

Title

Employing a trust-law hypothetical to illustrate the universal preliminary injunction's incompatibility with equity doctrine that was flagged in *Trump v. CASA*

Text

A federal trial judge in the course of adjudicating a controversy temporarily enjoins nationwide enforcement of a law. The universal preliminary injunction (UPI), however, is incompatible with the Anglo-American legal tradition. The traditional injunction is a procedural equitable remedy that may not be gratuitously issued for the direct benefit of third parties, that is non-parties to a specific matter in litigation. Equity acts *in personam*, not *in rem*, particularly when it comes to preliminary injunctions and specific performance orders; it imposes, for example, personal duties on a trustee and creates personal equitable property rights in the trust beneficiaries that are incident to those duties. See 1 Scott on Trusts 3 (1939). Whereas a judgment at law merely declares the plaintiff's rights. Accordingly, the U.S. Sup. Ct. has held that federal universal injunctions "exceed the equitable authority that Congress has given to federal courts." See *Trump v. CASA, Inc.*, 2025 WL 1773631. Equity's *in personam* limitation also renders federal and state UPIs problematic, both as an institutional matter and as a matter of due process. A single trial judge presumes to usurp prerogatives of all his fellow trial judges when it comes to determining doctrinal applicability, not to mention prerogatives of the appellate bench. And as a UPI can adversely and directly affect the personal rights, duties, and obligations of third parties not before the court, they are constitutionally entitled to advance notice and an opportunity to contest the UPI's universality.

Assume a state trial judge issues a state-wide UPI against enforcement of a state statute in a matter involving an irrevocable discretionary trust for the benefit of the settlor's widow. Terms of trust provide that upon her death any remaining entrusted property shall be distributed free of trust to a charity. The trustee makes distributions to a checking account held jointly by widow and her son. Trustee negligently distributes income and principal into account for 6 years following her death, exhausting the trust's corpus, the trustee having failed to exercise due diligence in monitoring the widow's health and well-being. Twelve years following her death charity discovers the malfeasance and commences a breach-of-trust action against trustee personally. Until then charity had been unaware of trust's very existence, which is the fault of the trustee and thus another breach of trust. Son has vanished, and in any case is judgment proof.

Under §1005(c)(3) of the Uniform Trust Code the trustee may be off the hook. It provides that a judicial proceeding against a trustee by a beneficiary for breach of trust must be commenced within five years after termination of trust. This ultimate repose provision applies even if trustee had negligently failed to apprise beneficiary of trust's very existence. If trustee via the routine accounting process had made such a disclosure, we might have had a case of constructive fraud, a possible exception to §1005(c)(3)'s availability. For an explanation, see §8.15.60 of *Loring and Rounds: A Trustee's Handbook* (2025), which section is reproduced in appendix below].

Assume our state trial judge is inclined to find the ultimate repose provision unconstitutional and temporarily enjoins all trial judges in the state from enforcing it. Recall that the trust relationship is a creation and ward of equity, with the injunction being one of equity's procedural remedies. The trial judge is presuming to usurp the prerogatives of the state's appellate court system when it comes to determining state-wide applicability of legal and equitable doctrine, and as a corollary the prerogatives of his fellow trial judges. This would be so even if enforcement of trusts were an executive function rather than a judicial one such that it was the state's executive officials who had been on the receiving end of the UPI. *Cf.* Kavanaugh concurrence in *Trump v. CASA, Inc.* ("But when it comes to the interim status of major new federal statutes and executive action, it is often important for reasons of clarity, stability, and uniformity that...[the U.S. Supreme Court]...be the decider.").

As to the due process issue, the UPI itself is constitutionally suspect in that third parties who would be adversely and directly affected by the trial judge's negation of the UTC's repose provision have not been given a timely opportunity *in this litigation* to oppose the state-wide applicability of the UPI. This is a jurisprudential incident of equity's acting *in personam*.

Appendix

§8.15.60 *Constructive Fraud* [from *Loring and Rounds: A Trustee's Handbook* (2025)].

Constructive fraud has all the elements of fraud, except the element of intent to defraud or deceive: "The principle is well settled, that if a person makes a representation of a fact, as of his own knowledge, in relation to a subject matter susceptible of knowledge, and such representation is not true; if the party to whom it is made relies and acts upon it, as true, and sustains damage by it, it is fraud for which the party making it is responsible."¹⁰⁸⁴ The negligent misrepresentation must be incident to some legal or equitable relationship.¹⁰⁸⁵ Parties in a contractual relationship generally have a legal duty to deal fairly and in good faith.¹⁰⁸⁶ The fiduciary in an equitable relationship, *e.g.*, an agent or a trustee, has a panoply of duties incident to that relationship, duties that are enumerated and discussed in Chapter 6 of this handbook.

In the trust context, the doctrine of constructive fraud and the *Cambridge Trust Case*¹⁰⁸⁷ will be forever linked in the minds of trust professionals on this side of the Atlantic. The case involved a testamentary trust for the benefit of the settlor's widow. Upon her remarriage, the trust was to continue for the benefit of a charity. The trust was funded in 1932. In 1945 the widow remarried but through the employment of elaborate ruses she managed to hide the fact of her remarriage from the trustee until her death in 1967. Thus, the trustee in violation of the terms of the trust and to the detriment of the charity continued to pay the net trust accounting income to the widow until her

¹⁰⁸⁴Page v. Bent, 43 Mass. 371, 374 (1841) (Chief Justice Lemuel Shaw rendering the opinion).

