

SOURCES OF AMERICAN TRUST LAW

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Trusts Controlled Primarily by State Not Federal Law

Laws in the United States are created at different levels of government. Laws created by the United States government take precedence over those created by the fifty states. Federal law applies to all citizens, regardless of their state of residence. Laws created by particular states normally apply only to persons located in that state. With a few notable exceptions such as the law relating to pension trusts, the law of trusts in the United States is the subject of state, not federal law. Consequently, in the United States there are currently fifty different laws of trusts, one for each state, sharing many similarities but also many differences.

The Common Law

Upon its separation from Great Britain in 1776, each of the former American colonies retained the common law of Great Britain. The common law is judge-made law that evolves through decisions on specific cases. The common law may be superseded by statute, but oftentimes the statute only partially modifies or merely codifies the common law. Consequently, to understand the statute usually requires that one also understand the common law background.

The law of trusts in the United States is based largely on the common law although that is beginning to change, driven primarily by enactment of the Uniform Trust Code.

Uniform Laws in the United States

Uniform laws in the United States are drafted by an organization known as the National Conference of Commissioners of Uniform State Laws. The Conference is a national body consisting of representatives appointed by the governments of the individual states. The function of the Commissioners is to draft model laws called uniform acts. Upon completion, uniform acts are recommended for enactment by the fifty states. As their name suggests, uniform laws are designed to reduce the conflicts and inconsistencies inevitable in a system of laws controlled by the legislatures of fifty separate jurisdictions. Hopefully, uniform laws also serve as models that improve existing law, reflecting the latest and best thinking on the subject addressed.

The Uniform Trust Code

The most important uniform law relating to trusts is the Uniform Trust Code, which was completed in 2000. Enactment by the American states began in 2002. There have been fifteen enactments through 2005 but the Code is currently under study for possible enactment in perhaps twenty other states.

Reasons for Uniform Trust Code

There are several reasons why the drafting of a uniform act on trusts in the United States is timely. The immediate stimulus for the drafting of the UTC is the much greater use of the trust in recent years. This greater use of the trust, and consequent increase in the number of day-to-day questions involving trusts, has led to a recognition that in the great majority of American states trust law is relatively sparse; there are few published trust law decisions, leaving many gaps. This greater use of the trust has also led to a recognition that the limited number of trust statutes in most American states are a patchwork, enacted sporadically over the years in response to narrow and immediate problems. The purpose of the UTC is to update, fill out, and systematize the American law of trusts.

Other Uniform Acts Relating to Trusts

There are several other uniform acts relating to trust law, but all of them deal with specialized topics. The most important of these other uniform acts is the 1994 Uniform Prudent Investor Act, enacted in over forty states. That Act codifies the Restatement (Third) of Trusts: Prudent Investor Rule. The Uniform Prudent Investor Act prescribes a trustee's responsibilities with regard to the management and investment of trust property. The UTC expands on this by also specifying the trustee's duties regarding distributions to beneficiaries. Given its importance and already widespread acceptance, the UTC does not modify the smaller Uniform Prudent Investor Act but incorporates it without change as Article 9 of the UTC.

The Restatement of Trusts

Restatements, which are written and approved by a national body of lawyers comprising the members of the American Law Institute, serve a proactive role close to that of uniform acts. A Restatement is more than a document that collects and summarizes in one place the common law on a particular subject. Rather, where the decisions of the courts conflict, a Restatement strives to delineate the better rule. It also tries to fill in gaps in the law, to promote the rule the courts should apply when it encounters an issue for the first time. The hope is that the courts of the different states, by relying on the Restatement as a primary guide for decision, will over time adopt uniform rules of decision.

Restatements are periodically revised. The Restatement (First) of Trusts was approved in 1937. The Restatement (Second) of Trusts was approved by the American Law Institute in 1957. Beginning in the late 1980s, work on the Restatement Third began. The portion of Restatement Third relating to the prudent investor rule and other investment topics was completed and approved in 1990. A tentative draft of the portion of Restatement Third relating to the rules on the creation and validity of trusts was approved in 1996; the portion relating to the office of trustee, trust purposes, spendthrift provisions and the rights of creditors was approved in 1999; the portion on trust modification and termination was approved in 2001; and a partial listing of the duties of a

trustee was approved in 2005.

Role of Treatises

Treatises written by notable scholars have played an important role in American trust law. In many states, particularly those with smaller populations, there are very few reported court decisions or statutes on trust issues. Practitioners and the courts therefore turn to the Restatement or treatises for guidance. There are two principal treatises on trust law. By far the more important of the two is Scott on Trusts, the author of which was also the primary writer of the First and Second Restatements on Trust Law. Less important is Bogert on Trusts. The original authors of these treatises (Professors Bogert and Scott) both died more than twenty years ago. Unfortunately, following the original authors' deaths, the updating of these treatises has not been of the same level of quality as the original text, and both treatises have consequently declined in importance.