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Remaining Heterogeneity in Trust Investment Law after Twenty-Five Years of Reform

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The Uniform Prudent Investor Act ("UPIA") has been enacted by forty-one states and the District of Columbia. Only Colorado has enacted the UPIA without any changes. The remaining forty states and the District of Columbia have made editorial and substantive changes which impact the manner in which trust assets are invested in these states. This article examines the rich diversity of these modifications. This article also examines the laws in the nine states that have not officially adopted the UPIA to determine if these states have enacted similar modern investment principles as expressed in the UPIA.

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Introduction

In 1952, Harry Markowitz revolutionized investing by shifting the focus from viewing investments in isolation to viewing investments as part of a portfolio of assets.[1] At the time his paper was published, most of states in the United States had in place a prudent man standard of care, many of them modeled on the Model Prudent Man Rule Statute, or a modified version thereof.[2] The Model Prudent Man Rule Statute

[1] Harry Markowitz, *Portfolio Selection*, 7 J. Fin. 77, 77-91 (1952). For a discussion of the Markowitz model see Herbert B. Mayo, Investments: An Introduction, 170-174 (7th ed. 2003)

[2] Mayo Adams Shattuck, *The Development of the Prudent Man Rule for Fiduciary Investment in the United States in the Twentieth Century*, 12 Ohio St. L.J. 491, 502-04 (1951). At the annual meeting of the trust division of the American Bankers Association in February 1942, the association instructed its legislative committee to prepare a model statute designed to enact the Massachusetts rule set forth in *Harvard College v. Amory*, 26 Mass. 446, 473 (1830). Shattuck was the drafter of the Model Prudent Man Rule Statute. For a list of the twenty states which adopted the Modern Prudent Man Rule

found much of its wording from the 1830 opinion of *Harvard College v. Amory*.[3] The statute authorized the trustee to invest in every kind of property subject to the limitation that the trustee invests with "prudence, discretion, and intelligence. . . not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital."[4] While the statute on its face appeared to be quite flexible, courts interpreted the statute as requiring that each asset be viewed in isolation, labeled each asset as either "prudent" or "speculative" resulting in many asset classes as being off limits for fiduciaries, forbade trustees from delegating investment functions to professional advisors, surcharged trustees for losses from any "speculative" investments while prohibiting the trustee from offsetting losses with gains from other investments, encouraged trustees to invest heavily in fixed income securities since they historically possessed less investment risk than stocks even though the highly conservative investment mix resulted in a real loss in the purchasing power of the trust in an inflationary environment, and prohibited investments in non-income producing property.[5] Commentators began to call for investment reform in the 1970s and 1980s.[6] In the trust arena, reform began in 1985 and has continued for a quarter-century.[7]

Both California and Washington modified their Model Prudent Man Rule Statutes in 1984 (effective January 1, 1985) by directing the trustee to "give due consideration to the role that the proposed investment or investment course of action plays within the overall portfolio of assets"[8] (described as a "total asset management" approach in the

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Statute and the states which had established the prudent man standard by common law, see pages 502-503 of Shattuck's article.

[3] Shattuck*, supra* note 2, at 501; Harvard College v. Amory, 26 Mass. at 473.

[4] Shattuck, *supra* note 2, at 509.

[5] BEVIS LONGSTRETH, MODERN INVESTMENT MANAGEMENT AND THE PRUDENT MAN RULE 12-22, 36-41 (Oxford University Press 1986); Jeffrey N. Gordon, *The Puzzling Survival of the Constrained Prudent Man Rule*, 62 N.Y.U. L. REV. 52, 66-74 (1987); Joel C. Dobris, *Speculating on the Idea of "Speculation" in Trust Investing: An Essay*, 39 REAL PROP. PROB. & TR. J. 439, 441-51 (2004); Austin Fleming, *Prudent Investments: The Varying Standards of Prudence*, 12 REAL PROP. PROB. & TR. J. 243, 248 -51 (1977).

[6] Fleming, *supra* note 5, at 248 -51; LONGSTRETH, *supra* note 5, at 18-21.

[7] Reform began in 1972 in the charitable area with the promulgation of the Uniform Management of Institutional Funds Act. The Employee Retirement Income Security Act of 1974 ("ERISA") also imposed modern investment principles on trustees of retirement funds. *See* Note, *Fiduciary Standards and the Prudent Man Rule Under the Employment Retirement Income Security Act of 1974*, 88 HARV. L. REV. 960 (1974); Note, *Fiduciary Responsibility and the Employee Retirement Income Security Act of 1974*, 12 REAL PROP. PROB. & TR. J. 285 (1977); LONGSTRETH, *supra* note 5, at 22-36; Edward C. Halbach, Jr., *Trust Investment Law in the Third Restatement*, 77 IOWA L. REV. 1151 (1992); *see infra* note 15 and accompanying text.

