered, and this is done without inquiry into the question of whether or not his defense resulted in some [direct] benefit to the trust [or estate]. Such benefit is necessarily present in the circumstance that by defending the action against him the executor or testamentary trustee is effectuating the testator's intent that the [trust or] estate be administered by the hands to which it has been confided.").

service[] were acting in consonance with the fiduciary duties imposed upon them."[166] The court explained that "fee litigation confers no immediate or direct benefit on the estate," but "it becomes a necessary incident to the attorney's work for the estate, and so compensable, when unjustified challenges are raised to a fee claim."[167]

Sloan and *Inlow* disagreed. *Sloan* opted for a more concrete measure of benefit, holding fees-for-fees "claims are brought in behalf of the attorney seeking the fees and clearly do not benefit the estate because they do not increase or preserve the estate's assets."[168] *Inlow* held the pursuit of fees for fees "is clearly a service performed for the attorney seeking to be paid, rather than a service performed for the estate."[169] Thus, the defense of compensation litigation is a "routine cost of doing business that must be factored into an attorney's hourly rate . . . and cannot be considered a separate expense to be subsidized by the estate."[170]

Sloan and *Inlow* are correct to an extent. A fiduciary's defense of their commissions and attorney's fees does not *directly* benefit a trust or an estate; it neither increases nor preserves any assets. In fact, if reimbursed from the trust or estate, the defense of commissions and attorney's fees further dilutes the trust or estate. But *Trynin* conceded this much. What *Sloan* and *Inlow* failed to wrestle with was *Trynin*'s discussion of services that provide an indirect benefit because they relate to duties imposed on the fiduciary by law.

Pennsylvania already recognizes this principle in the surcharge context. A surcharge action places a fiduciary "in the position to be sued because of duties they had performed" as a fiduciary.[171] If a fiduciary successfully defends a surcharge action, "it would be unjust to require them personally to bear the reasonable costs of the defense" given that the suit was "brought against them solely by reason of their position[]."[172] In other words, the attorney's fees "are necessarily incurred by [the fiduciary] in the administration of the trust [or estate]."[173]

The successful defense of a surcharge action does not increase or preserve any assets, yet a fiduciary is entitled to an allowance to pay for a successful defense. Why? Because a surcharge action impugns a fiduciary's stewardship. The threat of surcharge compels a fiduciary to

166. *In re* Estate of Trynin, 782 P.2d 232, 235 (Cal. 1989) (in bank).
167. *Id.* at 238.
168. *In re* Sloan Estate, 538 N.W.2d 47, 49 (Mich. Ct. App. 1995).
169. *In re* Estate of Inlow, 735 N.E.2d 240, 253 (Ind. Ct. App. 2000).
170. *Id.*
171. *In re* Estate of Browarsky, 263 A.2d 365, 366 (Pa. 1970).
172. *Id.*
173. *In re* Wormley's Estate, 59 A.2d 98, 100 (Pa. 1948).

prove they acted, as *Trynin* put it, "in consonance with the fiduciary duties imposed upon them"—i.e., the duty of care.[174] The successful defense of a surcharge action means no loss or impropriety occurred and the fiduciary exercised the prudence, caution, and skill the law requires. Success exonerates the fiduciary's administration.[175]

As noted in *Fishel*, the principles governing surcharge actions apply with equal force to a fiduciary's defense of their commissions and attorney's fees.[176] Unreasonable compensation is excessive compensation, and excessive compensation works a loss to the trust or estate.[177] This loss amounts to a "dereliction of duty" and opens a fiduciary to the imposition of a surcharge.[178] To reduce a fiduciary's commissions and fees with a surcharge means the services performed were inadequate, unnecessary, unsatisfactory, or overpriced. Any fiduciary that would pay themselves or their counsel for such services is careless or, at worst, fleecing the trust or estate. Neither is the paragon of a fiduciary. But if the compensation claimed by a fiduciary and their counsel survives judicial scrutiny, then it must necessarily be just and the result of proper administration because "the measure of [a fiduciary's] skill and attention lies *in the compensation*."[179] The successful defense of commissions and fees may secure a pecuniary benefit for the fiduciary and their counsel, but, like the successful defense of a surcharge action, it also eliminates concerns about whether the fiduciary properly administered the trust or estate. The benefit is mutual and, in the case of the trust or estate, indirect, but no less valuable. Unlike *Sloan* and *Inlow*, *Trynin* and *Fishel* recognized compensation litigation is not about the money, but what the money *represents*: services "directly related to the preservation, protection, administration[,] and distribution" of the trust or estate.[180]

Given the aptness of the surcharge analogy, why did the *Powers* court reject it? *Powers* dismissed the surcharge analogy as follows: "In our opinion the burden was on the trustee to establish the exceptional and

174. *See, e.g.*, *In re* Estate of Stephenson, 364 A.2d 1301, 1306 (Pa. 1976).

