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Foreword

Felix B. Chang
University of Cincinnati, changfx@ucmail.uc.edu

FOREWORD

Felix B. Chang[†]

Scholars have long observed a paradox in how we teach and write about trust law: in legal scholarship and the law school curriculum, trusts are classified within the law of donative transfers—even though in practice, trusts are used more as an instrument of business transactions. As John Langbein noted over 20 years ago, trusts hold far more in assets as vehicles for pension funds, mutual funds, and asset securitization than they do for gratuitous transfers.[1] Yet trusts and estates scholars are as unfamiliar with business trusts as business law scholars are with personal trusts. Even after Robert Sitkoff sketched out a research agenda for business trusts a decade ago,[2] scholars on both sides have not bridged the schism.

To restart these conversations, the University of Cincinnati College of Law's Corporate Law Center (the "Center") convened its Annual Symposium (the "Symposium") on the "Business Uses of Trusts."[3] As the Center's 30th annual symposium, it was a momentous occasion, one the organizers decided to mark by tackling a complex and still relatively unexplored topic. We assembled a roster of speakers that was drawn more from academia than in recent years, with a view toward pushing conversations across the scholarly silos. As a reflection, this special issue of the *University of Cincinnati Law Review* features a diverse selection of essays that take up Professor Sitkoff's challenge while surveying the ways that trusts have been put to use since then.

The contributions to the Symposium explored several major themes. One was the foundational question of how business trusts have come to develop and why they have been overlooked. The keynote address by John Morley addressed this puzzle. Professor Morley, who in his writings has positioned the common law trust as an alternative

† Professor and Co-Director, Corporate Law Center, University of Cincinnati College of Law. I thank Sean Mangan, Lori Strait, and Jennie Edelstein for their hard work in organizing the Symposium. Thanks, too, to all the Symposium participants, the editors of the *University of Cincinnati Law Review*, and the fellows of the Corporate Law Center.

1. John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 YALE L.J. 165 (1997).

2. Robert H. Sitkoff, *Trust as "Uncorporation": A Research Agenda*, 2005 U. Ill. L. Rev. 31 (2005).

3. For the full agenda, see *UC Law School Symposium Examines Trusts in the Business World*, UNIVERSITY OF CINCINNATI COLLEGE OF LAW (Feb. 22, 2019), https://www.uc.edu/news/articles/2019/02/n2069580.html [https://perma.cc/JJ3V-6NJT].

corporate form,[4] spoke about the role of the common law trust in commercial history. In this vein, Thomas Gallanis investigated the history of trust pedagogy. His contribution to this issue, *Commercial Trusts in U.S. Legal Thought*, challenges some of the explanations offered by Professor Langbein on the estrangement of commercial trusts from trust scholarship and pedagogy.[5] Instead, Professor Gallanis traces this feature to a curricular reform at Columbia Law School in the 1920s that broke with Harvard's tradition of teaching from appellate cases to offer education that approaches law through its "underlying political, economic, and social factors."[6] Other law schools quickly followed. Professor Gallanis, who is as much a comparativist and historian as a trusts and estates scholar,[7] then offers five reasons for why law schools continued to combine trust law and succession law—reasons that are unique to the U.S. context.

The natural question that arises, then, is whether trusts might be reintegrated into the business law curriculum and scholarship. If Columbia's move had been precipitated by socioeconomic dynamics, surely today's trends would prompt a re-evaluation of our approach to trusts. That brings up the second theme of the conference: the business uses of trusts in our time. Several of the contributions canvass those uses.

The essays by Steven Schwarcz and Natalya Shnitser investigate two of the most common statutory trusts—particularly how they fit with common law notions of fiduciary duties. In *Indenture Trustee Duties*, Professor Schwarcz, one of the few scholars to have written on business trusts early on,[8] mines the Trust Indenture Act of 1939 (the "TIA") for guidance on the duties of trustees for bond investors.[9] Focusing on trustee duties prior to the default of securitized bond issues, he considers normative justifications associated with the securities realm, such as the relative sophistication between the counterparties and the efficiency of imposing an overlay of duties.[10] Given the subtleties of bond investments, Professor Schwarcz concludes that trustees should only be

4. *See* John Morley, *The Common Law Corporation: The Power of the Trust in Anglo-American Business History*, 116 COLUM. L. REV. 2145 (2016).

5. Thomas P. Gallanis, *Commercial Trusts in U.S. Legal Thought: Historical Puzzles and Future Directions*, 88 U. CIN. L. REV. 843 (2020).

6. *Id*. at 848 (quoting A HISTORY OF THE SCHOOL OF LAW [OF] COLUMBIA UNIVERSITY 312 (Julius Goebel Jr., ed. 1955)).

7. *See, e.g.*, Thomas P. Gallanis, *The Contribution of Fiduciary Law*, *in* The Worlds of the Trust (Lionel Smith ed. 2013).

