Trust Law Primer

Since trust law is new to most, it may help to have a place to start in that line of study. To understand the law of trusts is to understand the legal mechanism of the "federal income tax system" and those claims, the "traffic code" and municipal court system and those claims, and the "property tax" system and those claims, just to identify a few of the trust agreements we've been seduced into signing.

In general, I can recommend BOGERT AND BOGERT, [1] THE LAW OF TRUSTS AND TRUSTEES and SCOTT ON TRUSTS as two, multi-volume treatises that supply all the information you might ever want to know about trusts and trust law. Along this same line, the Restatement (2d) of Trusts is also a very thorough review of the law of trusts. As a place to start, I can also recommend "Wills and Trusts In a Nutshell," which will very likely be available at all bookstores near law schools, as well as available through just about any standard bookstore, as well as on-line. In those "states" for which there also exists a "Trust Code," that will also provide invaluable information regarding the law of trusts.

Some key foundational points regarding trust law.

- He who claims trust must prove trust. "The burden of proof is on the party who asserts the existence of a trust." BOGERT § 50 at 102.

  Regarding these scams, since we are typically the fiduciary and don't even know that we've volunteered for that role or position, the threshold burden of proof will be on the party claiming to be a beneficiary.

  "A beneficiary seeking to obtain relief for a breach of trust must plead and prove facts which show the existence of a fiduciary duty and the failure of the trustee to perform it, and that consequently the court should grant the requested remedy." BOGERT § 871 at 156 and nn.2, 3 (where beneficiary fails to prove damages, there is no recovery).

- What must the party claiming trust prove, initially? There are basically three elements to a trust:

  (1) *a trustee*, who holds the trust property and is subject to equitable duties to deal with it for the benefit of another; (2) *a beneficiary*, to whom the trustee owes equitable duties to deal with the trust property for his benefit; (3) *trust property*, which is held by the trustee for the beneficiary.

Restatement (Second) Trusts § 2 (1959) (comment h) (emphasis added).

[1] I don't know whether this is "BO-gurt" or "bo-ZHAY" or something else.

> Moreover, a fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians. All of the necessary elements of a common-law trust are present: *a trustee* (the United States), *a beneficiary* (the Indian allottees), and *a trust corpus* (Indian timber, lands, and funds).

Mitchell, 463 U.S. at 225 (citing Restatement (2d) Trusts) (emphasis added).[2]

- The trust must have both a beneficiary and a trust property (the *res*). If there is no beneficiary or no trust *res*, then there is no trust. SCOTT, ABRIDGMENT OF THE LAW OF TRUSTS, §§ 66, 74 (necessity of trust property); § 112 (necessity of a beneficiary).

- But, if there is an absence of a fiduciary, a court of competent jurisdiction may supply a fiduciary. SCOTT, ABRIDGMENT OF THE LAW OF TRUSTS, §§ 66, 101.

- Acceptance of benefits is presumed. BOGERT § 169 (Notice to and Acceptance by Beneficiary), at 191 ("acceptance is presumed"). This is just to say that there's nothing that an alleged beneficiary of these scams needs to do to confirm, formally, acceptance of the role of beneficiary.

- The beneficiary may disclaim. BOGERT §§ 170-72 (disclaimer and its effect); § 170, at 205 (Proof of Acceptance or Disclaimer). "Conduct by the beneficiary which is inconsistent with a trust for his benefit may amount to an implied disclaimer. … [A] disclaimer amounts to a refusal to accept a gift of an equitable property right." BOGERT § 170, at 207.

  "In the absence of a statute governing the matter, the problem is often whether the beneficiary by his words or other conduct [*accepted* the equitable interest], or has indicated that he rejected such benefits. Since acceptance is normal, a claim of renunciation must be supported by clear evidence." BOGERT § 170, at 205 (Proof of Acceptance or Disclaimer).

- Disclaimer operates back to and as of the date of the start of the agreement. BOGERT § 172, at 227-28. The phrase "*nunc pro tunc*" may appear in this area of discussion. It means "now for then."

  "Conduct by the beneficiary which is inconsistent with a trust for his benefit may amount to an implied disclaimer. … Statutes which require "surrender" of such trusts to be in writing do not apply, since a surrender is based on a

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[2] This ***strongly*** suggests larceny, thus a *constructive* trust ("relationship ***necessarily*** arises;" "property ***belonging to*** the Indians;" "***Indian*** timber [etc.]"). May the American and Indian nations benefit from the lesson.

giving up of an existing equitable interest, whereas a disclaimer amounts to a refusal to accept a gift of an equitable property right." BOGERT § 170, at 207.

