Title

Is the Uniform Trust Code's 5-year ultimate-repose feature even constitutional?

Text

It is settled that even an ultra-contingent equitable interest incident to a trust relationship is a property right, not a mere expectancy. *See generally* §5.1 of *Loring and Rounds: A Trustee's Handbook* (2020) (the contingent equitable property interest versus the expectancy). In a judicial proceeding that could bring about an interference with that right, the beneficiary is entitled under the due process clause of the 14th Amendment to advance notice of the proceeding and an opportunity to be heard. *See, e.g.*, Roth v. Jelley, --- Cal.Rptr.3d ---, 2020 WL 882150 (Cal. Ct. App 2020). As the UTC's §1005(c) ultimate-repose feature is a piece of state legislation that would cut back certain property-focused notice protections that are generally afforded trust beneficiaries by the 14th Amendment to the U.S. Constitution one may expect that at some point someone whose equitable property rights are adversely affected by the feature will mount a serious challenge to its constitutionality. Recall that UTC §1005(c) provides "some ultimate repose" for actions against a trustee in cases in which the trustee has failed adequately, or even altogether, to report to the beneficiaries. The equitable defense of failure of beneficiary to take timely action against the trustee is covered generally in §7.1.3 of *Loring and Rounds: A Trustee's Handbook* (2020), which section is reproduced in its entirety in the Appendix below.

Appendix

§7.1.3 *Defense of Failure of Beneficiary to Take Timely Action Against Trustee* [from *Loring and Rounds: A Trustee's Handbook* (2020)]

> *At one end of the spectrum, the doctrine of laches applies where the claimant's delay in bringing proceedings makes it impossible for a fair trial of the action to take place, e.g., because of the loss or destruction of evidence. In that context, the defence of laches has much in common with the principle of procedure, which enables the court to strike out stale claims for want of prosecution. At the other end of the spectrum, the doctrine of laches applies where the claimant's delay induces the defendant to act on the basis that the claim will not be asserted or pursued. In that context, laches overlaps considerably with the doctrines of affirmation, acquiescence and estoppel....*[107]

Introduction. "Claims...[against trustees]...may be barred by principles such as estoppel and laches arising in equity under the common law of trusts."[108] These two principles are easily confused. Moreover, the defense of laches is sometimes confused with the defense of acquiescence and the defense of acquiescence with the defense of estoppel. In *Coke on Littleton* it is written: "*Laches*, or *Lasches*, is an old French word for slacknesse or negligence, or not doing."[109] An action against a trust director for breach of trust "must be commenced within the same limitation period as an action for breach of trust against a trustee in a like position and under similar circumstances."[110]

Acquiescence. The defense of acquiescence, which rests upon the doctrine of election, is available to

[107]Tom Leech, *What Is Laches?*, Tr. & Est. L.J. (Dec. 2002) at i (pull-out).

[108]UTC §1005 cmt. *See generally* §5.5 of this handbook (voluntary or involuntary loss of the beneficiary's rights).

[109]Coke on Littleton 380b (1628).

[110]Uniform Directed Trust Act §13(a).

a trustee if a beneficiary, fully apprised of all the relevant facts and law, of full age and legal capacity, and under no undue influence, "stands by" and in so doing induces the trustee to believe that the beneficiary has assented to a breach of trust. The beneficiary, for example, would be well advised not to hold back to see whether an imprudent investment appreciates or depreciates in value. He or she should promptly either affirm the actions of the trustee or call the trustee to account.