¹⁰⁸⁵*Cf.* Est. of Draper v. Bank of Am., N.A., 288 Kan. 510, 205 P.3d 698 (2009) ("Constructive fraud is a 'breach of a legal or equitable duty which, irrespective of moral guilt, the law declares fraudulent because of its tendency to deceive others or violate a confidence, and neither actual dishonesty [n]or purpose or intent to deceive is necessary.'").

¹⁰⁸⁶Wells v. Stone City Bank, 691 N.E.2d 1246 (Ind. Ct. App. 1998).

¹⁰⁸⁷Nat'l Acad. of Sci. v. Cambridge Tr. Co., 370 Mass. 303, 346 N.E.2d 879 (1976).

death, when at last it discovered its mistake.

The charity sought to have the court reopen a number of the trustee's previously allowed accounts and order the trustee to make the trust whole out of its own pocket, if necessary, for the amounts that it had misdelivered. By statute, allowed trustee accounts generally cannot be reopened, except for fraud or manifest error.¹⁰⁸⁸ While it was clear that the trustee had not intended to misrepresent the widow's marital status on the accountings, it was also clear that the trustee's inattention, in the words of even the dissent, was "pathetic."¹⁰⁸⁹ In fact, the trial court found that the trustee had exerted no effort whatsoever to ascertain the widow's marital status, not even going so far as to solicit from her periodic affidavits. Accordingly, the court found that the trustee's negligent misrepresentation of the widow's marital status on the face of the accountings, a misrepresentation that was occasioned by the absence of even a halfhearted effort to ascertain the critical fact of the widow's marital status, constituted a constructive fraud perpetrated by the trustee against the charity warranting a reopening of the trustee's previously allowed accounts.

The UTC, specifically §1007, would deem certain innocent acts of maladministration not to be constructively fraudulent: "If the happening of an event, including marriage, divorce, performance of educational requirements, or death, affects the administration or distribution of a trust, a trustee who has exercised reasonable care to ascertain the happening of the event is not liable for a loss resulting from the trustee's lack of knowledge." The policy behind the exoneration is "to encourage trustees to administer trusts expeditiously and without undue concern about liability for failure to ascertain external facts, often of a personal nature, that might affect administration or distribution of the trust."¹⁰⁹⁰

One court, this time in New York, has ruled that misrepresentations of law and fact made by a corporate cotrustee's counsel to a beneficiary, *i.e.*, by an agent of the corporate cotrustee, were grounds for opening and vacating a decree that had judicially settled the intermediate accounts of the cotrustees, notwithstanding the fact that the beneficiary had signed a general waiver and release running to the cotrustees.¹⁰⁹¹ The time for appeal had long passed. As it happened, the testamentary trust during the period covered by the intermediate account had sustained substantial realized losses from the sale of stock in the corporate cotrustee.¹⁰⁹² Granted the stock was an inception asset; but the will contained no language expressly authorizing its retention. All things being equal, the presence of such language would have been a defense to allegations that the corporate cotrustee had breached its duty of loyalty to the beneficiary in retaining its own stock in the trust.¹⁰⁹³ Trust counsel's statements to the beneficiary to induce the beneficiary to execute the waiver and release, namely, "that nothing could be done about ... [the shrinkage in value of the trust estate]... and that the signing of the release would save time and money," constituted at least constructive fraud such that a reopening of the accounts was warranted.¹⁰⁹⁴ The fraud having been perpetrated by an agent of the corporate cotrustee, the court imputed it to the cotrustee.

¹⁰⁸⁸ See generally §6.1.5.2 of this handbook (duty to keep and render accounts).

¹⁰⁸⁹ Nat'l Acad. of Sci. v. Cambridge Tr. Co., 370 Mass. 303, 313, 346 N.E.2d 879, 885 (1976).

¹⁰⁹⁰ UTC §1007 cmt.

¹⁰⁹¹ *In re Gillies' Will*, 98 N.Y.S.2d 853 (Sur. Ct. 1950).

¹⁰⁹² See generally §6.1.3.2 of this handbook (trustee invests in its own stock).

¹⁰⁹³ See generally §7.1.2 of this handbook (defenses to allegations that the trustee breached the duty of loyalty).

¹⁰⁹⁴ *In re Gillies' Will*, 98 N.Y.S.2d 853, 856 (Sur. Ct. 1950).

A trustee seeking a waiver or release who fails to disclose to the beneficiary all material facts, including those facts that are not in the interest of the trustee to disclose, perpetrates a fraud against the beneficiary.¹⁰⁹⁵ If the failure to disclose is *not* coupled with an intent to deceive, then the fraud is constructive.¹⁰⁹⁶ To the extent trust counsel is involved in a continuing deliberate effort to defeat the rights of the beneficiary through the withholding of material information, communications between the trustee and trust counsel made in the course of that effort may not be privileged.¹⁰⁹⁷ They are said to come within the crime-fraud exception to the attorney-client privilege.

¹⁰⁹⁵First Union Nat'l Bank v. Turney, 824 So. 2d 172, 188–189 (Fla. 2002).

¹⁰⁹⁶First Union Nat'l Bank v. Turney, 824 So. 2d 172, 191 (Fla. 2002).

¹⁰⁹⁷First Union Nat'l Bank v. Turney, 824 So. 2d 172, 191 (Fla. 2002).