Title

Third-party liability for knowingly participating in a breach of trust

Text

> *The direct connection between trustees de son tort and executors de son tort is … not difficult to infer. The executor de son tort can be traced back to at least the 13th century, but there seems no reason to doubt that the institution and the problems which created it went back for some time before that. On the other hand the term trustee de son tort seems not to have been used until the mid-19th century, indeed it appears first to have been devised by Sir John Romilly MR in Hope v. Liddell (No 1).…* Nolan v. Nolan [2004] VSCA 109 (U.K.) (citing to Hope v. Liddell (No. 1), (1856) 21 Beav. 183 at 205.

A person who intermeddles with, and assumes the management of, trust property becomes a trustee by construction. The person is said to be a trustee *de son tort*. A *de facto* trustee differs from a trustee *de son tort* in that the former assumes the office of trustee under a color of right or title. Where one without authority undertakes to administer entrusted property, he must carry all the risks, and make good all the losses, and have none of the profits. Trustees *de son tort* are subject to the same rules and remedies as trustees who have been duly appointed. This goes for *de facto* trustees as well.

A trusteeship *de son tort* has been described by English commentators as a type of institutional constructive trust. Institutional constructive trusts are trusts which arise from some preexisting fiduciary relationship before and apart from any breach of trust or duty, whereas remedial constructive trusts are imposed where no fiduciary relationship previously existed.

Assume a trustee in breach of trust transfers an entrusted parcel of real estate to a third party who knows of the breach. Assume, also, that the third party then voluntarily proceeds to make improvements on the property, *e.g.*, by landscaping the front yard. Is the third party entitled to be reimbursed from the trust estate for the costs of those improvements? Probably not. As is true in the law of contracts, a person is not entitled to recover for a benefit conferred if in conferring the benefit the person acted as an officious intermeddler. The third party knew the parcel belonged to others. On the other hand, payments made in satisfaction of obligations that run with the property, *e.g.*, real estate taxes, probably are reimbursable. For a general discussion of the rights of the beneficiary as against BFPs and non-BFPs of the trust property, the reader is referred to §5.4.2 of *Loring and Rounds: A Trustee's Handbook* (the "Handbook").

There is a general principle of equity that a third party who knowingly participates in a breach of trust is liable to the beneficiaries for any injury to the trust estate that is attributable to his actions. This is a topic that is taken up in §7.2.9 of the Handbook, which section is reproduced in its entirety in the appendix immediately below. The *de facto* trustee concept is, for all intents and purposes, little more than a specific application of this general equitable principle, at least one court has so determined. *See* Bird v. Carl C. Anderson, No. 03-21-00140-CV, 2021 Tex. App. LEXIS 5036 (Tex. App. – Austin June 24, 2021, no pet. history).

Appendix

§7.2.9 *Personal Liability of Third Parties, Including the Trustee's Agents, to the Beneficiary; Investment Managers; Directors and Officers of Trust Companies; Lawyers; Brokers* [from *Loring and Rounds: A Trustee's Handbook* (2021)].

A third party may not knowingly participate in a breach of trust. The trust beneficiary has an equitable property right that is enforceable against "every person in the world" because "every person in the world" is obligated not to collude with the trustee in a breach of trust.[668] That would include a right of action against trust counsel, brokers, and other such agents of the trustee.[669] So also a beneficiary of a decanted trust (first trust) would have a right of action against the trustee of a recipient trust (second trust) who knowingly takes into the recipient trust improperly decanted assets, or who unreasonably relies on incorrect assertions of the trustee of the decanted trust that the particular decanting was duly authorized at law and in equity.[670] Even a nontransferee-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.[671] As to the liabilities, if any, of third-party transferees of trust property, the reader is referred to §8.15.63 of this handbook.[672]

Uniform Directed Trust Act. The Uniform Directed Trust Act, which would govern the rights, duties, obligations, and liabilities of directed trustees and *nontrustee* trust directors, is examined in §3.2.6 of this handbook and §6.1.4 of this handbook. Under the Act, a *nontrustee* trust director would owe certain fiduciary duties to the trust beneficiaries. A breach of any one of these

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[668]3 Scott & Ascher §13.1.