Estoppel. A beneficiary cannot hold the trustee liable for a breach of trust if the beneficiary consents to the breach.[111] For the beneficiary to be "estopped" from holding the trustee liable, however, the beneficiary must have been fully apprised of the relevant facts and law and the trustee cannot have improperly induced the beneficiary to give consent. If, for example, the trustee transfers trust property to a third person in violation of the terms of the trust with the informed consent of the beneficiary, the beneficiary is precluded from holding the trustee liable, and also from retrieving the property from the third person. This is the case even when the third person is not a good-faith purchaser for value, *i.e.*, a bona fide purchaser (BFP).[112]

Laches and statutes of limitations that partially codify the laches doctrine. *While the trustee is in office.* For the beneficiary to be prevented by "laches" from holding the trustee liable for a breach of trust, the beneficiary must have so delayed in bringing an action against the trustee that it would be inequitable to permit the beneficiary to hold the trustee liable.[113] As a matter of public policy, suits should be brought with reasonable promptness.[114] With the passage of time, it becomes difficult to ascertain the truth.[115] The enforcement of a constructive trust also may be barred by laches.[116] Laches generally will not bar a beneficiary while under a legal incapacity, such as minority or incompetence, or bar the holder of an outstanding contingent equitable remainder interest until the intervening interest has expired.[117]

A cause of action against a trustee for breaches of the duty of loyalty (or any type of breach for that matter) would not be barred by laches until a reasonable time after all beneficiaries, both current beneficiaries and remaindermen, had become fully aware of the breach and its legal implications[118] and

---

[111]*See generally* §5.5 of this handbook (voluntary or involuntary loss of the beneficiary's rights).

[112]*See, e.g.*, Mathews v. Thompson, 186 Mass. 14, 71 N.E. 93 (1904) (consent to transfer as gift to third person); Preble v. Greenleaf, 180 Mass. 79, 61 N.E. 808 (1901) (consent to transfer in payment of personal debt of trustee). *See generally* §5.4.2 of this handbook (rights of the beneficiary as against BFPs and other transferees of the underlying trust property), §8.3.2 of this handbook (the doctrine of bona fide purchase and its notice requirement), and §8.15.63 of this handbook (doctrine of bona fide purchase). *See also* §8.3.6 of this handbook (negotiable instruments and the duty of third parties to inquire into the trustee's authority). For a comparison of the BFP, a creature of equity, with the holder in due course, a creature of law, *see* §8.15.68 of this handbook (holders in due course in the trust context).

[113]4 Scott & Ascher §24.24.1 (Laches); Restatement (Third) of Trusts §98 cmt. b(2) (delay prejudicial to trustee); §8.15.70 of this handbook (laches doctrine generally). *See, e.g.*, *In re* Estate of Forgey, 298 Neb. 865, 906 N.W.2d 618 (2018).

[114]4 Scott & Ascher §24.24.1 (Laches).

[115]*See* Restatement (Third) of Trusts §98 cmt. b; §8.15.70 of this handbook (laches doctrine generally).

[116]*See generally* 3 Scott & Ascher §17.2.7; §3.3 of this handbook (involuntary trustees) (in part discussing the remedial constructive trust).

[117]*See* 4 Scott & Ascher §24.24.1; Restatement (Third) of Trusts §98 cmt. b(1); §8.15.70 of this handbook (laches doctrine generally).

[118]*See, e.g.*, Bowen v. Bowen, 2011 UT App 352, 264 P.3d 233 (Utah Ct. App. 2011) (confirming that "when a case involves a trust, a trustee cannot take advantage of a statute of limitations defense until something has occurred to give the beneficiary a clear indication that a breach or repudiation has occurred, or, alternatively the circumstances must be such that [the beneficiary] must be charged with knowledge of such a repudiation or breach."). *See generally* §8.15.70 of this handbook (laches doctrine

failed to take appropriate action.[119] The Restatement (Third) of Trusts is generally in accord.[120] In one state, a remainderman has a reasonable time after his interest vests *in possession* to bring suit against the trustee for a breach of trust.[121] This would be the case even if he had become aware of the breach prior to the time of such vesting.[122]

To start the running of an applicable statute of limitations, it would generally require a subjective awareness *on the part of the beneficiary* of the relevant facts and law.[123] Statutes of limitations applicable to actions by beneficiaries against trustees for breaches of trust should be looked upon as little more than partial codifications of equity's laches doctrine.[124]

