

Title

Why infect the law of trusts with good faith doctrine?

Summary

The law's good faith principle has traditionally regulated legal relationships, such as the contractual relationship. Equity's more intense fiduciary principle has generally regulated equitable relationships, such as the trustee-beneficiary relationship. Now comes the Uniform Trust Code, specifically § 105, and provides that "the terms of a trust prevail over any....[of the Code's provisions]... except...the duty of a trustee to act in good faith..." This provision is "echoed" in § 801 (Duty to Administer Trust). What is one to make of this? The official commentary is devoid of any explanation. Could we be seeing here a stealth retirement of the fiduciary principle when it comes to the regulation of trusteeships? Or is this just a gratuitous muddling and conflating of nomenclature? Charles E. Rounds, Jr., et al. speculate in §8.15.81 of *Loring and Rounds: A Trustee's Handbook*, at page 1237 of the 2014 edition. See also § 3.5.3.2(a) [page 182 of the 2014 edition]. Section 8.15.81 is reproduced in its entirety below.

Section 8.15.81

of

Charles E. Rounds, Jr., et al. *Loring and Rounds: A Trustee's Handbook* (2014)

§8.15.81 *Good-Faith Doctrine*

Historically, the common law of trusts and the principles of equity did not look to contract law when applying a good faith standard to trustees. Instead, courts have consistently applied a good faith standard within the context of a broad fiduciary duty of loyalty.—Frederick R. Franke, Jr.¹²²⁹

The contract is a legal relationship, while the trust is an equitable one. Each relationship, however, brings with it a nonwaivable duty of good faith.¹²³⁰ The parties to a contract owe each other a legal duty of good faith, while the trustee owes the beneficiaries an equitable duty of good faith. In the contract context, good faith is generally viewed as little more than the absence of bad

¹²²⁹See generally Frederick R. Franke, Jr., *Resisting the Contractarian Insurgency: The Uniform Trust Code, Fiduciary Duty, and Good Faith in Contract*, 36 ACTEC L.J. 517, 544 (2010).

¹²³⁰See generally Frederick R. Franke, Jr., *Resisting the Contractarian Insurgency: The Uniform Trust Code, Fiduciary Duty, and Good Faith in Contract*, 36 ACTEC L.J. 517 (2010).

faith.¹²³¹ “Thus, good faith merely polices subjective bad conduct in the performance of the contract.”¹²³² In the trust context, the trustee is obliged to exercise his discretionary powers in good faith. This equitable duty of good faith is broader and more intense than its legal counterpart. It is a duty of “good faith in reasonably implementing the settlor's intent for the benefit of the beneficiary.”¹²³³ This definition of the trustee's equitable duty of good faith is essentially a compressed compilation of the general fiduciary duties of a trustee.¹²³⁴

¹²³¹ See generally Frederick R. Franke, Jr., *Resisting the Contractarian Insurgency: The Uniform Trust Code, Fiduciary Duty, and Good Faith in Contract*, 36 ACTEC L.J. 517, 533 (2010).

¹²³² See generally Frederick R. Franke, Jr., *Resisting the Contractarian Insurgency: The Uniform Trust Code, Fiduciary Duty, and Good Faith in Contract*, 36 ACTEC L.J. 517, 535 (2010).

¹²³³ See generally Frederick R. Franke, Jr., *Resisting the Contractarian Insurgency: The Uniform Trust Code, Fiduciary Duty, and Good Faith in Contract*, 36 ACTEC L.J. 517, 531 (2010).

¹²³⁴ See generally §6.1 of this handbook (the trustee's general duties).