[669]As to the complicit broker, *see* Restatement (Third) of Restitution and Unjust Enrichment §17, illus. 12 (a securities broker having received trust funds in payment for securities that he knew had been purchased in violation of the terms of the trust, the successor trustee has a claim against the broker to rescind the sale and recover the original purchase price).

[670]*See, e.g.*, Unif. Trust Decanting Act §6. Decanting is taken up generally in §3.5.3.2(a) of this handbook.

[671]Restatement (Second) of Trusts §326; 4 Scott on Trusts §326; 5 Scott & Ascher §§28.2, 30.6.5. One Missouri court, however, seems to have assumed that civil conspiracy doctrine, not general principles of equity, governs the liability of an agent of a trustee who knowingly participates in the trustee's breaches of trust. *See* Brock v. McClure, 404 S.W.3d 416 (Mo. Ct. App. 2013). Apparently, the law in Missouri has become unsettled as to whether civil conspiracy liability can attach to a conspirator who is not personally benefited by the conspiracy. *See Brock*, 404 S.W.3d 416 n.3. Civil conspiracy is a tort.

[672]*See also* §8.15.69 of this handbook (third party liability for trustee's misapplication of payments to trustee).

duties would constitute a breach of trust.

A trustee's nonministerial agents generally owe fiduciary duties to the beneficiaries. An agent-fiduciary of a trustee who is knowingly involved in matters relating to the administration of a trust generally has fiduciary duties that run also to the beneficiaries.[673] A broker retained by the trustee to find a buyer for a parcel of entrusted real estate, for example, may well have fiduciary duties that run to the beneficiaries as well as the trustee. The more discretionary the broker's authority, the more likely the broker is a fiduciary. As we discuss in §8.8 of this handbook, there may be a trust counsel exception in some jurisdictions. In some jurisdictions, trust counsel's fiduciary duties may run exclusively to the trustee. Still, as noted above, any lawyer who knowingly assists the trustee in committing a breach of trust may be held liable to the beneficiaries for the consequences.[674] Under common law agency principles, for the lawyer's partner to be liable to the trust beneficiaries, however, the partner would have to have, at minimum, actual knowledge of the conspiracy.[675]

The Uniform Prudent Investor Act expressly provides that "[i]n performing a delegated function, an agent owes a duty to the trust to exercise care to comply with the terms of the delegation."[676] The UTC is in accord.[677]

In England, however, there appears to be more deference to those who negligently assist trustees in breaching their trusts, the torts of conspiracy and unlawful interference having yet to intrude upon its law of trusts[678]: "[S]trangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions perhaps of which a Court of Equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees."[679]

Arbitration contracts between trustees and third parties. May a FINRA arbitration contract between the trustee and the trustee's investment manager/agent bind the nonsignatory trust beneficiaries in an action brought *by them* against the manager/agent for failing to "exercise care

[673]Lattuca v. Robsham, 442 Mass. 205, 812 N.E.2d 877 (2004). *See also* Restatement (Second) of Trusts §326, cmt. a.

[674]*See generally* 4 Scott on Trusts §326.4; 5 Scott & Ascher §28.2.

[675]Babb v. Bynum & Murphrey, PLLC, 643 S.E.2d 55 (N.C. Ct. App. 2007).

[676]Unif. Prudent Investor Act §9(b).

[677]UTC §807(b).

[678]Lewin ¶40-48 through ¶40–49 [England].

[679]Barnes v. Addy, L.R. 9 Ch. App. 244 (1874) (Eng.). The constructive trust is taken up generally in §7.2.3.1.6 of this handbook.

to comply with the terms of the delegation."?[680] It seems the answer is no, or should be no, absent special facts. A trustee, *qua* trustee, is not an agent of the beneficiaries; and neither the FINRA contract nor the trust itself is a third-party-beneficiary contract.[681] For more on the subject of arbitration contracts between trustees and third parties see §6.1.4 of this handbook (delegation by trustees of fiduciary functions to agents) and §6.2.7 of this handbook (amateur agent-fiduciaries may be held to a higher standard of fiduciary conduct than amateur trustees).

