

Title

State law and the right to a jury trial in trust litigation: Blurring the line between law and equity

Text

In an action at law that is litigated in a state court, the parties may be entitled to a jury trial. Generally not the case with an equitable action. Thus, as a general rule there is no right to a jury trial in proceedings concerning the internal affairs of trusts. Recall that the trust relationship itself is a creature of equity. An action against a trustee for breach of trust is historically an equitable action, and, therefore, one in which there is no right to a jury trial. If the trustee, however, is under a duty to pay money immediately and unconditionally to a beneficiary, the payment may be enforced against the trustee in an action at law. In that case, the parties may have a right to a jury trial. See Rest. (Third) of Trusts §95 cmt. a. These situations are unlike a suit in equity to compel a trustee to restore misappropriated money, or a misappropriated chattel, that is to remain an asset of the trust. Otherwise, a damage award against a trustee is likely to be an equitable remedy, and in any case the availability of a legal remedy ought not to oust the jurisdiction of the court in equity to compel delivery of the money. Occasionally, actions at law have been maintained by beneficiaries to compel trustees to disgorge items of tangible personal property, although such a remedy is actually an equitable one.

Under Texas law, the right to a jury trial extends to disputed issues of fact in equitable, as well as legal, proceedings. See §10 of article 5 of the Texas Constitution. The discretionary meting out of equitable remedies, however, is still the exclusive domain of the equity judges. Whether a plaintiff-beneficiary's hands are "clean," for example, is for a court, not some lay jury, to decide. On the other hand, whether there was subjective donative intent on the part of a purported settlor is an appropriate fact-based question for a jury. The pivotal inquiry is whether the disputed matter is a question of fact appropriate for a lay jury to decide or a question of equitable discretion that should only be decided by a court. When it comes to trust litigation, un-blending the questions of fact and the questions of equitable discretion is easier said than done.

The practical problem with extending to litigants in equity disputes the right to a jury trial is that the typical equity issue is a law-fact hybrid not easily transmogrified into a clean fact question. Take a UTC §412 trust-modification proceeding. Were the circumstances now prevailing unanticipated by the settlor and are the trust's purposes now impossible to fulfill? Each question has a heavy law component to it. Each calls for a parsing of the terms of the trust instrument in light of the circumstances surrounding its execution, as well as a general appreciation of what equity is all about. Jurisprudential context here is critical. Still, in Texas such questions are being put to lay juries.

Under the UPC, in any proceeding involving a trust where the parties otherwise would have no right to a jury trial, the court may call a jury to decide any issue of fact, in which case its verdict is advisory only. See UPC §1-306(b). The court may do so even if the parties have waived their rights, if any, to a jury trial.

As to the right to a jury trial in equity cases in the federal courts, see §7.1 of *Loring and Rounds: A Trustee's Handbook* (2022), the relevant portion of which section is set forth in **Appendix A** below. The assessment of punitive damages in trust litigation is also where the line between law and equity can get blurry. See generally §7.2.3.2 of the Handbook in this regard, the relevant portion of which section is set forth in **Appendix B** below. As to the intersection of law and equity when it comes to "remedying wrongful interferences in the making of gifts" see the link to my **JDSUPRA June 5, 2022 posting** in the list of postings below. The Handbook is available for purchase at <https://law-store.wolterskluwer.com/s/product/loring-rounds-a-trustees-handbook-2022e-misb/01t4R00000OVWE4QAP>.

Appendix A

§7.1 Trustee's Liabilities Generally (Breaches of Trust; Juries in Equity Litigation; Beneficiary's Standing to Seek Judicial Relief; Defenses; Equitable Excuses; Remedies) [from *Loring and Rounds: A*

Trustee's Handbook, available for purchase at <https://law-store.wolterskluwer.com/s/product/loring-rounds-a-trustees-handbook-2022e-misb/01t4R00000OVWE4QAP>].

Right to trial by jury in equity cases. *Federal courts.* Article III, Section 1, of the U.S. Constitution provides that “[t]he judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” Section 2 provides in part that the power of whatever inferior federal courts are established shall extend in law and equity to actual cases and controversies that implicate more than one jurisdiction.

In an internal dispute between or among the parties to a trust relationship that comes to a federal court, do the parties have a federal constitutional right to have the facts found by a jury? The U.S. Constitution's Seventh Amendment, enacted in 1791, provides as follows: “In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”

The trust relationship is a creature of equity, not law. For a detailed explanation of equity, see Chapter 1 of his handbook.²³ The parties to that relationship are the settlor, the trustee, the beneficiary. The trustee owes fiduciary duties to the beneficiary, the fiduciary principle also being an invention of equity. The beneficiary possesses equitable property rights incident to the trust relationship. The settlor imposes equitable duties on the trustee. One can go on and on. Bottom line: The internal affairs of a trust, such as a dispute between or among the parties to the relationship, are the domain of equity. So also, perforce, are equitable remedies meted out by courts. The trustee, on the other hand, can enter into legal as well as equitable relationships with third parties to the trust relationship. An example of such a legal relationship is the contract. An example of such an equitable relationship is the agency.

