

## Title

Merger Doctrine, the Common Trust Fund, the Trusteed Mutual Fund, Common-Fund Doctrine, Combining Trusts, Common Fund of Related Sub-trusts: Which is not about trust investing?

## Text

The answer is the common-fund doctrine, which relates not to asset management but to whether a trust beneficiary who brings an action involving the trust may be reimbursed from the trust estate for his or her attorneys' fees. See §8.15.13 of *Loring and Rounds: A Trustee's Handbook* (2022). As to merger doctrine the question is ambiguous. In the trust context merger occurs when one person possesses the entire legal and the entire equitable interest. In such a case, there is no trust; the person simply owns the property outright and free of trust, all interests being still merged or now having merged in that person. See § 8.7 of the Handbook. If merger occurs in mid-course of the trust, the person, going forward, no longer is bound by the fiduciary principle in the management of the once-entrusted assets, so in that sense merger can touch on investing.

In the case of a common trust fund or a trusteed mutual fund, the entire equitable interest in the entrusted asset pool is sliced into vested pieces (shares or participations), which themselves can end up being assets of other trusts. See §9.7.5 of the Handbook. The combining for investment purposes of the portfolios of related sub-trusts is very different in concept. Title to the common fund is in the trustees of the sub-trusts. There are no vested shares of beneficial interest, no intermediary trustees. Thus, unequal distributions out of the asset block can be a record-keeping nightmare. See §3.5.3.2(d) of the Handbook and UTC §810(d). Finally, there is the combining of similar trusts into a single trust, provided "the result does not impair rights of any beneficiary or adversely affect achievement of the purposes of the trust." See UTC § 417.

Un-trained and un-mentored newly-minted lawyers are finding it ever more challenging navigating trust law and its unhelpful nomenclature, and it is only going to get worse. The traditional, discrete *Trusts* course has no longer been required for decades in American law schools. See §8.25 of the Handbook. Now, the National Conference of Bar Examiners is on track to remove *Trusts* as a tested subject on the Multistate Bar Exam. *Equity*, as well as the other foundational fiduciary relationship besides the trust, namely *Agency*, have been on the Conference's cutting-room floor for some time now. It has concluded that "the Foundational Concepts & Principles assessed on the NextGen exam should be limited to those that are common to numerous practice areas, consistent with assessing competence for a general license to practice law." See <https://nextgenbarexam.ncbex.org/faqs/#ftoc-heading-7>.

In the appendix below is a fictional narrative of events that take place sometime in the not-to-distant future. It recounts the trials and tribulations of James, a newly-minted lawyer during his first few days on the job. It turns out they also were his only days on the job. He has neither taken *Trusts* nor been bar-tested on the subject. It is drawn from my experiences over the decades mentoring newly-minted lawyers and fielding their frantic phone calls.

## Appendix

### James' first day at the law firm and, surprise, surprise, he is hit with a trust question

Watching the un-trained and un-mentored struggle to navigate the law of trusts and its unhelpful nomenclature is painful, and it is only going to get worse. *Trusts* have been off the multistate for three years now. James, a new member of the bar who had never elected to take *Trusts* in law school, it not being a “bar course,” reports for duty at the law firm. Out of the box on the first day he is handed an assignment. The firm hopes to “merge” the portfolios only of three related sub-trusts into a single individually-invested portfolio. Supposedly more efficient. More cost effective. The research assignment: Prepare a memorandum of law on whether such a “merger” would be legally permissible.

James first googles “merger.” He is already starting to get confused. In law school he recalls the *Property* professor mentioning something “about” merger, but the class was never required to “learn” merger doctrine. In any case, James develops a vague sense that the end-result of a full-blown merger of legal and equitable interests in the trust context would be the extinguishment altogether of each of the three sub-trusts. That is not what the firm has in mind. He then stumbles across the common-fund doctrine. Bingo. Deep into his memorandum, however, he realizes that the common-fund doctrine has nothing to do with investing. Nevertheless, he explains to the senior lawyer what he has learned about the common-fund doctrine. Exasperated by all this time-consuming irrelevance, the senior lawyer barks: “Did you consult the Uniform Trust Code?” No. James had never heard of the UTC before.

James pulls up the UTC. Where to look. No relevant mention there of common trust funds or mutual funds. He nonetheless pads a memo with a lot of content relating to these two investment vehicles, material he happened to stumble across on the internet, and submits it to the senior lawyer. Again, totally irrelevant. The senior lawyer is beside himself. A common trust fund or a mutual fund involves vested shares of equitable or beneficial interest in a separate entrusted portfolio. The firm has in mind merely combining the portfolios of the sub-trusts. Legal title to the underlying assets would remain with the trustees of the sub-trusts. There is no intermediary trustee in the fact pattern. “We could always ‘dump’ everything into a mutual fund, but that is not what we want to do; we intend to individually-invest the combined portfolio,” says the senior lawyer, barely containing himself. James has no idea what the senior lawyer is talking about. He is not even sure what a sub-trust actually is.

James returns to the UTC. He is now almost in tears. Then he chances upon a separate section of the UTC, specifically § 417 (Combination and Division of Trusts). Back he goes to the senior lawyer. Totally, totally irrelevant. The end-result of a UTC § 417 combination is a single trust. The end-result of what the firm is contemplating is that the three sub-trusts themselves would remain intact. It is only the portfolios that the firm is contemplating combining.

At lunch the senior lawyer complains to his partners. What is it with these law schools. Kids coming out of law school these days are terrible writers. And what is worse, they know

nothing about practicing law in the real world. Several days later James is let go. It was not a good fit.

Now the senior lawyer shares some of the blame for the debacle. He should never have used the term “merger” in this context. Also, much of the law of trusts is not codified in the UTC, merger doctrine, for example. Actually, the common-fund doctrine is not addressed head on and by name in UTC §1004 and its accompanying commentary (attorney’s fees and costs). Maybe combining the portfolios of sub-trusts in a common fund also is elsewhere. As it turns out, such portfolio combining is addressed in the UTC, albeit obliquely and not where James could reasonably have been expected to find it. It is addressed not in § 816 (specific powers of trustees), but in § 810(d) (recordkeeping and identification of trust property). How was it that I thought I might find it there back in 2000 when the UTC came out? Well, one of the first lessons I had been taught by a senior lawyer upon reporting for duty back in 1977 was that recordkeeping “is a bear” when it comes to unequal distributions out of a common fund. True story. I had taken *Trusts* in law school. I had been bar-tested on the subject. And still this was news to me. But still I had sufficient foundational knowledge and context to at least have an inkling of what the senior lawyer was talking about.

*Loring and Rounds: A Trustee’s Handbook* (2022) is available for purchase at:  
<https://law-store.wolterskluwer.com/s/product/loring-rounds-a-trustees-handbook-2022e-misb/01t4R00000OVWE4QAP>.