Agents of mutual-fund trustees. By federal statute, one who advises the trustees of a mutual fund on investment matters is expressly deemed to have a fiduciary duty to the investors, *i.e*., the trust beneficiaries, not to take compensation that is unreasonable.[682] Moreover, the advisor may not be exculpated from liability to the investors for acts of "willful misfeasance, bad faith, or gross negligence, in the performance of his duties, or by reason of his reckless disregard of his duties and obligations," contractual and other-wise, under the investment management agency agreement.[683]

Whether the directors of a trust company owe fiduciary duties to trust beneficiaries. A corporation holding property in trust owes the trust's beneficiaries fiduciary duties.[684] In the United States, so too do the directors and officers of the corporation.[685] "[R]ecognition of a duty of a director to those for whom a corporation holds funds in trust may be viewed as another application of the general rule that a director's duty is that of an ordinary prudent person under the circumstances."[686] A corporate officer would have a similar duty.[687] Thus, a director or officer of a trust company may be held liable to the trust beneficiaries for directly harming their equitable interests, either negligently or intentionally, in violation of his or her fiduciary duties to them, or

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[680]*Cf*. Thompson v. Pruitt Corp., 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016) (arbitration agreement between patient-surrogate and nursing home does not bind the patient's estate in a wrongful death action against nursing home).

[681]*See generally* §9.9.2 of this handbook (comparing the agency and the trust); §9.9.1 of this handbook (comparing the third-party-beneficiary-contract and the trust).

[682]15 U.S.C. §80a-35(b) (Investment Company Act of 1940).

[683]15 U.S.C. §80a-17(i) (Investment Company Act of 1940).

[684]Francis v. United Jersey Bank, 87 N.J. 15, 432 A.2d 814 (1981).

[685]*See generally* 3 Scott & Ascher §17.2.14.1 (the directors of an insolvent trust company may be held personally liable to the trust beneficiaries for trust cash that had been parked on its commercial side, at least to the extent that the cash cannot be traced and recovered for the trusts); 5 Scott & Ascher §30.6.3 (Directors and Officers of Corporate Trustee).

[686]Francis v. United Jersey Bank, 87 N.J. 15, 432 A.2d 814 (1981). *See also* 5 Scott & Ascher §30.6.3 ("A director or officer is under a duty to the beneficiaries to use reasonable care in the exercise of his or her powers and the performance of his or her duties as director or officer").

[687]5 Scott & Ascher §30.6.3

for participating with the corporation in a breach of trust.[688] "It is no defense that a director or officer did not personally profit from the breach of trust or that the conduct was not dishonest."[689] For liability to attach, however, the director or officer must be personally at fault.[690] Just because the trust company is liable does not necessarily mean that its directors and officers are as well.[691] Even a director who is passive or disengaged may be personally liable to the beneficiaries for the breaches of his codirectors.[692] The same goes for the officers.[693]

Here is another rationale for allowing the trust beneficiaries to seek redress from a trust company's directors and officers, one that is not based on a duty that runs directly from the directors and officers to the beneficiaries: "Such directors and officers are personally liable to the corporation, and its claim against them is a corporate asset, which the beneficiaries can reach, as creditors of the corporation."[694] One commentator has suggested that under this theory of liability, the claims of the trust beneficiaries ought to have priority over the claims of the corporation's general creditors.[695]

In England, the director of a trust company owes no fiduciary duties or duties of care to the beneficiaries of the trusts of which the trust company is a trustee, unless he or she has dishonestly assisted the trust company in a breach of trust.[696] Moreover, English case law does not support the proposition that a trust company's claim against an honest but negligent director constitutes a corporate asset that is reachable in a "dog leg" action by trust beneficiaries.[697] "The validity or invalidity of the dog-leg claim, of course, is of only theoretical interest where the corporate trustee has assets adequate to meet a claim for breach of trust or where it has insurance."[698] A "dog leg" action is analogous to a derivative suit in the corporate context, or in the trust context for that

[688]5 Scott & Ascher §30.6.3.

[689]5 Scott & Ascher §30.6.3.

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[691]5 Scott & Ascher §30.6.3.

[692]Francis v. United Jersey Bank, 87 N.J. 15, 432 A.2d 814 (1981). *See generally* 5 Scott & Ascher §30.6.3 ("It would seem, however, that the mere fact that the director or officer is guilty of inaction rather than of intentionally wrongful or negligent action should not negate personal liability").

[693]5 Scott & Ascher §30.6.3.

[694]5 Scott & Ascher §30.6.3.

