

Title

The poor excuse for a tort that lurks in the Uniform Trust Code's certificate-of-trust regime

Text

A third party may not *knowingly* participate in a breach of trust. Even a non-transferee third party who knowingly participates in a breach of trust may not escape liability to the beneficiary for any loss occasioned by the breach of trust. See generally *Loring and Rounds: A Trustee's Handbook* §7.2.9. Uniform Trust Code § 1012(b) purports to relieve prospective third-party service providers of the need to request and examine a copy of the entire trust instrument, which they would ordinarily want to do for purposes of ascertaining the trustees' powers and the propriety of their exercise. Instead, third parties may rely on a so-called certification of trust as provided in UTC § 1013. Disclosure is limited to the following information: (1) that the trust exists and the date the trust instrument was executed; (2) the identity of the settlors; (3) the identity and address of the currently acting trustee; (4) the powers of the trustee; (5) the revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust; (6) the authority of the co-trustees to sign or otherwise authenticate and whether all or less than all are required in order to exercise powers of the trustee; (7) the trust's taxpayer identification number; and (8) the manner of taking title to trust property. On the other hand, a third party who has actual knowledge that the trustee is exceeding or improperly exercising the trustee's powers may not rely on such a certification.¹

UTC § 1013(h) provides that a third person "making a demand for the trust instrument in addition to certification of trust or excerpts is liable for damages if the court determines that the person did not act in good faith in demanding the trust instrument." As a practical matter, a third party, say, a financial institution, who demands to see, for whatever reason, a copy of the entire trust instrument is unlikely to be deterred from doing so by the ultra-remote prospect of being a defendant in a *very public* UTC §1013(h) action in tort initiated by the trustee *at trust expense*.² A trustee who would go down that road would run a serious risk of being held personally liable for squandering trust assets,³ not to mention for frivolously compromising the privacy of the parties to the particular trust relationship. First, bad faith is hard to prove.⁴ Second, damages are likely to be nominal. Third, should the trustee not have simply sought the services of a third-party who was prepared to rely only on a certification of trust? Let's assume that such a provider could not be found. Why not then have resorted to a simple *contract-based* non-disclosure arrangement between the trustee and a third-party who was unwilling to rely on a certification of trust alone but whose services were indispensable to a proper administration of the trust?

The duty of confidentiality owed to each beneficiary by a trustee in the trustee's dealing with third parties and/or the other beneficiaries is taken up generally in §6.2.3 of *Loring and Rounds*:

¹ See generally §7.2.9 of this handbook.

² See generally Mel M. Justak & Anne-Marie Rhodes, *Maintaining Client Privacy in an Increasingly Public World*, 47 ACTEC L. J 65 (Fall 2021).

³ See generally §6.2.1.3 of this handbook.

⁴ See generally §8.15.81 of this handbook.

A Trustee's Handbook (2022), which section is reprinted in its entirety, with enhancements, in the appendix immediately below. To obtain a copy of the 2022 Edition of *Loring and Rounds: A Trustee's Handbook* in its entirety (1639 pages of text, plus front and end matter) visit the Wolters Kluwer “estore” at <https://law-store.wolterskluwer.com/s/product/loring-rounds-a-trustees-handbook-2022e-misb/01t4R00000OVWE4QAP>.

Appendix

§6.2.3 Duty of Confidentiality Owed to Each Beneficiary by Trustee in Trustee's Dealings with Third Parties and/or the Other Beneficiaries [from *Loring and Rounds: A Trustee's Handbook* (2022)]

Status/duties of prospective trustee in run-up to trust's creation. A fiduciary relationship of agency arises upon a prospective settlor supplying the prospective trustee with confidential information. The latter may not disclose the information to third parties absent the former's informed consent or otherwise take personal advantage of the former's confidence.⁴⁸⁴