[8] WASH. REV. CODE § 11.100.020(1) (2012).

Washington statute[9]) or directing the trustee to consider "individual investments as part of an overall investment strategy."[10] California's statute required the trustee to consider the "general economic conditions and the anticipated needs of the trust and its beneficiaries."[11] Washington's statute required the trustee to consider these same two factors but also required the trustee to consider the marketability of investments; length of the term of the investments; duration of the trust; liquidity needs; other assets of the beneficiaries, including their earning capacity; and the effect of investments in increasing or diminishing liability for taxes.[12] California's statute deleted the troublesome phrase, "not in regard to speculation but in regard to the permanent disposition of funds, considering the probable income as well as the probable safety of the capital."[13]

In 1986, Minnesota amended its trust investment statute by adopting a statute similar to Washington's.[14] Delaware, Georgia, and Tennessee followed suit thereafter adopting statutes similar to California's.[15] Delaware added the phrase, "[a]ny determination of liability for investment performance shall consider not only the performance of a particular investment, but also the performance of the portfolio as a whole."[16]

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9 *Id.*

10 1984 Wash. Sess. Laws ch. 149 (effective Jan. 1, 1985); 1984 Cal. Stat. ch. 1872, § 1 (effective Jan. 1, 1985). For an analysis of the 1984 California law, see William P. Wade, *The New California Prudent Investor Rule: A Statutory Interpretive Analysis*, 20 REAL PROP. PROB. & TR. J. 1 (1985).

11 CAL. CIV. CODE § 2261(a)(1) (West 1985) *restated in* CAL. PROB. CODE §16040(b) (West 2012).

12 WASH. REV. CODE § 11.100.020(1).

13 Prior to the 1984 amendment of California Civil Code § 2261(1), the statute modeled on the Model Prudent Man Rule Statute provided the trustee was to

> exercise the judgment and care, under the circumstances then prevailing, which men of prudence, discretion and intelligence exercise in the management of their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of their capital.

This language was interpreted by the courts to forbid certain investment classes, thereby prohibiting trustees from investing in certain investment opportunities. *See* Fleming, *supra* note 5, at 251; *See also* LONGSTRETH, *supra* note 5, at 22. ("The most striking features of the new statute [referring to the 1984 California statute] are the elimination of the classic language prohibiting 'speculation,' the specific directions to take into account general economic conditions (presumably including inflation) and the particular needs of the trust, and, most strikingly, the instructions to consider individual investments as part of an overall investment strategy.").

14 1986 Minn. Laws ch. 442, § 7 (effective Mar. 25, 1986).

15 65 Del. Laws ch. 422 (1986) (effective July 3, 1986); 1988 Ga. Laws 725 (effective Jan. 1, 1988); 1989 Tenn. Pub. Acts ch. 288, § 2 (effective in 1989).

16 DEL. CODE. ANN. tit. 12, § 3302(c)(3) (2011).

Georgia and Tennessee added similar sentences.[17] Alabama, Nevada, South Carolina, Texas, and Iowa (in that order) followed suit following California's statute for the most part.[18]

Illinois enacted the first "prudent investor" statute based on a tentative draft of the America Law Institute's Restatement (Third) of Trusts: Prudent Investor Rule (1992).[19] Illinois's statute required the trustee to invest the trust assets as a "prudent investor," viewing assets "not in isolation, but in the context of the trust portfolio as a whole and as part of an overall investment strategy that should incorporate risk and return objectives reasonably suited to the trust."[20] "No specific investment or course of action" was deemed imprudent.[21] The trustee was specifically required to invest bearing in mind the "possible effect of inflation."[22]

North Dakota and Virginia enacted modern investment statutes following the precedent of Washington and California.[23] Florida and Kansas enacted statutes modeled after Illinois's statute.[24] In summary, before the UPIA was adopted by the Uniform Commissioners in 1994, sixteen states had enacted modern investment provisions with three of those states modeled on a draft of the Restatement's Prudent Investor Rule.[25]

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17 GA. CODE ANN. § 53-12-340(c) (2011); TENN. CODE ANN. § 35-3-117 (2012).