The trustee's duty to monitor investments. A trustee has a continuing duty to monitor trust investments and remove imprudent ones. This continuing duty exists separate and apart from the trustee's duty to exercise prudence in selecting investments at the outset.[125] In the face of such a "continuing duty," a statute of limitations that purports to set up a time defense to actions against trustees for imprudent investing may be less than that meets the eye.[126] That having been said, Georgia is one state whose courts have rejected

---

generally). *Cf.* 3 Scott & Ascher §17.2.4 (noting that a beneficiary's consent or acquiescence may bar the beneficiary from holding the trustee liable for improper lending of trust funds, but only if the beneficiary had full knowledge of the facts and his or her legal rights). Note, however, that if laches or the applicable statute of limitation forecloses the trustee from filing suit against a third party for harming the trust estate, so too are the remaindermen, including the unborn and unascertained, likely to be foreclosed. *See generally* §8.27 of this handbook (the difference between a legal life estate and an equitable life estate incident to a trust).

[119]*See, e.g.*, Lawson v. Haynes, 170 F.2d 741 (10th Cir. 1948). *See generally* Bogert §542(U); §5.5 of this handbook (voluntary or involuntary loss of the beneficiary's rights). For a discussion of the current state of the doctrine of laches in England, the reader is referred to Tom Leech, *What Is Laches?*, Tr. & Est. L.J. (Dec. 2002) at i (pull-out).

[120]Restatement (Third) of Trusts §98 cmt. b(1).

[121]Eldridge v. Eldridge, 398 S.C. 113, 728 S.E.2d 24 (2012).

[122]Eldridge v. Eldridge, 398 S.C. 113, 728 S.E.2d 24 (2012).

[123]*See generally* 4 Scott & Ascher §24.24.2 (Statutes of Limitations). *See, e.g.*, Beck v. Mueller, 848 N.W.2d 903 (Wis. Ct. App. 2014) (statute of limitations began to run against trust beneficiaries upon their failure to receive incremental distributions over time as expressly and unambiguously required by terms of governing trust instrument, terms which they had been well aware of, or should have been well aware of, at the various times the distributions should have been made); Koob v. Koob, No. A14-0506, 2014 Minn. App. Unpub. LEXIS 1202 (Minn. Ct. App. Nov. 24, 2014) (unpublished) (although the appellant informally on numerous occasions within the period of the applicable statute of limitations expressed his concerns orally and in writing to the trustees that he should have received a distribution of a certain percentage of the trust estate, he failed to bring a formal action against them within the period prescribed by the statute, and, thus, when he did get around to bringing the action, it was time-barred).

[124]*See, e.g.*, Woodward v. Woodward, 192 So. 3d 528 (Fla. Dist. Ct. App. 2016). *See generally* 3 Scott & Ascher §17.2.1.1; Restatement (Third) of Restitution and Unjust Enrichment §70, cmt. f (discovery rule); §8.15.70 of this handbook (laches doctrine).

[125]*See* Bogert §§684 & 685; 4A Scott & Ascher §19.3.1; Unif. Prudent Investor Act §2, cmt.; Restatement (Third) of Trusts §90, cmt. b; *In re* Stark's Estate, 15 N.Y.S. 729, 731 (Sur. Ct. 1891) (a trustee must "exercise[e] a reasonable degree of diligence in looking after the security after the investment has been made"); Johns v. Herbert, 2 App. D.C. 485, 499 (D.C. Cir. 1894) (trustee liable for failure to discharge his "duty to watch the investment with reasonable care and diligence").

[126]*Cf.* Tibble v. Edison Int'l, 135 S. Ct. 1823 (2015) (an ERISA case in which the court piggybacked on the common law of trusts).

application of a continuing tort theory to claims for breach of trust.[127] Fiduciary investing is discussed generally in §6.2.2.1 of this handbook.