The current trustee. A corollary of the trustee's general duty of loyalty is the specific duty to keep all the affairs of the trust confidential.⁴⁸⁵ The trustee's duty to act solely in the interest of the beneficiaries means that third parties are told only what the law requires the trustee to divulge, *e.g.*, information mandated by regulatory, supervisory, and taxing authorities,⁴⁸⁶ or what furthers the interests of all the beneficiaries, *e.g.*, information needed by executors of pour-over wills and trustees of related trusts.⁴⁸⁷ “Even in providing information to or on behalf of beneficiaries, however, the trustee has a duty to act with sensitivity and, insofar as practical, with due regard for considerations of relevancy and sound administration, and for the personal concerns and privacy of the trust beneficiaries.” Breach of confidence was one of three traditional bases for equity jurisdiction, the others being fraud and accident. The law of trusts, the law of agency, and the law governing lawyers are separate offshoots of the branch of equity that remedied breaches of confidence.⁴⁸⁸ Unauthorized disclosure to third parties, at minimum, is grounds for removal.⁴⁸⁹

The “certification of trust” concept. A third party may not *knowingly* participate in a breach

⁴⁸⁴Paul-Jean Le Cannu, *Trusts and Money Laundering in English Law: The Duties of Confidentiality and Disclosure of Trustees and the Obligations Arising Out of Sections 93a, 93b and 93d of the Criminal Justice Act 1988*, 2 Global Jurist Topics No. 2, Article 4 (2002).

⁴⁸⁵See Restatement (Second) of Trusts §170 cmt. s. See also §5.4.1.1 of this handbook (the trust beneficiary's right to information and confidentiality) and §8.8 of this handbook (whom trust counsel represents).

⁴⁸⁶Restatement (Third) of Trusts §78 cmt. i.

⁴⁸⁷See Restatement (Third) of Trusts §78 cmt. i; Restatement (Second) of Trusts §170. See also 2A Scott on Trusts §170.

⁴⁸⁸See generally Chapter 1 of this handbook.

⁴⁸⁹See Bogert §527. See generally §7.2.3.6 of this handbook (trustee removal).

of trust. Even a non-transferee third party who knowingly participates in a breach of trust may not escape liability to the beneficiary for any loss occasioned by the breach of trust. See generally §7.2.9 of this handbook. Uniform Trust Code § 1012(b) purports to relieve prospective third-party service providers of the need to request and examine a copy of the entire trust instrument, which they would ordinarily want to do for purposes of ascertaining the trustees' powers and the propriety of their exercise. Instead, third parties may rely on a so-called certification of trust as provided in UTC § 1013. Disclosure is limited to the following information: (1) that the trust exists and the date the trust instrument was executed; (2) the identity of the settlors; (3) the identity and address of the currently acting trustee; (4) the powers of the trustee; (5) the revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust; (6) the authority of the co-trustees to sign or otherwise authenticate and whether all or less than all are required in order to exercise powers of the trustee; (7) the trust's taxpayer identification number; and (8) the manner of taking title to trust property. On the other hand, a third party who has actual knowledge that the trustee is exceeding or improperly exercising the trustee's powers may not rely on such a certification.⁵

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Cybersecurity. A breach of confidence need not necessarily implicate the trustee's duty of loyalty. The trustee who maintains in digital form confidential information pertaining to the terms of the trust, its settlor, its beneficiaries, and/or the subject property assumes a duty to keep that information secure.⁴⁹⁰ Thus, the trustee could be held personally liable for the consequences of negligently failing to protect such information from the predations of cybercriminals. The trustee's

⁵ See generally §7.2.9 of this handbook.

⁶ See generally Mel M. Justak & Anne-Marie Rhodes, *Maintaining Client Privacy in an Increasingly Public World*, 47 ACTEC L. J 65 (Fall 2021).

⁷ See generally §6.2.1.3 of this handbook.

⁸ See generally §8.15.81 of this handbook.