18 1989 Ala. Acts 89-813; 2007 Iowa Acts ch. 36, sec. 3, § 633.123; 1989 Nev. Stat. 181; 1990 S.C. Acts No. 521, § 92(A); 1991 Tex. Gen. Laws ch. 876, § 1.

19 1992 Ill. Laws 87-715. See the Prefatory Note to the UPIA for a brief history of the literature and legislation with a specific reference to the Illinois law. For an analysis of the RESTATEMENT (THIRD) OF TRUSTS Prudent Investor Rule (2003), see Edward C. Halbach, Jr., *Trust Investment Law in the Third Restatement*, 77 IOWA L. REV. 1151 (1992).

20 760 ILL. COMP STAT. 5/5(a)(1) (2011).

21 5/5(a)(2).

22 5/5(a)(6).

23 1993 N.D. Laws ch. 583; 1992 Va. Acts ch. 810.

24 1993 Fla. Laws ch. 93-257; 1993 Kan. Sess. Laws ch. 583.

25 The Illinois statute was modeled on an earlier draft of the Restatement's Prudent Investor Rule. *See supra* note 19 and accompanying text. Kansas and Florida enacted statutes modeled after Illinois' statute. *See supra* note 24 and accompanying text. Maryland enacted modern investment provisions (1994 Md. Laws ch. 602, § 1), effective Oct. 1, 1994, incorporating many of the investment provisions from the other enacted statutes but not their wording. New York enacted modern investment provisions (1994 N.Y. Laws 609), effective Jan. 1, 1995. While minor amendments have been enacted, for the most part, Maryland and New York retained these original provisions. Maryland and New York's statutes were effective after the UPIA was adopted by the Commissioners and thus are not included in the list of 16 states that had statutes in place prior to the adoption.

In 1994, the Uniform Commissioners adopted the UPIA. It made five fundamental alterations to the former criteria of prudent investing,[26] to wit:

> (1) The standard of investment prudence was founded on the total portfolio rather than individual investments. This standard is in sharp contrast to the former rule which determined prudence by examining each investment in isolation rather than determining how a particular investment operated in a total portfolio;[27]
>
> (2) The fiduciary's central consideration was identified as balancing risk and return. The former analysis examined each asset and determined whether it was prudent or speculative viewed in isolation.[28]
>
> (3) All categorical restrictions on types of investments were abrogated. The Model Prudent Man Rule Statute permitted the trustee to invest in every kind of property. But, as noted previously, courts insisted that trustees avoid "speculation" and issued opinions prohibiting numerous investment types.[29]
>
> (4) Diversification was integrated into the definition of prudent investing. Under the prudent man rule, the states differed on whether diversification was required or merely a factor to consider in determining whether the trustee had acted prudently.[30]
>
> (5) Delegation was permitted. The prior law prohibited trustees from delegating investment decisions.[31]

Since its adoption by the Uniform Commissioners in 1994, forty-one states and the District of Columbia have adopted the UPIA, with most of them making modifications, some of them material.[32] Of the sixteen

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[26] The Prefatory Note to the Uniform Prudent Investor Act sets forth the five fundamental alterations. *See* NAT'L CONF. OF COMM'RS ON UNIFORM STATE LAWS, UNIF. PRUDENT INVESTOR ACT (1994), http://www.law.upenn.edu/bll/archives/ulc/fnact99/1990s/upia94.pdf at 1 [hereinafter UPIA].

[27] *See supra* note 5 and accompanying text.

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] ALA. CODE §§ 19-3B-901 to 19-3B-906 (2012); ALASKA STAT. §§ 13.36.225 to 13.36.290 (2012); ARIZ. REV. STAT. ANN. §§ 14-10901 to 14-10909 (2012); ARK. CODE ANN. §§ 28-73-901 to 28-73-908 (2011); CAL. PROB. CODE §§ 16045-16054 (West 2012); COLO. REV. STAT. §§ 15-1.1-101 to 15-1.1-115 (2012); CONN. GEN. STAT. §§ 45a-541 to 45a-5411 (2012); D.C. CODE §§ 19-1309.01 to 19-1309.06 (2012); HAW. REV. STAT.

states that had enacted modern investment provisions prior to the UPIA, twelve have subsequently adopted the UPIA.[33] The remaining four states (Delaware, Florida, Georgia and Illinois) have retained their original statutes.[34]

In Part I of this article, I examine the current state of trustee investment law in the United States with particular emphasis on whether, and