Repudiating the trust. In the case of a breach of trust, it is a principle of equity that the laches period, or the applicable statute of limitations period, as the case may be, does not commence to run against the beneficiary until the trustee "openly" makes the beneficiary aware that he is "repudiating" his fiduciary duty not to be in breach of trust.[128] Thus, when one hears that the trustee has "repudiated" his trust, it is likely that he is openly in breach of one or more of his trustee duties, not that he has denied the very existence of, or abandoned altogether, the trust.[129] By way of example, an unequivocal failure to render a proper accounting in a timely fashion to the beneficiary upon request may well constitute an act of "repudiation" sufficient to trigger an applicable statute of limitations running against the beneficiary. So, too, might the rendering of an accounting to the beneficiary, say, via the beneficiary's counsel, that reveals on its face a breach of trust.[130] If, on the other hand, the trustee in bad faith or otherwise is stringing the beneficiary along when it comes to furnishing information to which the beneficiary is entitled, then the trustee has yet to openly repudiate the trust.[131]

A beneficiary might be foreclosed by laches or an applicable statute of limitations from extracting damages from the trustee personally for a particular breach of trust.[132] That having been said, the beneficiary generally would not otherwise be foreclosed from seeking the trust's enforcement in the courts.[133] If, however, the alleged trustee has repudiated the very existence of the trust, and the beneficiary with knowledge or reason to know of the wholesale repudiation fails to bring suit within a reasonable time or a time prescribed by statute, the beneficiary may well be barred from seeking the trust's enforcement.[134]

The court and the state attorney general are not bound by laches doctrine when it comes to charitable trusts. The state attorney general under the so-called public rights principle is not bound by the doctrine of laches when it comes to the enforcement of charitable trusts.[135] The court is not so bound, as well. "The mere fact that the trustees of a charitable trust have long applied the trust property to purposes other than those designated by the settlor does not preclude the court from directing that the trust be administered according to its terms."[136]

The Uniform Trust Code. In the case of an irrevocable trust, the UTC creates two limitation periods for actions by beneficiaries against trustees, a one-year period and a five-year period. "A beneficiary may not commence a proceeding against a trustee for breach of trust more than one year after the date the beneficiary or a representative of the beneficiary was sent a report that adequately disclosed the existence of a potential claim for breach of trust and informed the beneficiary of the time allowed for commencing a proceeding."[137]

---

[127]*See* Wells Fargo Bank, N.A. v. Cook, 332 Ga. App. 834, 775 S.E.2d 199 (2015) ("Rather, '[e]ach act of alleged mismanagement by a trustee that detrimentally affects a beneficiary creates a new cause of action for that specific act of mismanagement' on which the statute of limitation begins to run.").

[128]Matter of Barabash, 31 N.Y.2d 76, 286 N.E.2d 268 (1972).

[129]*See, e.g.*, 5 Scott, Trusts [3d ed.], §409, p. 3226 ("A fiduciary is not entitled to rely upon the laches of his beneficiary as a defense, unless he repudiates the...[trust]...relation to the knowledge of the beneficiary.").

[130]*See, e.g.*, Matter of JP Morgan Chase Bank N.A. (Strong), 41 Misc. 3d 1231(A) (N.Y. Sur. Ct. 2013).

[131]*See, e.g.*, *In re* JP Morgan Chase Bank N.A. (Strong), 41 Misc. 3d 1231(A) (N.Y. Sur. Ct. 2013).

[132]Restatement (Third) of Trusts §98 cmt. a(1).

[133]Restatement (Third) of Trusts §98 cmt. a(1).

[134]Restatement (Third) of Trusts §98 cmt. a(1).

[135]Restatement (Third) of Trusts §98 cmt. a(2).

[136]5 Scott & Ascher §37.3.10.