- Abuse by the alleged beneficiary of the alleged fiduciary is relevant to the questions of whether a trust was ever created and of disclaimer.

  > Where, as is usual, the creation of the trust is by way of gift, the relationship between the settlor and beneficiary may influence a court in deciding whether a trust intent existed. If the parties are on bad terms, as where the alleged beneficiary has been mistreating the supposed settlor, the creation of a trust is rendered unlikely.

  BOGERT § 50 at 108.

- A coerced trust is not evidence of such agreement. BOGERT §§ 42 at 434, 44 at 452 and n.16. In other words, no one may be compelled to be a fiduciary. The only way to be a fiduciary is voluntarily.

  This item is included for one main reason. There is a moral level response of repulsion that those in "government" feel the need and the authority to run these scams against us. Thus, these scams feel like fraud. If the "choice of law" were the Law of the Land, then it would be fraud. But, the "choice of law" is not the Law of the Land. Therefore, we need to move through that feeling as quickly as possible. Under the "choice of law" by which these scams are being evaluated, "all" the trusts that are part of these scams are 100% voluntary. This doesn't mean that one should not ever assert these defenses. It just means that those who feel compelled to assert claims or defenses of fraud or of duress or coercion are strongly encouraged also to assert claims and defenses that may actually be "heard." [3]

- In this day and age of the "Statute of Frauds," the trust agreement must be in writing and signed by the party to be charged. For our purposes, here, that party would be the fiduciary. As an example of this idea, we find this in the Texas Property Code (that part of which addresses trusts):

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[3] Under the Common Law standards, the agreement would be evaluated per the "subjective" standard. Per that standard, a relevant question would be along these lines: Did you understand that you were even creating a trust when you signed that document? However, under the standard for "this state," which standard is the "objective" standard, about the only relevant question is this: Is this your signature? In other words, in agreements evaluated per the "choice of law" of "this state," one is presumed to know the nature and consequences of what he signs. While this presumption is not necessarily irrebutable, we have the choice of focusing solely on that standard or of also digging deeper into the substance of the matter so as to deal with the legal reality of the matter.

Sec. 112.004. STATUTE OF FRAUDS. A trust in either real or personal property is enforceable only if there is written evidence of the trust's terms bearing the signature of the settlor or the settlor's authorized agent. A trust consisting of personal property, however, is enforceable if created by:

(1) a transfer of the trust property to a trustee who is neither settlor nor beneficiary if the transferor expresses simultaneously with or prior to the transfer the intention to create a trust; or

(2) a declaration in writing by the owner of property that the owner holds the property as trustee for another person or for the owner and another person as a beneficiary.

Added by Acts 1983, 68th Leg., p. 3332, ch. 567, art. 2, Sec. 2, eff. Jan. 1, 1984.

- "If the beneficiary makes a prima facie case, the burden of contradicting it or showing a defense will [*then*] shift to the trustee." BOGERT § 871 at 156-57. *See also* 2A SCOTT ON TRUSTS § 172, at 452-53; BOGERT § 861 at 2-3.

The "burden of proof" issue is one of the most significant distinctions and characteristics about trust law.

As we know from the foregoing, the party claiming trust must satisfy the threshold burden (the three elements identified above). Where that's the *fiduciary*, then there is no obvious transition from the threshold burden phase to the substantive burden phase.

However, where the party claiming trust is the *beneficiary*, what happens is what is referred to as a "shift in the burden of proof." Thus, where it's the beneficiary who is asserting trust, then the beneficiary is expected to be the party who files the suit or the claim, because the threshold burden of proof is on the *beneficiary*. Then, once the beneficiary satisfies that threshold burden, the burden of proof shifts to the alleged fiduciary.

What does the fiduciary then have the burden to prove? The fiduciary then has the burden to prove "compliance," or "non-breach."

The point to make here about the evidence and the burden of proof is that once that threshold burden is satisfied, the law of trusts presumes that the fiduciary is wrong, or, is "guilty," or has "breached the agreement," as it were, and the fiduciary must prove that what he did was consistent with the applicable trust agreement and with the applicable trust law. Thus, in the civil (commercial) context, a fiduciary is quite literally "presumed guilty," or "presumed to have breached," as it were, and he must prove that he was within the terms of the trust and within the applicable trust law, i.e., "not guilty."