§§ 554c-1 to 554c-12 (2011); IDAHO CODE ANN. §§ 68-501 to 68-514 (2012); IND. CODE §§ 30-4-3.5-1 to 30-4-3.5-13 (2011); IOWA CODE §§ 633A.4301 to 633A.4401 (2012); KAN. STAT. ANN. §§ 58-24a01 to 58-24a14 (2011); ME. REV. STAT. tit. 18-B, §§ 901-1104 (2011); MASS. GEN. LAWS ch. 203C, §§ 1-11 (2011); MICH. COMP. LAWS §§ 700.1501 to 700.1512 (2012); MINN. STAT. § 501B.151 (2012); MISS. CODE ANN. §§ 91-9-601 to 91-9-627 (2011); MO. REV. STAT. §§ 469.900-469.913 (2011); MONT. CODE ANN. §§ 72-34-602 to 72-34-610 (2011) ; NEB. REV. STAT. §§ 30-3883 to 30-3889 (2011); NEV. REV. STAT. §§ 164.705-164.775 (2010); N.H. REV. STAT. ANN. §§ 564-B:9-901 to 564-B:9-907 (2011); N.J. STAT. ANN. §§ 3B:20-11.1 to 3B:20-11.12 (West 2011); N.M. STAT. ANN. §§ 45-7-602 to 45-7-612 (2011); N.C. GEN. STAT. §§ 36C-9-901 to 36C-9-907 (2011); N.D. CENT. CODE §§ 59-17-01 to 59-17-06 (2011); OHIO REV. CODE ANN. §§ 5809.01-5809.08 (LexisNexis 2011); OKLA. STAT. tit. 60, §§ 175.60-175.72 (2011); OR. REV. STAT. §§ 130.750-130.775 (2012); 20 PA. CONS. STAT. §§ 7203-7206 (2011); R.I. GEN. LAWS §§ 18-15-1 to 18-15-13 (2011); S.C. CODE ANN. § 62-7-933 (2011); S.D. CODIFIED LAWS §§ 55-5-6 to 55-5-17 (2011); TENN. CODE ANN. §§ 35-14-101 to 35-14-114 (2012); TEXAS PROP. CODE ANN. §§ 117.001-117.012 (West 2011); UTAH CODE ANN. §§ 75-7-901 to 75-7-907 (LexisNexis 2011); VT. STAT. ANN. tit. 14A, §§ 901-906 (2012); VA. CODE ANN. §§ 26-45.3 to 26-45.14 (2012); WASH. REV. CODE § 11.100.020 (2012); W. VA. CODE §§ 44-6C-1 to 44-6C-15 (2012); WIS. STAT. § 881.01 (2011); WYO. STAT. ANN. §§ 4-10-901 to 4-10-913 (2011). On the Uniform Law Commission's website (http://www.nccusl.org/Act.aspx?title=Prudent%20Investor%20Act (last visited Apr. 6, 2012)), the following states are not listed as having adopted the UPIA: Delaware, Florida, Georgia, Illinois, Kentucky, Louisiana, Maryland, New York and South Dakota. Due to its recent enactment in 2010 Ga. Laws 131, effective Jan. 1, 2011, Georgia could be added to the list of states that have enacted the UPIA; although, arguably, its changes may lead the Commissioners to continue its exclusion from the list.

Of the states that have enacted the UPIA, Colorado is the only state that has made absolutely no changes at all. New Mexico, Oklahoma, Rhode Island and West Virginia have enacted the UPIA with minor editorial changes. Arkansas, Hawaii, Idaho, Indiana, Nebraska, North Dakota and Vermont have made minor substantive changes. The remaining states that have enacted the UPIA have made at least one significant modification.

[33] The UPIA was adopted by the following acts: 2006 Ala. Acts ch. 216 (effective Jan. 1, 2007); 1995 Cal. Stat. ch. 63 (effective July 5, 1995); 1992 Iowa Acts ch. 125 § 61 (effective July 1, 1993); 2000 Kan. Sess. Laws ch. 80 (effective July 1, 2000); 1996 Minn. Laws ch. 314 (effective Jan. 1, 1997); 2003 Nev. Stat. ch. 355 (effective Nov. 1, 2003); 1997 N.D. Laws ch. 508 (effective Aug. 1, 1997); 2001 S.C. Acts No. 8, § 5 (effective July 18, 2001); 2002 Tenn. Pub. Acts ch. 216 (effective July 1, 2002); 2003 Tex. Gen. Laws ch. 1103 (effective Jan. 1, 2004); 1999 Va. Acts ch. 772 (effective Jan 1, 2000); 1995 Wash. Sess. Laws ch. 307 (effective July 23, 1995).

