

Title

Judicial imposition of a constructive trust on traceable property for benefit of a victim of unjust enrichment freezes property, insulates it from reach of creditors of others, and captures any appreciation

Text

Assume wrongdoer procures title to a traceable portfolio of stocks by fraud, duress, or undue influence from rightful owner and then transfers title on to an innocent third party for nominal consideration, i.e. to a non-BFP. The innocent third party's unjust enrichment is at the expense of its rightful owner.

The rightful owner could bring a tort action, which would be an action at law, against the wrongdoer for money damages and leave it at that. Simple. The rightful owner, however, if successful, is now in competition with the wrongdoer's other creditors. Moreover, the value of any appreciation in the value of the portfolio after the awarding of damages is not captured.

Or the rightful owner might want to turn to equity in the first instance. He might seek the judicial imposition of a constructive trust on the portfolio, the constructive trust being a procedural equitable remedy. The unjustly enriched title-holding third party constructive trustee now holds the portfolio for the benefit of its rightful owner. Any subsequent appreciation in its value accrues to the rightful owner. Even better, the portfolio, or the product into which it has been traced, is insulated from the reach of the creditors of the wrongdoer and of the unjustly enriched innocent third party. In other words, the rightful owner's *in specie* interest in the portfolio has been judicially secured via the imposition of a constructive trust. At some point the equity court will then issue an *in personam* specific performance order of restitution to the third party to transfer legal title back to the rightful owner. The restitution order is a substantive equitable remedy. At some point in the process the rightful owner will want to give consideration to bringing an action at law for damages against the wrongdoer for the direct and indirect costs, legal and otherwise, that the rightful owner has incurred in having the unjust enrichment remedied in equity.

The Idaho Supreme Court [McOmber v. Thompson, 572 P.3d 736 (Idaho 2025)] failed to appreciate that the equitable doctrines of traceability and

constructive trust operate in tandem, a topic I addressed in a prior JDSUPRA posting. See <https://www.jdsupra.com/legalnews/traceable-economic-value-of-3260875/>. The court had also failed to appreciate that even a titleholder who has been innocently unjustly enriched may be saddled with the status of constructive trustee. In §7.2.3.1.6 of *Loring and Rounds: A Trustee's Handbook* (2026) we explain how an express trustee can morph into constructive trustee. Said section is reproduced in the appendix below. The sub-section also supplies authority for the assertions in this posting.

Appendix

§7.2.3.1.6 Constructive Trust [from *Loring and Rounds: A Trustee's Hand Book* (2026)]

Constructive trust doctrine. A general discussion of constructive trust doctrine is contained in §3.3 of this handbook, which the reader is advised to consult before proceeding further. A constructive trust is an express trust which doubles as a procedural equitable remedy, that is to say its purpose is to support the substantive equitable remedy of restitution for unjust enrichment.¹⁴⁴ The Restatement of Restitution (1937) is not in accord, suggesting that a constructive trust is something other than a true trust.¹⁴⁵ For the same reason, neither is the Restatement (Third) of Restitution and Unjust Enrichment in accord.¹⁴⁶

The substantive equitable remedy of restitution is covered in §7.2.3.3 of this handbook. The “wrong” of unjust enrichment is taken up in §8.15.78 of this handbook. “Where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it, a constructive trust arises.”¹⁴⁷ Considered in §8.47 of this handbook is the tort of wrongful interference with inheritance or gift and whether equity rather than the law is generally better equipped to remedy the harm caused by such an interference.

Unauthorized fiduciary self-dealing. As we discuss in greater detail in §6.1.3 of this handbook, there are many ways that a trustee can unjustly enrich himself from the trust property in breach of the duty of loyalty such that the judicial imposition of

¹⁴⁴See generally Charles E. Rounds, Jr., *Relief for IP Rights Infringement Is Primarily Equitable: How American Legal Education Is Short-Changing the 21st Century Corporate Litigator*, 26 Santa Clara Computer & High Tech L.J. 313 (2010).

¹⁴⁵Rest. (First) of Restitution §160, cmt. a.

¹⁴⁶See Rest. (Third) of Restitution & Unjust Enrichment §55, cmt. b.