8. Steven L. Schwarcz, *Commercial Trusts as Business Organizations: Unraveling the Mystery*, 58 BUS. LAW. 559, 568-69 (2003)

9. Steven L Schwarcz, *Indenture Trustee Duties: The Pre-Default Puzzle*, 88 U. CIN. L. REV. 659 (2020).

10. *See id.* at 667–68.

held to the pre-default duties specified in the bond indenture.[11] In contrast, Professor Shnitser evaluates the role of the traditional fiduciary framework in the Employee Retirement Income Security Act of 1974 ("ERISA")—and the mismatch between that traditional framework and defined contribution plans, which have eclipsed pensions funds.[12] She notes that trust law "inadvertently" became the paradigm of governance for defined contribution plans, even though delineations between settlor and fiduciary do not map neatly onto such plans.[13] Nonetheless, the adoption of the common law notions of the trust has led to perverse results such as judicial deference to employers and, simultaneously, lax monitoring by employees.[14]

What unites the TIA and ERISA studies is the truism that context matters. Professors Schwarcz and Shnitser have each identified instances where common law trusts are inappropriate models for statutory "trustees." For both bond issuances and defined contribution plans, if traditional fiduciary duties take on too much, the results can be counterproductive.

The contributors are careful not to overreach in looking to trustee duties, reflecting the skepticism of courts toward fiduciary litigation as a panacea in business cases. Since the early business law cases, a common impulse has been to fill out the contours of partnership and corporate fiduciaries duty by analogizing to trusts—an impulse that has viewed trustee duties through too rose-tinted a set of glasses.[15] The reality, however, is that trust law has taken the same libertarian turn as agency, partnership, and corporate law.[16] With duties of care gutted and duties of loyalty circumscribed, common law trusts cannot stand as the paragon for business contexts. Thus, as Professor Shnitser points out, recent progressive reforms to retirement plans at the state level have supplemented or eschewed fiduciary principles for bright-line fee caps.[17]

Business trusts are more accurately a collection of statutory trusts, each designed for a particular commercial purpose. Apart from pension funds and securitized bonds, these purposes might even be more sustainable than short-term profits, such as steering a business through market

11. *Id.* at 684.

12. Natalya Shnitser, *The New Fiduciaries*, 88 U. CIN. L. REV. 685 (2020).

13. *Id.* at 690–91.

14. *Id.* at 692–93.

15. See, e.g., Meinhard v. Salmon, 249 N.Y. 458, 464 (N.Y. Ct. App. 1928) ("A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior."); In re Citigroup Inc Shareholder Derivative Litigation, 964 A.2d 106 (Del. Ch. 2009).

16. For a summary, see Felix B. Chang, *Asymmetries in the Generation and Transmission of Wealth*, 79 OHIO ST. L.J. 73, 105–08 (2018).

17. Shnitser, *supra* note 12, at 700–05.

vagaries and succession planning. Such is the world that Susan Gary explores in her essay, *The Oregon Stewardship Trust*.[18] In this piece, Professor Gary analyzes Oregon's newly adopted statute on the stewardship trust, which provides a structure for steward-owned companies, where management focuses on a business's purpose rather than its profits.[19] Modeled on the noncharitable purpose trust of Section 409 of the Uniform Trust Code,[20] the statute provides a formal mechanism to ensure that a company's operation hews closely to its mission by, among other things, vesting control in a trustee, trust enforcer, and stewardship committee, rather than officers and directors who can be ousted by outside investors.[21] This structure is more responsive to Oregon businesses like the Organically Grown Company than the purpose trust of the UTC or other state statutes.

A hallmark of common law trusts is their flexibility, and statutory trusts have preserved this feature, utilizing the settlor–trustee–beneficiary structure to serve a variety of objectives. Far beyond Oregon, business trusts are also the preferred vehicle for sustainability-minded companies in Singapore, as Lee-ford Tritt and Ryan Scott Teschner reveal in *The Rise of Business Trusts in Sustainable Neo-Innovative Economies*.[22] In fact, Singapore's Code of Corporate Governance expressly incorporates "the interests of other [i.e., nonshareholder] stakeholders" into its definition of governance,[23] which adheres to an investment mindset that prioritizes incremental wealth above excessive risk.[24] Tritt and Teschner catalog the host of reasons—other than sociocultural differences—for the prevalence of business trusts in Singapore but not in the United States, where corporations reign. These reasons include (i) the success of predecessors to Singapore's statutory business trusts, such as real estate investment trusts, (ii) aggressive marketing by law firm trust practices, and (iii) the general aversion to managerial entrenchment in the U.S. (to which Professor Gary's study on Oregon stewardship trusts stands as an interesting counterpoint).[25]

The third theme that cuts across the essays in this issue is the myriad

18. Susan N. Gary, *The Oregon Stewardship Trust: A New Type of Purpose Trust That Enables Steward-Ownership of a Business*, 88 U. CIN. L. REV. 707 (2020).