[34] DEL. CODE ANN. tit. 12, §§ 3301-06 (2011); FLA. STAT. §§ 518.10 to 518.112 (2012); GA. CODE ANN. §§ 53-12-340 to 53-12-345 (2011) (see *supra* note 32 concerning Georgia's recent enactment of legislation tracking in part the UPIA); and 760 ILL. COMP STAT. 5/5.1 (2011).

to what extent, the five fundamental principles set forth in the UPIA have been enacted by the states. In Part II, I examine the other changes that the states have made to the UPIA. In Part III, I point out the significance of the article's analysis. In Part IV, I make a few recommendations for reform.

I. Five Fundamental Investment Principles

As will be discussed in this Part, all of the states and the District of Columbia have imposed upon corporate fiduciaries the duty to invest trust assets in accordance with modern investment principles. Identical investment duties have been imposed on individuals serving as trustee in the District of Columbia and all of the states except in Kentucky and Maryland. Kentucky's modified version of the UPIA only applies to banks and trust companies acting in a fiduciary capacity.[35] The statute does not apply to individuals who serve as trustee. Maryland's prudent investor's statute applies to a trust company, an investment advisor that is controlled by or under common control with a trust company, or to any person that elects to have the statute apply.[36] The Maryland statute does not apply to an individual serving as trustee unless the person elects to have the UPIA apply.[37]

A. Portfolio Investment Standard

Markowitz and those that followed him shifted the investment focus from examining each investment in isolation to a portfolio analysis which examines how assets react with each other to changing market conditions.[38] UPIA § 2(b) provides:

> A trustee's investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.

UPIA § 2(b) "emphasizes the consolidated portfolio standard for evaluating investment decisions. An investment that might be imprudent standing alone can become prudent if undertaken in sensible relation to other trust assets, or to other nontrust assets."[39] The emphasis on investing as a whole is in sharp contrast to the prior law which focused on each investment in isolation to determine if the investment was pru-

[35] Ky. Rev. Stat. Ann. § 286.3-277(1) (West 2011).
[36] Md. Code Ann., Est. & Trusts § 15-114(a)(2) (LexisNexis 2012).
[37] § 15-114(g).
[38] *See supra* note 1 and accompanying text.
[39] UPIA, *supra* note 26, § 2(b), cmt. (Portfolio standard).

dent.[40] All of the states and the District of Columbia have enacted statutes which specifically direct the trustee to evaluate assets not in isolation but in the context of the trust portfolio as a whole.[41]

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40 The prior law is reflected in *In re Bank of N.Y.*, 35 N.Y.2d 512, 517 (N.Y. 1974), wherein the court stated: "[t]he fact that this portfolio showed substantial overall increase in total value during the accounting period does not insulate the trustee from responsibility for imprudence with respect to individual investments for which it would otherwise be surcharged" (citation omitted). *See also* Stephen P. Johnson, *Trustee Investment: The Prudent Person Rule or Modern Portfolio Theory, You Make the Choice*, 44 SYRACUSE L. REV. 1175, 1180 (1993) (detailing an incident where the Supreme Court of Alabama surcharged a trustee for making imprudent investments); Jeffrey N. Gordon, *The Puzzling Persistence of the Constrained Prudent Man Rule*, 62 N.Y.U. L. REV. 52, 96-97 (1987) (discussing the Prudent Man Rule in light of *In re Bank of New York*).