[137]UTC §1005(a). Georgia's version of UTC §1005(a) has (1) a two-year limitation period that is triggered upon receipt rather than transmission of a report and (2) lacks an express requirement that the

Might the court consider even an action brought by a beneficiary to construe the terms of a trust such a "proceeding"? It might, particularly if the litigation could lead to the trustee incurring personal liability.[138] The five-year period is taken up at the end of this section.

In the case of a revocable trust, the UTC, specifically §604(a), provides that "a person may commence a judicial proceeding to contest the *validity* of a trust that was revocable at the settlor's death within the earlier of: (1) [three] years after the settlor's death; or (2) [120] days after the trustee sent the person a copy of the trust instrument and a notice informing the person of the trust's existence, of the trustee's name and address, and of the time allowed for commencing a proceeding."[139] One court has held that an action to establish that a revocable trust had terminated as a matter of law by merger constituted a challenge to the trust's *validity*, thus subjecting the action to the time limitations of Missouri's version of UTC §604(a).[140]

Once a trustee leaves office. It has been a core principle of trust law that "[t]he resignation of the trustee, although in accordance with the terms of the trust, will not relieve the trustee from liability for breaches of trust committed by him."[141] Thus a trustee's departure from office does not relieve him of the duty to properly account *to the beneficiaries*. A former trustee who has failed to properly account for his actions while in office will have the same equitable and legal defenses to a beneficiary's breach of trust allegations that the former trustee would have were he still in office. In one former-trustee liability case, however, the New York court, for reasons of practicality, held that New York's six-year statute of limitations for breach-of-trust actions began to run against a beneficiary from the time the successor trustee was "put in place," *because the beneficiary knew of the trustee's resignation and never demanded an accounting, the beneficiary at all relevant times having been of full age and legal capacity*.[142]

The highest Massachusetts court took a radical and unprecedented departure from traditional trust law principles when it held that a statute of limitations had begun to run *against the beneficiaries* of a trust whose former trustees had never properly accounted to them when the *successor trustee* knew or should have known of the predecessors' breaches.[143] At the time the successor was deemed to know of the predecessor's breach, one beneficiary was a minor and the other was missing. No guardian ad litem had ever been duly and formally appointed by the court to represent their interests.[144] It appears that the court had confused and conflated the limitation rules applicable to external *legal* actions by third-party tort and contract claimants against trustees with the rules applicable to internal breach of fiduciary *equitable* actions by beneficiaries against their trustees.[145]

The principle that a successor trustee owes a duty to the beneficiaries to compel the predecessor to account has traditionally meant that upon acceptance of the successor trusteeship the successor merely joins

---

beneficiary be informed "of the time allowed for commencing a proceeding." *See* Wells Fargo Bank, N.A. v. Cook, 775 S.E.2d 199 (Ga. Ct. App. 2015).

[138]*See, e.g.*, Konrardy v. Vincent Angerer Trust, 925 N.W.2d 620 (Iowa 2019).

[139]UTC §604(a).

[140]*See* Morris v. Trust Co. of the Ozarks, 423 S.W.3d 918 (Mo. Ct. App. 2014). Merger is discussed generally in §8.7 and §8.15.36 of this handbook).

[141]2 Scott on Trusts §106.2.

[142]Tydings v. Greenfield, Stein & Senior, LLP, 11 N.Y.3d 195, 897 N.E.2d 1044, 868 N.Y.S.2d 563 (2008). *See generally* §6.1.5 of this handbook (the trustee's affirmative duty to furnish the beneficiary with critical information).

[143]O'Connor v. Redstone, 452 Mass. 537, 896 N.E.2d 595 (2008). *See generally* Heidi A. Seely, Knowledge of Successor Trustee Sufficient to Commence Statute of Limitations—*O'Connor v. Redstone*, XLIII Suffolk Univ. L. Rev. 519 (2010).

[144]*See generally* §8.14 of this handbook (when there is a need for a guardian ad litem).