175. *See, e.g.*, Powell v. Tagami, 236 Cal. Rptr. 3d 765, 779 (Cal. Ct. App. 2018) (affirming award of attorney's fees incurred by trustee who successfully defended a surcharge action because, even though the litigation "'may have benefited [the trustee] personally by eliminating the possibility of individual liability, [the defense] also benefited the trust by eliminating charges raising serious questions about whether [the trustee] had and could continue to administer the trust properly'" (quoting Hollaway v. Edwards, 80 Cal. Rptr. 2d 166, 170 (Cal. Ct. App. 1998))).

176. *See In re* Fishel Land Co., 27 Fiduc. Rep. 237, 238 (Pa. Orphans' Ct. 1976).

177. *See, e.g.*, *In re* Estate of Sweetland, 770 A.2d 1017, 1020 (Me. 2001).

178. *Fishel*, 27 Fiduc. Rep. at 238.

179. *In re* Clark's Estate, 10 Pa. D. 378, 379 (Pa. Orphans' Ct. 1901) (emphasis added).

180. *Fishel*, 27 Fiduc. Rep. at 238.

unusual facts which justified the special allowance of compensation, and that no fee should be paid to counsel beyond the fee for general services, credit for which is taken in the account."[181] That is all. The reader never learns why fees for fees are "special" and require "exceptional and unusual facts" to support their allowance.[182] There is no authority for this rule other than the court's "opinion."[183] No doubt, a learned opinion,[184] but, in a decision replete with citations to and discussions of precedent,[185] the court's retreat into enigmatic buzzwords reveals the hand of the rhetorician, not the jurist. Such rhetoric is neither profound nor even superficial. It is a clumsy attempt to disguise judicial fiat. Worse, the awkwardness of *Powers* manifests in later decisions that unthinkingly applied its holding.[186]

The *Powers* court's discussion of the surcharge analogy is an object lesson in what Justice Cardozo labeled the "magisterial or imperative" style in judicial writing:

> It eschews ornament. It is meager in illustration and analogy. If it argues, it does so . . . seldom with tentative gropings towards the inductive apprehension of a truth imperfectly discerned . . . . It is the inevitable progress of an inexorable force . . . . It is thus men speak when they are conscious of their power. One does not need to justify oneself if one is the mouthpiece of divinity . . . . [I]t is the masters, and no others, who feel sure enough of themselves to omit the intermediate steps and stages, and leap to the conclusion.[187]

The *Übermensch* mentality is all well and good, but, seeing as the law is "a process of adaptation and adjustment," the magisterial style must cede ground to "other methods more conciliatory and modest."[188] The pseudo-Cartesian form of argument—"I say it, therefore it's true"—is incompatible with today's opinions that "grope and feel" their way toward judgments based on "groupings of fact and argument and illustration."[189] Terse edicts paired with scant reasoning produce opinions

181. *In re* Powers' Estate, 58 Pa. D. & C. 379, 386 (Pa. Orphans' Ct. 1947) (en banc).

182. *See id.*

183. *See id.*

184. The *Powers* decision was penned by none other than Judge Hunter, author of the classic treatise *Pennsylvania Orphans' Court Commonplace Book*. *See* Klein, *supra* note 105, at 17 (describing Judge Hunter's text as one of the Orphans' Court's "Bibles").

185. *See Powers*, 58 Pa. D. & C. at 381–86.

186. *See In re* Moss Trust, 21 Fiduc. Rep. 2d 151, 153 (Pa. Orphans' Ct. 2001); *In re* Nicely Estate, 18 Fiduc. Rep. 2d 397, 415 (Pa. Orphans' Ct. 1998); *In re* Biddle's Estate, 20 Pa. D. & C.2d 184, 193 (Pa. Orphans' Ct. 1961).

187. Benjamin Cardozo, *Law and Literature*, *reprinted in* 39 COLUM. L. REV. 119, 123, 125, 126 (1939).

188. *Id.* at 125.