41 The following thirty-five states and the District of Columbia have enacted a provision identical or containing only slight editorial changes to UPIA § 2(b): ALA. CODE § 19-3B-901(b) (2012) (identical to UPIA); ALASKA STAT. § 13.36.230(b) (2012) (replaces "must" with "shall"); ARIZ. REV. STAT. ANN. § 14–10902(B) (2012) (replaces "must be evaluated not in isolation" with "shall not be evaluated in isolation"); ARK. CODE ANN. § 28-73-902(b) (2011) (identical to UPIA); COLO. REV. STAT. § 15-1.1-102(b) (2012) (identical to UPIA); CONN. GEN. STAT. § 45a-541b(b) (2012) (replaces "must" with "shall"); D.C. CODE § 19-1309.02(b) (2012) (identical except inserts a comma after "isolation"); HAW. REV. STAT. § 554c-2(b) (2011) (identical to UPIA except inserts a comma after "isolation"); IDAHO CODE ANN. § 68-502(2) (2012) (identical to UPIA); IND. CODE § 30-4-3.5-2(b) (2011) (identical to UPIA); IOWA CODE § 633A.4302(2) (2012) (identical to UPIA); KAN. STAT. ANN. § 58-24a02(b) (2011) (replaces "trustee" with "fiduciary"); ME. REV. STAT. tit. 18-B, § 902(2) (2011) (identical to UPIA); MICH. COMP. LAWS § 700.1503(1) (2012) (several editorial changes including replacing "must" with "shall"); MINN. STAT. § 501B.151(2)(b) (2012) (identical to UPIA); MISS. CODE ANN. § 91-9-603(b) (2011) (identical to UPIA); MO. REV. STAT. § 469.902(2) (2011) (identical to UPIA); NEB. REV. STAT. § 30-3884(b) (2011) (identical to UPIA); N.H. REV. STAT. ANN. § 564-B:9-902(b) (2011) (identical to UPIA); N.J. STAT. ANN. § 3B:20-11.3(b) (West 2011) (several editorial changes including replacing "must be evaluated not in isolation" with "shall not be evaluated in isolation"); N.M. STAT. ANN. § 45-7-603(B) (2011) (identical to UPIA); N.C. GEN. STAT. § 36C-9-902(b) (2011) (identical to UPIA); N.D. CENT. CODE § 59-17-02(2) (2011) (identical to UPIA); OHIO REV. CODE ANN. § 5809.02(C) (LexisNexis 2011) (inserts word "trust" before word "assets" and replaces "must be evaluated not in isolation" with "shall not be evaluated in isolation"); OKLA. STAT. tit. 60, § 175.62(B) (2011) (identical to UPIA except inserts a comma after word "isolation"); OR. REV. STAT. § 130.755(2) (2012) (replaces "must be evaluated not in isolation" with "are not evaluated in isolation" and inserts a comma after the word "isolation"); R.I. GEN. LAWS § 18-15-2(b) (2011) (identical to UPIA); S.C. CODE ANN. § 62-7-933(C)(2) (2011) (identical to UPIA); TENN. CODE ANN. § 35-14-104(b) (2012) (identical to UPIA); TEX. PROP. CODE ANN. § 117.004(b) (West 2011) (identical to UPIA); UTAH CODE ANN. § 75-7-902(2) (LexisNexis 2011) (identical to UPIA); VT. STAT. ANN. tit. 14A, § 902(b) (2012) (identical to UPIA); VA. CODE ANN. § 26-45.4(B) (2012) (replaces "must" with "shall"); W. VA. CODE § 44-6C-2(b) (2012) (identical to UPIA); WIS. STAT. § 881.01(3)(b) (2011) (several editorial changes including replacing "must" with "shall"); and WYO. STAT. ANN. § 4-10-902(b) (2011) (replaces "must" with "shall").

The following fifteen state statutes have more than editorial changes to UPIA § 2(b), but retain the emphasis on investing as part of an overall investment strategy: CAL. PROB.

B. Tradeoff in Investing between Risk and Return

According to the UPIA, the fiduciary's central consideration in investing is weighing the tradeoff between risk and return.[42] According to the comments to UPIA § 2:

> [s]ubsection (b) also sounds the main theme of modern investment practice, sensitivity to the risk/return curve. . .. Returns correlate strongly with risk, but tolerance for risk varies greatly with the financial and other circumstances of the investor, or in the case of a trust, with the purposes of the trust and the relevant circumstances of the beneficiaries.

Forty-six states and the District of Columbia have enacted a provision which specifically states that the trustee must consider the risk and return tradeoff when investing trust assets.[43] Delaware, Massachusetts, Pennsylvania and Washington emphasize investing as part of an overall investment strategy, but their statutes do not specifically reference risk and return.[44] Why did these four legislatures leave out any reference to