¹⁴⁷Rest. (First) of Restitution §160.

a constructive trust is warranted.¹⁴⁸ Here are a few:

- Purchase by trustee for his own account of property entrusted to him as fiduciary;¹⁴⁹
- Sale of trustee's individual property to himself as fiduciary;¹⁵⁰
- Purchase by trustee of property that he should purchase for the beneficiary;¹⁵¹
- Renewal of lease by trustee for his personal benefit;¹⁵²
- Purchase by trustee for his own account of an encumbrance upon property held by him as fiduciary;¹⁵³
- Bonus or commission received by trustee;¹⁵⁴
- Sale of entrusted property in breach of trust;¹⁵⁵
- Competition by trustee;¹⁵⁶ and
- Exploiting confidential information for personal purposes.¹⁵⁷

Third-party acquisition of the legal interest, i.e., of the entrusted property. A constructive trust can also be judicially imposed as a procedural equitable remedy on property wrongfully in the hands of a third party to a trust relationship. "Where a fiduciary in violation of his duty to the beneficiary transfers property or causes property to be transferred to a third person, the third person, if he gave no value or if he had notice of the violation of duty, holds the property upon a constructive trust for the beneficiary."¹⁵⁸ By imposing a constructive trust, the court concludes that the

¹⁴⁸See generally Rest. (First) of Restitution §190.

¹⁴⁹Rest. (First) of Restitution §192.

¹⁵⁰Rest. (First) of Restitution §193.

¹⁵¹Rest. (First) of Restitution §194.

¹⁵²Rest. (First) of Restitution §195 (providing that a person holding as trustee a leasehold interest who in violation of his duty to the beneficiary obtains a renewal of the lease for himself holds the new lease upon a constructive trust for the beneficiary).

¹⁵³Rest. (First) of Restitution §196.

¹⁵⁴Rest. (First) of Restitution §197 (providing that where a trustee in violation of his duty to the beneficiary receives or retains a bonus or commission or other profit, he holds what he receives upon a constructive trust for the beneficiary).

¹⁵⁵Rest. (First) of Restitution §198 (providing that where a trustee in violation of his duty to the beneficiary disposes of property entrusted to him as fiduciary, he holds any property received in exchange upon a constructive trust for the beneficiary).

¹⁵⁶Rest. (First) of Restitution §199 (providing that where a trustee acquires property by competing with the beneficiary, i.e., with the "trust," in violation of his duty to the beneficiary, he holds the property upon a constructive trust for the beneficiary).

¹⁵⁷Rest. (First) of Restitution §200 (providing that where a trustee in violation of his duty to the beneficiary acquires property through the use of confidential information, he holds the property so acquired upon a constructive trust for the beneficiary).

¹⁵⁸Rest. (First) of Restitution §201(1).

third party should not be holding the property at all, which makes the party's title anything but clear.¹⁵⁹ If the third party were a good faith purchaser for value (BFP) of the entrusted property, there would be no unjust enrichment and thus there could be no imposition of a constructive trust on the property that had been transferred out. The rights of a BFP are considered in §8.15.63 of this handbook. If circumstances warrant, however, a constructive trust could be judicially imposed on the proceeds from the sale of entrusted property to a BFP.¹⁶⁰

Acquisition of equitable interest by fraud, duress, or undue influence. One who acquires a legal or equitable property interest incident to a trust relationship by fraud, duress, or undue influence that is perpetrated against the settlor, the trustee, or a beneficiary is unjustly enriched. A remedy tailor-made for such situations is the constructive trust. Why, then, a need for the tort of intentional interference with inheritance or acquisition by inter vivos transfer, at least in the trust context? This is a topic that is taken up in §7.2.3A of this handbook.

Mistake-based acquisition of equitable interest. A gratuitous entrustment occasioned by mistake also may be grounds for the imposition of a constructive trust, even when the terms of the trust are unambiguous. But evidence of the mistake must be clear and convincing.¹⁶¹

Creditors of the constructive trustee. It is said that “[t]he preference that the constructive trust claimant acquires over general creditors of the defendant is usually the object of the ... [procedural]... remedy.”¹⁶² The restitution claimant will generally prevail over a judgment creditor, “though not over a secured creditor who qualifies as a bona fide purchaser of the assets in question.”¹⁶³ Otherwise the judgment creditor would be unjustly enriched. “The practical advantages of asset-based restitution are particularly apparent when the claimant obtains restoration of appreciated property without the need to prove its value.”¹⁶⁴

The claimant's property must be identifiable and titled in the one who is unjustly enriched. The procedural equitable remedy of constructive trust is only available, however, if the specific property at issue is identifiable, that is capable of

¹⁵⁹See *Freeport-McMoRan Oil & Gas LLC v. 1776 Energy Partners, LLC*, 672 S.W.3d 391, 400 (Tex. 2023).

¹⁶⁰Rest. (First) of Restitution §198, cmt. a.

¹⁶¹See *In re the Ishida-Waiakamilo Legacy Trs.*, 398 P.3d 658 (Haw. 2017).

¹⁶²Rest. (Third) of Restitution and Unjust Enrichment §55, cmt. a. See also cmt. d.

¹⁶³Rest. (Third) of Restitution and Unjust Enrichment §55, cmt. d.