“In order to ascertain the scope and meaning of the Seventh Amendment, resort must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791.”²⁴ Back then, suits in equity were not tried to a jury, unless the chancellor in his discretion sent an issue to a jury for an advisory verdict.²⁵ Suffice it to say that disputes between and among the parties to a trust relationship, such as over the existence of facts that would warrant surcharge of an express trustee, are unquestionably the exclusive domain of equity.²⁶ In such disputes the parties may have some right to have the facts found by a jury, but the source of that right would not be the Seventh Amendment.

²³Equity's gloss on the common law is effected via doctrines, see generally §8.15 of this handbook, and maxims, see generally §8.12 of this handbook.

²⁴*Dimick v. Schiedt*, 293 U.S. 474 (1935).

²⁵Fleming James, Jr., *Right to a Jury Trial in Civil Actions*, 72 Yale L.J. 655 (1963).

²⁶Fleming James, Jr., *Right to a Jury Trial in Civil Actions*, 72 Yale L.J. 655, 691-692 (1963).

There is generally no federal right to have facts found by a jury in litigation involving the internal affairs of a trust. In the case of disputes at law generally that are adjudicated in the federal courts, there is a limited constitutional right to a jury trial. That right, however, has not been incorporated into the federal Bill of Rights, and thus a state is free to eliminate the right altogether in actions at law that are brought in its courts, at least without violating the federal constitution, or, conversely, is free to expand the right to encompass equity actions that are tried in its courts.²⁷

Appendix B

§7.2.3.2 Damages (a Substantive Remedy) [from *Loring and Rounds: A Trustee's Handbook*, available for purchase at <https://law-store.wolterskluwer.com/s/product/loring-rounds-a-trustees-handbook-2022e-misb/01t4R00000OVWE4QAP>].

Punitive or exemplary damages. The courts of equity had no power to award punitive damages.³⁴² “Equity suffers not Advantage to be taken of a Penalty or Forfeiture, where Compensation can be made.”³⁴³ It therefore followed that an award of damages for breach of fiduciary duty could not have a punitive element to it, the office of trustee itself being a creature of equity.³⁴⁴ Thus there is an absence of any mention of punitive damages in the body of the Restatement (Third) of Trusts.³⁴⁵ Courts, in any case, have always considered it within their equitable powers to reduce or deny compensation—and reimbursement for expenses—to trustees who are held to be in breach of trust.³⁴⁶ Still, some courts have begun to assess punitive damages against professional trustees and these assessments are being upheld, particularly in cases

²⁷See *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211 (1916).

³⁴²“Traditionally, remedies for breach of trust at law were limited to suits to enforce unconditional obligations to pay money or deliver chattels.” UTC §1001 cmt. “Otherwise, remedies for breach of trust were exclusively equitable, and as such, punitive damages were not available and findings of fact were made by the judge and not the jury.” UTC §1001 cmt.

³⁴³Richard Francis, *Maxims of Equity* 44 (London, Bernard Lintot 1728) (maxim no. 12).

³⁴⁴See generally 22 Am. Jur. 2d *Equity* §738 (1990).

³⁴⁵But see Restatement (Third) of Trusts §100, cmt. d (“In the egregious case, however, punitive damages are permissible under the laws of many jurisdictions. This is especially so if the trustee has acted maliciously, in bad faith, or in a fraudulent, particularly reckless, or self-serving manner.”). See also UTC §1001 cmt. (noting that the UTC does not preclude the awarding of punitive damages for breaches of fiduciary duty).

³⁴⁶See Bogert §861 n.60 and accompanying text. See also Restatement (Third) of Trusts: Prudent Investor Rule §205 cmt. a (1992). Cf. *Est. of Gould*, 547 S.W.2d 863 (Mo. Ct. App. 1977) (an attorney’s conduct as executor being improper and his conduct as attorney wrong, he was properly removed from those positions and denied all compensation). For a discussion of the difference between punitive damages and appreciation damages, see *Est. of Rothko*, 84 Misc. 2d 830, 379 N.Y.S.2d 923 (Sur. Ct. 1975).

where the breach of fiduciary duty involves fraud or malice.³⁴⁷ In one case, a reckless disregard for the beneficiaries, coupled with the fact that the trust administrator had provided false testimony, warranted an award of punitive damages, this in the absence of a finding of fiduciary self-dealing.¹ Stonewalling the court is ill-advised as well:

Moreover we agree with the district court that the size of the punitive damages award is not out of proportion to the actual damages sustained. Evidence in the record revealed that Mercantile is part of a twenty-one-bank holding company. Mercantile, standing alone, claims assets in excess of \$48 million. Clearly a substantial sting would be required to deter this financial institution from profiting in the future by ignoring—and thereby impairing—the rights of trust beneficiaries such as Virginia Haberstick....The complete and utter failure of the bank to offer an explanation for its inaction bespeaks an ulterior motive. One can only assume from this record that more remunerative trusts occupied the trust officers' time.³⁵⁰