[695]5 Scott & Ascher §30.6.3.

[696]HR v. JAPT, [1997] O.P.L.R. 123 (Eng.).

[697]Gregson v. H.A.E. Trs. Ltd. [2008] EWHC 1006 (ch), [2008] All E.R. (D) 105 (May) (Eng.).

[698]Nicholas Le Poidevin, *Corporate trustees: The limits of responsibility*, 6(4) Tr. Q. Rev. 7 [a STEP publication].

matter.[699]

Personal liability of trust officers and other agents of the corporate trustee. A corporate trustee would be liable to the beneficiary for neglect or default of an internal agent, *i.e.*, an officer or employee, provided that the agent had been acting within the course of the employment.[700] This would be the case whether or not the corporate trustee, itself, had engaged in any breach of trust in connection with the matter.[701] The corporate trustee, for example, would be on the hook even if it had acted prudently in hiring and overseeing the activities of the internal agent.

On the other hand, if the activities of an external agent, *i.e.*, independent contractor, had been the cause of the problem, whether or not there was liability to the beneficiary *on the part of the corporate trustee* would in part depend upon the prudence or lack thereof of the corporate trustee in selecting and retaining the external agent.[702] As a general rule, a natural person has knowledge of a fact if the person has actual knowledge of it; has received a notice or notification of it; or from all the facts and circumstances known to the person at the time in question, has reason to know it.[703] On the other hand, a corporate trustee would have notice or knowledge of a fact only when the information is received by an employee having responsibility to act for the trust, or would have been brought to the employee's attention had the corporate trustee exercised reasonable diligence.[704] In other words, notice to a corporate trustee is not necessarily achieved by giving notice to a branch office.[705] Nor does it necessarily acquire knowledge at the moment a notice arrives in the mailroom.[706] A corporate trustee exercises reasonable diligence if it maintains reasonable routines for communicating significant information to the employee having responsibility to act for the trust and there is reasonable compliance with the routines.[707] In any case, that a corporate trustee is found not liable to the beneficiaries for the malfeasance or nonfeasance of an external agent does not mean that the agent must be so found as well.

There are also instances where internal agents such as trust officers have been sued personally, along with their corporate employers, for breaches of fiduciary duty, notwithstanding the fact that

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[699]*See generally* §5.4.1.8 of this handbook (right and standing of beneficiary to proceed instead of trustee against those with whom the trustee has contracted, against tortfeasors, and against the trustee's agents *i.e.,* against third parties).

[700]Restatement (Second) of Trusts §225 cmt. b.

[701]Restatement (Second) of Trusts §225 cmt. b.

[702]Restatement (Second) of Trusts §225(2)(c).

[703]UTC §104(a).

[704]UTC §104(a) cmt.

[705]UTC §104(a) cmt.

[706]UTC §104(a) cmt.

[707]UTC §104(b).

the corporate employer was the named trustee.[708] True, the trust company may be held liable for the acts of the trust officer under the doctrine of *respondeat superior*.[709] It does not follow, however, that the trust officer is then relieved of liability.[710] A trust officer is at some personal financial risk if the trust company does not carry employee liability insurance; the trust company is financially weak, bankrupt,[711] or otherwise unable or unwilling to indemnify the trust officer; or the trust officer's homeowner's policy does not cover acts performed in the course of employment. Certainly, the trust beneficiaries would be tempted to mount an effort to have the officer of the insolvent trust company saddled with liabilities that run to them directly. Why? Because the beneficiaries would merely be general creditors of the insolvent trust company, at least to the extent the trust property itself could not be traced into the bankruptcy estate.[712] Thus, it would be particularly unwise for a trust officer to park trust cash on the commercial side if the trust company's insolvency is a real possibility. Actual insolvency could well expose the trust officer to personal liability *to the beneficiaries* for any of the cash that could not be traced and recovered for the trusts, at least to the extent the trust officer knew or should have known about the entity's precarious financial situation.[713]

Whether trust counsel has a fiduciary duty to the trust beneficiaries. As discussed in §8.8 of this handbook, the cases are all over the lot on the question of whether trust counsel represents the trustees, the beneficiaries, or both classes together. It is settled law, however, that in matters unrelated to the rendering of legal advice, a lawyer for a trustee has the same duty of undivided loyalty to the beneficiaries as does the trustee.[714] In one case, for example, a lawyer who was representing trustees in the sale of trust real estate secretly arranged with the brokers to take a

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[708]*See generally* 5 Scott & Ascher §30.6.3, n. 1; 4 Scott on Trusts §326.3.

