

## PACT Plaintiff Cannot Bring Suit

The Alabama Legislature in 1990 established the Alabama Prepaid Affordable College Tuition ("PACT") program as part of the Wallace-Folsom College Savings Investment Plan. *Ala. Code* §§ 16-33C-1 to 8 (1975). The purpose of the PACT program is to assist payment of college tuition costs by allowing a person to purchase PACT contracts in advance of a child's attending college. The PACT program obligates the state to pay tuition in accordance with the contract if the minor child attends a state college or university. Payments received by the PACT program become public funds, which the state invests to generate assets to fund the child's education. *See id.* at §§ 16-33C-1 and 16-33C -6(d). The PACT program is overseen by a "PACT board," which serves as both "[t]he board of directors and trustees of the PACT Trust Fund." *Id.* at § 16-33C-3(14). The PACT board is specifically empowered "[t]o invest as [the board] deems appropriate any funds in the PACT Trust Fund ...." *Id.* at § 16-33C-5(3).

In 2003, the PACT board entered into an "Investment Consultant Agreement" with Callan Associates, Inc., a San Francisco based investment management company. Under this agreement, Callan was to provide "professional investment consulting services to the PACT Board. On February 27, 2009, Kay Ivey, then state treasurer and, by virtue of that office, chairman of the PACT board, issued a letter to the purchasers (holders) of PACT contracts informing them that a downturn in the stock market had negatively impacted the assets of the PACT Trust Fund. Shortly thereafter, Carol M. Perdue filed suit against the PACT board and Callan on behalf of her daughter, Anna Perdue, a designated beneficiary of the PACT Trust Fund. The complaint alleged that the Trust has lost millions of dollars as a result of Callan's and the Trustees' mismanagement.

The Alabama Supreme Court recently held that the suit should be dismissed. *Ex parte Callan Associates, Inc.*, No. 1081683 (Ala. Sept. 9, 2011). The Court reasoned that when an individual places his or her property in an active trust, legal title to that property passes to the trustee. If there is any injury to the property, the proper party to seek redress for that injury is the trustee. A beneficiary to a trust (such as the plaintiff's daughter in this case) acquires a right to sue for damage to the trust property only if certain conditions exist. Specifically, there must either be a conflict of interest between the trustee and the beneficiary or the trustee must refuse or fail to initiate a meritorious lawsuit against a third party. Here the plaintiff had failed to make a proper *demand* that the trustee pursue a claim against Callan. In the absence of that demand, and a failure or refusal by the trustee, the Court ruled that the plaintiff did not have standing to pursue the litigation. "Standing" in this context meant that the lawsuit was "premature," in the sense that the preconditions to a suit against Callan had not been satisfied.

The Court's reasoning leaves open the possibility that the present plaintiff, or some other adversely affected person, might later be able to properly pursue a claim against the investment management company, assuming the necessary preconditions to such a suit were met.