189. *Id.* at 126, 133.

that are dead on arrival in the marketplace of ideas. Judicial authority "depend[s] altogether on the force of the reasoning by which it is supported."[190] Imperious opinions may lay down rules of general applicability and, for a time, decide the rights and duties of human beings, but, like the house built on sand, their methodology cannot endure the rains and floods of later scrutiny. Maybe the *Powers* court served as Themis's oracle when it rejected the surcharge analogy, but it omitted several intermediate steps in reaching that divine conclusion. Left only with its say-so, the decision is unavailing.

One suspects, although cannot prove, that *Powers* rejected the surcharge analogy for the same reason *Sloan* and *Inlow* adopted a myopic understanding of benefit: anxiety.[191] To award attorney's fees for the successful defense of a fiduciary's commissions and fees shifts the cornerstone of the fiduciary relationship closer toward the quicksand of self-interest.[192] If this was the courts' fear, that ship sailed centuries ago when fiduciary administration ceased to be a gratuitous burden.[193] Fiduciaries may be "held to something stricter than the morals of the market place,"[194] but entitlement to compensation betrays the transactional undercurrent in modern trust and estate administration.[195] The *ancien régime* of gratuitous service is unlikely to return anytime

190. Smith v. Turner (The Passenger Cases), 48 U.S. (7 How.) 283, 470 (1849) (Taney, C.J., dissenting).

191. *Cf.* Arthur Selwyn Miller & D.S. Sastri, *Secrecy and the Supreme Court: On the Need for Piercing the Red Velour Curtain*, 22 BUFF. L. REV. 799, 803 (1973) ("Judges seldom reveal publicly why a major premise was chosen while other available premises were discarded. The unavoidable conclusion is that there is more to adjudication than what the judges choose to say, either in their opinions or in their extrajudicial utterances.").

192. *Cf., e.g.*, GEORGE GLEASON BOGERT ET AL., BOGERT'S THE LAW OF TRUSTS AND TRUSTEES § 975 (2020) (stating early authorities believed the expectation of payment injected mercenary motives into trustees' work).

193. A trip back in time reveals fiduciaries were expected to serve for free. *E.g.*, Robinson v. Pett (1734) 24 Eng. Rep. 1049, 1049; 3 P. Wms. 249, 251. This English rule did not last in America; local customs and statutes steadily modified the common law. *See* Granberry's Ex'r v. Granberry, 1 Va. 246, 250 (1793) ("An executor is certainly entitled to some compensation for his trouble, and that, by custom, is generally fixed at five *per cent.* upon actual receipts."); Meacham v. Sternes, 9 Paige Ch. 398, 400, 401 (N.Y. Ch. 1842) (noting how the New York legislature abrogated the common law bar on fiduciary compensation). The change was based, in part, on a "shift of emphasis in the conception of fiduciary qualification from personal loyalty to business integrity and capacity, on the ground that 'cheap trustees are poor trustees.'" Comment, *Compensation of Fiduciaries*, 42 YALE L.J. 771, 771 (1933); *accord In re* Clark's Estate, 10 Pa. D. 378, 379 (Pa. Orphans' Ct. 1901) ("Gratuitous services are not to be expected in business relations. Disinterested benevolence is as rare as human gratitude. The law is formed, not on exceptional, but prevailing types. Hence, a policy of allowing [fiduciaries] compensation commensurate to the services and responsibility required is essential to secure the best results.").

194. Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928).

195. *See, e.g.*, *In re* Estate of McAleer, 248 A.3d 416, 436 n.36 (Pa. 2021).

soon. Disallowing fees for fees cannot alter this reality any more than Pandora could reassemble the contents of her box. But allowing fees for fees in appropriate cases rewards those fiduciaries who observe "the punctilio of an honor the most sensitive."[196]

The *Sloan*, *Inlow*, and *Powers* triumvirate treat a fiduciary's defense of their commissions and attorney's fees (successful or not) as some kind of post-administrative proceeding incurring unique costs unrelated to the rest of the fiduciary's administration. To dismantle fiduciary administration in this way would require a radical redefinition of "administration."[197] Moreover, to disallow fees for fees based on the idea compensation litigation is unbeneficial runs afoul of the surcharge analogy advanced in *Fishel*.[198] If there is any substantive distinction between the successful defense of a more general surcharge action and the successful defense of a surcharge connected with compensation litigation, it is a hair too fine to split.[199] Whether framed in common law terms as a "service actually rendered" in the administration of an estate[200] or an expense "properly incurred" in the administration of a trust under Subsection 7769(a)(1) of the UTA,[201] Pennsylvania courts should adopt the surcharge analogy as the basis for awarding attorney's fees incurred in the successful defense of a fiduciary's commissions and fees.