[709]*See generally* §6.1.4 of this handbook (the trustee's duty not to delegate critical fiduciary functions). *See also* §7.3.3 of this handbook (trustee's liability as legal owner in tort to nonbeneficiaries) and §8.32 of this handbook (whether the trustee may escape liability for making a mistake of law if he acted in good faith on advice of counsel). The UTC provides that a corporate trustee that conducts activities through employees has notice or knowledge of a fact involving a trust only from the time the information was received by an employee having responsibility to act for the trust, or would have been brought to the employee's attention if the corporate trustee had exercised reasonable diligence. UTC §104(b). A corporate trustee exercises reasonable diligence if it maintains reasonable routines for communicating significant information to the employee having responsibility to act for the trust and there is reasonable compliance with the routines. UTC §104(b). Would a corporate trustee's exercise of "reasonable diligence" insulate it from vicarious liability for the actions of the employees?

[710]*See* Bogert §901 n.10 and accompanying text; 4 Scott on Trusts §326.3; 5 Scott & Ascher §30.6.3 (noting that the claim of a corporation against its directors or officers for causing it to incur fiduciary liability is a corporate asset).

[711]*See generally* 4 Scott on Trusts §326.3.

[712]5 Scott & Ascher §30.6.3 (Directors and Officers of Corporate Trustee).

[713]*See generally* 3 Scott & Ascher §17.2.14.1.

[714]*See In re* Clarke's Estate, 12 N.Y.2d 183, 187, 188 N.E.2d 128, 130, 237 N.Y.S.2d 694, 697 (1962).

portion of any commissions they might earn on the transaction. While the trustees were not found culpable, and although the trust ultimately was not harmed by the lawyer's machinations, the court nonetheless reduced the lawyer's compensation and ordered him to turn over the kickback to the trust estate.[715]

When trust counsel knowingly participates in a breach of trust. It goes without saying that trust counsel may not knowingly participate with the trustee in an act that would constitute a breach of trust, such as the sale of a parcel of trust real estate to counsel for less than fair market value in violation of the terms of the trust.[716] A trustee who pays counsel out of entrusted funds legal fees that are demonstrably excessive is wasting trust assets.[717] It is self-evident that counsel is a knowing participant in that breach.[718] Suffice it to say, a trust counsel who knowingly participates in any act that might reasonably be considered by a court to be a breach of trust is asking for trouble.[719]

On the other hand, trust counsel generally would not be liable to the trust beneficiaries for participating in a breach of trust if all that counsel did was render naked legal advice to the trustee as to the law applicable to an act of the trustee that was in a breach of trust, or to an act that if undertaken by the trustee would be in breach of trust.[720] That is not to say that counsel could not incur liability to the trustee, and possibly to the beneficiaries, as well, for negligently rendering faulty legal advice.[721] But that would be for the commission of a tort, a legal proscription, not for the participation in a breach of trust, which is an equitable proscription.[722]

Trust-accountant liability. As a general rule, an accountant, *qua* accountant, is not a fiduciary, absent special facts. That having been said, an accountant who, say, in the course of

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[715]Clarke's Estate, 12 N.Y.2d 183, 187, 188 N.E.2d 128, 130, 237 N.Y.S.2d 694, 697 (1962). *See also In re* Bond & Mortg. Guar. Co. (*In re* Half Moon Hotel), 303 N.Y. 423, 103 N.E.2d 721 (1952) (attorneys for trustee held liable for breach of the duty of undivided loyalty to the trust beneficiaries when they purchased at arm's length through third-party brokers interests in the underlying property, though there was no evidence of actual fraud, bad faith, or "manipulation of the trust dealings" by the attorneys).

[716]5 Scott & Ascher §30.6.4 (Attorneys and Other Agents).

[717]*See generally* §6.2.1.3 of this handbook (the trustee's duty not to waste the trust property).

[718]*See, e.g.*, McCormick v. Cox, 118 So. 3d 980, 982 (Fla. Dist. Ct. App. 2013) (upholding a finding of the trial court that the legal fees paid to trust counsel were "substantially unreasonable and unsupported by the evidence").