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CODE § 16047(b) (West 2012); DEL. CODE ANN. tit. 12, § 3302(b) (2011); FLA. STAT. § 518.11(1)(a) (2012); GA. CODE ANN. § 53-12-340(c) (2011); 760 ILL. COMP. STAT. 5/5(a)(1) (2011); KY. REV. STAT. ANN. § 286.3-277 (West 2011) (in Kentucky, the UPIA only applies to corporate fiduciaries, *see supra* note 35 and accompanying text); LA. REV. STAT. ANN. § 9:2127 (2011); MD. CODE ANN., EST. & TRUSTS § 15-114(b)(3) (LexisNexis 2012) (in Maryland the UPIA applies to trust companies and investment advisors and only to individual trustees who elect into the statute. *See supra* notes 36 and 37 and accompanying text); MASS. GEN. LAWS ch. 203C, § 3(b) (2011); MONT. CODE ANN. § 72-34-603(2) (2011); NEV. REV. STAT. § 164.745(2) (2010); N.Y. EST. POWERS & TRUSTS LAW § 11-2.3(b)(3)(A) (McKinney 2011); 20 PA. CONS. STAT. § 7213 (2011); S.D. CODIFIED LAWS § 55-5-7 (2011); WASH. REV. CODE § 11.100.020(1) (2012).

42 *See* UPIA, *supra* note 26, Prefatory Note.

43 See *supra* note 41 for the thirty-five states and the District of Columbia which have enacted a provision identical to U.P.I.A. § 2(b) or have only made slight editorial modifications.

Of the fifteen states that have made more than editorial changes to § 2(b), eleven of those require an investment strategy having risk and return objectives reasonably suited to the trust. *See* CAL. PROB. CODE § 16047(b) (West 2012); FLA. STAT. § 518.11(1)(a); GA. CODE ANN. § 53-12-340(c); 760 ILL. COMP. STAT. 5/5(a)(1) (2011); KY. REV. STAT. ANN. § 286.3-277 (West 2011) (In Kentucky, the UPIA only applies to corporate fiduciaries. *See supra* note 35 and accompanying text); LA. REV. STAT. ANN. § 9:2127 (2011); MD. CODE ANN., EST. & TRUSTS § 15-114(b)(3) (In Maryland the UPIA applies to trust companies and investment advisors and only to individual trustees who elect into the statute. *See supra* notes 36 and 37 and accompanying text); MONT. CODE ANN. 72-34-603(2); NEV. REV. STAT. § 164.745(2); N.Y. EST. POWERS & TRUSTS LAW § 11-2.3(b)(3)(A); S.D. CODIFIED LAWS § 55-5-7.

44 DEL. CODE ANN. tit. 12 §§ 3301-3306; MASS. GEN. LAWS ch. 203C, §§ 1-11; 20 PA. CONS. STAT. §§ 7203-7206; WASH. REV. CODE § 11.100.020.

"risk and return?"[45] Have these states rejected the risk and return concept or did the legislatures of these states consider risk and return as an integral part of investing with an overall investment strategy? Since a definitive answer cannot be given,[46] it can only be stated that at a minimum, forty-six states and the District of Columbia have clearly adopted the risk and return concept of the UPIA.

C. Categorical Investment Restrictions Abrogated

Under the legal lists in place in many states for decades, categorical exclusions applied, such as prohibitions on junior mortgages and new ventures.[47] Under the prudent man (person) rule, "speculative" investments exposed the trustee to liability.[48] The UPIA disavows the emphasis in traditional law on avoiding "speculative" or "risky" investments.[49] UPIA § 2(e) provides: "[a] trustee may invest in any kind of property or type of investment consistent with the standards of this [Act]." Forty-seven states and the District of Columbia have enacted a provision iden-

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[45] Delaware enacted its modern investment statute prior to the Uniform Commissioners adopting the UPIA. Thus, it did not have a model statute to examine. The absence of any reference to "risk and return" in this state does not mean the state deleted the phrase. However, Massachusetts, Pennsylvania and Washington had the UPIA as a guide but did not include the phrase.

[46] There has not been any case law development in these four states to provide insight as to whether the deletion of the phrase "risk and return" was meant to impact the manner in which trust assets were invested.

[47] FRANK C. MCKINNEY, TRUST INVESTMENT xii-xix, 33-44 (2d ed. 1927). *See* Leslie Joyner Bobo, *Non-traditional Investments of Fiduciaries: Reexamining the Prudent Investor Rule*, 33 EMORY L.J. 1067, 1073-74 (1984).