[145]*See generally* §7.3 of this handbook (trustee's external liability to third parties in contract and tort) and §8.25 of this handbook (few American law schools still require instruction in Agency, Trusts and Equity).

the predecessor on the fiduciary hook.[146] Succession generally has not also started a process of phasing out the predecessor's liability *to the beneficiaries,* come what may.[147] Having said that, Judge Cardozo saw it otherwise, although, we suggest, he had conveniently ignored the fact that lawyers and trustees upon leaving office are not relieved of all their fiduciary duties, this in accordance with long-standing common law agency and trust principles.[148] Here is Judge Cardozo: "While an express trust subsists and has not been openly renounced, the Statute of Limitations does not run in favor of the trustee. But after the trust relation is at an end, the trustee has yielded the estate to a successor the rule is different. The running of the statute then begins, and only actual or intentional fraud will be effective to suspend it."[149] Maybe the trust relation ends upon a yielding of the trust estate, but surely elements of the fiduciary relation continue, such as the duty to provide the beneficiaries with critical information and the duty of confidentiality.[150] Just as a breach of trust is not always the breach of a fiduciary duty to the beneficiaries,[151] so also a breach of fiduciary duty to the beneficiaries is not always a breach of trust.

Still, until these issues of residual predecessor-trustee liability sort themselves out a bit more in the courts and the legislatures, the trustee would be well advised to look upon the UTC statutes of limitation as little more than partial codifications of laches doctrine.[152] They are by no means self-contained. Particularly in cases of unauthorized acts of trustee self-dealing, "other law" will generally determine which trustee "misdeeds" will cause them to toll,[153] as well as the level of "understanding" a beneficiary must have before the statutory periods will begin to run.[154] The level, by the way, is likely to be high, namely, a full subjective understanding of the facts and law applicable to the self-dealing.[155] That is either traditional laches, or laches by analogy.[156]

The Uniform Trust Code's statute of ultimate repose. The UTC, too, opts for expediency over principle when it comes to predecessor-trustee liability. Under the UTC, specifically §1005(c), a judicial proceeding by a beneficiary against a trustee for breach of trust must be commenced within five years after the first to occur of the removal, resignation, or death[157] of the trustee; the termination of the beneficiary's interest in the trust; or the termination of the trust. Michigan's version of Section §1005(c), specifically Mich. Comp. Laws §700.7905(3), is an affirmative defense that is deemed waived if not affirmatively

---

[146]*See generally* §7.2.4 of this handbook (successor trustee liability).

[147]*See generally* §7.2.4 of this handbook (predecessor trustee fiduciary liability).

[148]*See generally* Charles E. Rounds, Jr., *Lawyer Codes Are Just About Licensure, the Lawyer's Relationship with the State: Recalling the Common Law Agency, Contract, Tort, Trust, and Property Principles that Regulate the Lawyer-Client Fiduciary Relationship*, 60 Baylor L. Rev. 771 (2008) (certain fiduciary duties are owed by the lawyer to the client even after representation has terminated).

[149]Spallholz v. Sheldon, 216 N.Y. 205, 209, 110 N.E. 431 (1915).

[150]*See generally* §6.1.5.1 of this handbook (the trustee's duty to provide information) and §6.2.3 of this handbook (the trustee's duty of confidentiality).

[151]*See generally* §6.1.1 of this handbook (while the trustee's duty of loyalty is a fiduciary duty, his duty of prudence really is not).

[152]*See* §8.15.70 of this handbook (laches doctrine generally).

[153]*See* UTC §1005 cmt.

[154]*See generally* §7.1.2 of this handbook (defenses to allegations that the trustee breached the duty of loyalty).

[155]*See generally* §7.1.2 of this handbook (defenses to allegations that the trustee breached the duty of loyalty).

[156]*See* §8.15.70 of this handbook (laches doctrine generally).