19. *Id.* at 707.

20. Section 409 is the basis of honorary trusts for purposes such as the care of a settlor's gravesite. Relatedly, Section 408, which Professor Gary cites as another precursor of the Oregon statute, provides for the care of a settlor's pet.

21. *See* Gary, *supra* note 18 at 727.

22. Lee-ford Tritt & Ryan Scott Teschner, *The Rise of Business Trusts in Sustainable Neo-Innovative Economies*, 88 U. CIN. L. REV. 735 (2020).

23. *Id.* at 761 (citing CODE OF CORPORATE GOVERNANCE, 2 (Sing. 2018)).

24. *See id.* at 762.

25. *Id.* at 763-64.

of comparative perspectives on the topic. The contributors undertake comparisons of business trusts in different markets (e.g., pooled investments versus purposeful stewardship companies) and across jurisdictions (e.g., between the U.S. and Singapore). To that end, Lusina Ho examines trust and investment companies in China,[26] adding to the literature on trusts in civil law countries and, more significantly, trusts as a financing instrument in China.[27] Professor Ho's essay, *Business Trusts in China*, shows that the statutory framework of the Chinese Trust Law, as well as regulations on the administration of trust companies and collective trust plans, fails on both micro and macroscopic levels: the framework fails not only to protect investors but also to rein in a bloated, systemically risky shadow banking sector. To avert sociopolitical instability, governmental entities bail trust companies out of bad investments, and trust plans leave investors with the impression of implicit government guarantees. Consequently, the financial markets cannot sort out sound investments from foolhardy ones, and moral hazards augment the likelihood of systemic collapse.[28] Among other flaws, trusts in China lack the basic beneficiary protections and market pressures of trusts elsewhere.[29] Unlike the other cases, business trusts in Chinese finance fall short not because of vestigial notions from common law trusts but because of design flaws and the lack of an administrative and enforcement ecosystem to hold fiduciaries accountable.

Finally, Eric Chaffee articulates a collaboration theory of the business trust. Building on his prior work,[30] Professor Chaffee extends a theory of the corporate form that he has been tinkering with to the realm of business trusts.[31] Yet he is careful not to borrow wholesale from the corporate context; as Professor Chaffee recognizes, corporations and trusts have traveled different historical and doctrinal paths.[32] The collaboration theory can be summarized as "a narrowly focused collaboration . . . [for the] gain of the beneficiary through the action of a trustee."[33] Applied to business trusts, this leads to some counterintuitive results, such as wealth

26. Lusina Ho, *Business Trusts in China: A Reality Check*, 88 U. CIN. L. REV. 767 (2020).

27. *See, e.g.*, The Worlds of the Trust (Lionel Smith ed. 2013); Lusina Ho, *Trust Law in China* (2003); Lusina Ho, Rebecca Lee, and Jin JinPing, *Trust Law in China: A Critical Evaluation of its Conceptual Foundation*, *in* TRUST LAW IN ASIAN CIVIL LAW JURISDICTIONS: A COMPARATIVE ANALYSIS 80, 85-91 (Lusina Ho & Rebecca Lee eds., 2013). In fact, much of this literature on trust law in China has come from Professor Ho herself.

28. *See* Ho, *supra* note 26, at 777–79.

29. *See id.* at 791 (singling out "the ring-fencing of trust property, the attribution of profits and losses to the beneficiary, and the trustee's duty to provide accounts").

30. Some of it, incidentally, developed in prior symposia.

31. Eric C. Chaffee, *A Theory of the Business Trust*, 88 U. CIN. L. REV. 797 (2020).

32. *Id.* at 802–13.

33. *Id.* at 841-42.

maximization for beneficiaries and trustee primacy.[34] In the corporate context, Professor Chaffee was more comfortable with his theory justifying broader concerns—namely, corporate social responsibility.[35] Professor Gary, too, may challenge any assertion that statutory trusts focus exclusively on wealth maximization.[36] However, Professor Chaffee's essay, A Theory of Business Trusts, moves the conversation on business trusts beyond the comparative (e.g., historical comparisons to corporations, comparisons across industries, and comparisons across jurisdictions) and into the theoretical, where the literature is thinner. And in the end, the different approaches of the contributors illustrate the flexibility and adaptability of trusts to business settings.

34. *See id.* at 834, 837.

35. *See* Eric C. Chaffee, *The Origins of Corporate Social Responsibility*, 85 U. CIN. L. REV. 353 (2017).

36. For my part, I have always found theoretical debates about the corporate form to be a little outcome-determinative. With business trusts, surely there may be collaborations that are less focused on the *economic* gains of beneficiaries and yet still be wholly consistent with the theory. I look forward to Professor Chafee's further development of this theory to reconcile the seemingly divergent outcomes in the corporate and trust contexts.