3. Success as the Linchpin to Recover Fees for Fees

It cannot be stressed enough: success is the linchpin to recover fees for fees. Where compensation litigation results in the *total* reduction of a

196. *Meinhard*, 164 N.E. at 546.

197. *See supra* Part V.B.1.

198. *See In re* Fishel Land Co., 27 Fiduc. Rep. 237, 238 (Pa. Orphans' Ct. 1976).

199. The only practical difference is burden-shifting at trial. Initially, "[t]hose who seek to surcharge a fiduciary for a breach of trust must bear the burden of proving the particulars of his wrongful conduct." *In re* Bard's Estate, 13 A.2d 711, 713 (Pa. 1940). Once the objector establishes a *prima facie* case of breach, the burden of proof shifts to the fiduciary to present exculpatory evidence. *E.g.*, *In re* Estate of Maurice, 249 A.2d 334, 336 (Pa. 1969). *But see, e.g.*, *In re* Estate of Geniviva, 675 A.2d 306, 311 (Pa. Super. Ct. 1996) ("[W]here a significant discrepancy appears on the face of the record, the burden shifts [immediately] to the [fiduciary] to present exculpatory evidence and thereby avoid the surcharge."). Conversely, objections to unreasonable commissions and attorney's fees place the initial burden of proof on the fiduciary and their attorney to "establish[] facts which show that he or she is entitled to such compensation." *In re* Estate of Sonovick, 541 A.2d 374, 376 (Pa. Super. Ct. 1988) (internal quotation marks omitted). The burden then shifts to the objector to present "sufficient countervailing evidence." *Id.* Although the case law does not say, one commentator has argued the burden of proof in a surcharge action is by a preponderance of the evidence. Robert W. Tredinnick, *Presumptions and the Burden of Proof in Orphans' Court Litigation*, 7 Fiduc. Rep. 2d 102, 128–29 (1986). Considering the surcharge analogy, this same burden applies to compensation litigation.

200. *See, e.g.*, *In re* Estate of Rees, 625 A.2d 1203, 1206 (Pa. Super. Ct. 1993).

201. *See* 20 PA. CONS. STAT. § 7769(a)(1) (2022).

fiduciary's commissions, attorney's fees, or both, courts should not entertain fees-for-fees claims because the litigation confers no indirect benefit on the trust or estate.[202] A fees-for-fees award in those cases would actually reward the lack of due care that prompted the reduction. Per the surcharge analogy, only the *successful* defense of commissions and fees entitles a fiduciary to indemnification.[203] Where the commissions and fees claimed are allowed without reduction by the court, the fiduciary is eligible for a fully compensatory fees-for-fees award.[204] That award, however, is not automatic.[205] Eligibility does not render the trial court a rubber stamp. What constitutes a fully compensatory fees-for-fees award should be, as with all other fee questions, left to the sound discretion of the trial court.[206] Moreover, as noted in *Trynin*, there may be cases where "the trial court reasonably concludes that the amounts previously awarded the attorney . . . are adequate, given the value of the estate and the nature of its assets, to fully compensate the attorney for all services, including fee-related services."[207] Under those circumstances, "denial of a request for fee-related fees would not be an abuse of discretion."[208]

But what of those instances where the fiduciary's commissions and fees sustain something less than a total reduction? The question of *partial* success is trickier, but it stands to reason partial success in the underlying compensation litigation imposes an upper limit on the recovery of fees for fees. As the United States Supreme Court noted in a different fee-shifting context:

> The product of reasonable hours times a reasonable rate does not end the [fee] inquiry. There remain other considerations that may lead the [trial] court to adjust the fee upward or downward, including the important factor of the "results obtained." This factor is particularly

202. *Cf. In re* Estate of Inlow, 735 N.E.2d 240, 254 (Ind. Ct. App. 2000) ("In the case of a meritorious challenge to a fee petition, defending its reasonableness cannot seriously be considered a service 'for the estate,' especially if the challenge results in a reduction of the proposed fee.").

203. *See supra* Parts II.B.2, V.B.2.

204. *See supra* Parts II.B.2, V.B.2.

205. *See In re* Estate of Trynin, 782 P.2d 232, 239 (Cal. 1989) (in bank).

206. *See, e.g.*, *In re* Trust of Ischy, 415 A.2d 37, 42–43 (Pa. 1980).