[719]5 Scott & Ascher §30.6.4. *See, e.g.*, Roth v. Jelley, ___ Cal. Rptr. 3d ___, No. A155742, 2020 WL 882150 (Cal. Ct. App. Feb. 24, 2020) (a case involving the failure of the holder of a contingent equitable interest under a trust to receive due notice of a judicial proceeding, advance and otherwise—a proceeding that ultimately resulted in the extinguishment of that interest).

[720]5 Scott & Ascher §30.6.4.

[721]*See generally* §8.8 of this handbook (whom trust counsel represents).

[722]*See generally* §8.8 of this handbook (whom trust counsel represents).

preparing the trust's income tax returns knowingly participates with the trustee in a breach of trust risks incurring personal liability to the trust beneficiaries for any injury to the trust estate that is attributable to the participation.[723]

The third party who pays directly to the beneficiary a debt owed the trust. A third party who bypasses the trustee does so at his peril. Take, for example, the trustee who holds legal title to contractual rights against a third party, such as rights against the corporate issuer of a bond or rights against an insurance company incident to one of its insurance policies.[724] In other words, a bond or an insurance contract is a trust asset. The third party, instead of making a payment to the trustee, who is the other party to the contract, takes it upon itself to make a payment directly to the trust beneficiary, who is not of full age and legal capacity. The trustee may have a fiduciary duty to seek to compel the third party to make the payment a second time, this time to the trustee.[725]

A third party definitely risks having to pay twice if he makes a payment to the beneficiary designated in the governing instrument in the face of a valid assignment of the equitable interest, even when the "original" beneficiary is of full age and legal capacity and even if the third party had no notice, actual or constructive, of the assignment.[726] The trustee to whom the obligation ran and to whom the payment should have been made did not receive it.[727] Nor did the assignee, the current possessor of the equitable property interest, receive the payment.[728] If the third party has any recourse, it is against the original or former beneficiary.

Liability of third-party purchasers of trust property to the beneficiaries. A third party who knowingly participates with a trustee in a breach of trust shares with the trustee liability for any losses occasioned by the breach.[729] If the trustee transfers trust property in breach of trust to a third-party purchaser who is aware of the breach, the purchaser holds the trust property subject to

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[723]*See* Bennett v. Carter, 807 S.E.2d 197 (S.C. 2017).

[724]*See generally* §9.9.4 of this handbook (bank accounts and other such debtor-creditor contractual arrangements are not trusts) and §9.9.1 of this handbook (life insurance and other such third-party beneficiary contracts are not trusts).

[725]The third-party obligor who makes a payment directly to the trust beneficiary instead of to the title-holding trustee, the other party to the contract, does so at his, her, or its peril, unless directed to do so by the trustee. 5 Scott & Ascher §32.1 (Discharge by Beneficiary of Claim Against Third Person). If the beneficiary is not of full age and legal capacity, the third-party obligor runs the risk of having to pay twice. 5 Scott & Ascher §32.1 (Discharge by Beneficiary of Claim Against Third Person). There is a similar risk if following the direction were to constitute a knowing participation with the trustee in a breach of trust, or if the trust were a spendthrift trust. 5 Scott & Ascher §32.1 (Discharge by Beneficiary of Claim Against Third Person).

[726]5 Scott & Ascher §32.1 (Discharge by Beneficiary of Claim Against Third Person). *See generally* §5.3.2 of this handbook (voluntary transfers of the equitable (beneficial) interest under a trust).

[727]5 Scott & Ascher §32.1.

[728]5 Scott & Ascher §32.1.

[729]*See generally* §7.2.9 of this handbook.

the terms of the trust.[730] Otherwise, "such a purchaser is liable only if the trustee commits a breach of trust in making the transfer and the purchaser has notice that the trustee is doing so."[731] At common law, however, it was doctrine that even the innocent third-party purchaser had a continuing obligation running to the trust beneficiaries to see to it that the trustee properly applied the purchase price.[732] In the United States, such an innocent third party either by case law or by statute has been relieved of such an obligation.[733] "In England, the old rule has been repudiated by statute."[734]

Liability of a third party who fails to honor a Uniform Trust Code §1013 certification. The trustee of the typical trust will have numerous occasions to transact with third parties in furtherance of the trust's lawful purposes. This is appropriate as the trustee holds the legal title to the trust property, and, thus, "as to the world" is its owner. A third party might be selling an asset to, or purchasing an entrusted asset from, the trustee. A third party might be loaning funds to the trustee in his fiduciary capacity or borrowing entrusted property from the trustee. A third party might be selling goods and services to the trustee or purchasing goods and services from the trustee, all in furtherance of the trust's lawful purposes. The trustee also may properly retain third-party agents in furtherance of the trust's lawful purposes, such as attorneys-at-law and investment managers.