[157]"If a trusteeship terminates by reason of death, a claim against the trustee's estate for breach of fiduciary duty would, like other claims against the trustee's estate, be barred by a probate creditor's claim statute even though...[the five-year statutory period]...had not yet expired." UTC §1005 cmt.

pled.[158] The five-year limitation period, which is intended to provide some ultimate repose for actions against a trustee,[159] may or may not cover fraudulent acts on the part of the trustee, the drafters of the UTC having preferred "to leave that question to...[laws that deal with fraudulent acts generally]...."[160] If §1005(c) is subject to a fraud exception, then possibly it would be subject to a constructive fraud exception as well. Constructive fraud is taken up generally in §8.15.60 of this handbook. (England does have a fraud exception to its six-year statute of limitations applicable to any "action by a beneficiary to recover trust property or in respect of any breach of trust.")[161] The trust-reformation action, a topic that is taken up in §8.15.22 of this handbook, also would not be subject to the UTC's ultimate repose provisions, it not being an action against the trustee for a breach of his trust.[162]

A nasty trap for the unwary trust counsel. UTC §1005(c) provides that under certain circumstances a trust beneficiary has only five years to bring a breach-of-trust action against the trustee *even should the beneficiary lack actual or constructive notice of the breach*. Assume four years have run since a breach of trust has occurred. The trustee and the beneficiary are clueless about it. One more year and the trustee is off the hook. Trust counsel, on the other hand, becomes aware of the breach. Now two potentially conflicting fiduciary duties must be rationalized: (1) representing the trustee, *qua* trustee, and (2) representing the trustee personally. If counsel informs the trustee of the breach and the trustee takes no action to remedy it, the trustee's fraudulent inaction may toll the running of the statute. On the other hand, if counsel keeps quiet, the five-year period will expire and the trustee will be personally off the hook, unless counsel's knowledge can be imputed to the trustee under agency principles. Still, the trustee will have breached virtually the entire panoply of fiduciary duties that had been owed to the beneficiary, duties that are the subject of Chapter 6 of this handbook. What if counsel's intentional silence is later construed as a knowing *participation* in those breaches? While trustees may have the benefit of the ultimate-repose defense, presumably their agents will not. What is the ethical trust counsel to do in such a situation?

One court has proffered the following advice: When a trustee is faced with a personal-fiduciary conflict, "the trustee can mitigate or avoid the problem by retaining and paying out of his own funds separate counsel for legal advice that is personal in nature."[163] But how exactly is trust counsel to get the trustee to retain at his own expense separate personal counsel without causing a fraud-based tolling of the running of the statute and/or without trust counsel, himself, ending up constructively participating in the breach of trust? Perhaps the only way out of the cul-de-sac is the *deus ex machina* of a repeal of §1005(c). Under default laches doctrine, trust counsel would no longer be conflicted in that the trustee would be personally benefited by a full disclosure of the breach *to the beneficiary*. This is because full disclosure would trigger a start of the running of any statute of limitations that might be applicable to such a breach of fiduciary duty or, in the absence of such a statute, a start of the running of the "reasonable" laches period in which a fully informed trust beneficiary would have to bring suit against the trustee for a breach of trust. To summarize, in the case of laches as tweaked by a traditional statute of limitations, say of one, two or three years, there was no incentive for trust counsel, whose fiduciary duties ran primarily to the trustee, to keep the trustee in the dark. The incentive was one of full and timely disclosure. The UTC's ultimate-repose feature has brought with it into our trust jurisprudence a perverse counter-incentive, a counter-incentive that now needs to be somehow corralled.

---

[158]*See In re* Beverly J. LaForest Living Trust, No. 323296, 2016 Mich. App. LEXIS 3 (Jan. 5, 2016) (unpublished).

[159]UTC §1005 cmt.

[160]UTC §1005 cmt.

[161]Limitation Act 1980 §21(1)(a) [Eng.].