One court has upheld an award of exemplary damages against a predecessor trustee in an action for breach of fiduciary duty brought by the successor.³⁵¹ It did so, however, by misconstruing the nature of the action as legal rather than equitable. As the dissent pointed out: “While the nature of the available remedies may be a strong indicator of the legal or equitable nature of an action,...the fact that a plaintiff seeks a money judgment has by no means been considered decisive that the action is one at law.”³⁵²

The UTC would not preclude the awarding of punitive damages for breaches of fiduciary duty.³⁵³ In fact, under Kansas's version of the UTC, a trustee who embezzles or knowingly converts to the trustee's

³⁴⁷See Bogert §862 n.34 and accompanying text; 4 Scott & Ascher §24.9 n.36 and accompanying text; 3 Scott on Trusts §205 n.1 and accompanying text; Campisi et al., *Emerging Damages Claims and the Right to Jury Trials in Fiduciary Litigation*, 27 Real Prop. Prob. & Tr. J. 541, 542–553 (1992) (containing a review of availability of punitive damages and appreciation damages in fiduciary litigation in the various states). See, e.g., *Smith v. Underwood*, 487 S.E.2d 807 (N.C. Ct. App. 1997) (allowing punitive damages where a plaintiff has proven at least nominal damages and where an element of aggravation, such as fraud, causes the injury); *Shoemaker v. Est. of Freeman*, 967 P.2d 871 (Okla. 1998) (holding that evidence supports an award of punitive damages where trustee has failed to transfer farm to remaindermen as required by terms of the trust); *InterFirst Bank of Dallas, N.A. v. Risser*, 739 S.W.2d 882 (Tex. App. 1987) (assessing \$10 million in punitive damages against trustee bank that sold trust property to a debtor of the bank). *But see* *Kann v. Kann*, 690 A.2d 509, 520 (Md. 1997) (holding “allegations of breach of fiduciary duty, in and of themselves, do not give rise to an omnibus or generic cause of action at law....[H]ere...the claim is exclusively equitable and not triable of right before a jury....[P]unitive damages are not at all available in equity.”).

¹ See *Jo Ann Howard and Associates, P.C. v. National City Bank*, 11 F.4th 876, 886 (2021).

³⁵⁰*Hamilton v. Mercantile Bank of Cedar Rapids*, 621 N.W.2d 401 (Iowa 2001) (assessing punitive damages against a successor trustee for making “absolutely no effort” to ascertain condition of degraded trust real estate upon and after it assumed the trusteeship).

³⁵¹*Peterson v. McMahan*, 99 P.3d 594 (Colo. 2004).

³⁵²*Peterson v. McMahan*, 99 P.3d 594, 600 (Colo. 2004).

³⁵³UTC §1001 cmt.

own use trust property would be liable for double the property's value.³⁵⁴ Apart from its UTC, the availability of punitive damages in Kansas has long existed in, but only in, Kansas statutory law.³⁵⁵ In Kansas, however, a claim for punitive damages will not survive the death of the wrongdoer, nor would it in the majority of U.S. states.³⁵⁶

A Texas court, invoking common law and statutory authority, has awarded exemplary damages in a trust matter.³⁵⁷

Without an award of actual damages, however, there can be no award of punitive damages, at least that is the case in Missouri.³⁴⁸ And in Wyoming, as well.³⁴⁹

³⁵⁴Kan. Stat. Ann. §58a-1002(a)(3). *See also* McCabe v. Duran, 180 P.3d 1098 (Kan. Ct. App. 2008) (the court declining to retroactively apply the double-damages provision of Kansas's version of the UTC).

³⁵⁵*See* Alain Ellis Living Tr. v. Harvey D. Ellis Living Tr., 385 P.3d 533 (Kan. Ct. App. 2016).

³⁵⁶*See* Alain Ellis Living Tr. v. Harvey D. Ellis Living Tr., 385 P.3d 533 (Kan. Ct. App. 2016).

³⁵⁷*See* Wells Fargo, N.A. v. Militello, No. 05-15-01252-CV, 2017 App. LEXIS 5640 (Tex. App. June 20, 2017) (upholding the following trial-court order: "It is further ORDERED that Plaintiff is awarded exemplary damages pursuant to Texas Trust Code Section 114.008(a)(1), Texas Civil Practice and Remedies Code Section 41.003 and the Texas common law on breach of fiduciary duty, fraud, negligence, and gross negligence in the amount of \$3,465, 490.20.").

³⁴⁸*See* O'Riley v. U.S. Bank, N.A., 412 S.W.3d 400, 418 (Mo. Ct. App. 2013).

³⁴⁹*See* Gowdy v. Cook, 455 P.3d 1201 (Wyo. 2020) ("Punitive damages cannot be awarded when compensatory damages are not recoverable.").