To review this in the context in which we'll find ourselves regarding these "government"-sponsored scams, the threshold burden is on the beneficiary. That party must prove up (1) beneficiary, (2) trustee, and (3) trust *res*. Then, after that, but only *after* that, threshold burden is satisfied, the burden of proof shifts to the alleged fiduciary, who must then show "compliance," as in "non-breach."

Looked at another way, while it is indisputable that a fiduciary carries the burden to show compliance with the trust agreement, it's just as indisputable that such burden doesn't even exist until *after* the beneficiary carries the *threshold* burden to show (1) that the claimant is a beneficiary, (3) of a trust with a trust *res*, (2) managed by the alleged fiduciary.

- "If there is a lack of any presumption of death or grant of power to pay a substitute, the trustee may pay the funds to any alleged successor of the absentee [beneficiary] at this peril *or hold them indefinitely*, unless he can secure protection by court order." BOGERT § 814 at 314 (emphasis added).

  This is the "unknown beneficiary" problem. Where the alleged beneficiary is unknown, then the alleged fiduciary has no duty or obligation to such party.

  Typical identification would include a name and address. BOGERT § 161 at 133-34.

- Breach of the fiduciary duty can be a criminal act. *See e.g.,* TEX. PENAL CODE §§ 32.43 ("Commercial Bribery"), 32.45 ("Misapplication of Fiduciary Property or Property of Financial Institution"). *See also* Embezzlement, Willful Misappropriation.

  Sometimes, the term *defraud* includes *embezzlement*. *Defraud* derives from the Common Law. *Embezzlement* is a statutory concept, generally unknown to the Common Law. *Larceny*, on the other hand, is a Common Law concept. Thus, in general, where *defraud* takes its meaning from the Common Law, it would include *larceny* but not *embezzlement*. But, in the statutes, *defraud* can also include *embezzlement*. This is the case, for example, with 18 U.S.C. § 371, where *defraud* includes *embezzlement*.

To conclude this Primer, let's look at one example. To facilitate understanding of this example, let's add one more foundational concept from trust law. As already identified in the "burden of proof" discussion, *infra*, in general, the fiduciary must act within the terms of the trust agreement, and he must be able to prove that he has acted in "compliance" with the terms of that trust agreement. However, the fiduciary may act in contravention to that agreement where all the beneficiaries agree to that deviation. SCOTT, ABRIDGMENT, § 216.

By way of introducing this example, let's say that there are several beneficiaries. And, let's say that the fiduciary wants to make a donation to a new charity, which entity was not previously a named beneficiary of that trust. And, let's say that all but one of the named beneficiaries support the idea of making that donation out of the trust property. Can the fiduciary make that donation? No. Why not? Because it'd be a distribution of trust property to a non-beneficiary without the unanimous consent of the named beneficiaries. What is it called, sometimes, where a fiduciary deliberately makes an unauthorized distribution from the trust? Embezzlement.

What follows in the opening paragraph of a rather well-known case. See if it makes sense to you now in a way that it may never had made sense before.

> Mr. Chief Justice FULLER, after stating the facts in the foregoing language, delivered the opinion of the court.
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> The jurisdiction of a ***court of equity*** to prevent any ***threatened breach of trust*** in the ***misapplication or diversion of the funds*** of a corporation by ***<u>illegal</u> payments*** out of its capital or profits has been frequently sustained. *Dodge v. Woolsey*, 18 How. 331; *Hawes v. Oakland*, 104 U.S. 450. As in *Dodge v. Woolsey*, this bill proceeds on the ground that the defendants would be ***<u>guilty</u>*** of such ***breach of trust or duty*** in voluntarily making return for the imposition of, and paying, an unconstitutional tax; and also on allegations of threatened multiplicity of suits and irreparable injury.

Pollock v. Farmers' Trust & Loan Co., 157 U.S. 429, 553-54 (1895) (all emphasis added).

To review, reflect on the fact that at the time of the original 1894 "income tax" program, "United States" was not a named beneficiary to any of Farmers' agreements. Thus, where at least one "beneficiary" (Pollock, a shareholder) withheld consent to any distribution to any "unknown beneficiary" ("United States"), then, for the "fiduciary" (the directors of Farmers') to make such distribution would be for them to breach the duty of loyalty and to engage in criminal conduct. As the Court tell us in this very first paragraph, the *Pollock* case was never about direct or indirect taxes. It's just one more run-of-the-mill trust case, with several hundred pages of diplomatic judicial discussion that exists to salve the ego of those asserting unfocused, manifestly distracting arguments.