[162]*Cf. In re* Admin. of C.H. Young Revocable Living Trust, 751 N.W.2d 715 (S.D. 2008) (trust reformation action in which laches, not statute of limitations, was "dispositive").

[163]*See* Stewart v. Kono, No. B234722, 2012 WL 4427096 (Cal. Ct. App. Sept. 26, 2012) (unpublished).

One commentator on ethical lawyering is floating a general proposal that might at least eliminate our §1005(c) fraud-disclosure conundrum, though in a given situation the fall-out from the cure would most likely be worse than the disease. He proposes that each state "adopt a rule" along the lines of the following: "A lawyer, to the extent the lawyer reasonably believes necessary, may reveal information relating to the representation of a client to inform a tribunal or a beneficiary about any material breach of fiduciary responsibility when the client is serving as a fiduciary such as a guardian, personal representative, trustee, or receiver."[164]

End-running the UTC's ultimate-repose feature. Does the running of the UTC §1005(c) statute of ultimate repose shut the door once and for all on all claims against the trustee arising out of his maladministration of the trust? Maybe not: Let us assume that the trustee innocently or negligently makes off with the trust property in violation of the terms of the trust. The beneficiary neither knew nor should have known of the trustee's personal enrichment at trust expense. Five years elapse such that the beneficiary under §1005(c) is foreclosed from bringing a *breach of trust* action against the trustee. In this particular situation, however, the beneficiary may well have another arrow in his quiver, namely, an equitable action against the trustee not for his breach of trust but for the equitable wrong of his unjust enrichment. The equitable action of restitution for unjust enrichment is taken up generally in §7.2.3.3 of this handbook. The equitable wrong of unjust enrichment itself is taken up generally in §8.15.78 of this handbook. Presumably, the trustee was not only unjustly enriched by the trust property but also by any compensation he took for "services" performed during the period of maladministration.[165]

Is the UTC's ultimate-repose feature even constitutional? It is settled that even an ultra-contingent equitable interest incident to a trust relationship is a property right, not a mere expectancy.[1] In a judicial proceeding that could bring about an interference with that right, the beneficiary is entitled under the due process clause of the U.S. Constitution to advance notice of the proceeding and an opportunity to be heard.[2] As the UTC's ultimate-repose feature is a piece of state legislation that would cut back certain property-focused notice protections that are generally afforded trust beneficiaries by the 14th Amendment we can expect that at some point someone whose property rights are adversely affected by the feature will mount a serious challenge to its constitutionality. *The Georgia Trust Code lacks a comparable ultimate-repose feature*. Taking a page from traditional laches doctrine it provides that "[i]f the beneficiary has not received a report which adequately discloses the existence of a claim against the trustee for a breach of trust, such claim shall be barred as to that beneficiary unless a proceeding to assert such claim is commenced within six years after the beneficiary discovered, or reasonably should have discovered, the subject of such claim."[166] Thus, the trustee's fraudulent concealment will toll the limitation period.[167]

---

[164]Kennedy Lee, *Representing the Fiduciary: To Whom Does The Attorney Owe Duties?*, 37 ACTEC L.J. 469, 492 (Winter 2011).

[165]*See generally* Charles E. Rounds, Jr., *Chinks in the Armor: Three Exceptions to the Uniform Trust Code's 5-Year Ultimate Repose Provision Suggest that a Trustee May Not Be Home Free from Liability*, Trusts & Estates (Nov. 19, 2013), *available* at <http://wealthmanagement.com/estate-planning/chinks-armor> (last accessed Aug. 18, 2019).

[1] *See generally* §5.1 of this handbook (the contingent equitable property interest versus the expectancy).

[2] *See, e.g.*, Roth v. Jelley, --- Cal.Rptr.3d ---, 2020 WL 882150 (Cal. Ct. App 2020).

[166]Ga. Code Ann. §53-12-307(a).

[167]*See, e.g.*, Smith v. SunTrust Bank, 325 Ga. App. 531, 754 S.E.2d 117 (2014).