⁴⁹⁰ See generally Huw Thomas, *Defend your data*, Dec. 2014/Jan. 2015 STEP J. 55 (how trustees should approach information security).

costs of prudently insuring against the quantifiable costs of cybercrimes, both avoidable but for the trustee's ordinary negligence and unavoidable, ought to be reimbursable from the trust estate.⁴⁹¹

Liability of third parties. What about the liability of the third party who receives the confidential information? If the third party exploits the information in ways that are injurious to the trust, or if the third party and the trustee are somehow connected such that the trustee is in conflict of interest, then the third party may well share liability with the trustee, provided the third party knew of the trust's existence.⁴⁹² In England, a third party may incur liability if he, she, or it exploits confidential information pertaining to the trust in order to "dishonestly assist" the trustee in misapplying the trust property, or to induce him to do so.⁴⁹³ If the misapplication was for the third party's benefit, then the third party might well be held accountable as a constructive trustee of the misapplied property.⁴⁹⁴ For a detailed discussion of third-party fiduciary liability of the trustee's agents, see §7.2.9 of this handbook.

Keeping critical information from beneficiaries themselves. As to whether a trustee may keep information pertaining to the affairs of the trust secret not only from third parties but also from the beneficiaries themselves, see §5.4.1.1 of this handbook (right to information and confidentiality).

The former trustee. The trustee's fiduciary duties to the beneficiaries (or to the trust's charitable purposes, as the case may be) will not cease even upon the proper transfer of legal title to a qualified successor trustee. The transferor-trustee, for example, remains burdened with the duty of undivided loyalty, to include the incidental sub-duty of confidentiality.⁴⁹⁵ In the face of such residual trust-related burdens, divestiture of bare legal title, in and of itself, will not also divest the transferor-trustee of standing to litigate matters pertaining to the trust's proper administration.⁴⁹⁶

Common breach-of-the-duty-of-confidentiality traps for the unwary trustee. There are many actions that a trustee can take that run afoul of the duty to keep the affairs of the trust confidential, actions that would at first glance seem not to implicate the duty. Here are a few examples:

- Disclosing information to settlors to which they are not entitled.

⁴⁹¹See generally §3.5.2.3 of this handbook (expenses reimbursable from the trust estate).

⁴⁹²See generally Lewin ¶120-49 through ¶120-50 (England).

⁴⁹³Lewin ¶120-49 through ¶120-50 (England).

⁴⁹⁴Lewin ¶120-49 (England).

⁴⁹⁵Not only is a former trustee-fiduciary saddled with such residual fiduciary duties, so also is the former agent-fiduciary. The attorney-at-law in the post-termination-of-the-representation period particularly comes to mind in this regard.

⁴⁹⁶But see *Old Nat'l Bancorp v. Hanover Coll.*, 15 N.E.3d 574 (Ind. 2014) (the court apparently oblivious of maxim that equity exalts substance over form that is discussed in §8.12 of this handbook).

- Disclosing information to family-office personnel to which they are not entitled.
- Disclosing information pertaining to beneficiary #1 to beneficiary #2 to which the latter is not entitled.
- Disclosing information to a beneficiary’s advisor that the advisor has not been authorized to receive.
- In the case of the trustee of a constellation of trusts, “automatically telling the whole family about all the trusts.”⁴⁹⁷

A related issue is the loss of the attorney-client privilege by too much information sharing.⁴⁹⁸ “A trustee...does need to be careful that it does not overexpose any legal advice it receives by copying it too widely and beyond the ‘client.’”⁴⁹⁹

⁴⁹⁷Sally Edwards, *Silence is golden*, STEP J. 23 (Mar. 2019) (“Separate files for each trust should be maintained, to avoid ‘cross-contaminating’ the trusts by dealing with more than one trust in the same piece of correspondence, so resulting in information about one trust appearing on the file of another.”); *cf. In re Raggio Family Tr.*, 460 P.3d 969 (Nev. 2020) (a case involving the shared trustee-beneficiary of two discretionary subtrusts with different sets of remaindermen in which the remaindermen of one subtrust held not entitled to discover certain central facts pertaining to the trustee’s administration of the other subtrust).

⁴⁹⁸See generally §8.8 of this handbook (the attorney-client privilege in the trust context).

⁴⁹⁹Sally Edwards, *Silence is golden*, STEP J. 23 (Mar. 2019).