207. *Trynin*, 782 P.2d at 239; *accord In re* LaRocca Estate, 246 A.2d 337, 339 (Pa. 1968) ("The facts and factors to be taken into consideration in determining the fee or compensation payable to an attorney include . . . the ability of the client to pay a reasonable fee for the services rendered[] and, very importantly, the amount of money or the value of the property in question.").

208. *Trynin*, 782 P.2d at 239; *accord In re* Estate of Wallis, 218 A.2d 732, 736 (Pa. 1966) ("In determining whether the court below abused its discretion in awarding additional compensation, we examine the record as a whole in order to evaluate the totality of the services rendered.").

> crucial where a plaintiff is deemed "prevailing" even though he succeeded on only some of his claims for relief.[209]

In those cases, the "most critical factor" in determining the size of the fee award is the "degree of success obtained" because a plaintiff's status as a prevailing party entitling them to an award of attorney's fees "say[s] little about whether the expenditure of counsel's time was reasonable in relation to the success achieved."[210] The Supreme Court later extended the degree-of-success criterion to fees for fees,[211] and lower courts have held an award of fees for fees should be reduced by the ratio of the fees awarded in the underlying fee litigation compared to the amount requested.[212] Therefore, Pennsylvania courts should pay careful attention to the results obtained in the compensation litigation and reduce fees for fees in proportion to the success of the fiduciary's defense.[213] This approach is consistent with longstanding Pennsylvania precedent.[214]

VI. CONCLUSION

Even if this Article fails to convince the reader the successful defense of a fiduciary's commissions and attorney's fees is a reimbursable expense of trust and estate administration, two things should be clear. First, the law governing fiduciary fees for fees is woefully underdeveloped. Despite the steady stream of trust and estate litigation in Pennsylvania, only a smattering of reported trial court decisions have addressed the question of fees for fees. *Fishel* shows a way out of this precedential desert.[215] *Powers* and its progeny are mirages.[216] Second, "courts are reactive institutions. They do not search out interpretive occasions, but instead wait for others to bring matters to their attention."[217] As parties increasingly forgo formal audits and settle trust and estate administration with informal accountings,[218] the courts have fewer and fewer opportunities to extend, modify, or reverse existing law on fiduciary attorney's fees. "A court cannot proceed (or not proceed

209. Hensley v. Eckerhart, 461 U.S. 424, 434 (1983) (footnote omitted).

210. *Id.* at 436.

211. Comm'r v. Jean, 496 U.S. 154, 163 n.10 (1990).

212. *See, e.g.*, Thompson v. Gomez, 45 F.3d 1365, 1366–68 (9th Cir. 1995).

213. *See* BOGERT ET AL., *supra* note 192, § 971 ("The trustee's legal fees incurred in connection with a beneficiary's claim against it that is partially successful may be allocated by the court, with part of it being allowed on the trustee's account as a proper charge to the trust and the remainder being payable by the trustee.").

214. *See In re* LaRocca Estate, 246 A.2d 337, 339 (Pa. 1968) ("The facts and factors to be taken into consideration in determining the fee . . . payable to an attorney include . . . the results he was able to obtain . . . .").

215. *See supra* Part V.B.2.

216. *See supra* Part V.B.2.

217. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984).

218. *Cf.* CASELOAD STATISTICS, *supra* note 43, at 120.

very far) in the face of a settlement."[219] Accordingly, the fate of fees for fees is, in large part, beholden to the willingness of litigants to press the issue in court. Yet the legislature is not constrained in this way; it is the more nimble and responsive branch of government. The General Assembly can, and indeed should, remedy the fees-for-fees lacuna in Pennsylvania law with a statute explicitly addressing fees for fees.[220] Consider the following proposed addition to the Probate, Estates and Fiduciaries Code[221]:

AWARD OF ATTORNEY'S FEES

> In any proceeding where a fiduciary is required to defend their administration of a trust or an estate, including the reasonableness of their commissions and attorney's fees, the court, in its discretion, may award a prevailing fiduciary a reasonable attorney's fee payable from the trust or estate.

Whatever the final wording or whether the statute is pro or con, some clarification is long overdue.

219. Fiss, *supra* note 217, at 1085.

220. *See In re* Estate of Scott, 211 A.2d 429, 431 (Pa. 1965) ("A legislature has the power to enact all manner of legislation with respect to wills and trusts subject, of course, to the rights and limitations ordained in the Constitution of the United States and the Constitution of Pennsylvania.").

221. 20 PA. CONS. STAT. §§ 101–8815 (2022).