¹⁶⁴Rest. (Third) of Restitution and Unjust Enrichment §55, cmt. i.

either being followed *in specie* or followed (traced) into its product,¹⁶⁵ and if the property has not found its way into the hands of a good faith purchaser for value (BFP).¹⁶⁶ The one who is unjustly enriched needs to have the legal title to the identifiable property, not just the possession of the property. Otherwise, the claimant will have to resort to some other remedy.¹⁶⁷ Thus, the constructive trust coupled with an equitable restitution order would not be a suitable judicial vehicle for recovering stolen property *in specie* directly from its thief, the thief having possession of but not legal title to the property. All is not necessarily lost, however. The mere fact that title never left the claimant ought not to prevent the claimant from recovering the property *in specie* from the thief via an action at law for replevin.¹⁶⁸ So also, “a claimant who can show unjust enrichment, but who cannot identify such property in the hands of the defendant, is not entitled to the remedy of constructive trust.”¹⁶⁹

The constructive trustee will generally be called upon to render an equitable accounting. The procedural equitable remedy of constructive trust may be coupled with the procedural equitable two-pronged remedy of a judicial specific performance order to the constructive trustee to account to the claimant for net profits accruing to the constructive trustee incident to the constructive trustee’s unjustifiable use of the identified property over time, “in the same manner as a trustee’s accounting under an express trust, for the purpose of determining ... net liability in restitution.”¹⁷⁰

Joint ownership in constructive trust. What about joint ownership in constructive trust? Say an express trustee purchases identifiable property for personal purposes for \$20,000. It turns out that \$10,000 of the purchase price was obtained in breach of trust from the trust estate. The value of the property doubles. The express trustee is a constructive trustee of 50 percent of the property for the benefit of the beneficiaries of the express trust. The express trust is the equitable owner of the property acquired in the proportion that its asset contribution bears to the total amount invested.¹⁷¹ Thus, the current market value of the express trust’s share of the property is \$20,000.¹⁷² “A case in which the claimant’s funds supply a portion of the purchase price must be distinguished from one in which the claimant’s

¹⁶⁵See generally §7.2.3.1.2 of this handbook (following *in specie*); §7.2.3.1.3 of this handbook (following property into its product or tracing); Rest. (Third) of Restitution & Unjust Enrichment §55, cmt. g.

¹⁶⁶See generally Rest. (Third) of Restitution and Unjust Enrichment §55, cmt. m; §8.15.63 of this handbook (the BFP).

¹⁶⁷Rest. (Third) of Restitution and Unjust Enrichment §55, cmt. f.

¹⁶⁸Rest. (Third) of Restitution and Unjust Enrichment §55, cmt. f.

¹⁶⁹See *In re Fenenbock Trs.*, 690 S.W.3d 80 (Tex. 2024).

¹⁷⁰Rest. (Third) of Restitution and Unjust Enrichment §55, cmt. l. See, e.g., *Jimenez v. Lee*, 547 P.2d 126 (Or. 1976).

¹⁷¹Rest. (Third) of Restitution and Unjust Enrichment §55, cmt. n.

¹⁷²Rest. (Third) of Restitution & Unjust Enrichment §55, illus. 32.

funds are used to enhance the value of the property the defendant owns.”¹⁷³ In the latter case, the claimant’s remedy is likely to be an equitable lien, a topic we take up in §7.2.3.1.4 of this handbook.

The constructive trust versus the resulting trust. Sometimes it is not all that clear whether the constructive trust or the resulting trust is the appropriate procedural equitable remedy for innocent unjust enrichment. Sometimes it may not matter. Assume the owner of an identifiable item of property transfers it by mistake to *B* in trust. Assume that the legal title to the property metaphorically just falls into *B*’s lap. No express trust beneficiaries are designated or ascertainable. The transferor then dies. Finally, assume that *B* would be unjustly enriched were he to retain title to the property. In other words, title to the item should somehow find its way into the hands of the executor of the transferor’s probate estate. But what procedural vehicles are available to the court for bringing about such a result? The resulting trust might be one, a topic we take up generally in §4.1.1.1 of this handbook. *B* is judicially determined to hold the item upon a resulting trust for the benefit of the executor.¹⁷⁴ The constructive trust is another. The transfer of legal title having been the product of a unilateral mistake on the part of the transferor, that is to say there having been no intention on the part of the transferor to make a gift of the item to *B*, the court declares *B* a constructive trustee of the item for the benefit of the executor. “Liability in restitution is often independent of fault.”¹⁷⁵ In either case, the court follows up with an equitable specific performance order compelling *B* to transfer title to the executor.

¹⁷³Rest. (Third) of Restitution & Unjust Enrichment §55, cmt. n.

¹⁷⁴*See, e.g.*, Stephenson v. Spiegle, 429 N.J. Super. 378, 58 A.3d 1228 (App. Div. 2013) (endorsing the resulting trust option).

¹⁷⁵Rest. (Third) of Restitution & Unjust Enrichment §1, cmt. f.