Section 1013(h) of the UTC provides as follows: "A person … [other than a beneficiary]… making a demand for the trust instrument in addition to a 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 instrument."

The information in a trustee's UTC §1013 certification is limited to the following bits of information:

- That the trust exists and its date of execution
- The identity of the settlors
- The powers of the trustee
- The revocability or irrevocability of the trust and the identity of any persons holding a power to revoke
- The authority of cotrustees to sign or otherwise authenticate and whether all or less than all are required in order to exercise the powers of the trustee

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[730] *See generally* §5.4.2 of this handbook (rights of the beneficiary as against transferees of the underlying trust property).

[731] 5 Scott & Ascher §30.1 (Misapplication of Payments Made to Trustee).

[732] 5 Scott & Ascher §30.1. *See also* §8.15.69 of this handbook (third party liability for trustee's misapplication of payments to the trustee).

[733] 5 Scott & Ascher §30.1, n.5 (Case Law) & n.7 (Statute).

[734] 5 Scott & Ascher §30.1 (referring to Trustee Act, 1925, 15 Geo. V., c. 19, §14 (England)).

- The trust's taxpayer identification number
- The manner of taking title to trust property
- A statement that the trust has not been revoked, modified, or amended in any manner that would cause the representations contained in the certification to be incorrect.

A UTC §1013 certification, however, "need not contain the dispositive terms of a trust." Unexplained are the nature of the "liability" and "damages" that are being contemplated by subsection (h). Nor is a definition of "good faith" even supplied in this context. Presumably, the third party is subject to some type of tort liability, but what duty of care is implicated by the "making of a demand for a trust instrument"? According to the section's official commentary, left to "other law" is the issue of "how damages for a bad faith refusal are to be computed." Also unspecified is to whom this demanding "person" would be liable in the face of a judicial determination of liability.

A third party contemplating dealing with a trustee should be able contractually to defang UTC §1013(h), assuming it actually has fangs. Time will tell whether it actually does in the face of all this statutory vagueness.

May UTC §1013's general applicability be negated effectively *ab initio* by the trust's terms? In the face of subsection (g) of UTC §1013, some settlors may want to consider doing just that so as to better protect the equitable property rights of the beneficiaries of their trusts. Subsection (g) provides as follows: "A person who in good faith enters into a transaction in reliance upon a certification of trust may enforce the transaction *against the trust property* [emphasis supplied] as if the representations contained in the certification were correct." The problem is that the third party who is not furnished a copy of the trust instrument, only a cryptic trustee certification, will not be privy to the UTC §1013 negation provision and therefore may well not be bound by its terms.

Related sections. As to whether a trustee may shift liability for breaches of fiduciary duty on to the shoulders of his agents, see §3.2.6 of this handbook (Considerations in the Selection of a Trustee). As to the beneficiary's right to proceed in the stead of the trustee directly against the trustee's agents, the reader is referred to §5.4.1.8 of this handbook (Right (of Beneficiary) to Proceed in Stead of Trustee against Those with Whom the Trustee Has Contracted, against Tortfeasors, and against His Agents, *i.e.*, against Third Parties). As to the duties, if any, that a trustee's counsel may have to the beneficiaries, see §8.8 of this handbook (Whom Does Counsel Represent?). So too *a beneficiary* who consents to a breach of trust and/or participates in a breach of trust may incur liability to the other beneficiaries for so doing, a topic that is covered in §5.6 of this handbook.[735] For a discussion of the inbound external liabilities of third parties generally to the trustee or the beneficiary, or both, see §3.6 of this handbook.

[735] *See also* 4 Scott & Ascher §25.2.6.3 (Participation by Beneficiary in Breach of Trust).