[48] In the leading case of *Harvard College v. Amory*, 26 Mass. 446, 469 (Mass. 1830), which establishes the prudent man rule, the court stated that a trustee must "observe how men of prudence . . . manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested." Jeffrey N. Gordon notes in *The Puzzling Persistence of the Constrained Prudent Man Rule*, "[s]peculative stocks seems to refer to all companies except those with regular earnings and paying regular dividends which may reasonably be expected to continue." 62 N.Y.U. L. REV. 52, 61 (1987). Harvey E. Bines, in *Modern Portfolio Theory and Investment Management Law: Refinement of Legal Doctrine*, 76 COLUM. L. REV. 721, 726 (1976), notes that the difficulty with the term "speculation" is the "imprecision of the term." For additional discussion on speculative stocks *see* John H. Langbein, *The Uniform Prudent Investor Act and the Future of Trust Investing*, 81 IOWA L. REV. 641, 649 (1996); Michael T. Johnson, *Speculating on the Efficacy of "Speculation": An Analysis of the Prudent Person's Slipperiest Term of Art in Light of Modern Portfolio Theory*, 48 STAN. L. REV. 419, 422 (1996); Joel C. Dobris, *Speculations on the Idea of "Speculation" in Trust Investing: An Essay*, 39 REAL PROP. PROB. & TR. J. 439, 441 (2004); and Stewart E. Sterk, *Rethinking Trust Law Reform: How Prudent Is Modern Portfolio Investor Doctrine?* 95 CORNELL L. REV. 851, 853-54 (2010).

[49] UPIA, *supra* note 26, § 2(e), cmt. (Abrogating categoric restrictions).

tical to UPIA § 2(e) or containing only slight editorial changes.[50] Alabama prohibits investments of trust assets in private corporations.[51] Kentucky and Maryland have not adopted a provision similar to UPIA § 2(e).[52] Categorical investment restrictions have been statutorily eliminated in forty-seven states and the District of Columbia.

D. Diversification

Under the prudent man (person) rule that applied in most states prior to the adoption of the UPIA, some courts concluded that there

50 Thirty-two states and the District of Columbia have enacted a provision identical to UPIA § 2(e) or containing only slight editorial changes. *See* Alaska Stat. § 13.36.230(e) (2012) (identical to UPIA); Ariz. Rev. Stat. Ann. § 14-0902(E) (2012) (identical to UPIA); Ark. Code Ann. § 28-73-902(e) (2011) (identical to UPIA); Colo. Rev. Stat. § 15-1.1-102(e) (2012) (identical to UPIA); Conn. Gen. Stat. § 45a-541b(e) (2012) (editorial change made to UPIA referencing internal statutes); D.C. Code § 19-1309.02(e) (2012) (editorial changes); Ga. Code Ann. § 53-12-340(e) (2011) (identical to UPIA); Haw. Rev. Stat. § 554c-2(e) (2011) (identical to UPIA); Idaho Code Ann. § 68-502(5) (2012) (identical to UPIA); Ind. Code § 30-4-3.5-2(e) (2011) (identical to UPIA); Iowa Code § 633A.4302(5) (2012) (identical to UPIA); Kan. Stat. Ann. § 58-24a02(e) (2011) (replaces "trustee" with term "fiduciary"); Me. Rev. Stat. tit. 18-B, § 902(5) (2011) (identical to UPIA); Mass Gen. Laws. § 203C(3)(e)(2011) (identical to UPIA); Minn. Stat. § 501B.151(2)(d) (2012) (identical to UPIA); Miss. Code Ann. § 91-9-603(e) (2011) (identical to UPIA); Mo. Rev. Stat. § 469.902.5 (2011) (identical to UPIA); Neb. Rev. Stat. § 30-3884(e) (2011) (identical to UPIA); N.H. Rev. Stat. Ann. § 564-B:9-902(e) (2011) (identical to UPIA); N.M. Stat. Ann. § 45-7-603(E) (2011) (identical to UPIA); N.C. Gen. Stat. § 36C-9-902(e) (2011) (identical to UPIA); N.D. Cent. Code § 59-17-02(5) (2011) (identical to UPIA); Okla. Stat. tit. 60, § 175.62(E) (2011) (identical to UPIA); Or. Rev. Stat. § 130.755(5) (2012) (identical to UPIA); R.I. Gen. Laws § 18-15-2(e) (2011) (identical to UPIA); S.C. Code Ann. § 62-7-933(c)(5)(a) (2011) (identical to UPIA); Tex. Prop. Code Ann. § 117.004(e) (West 2011) (insertion of introductory phrase); Utah Code Ann. § 75-7-902(5) (LexisNexis 2011) (identical to UPIA); Vt. Stat. Ann. tit. 14A, § 902(e) (2012) (identical to UPIA); Va. Code Ann. § 26-45.4(E) (2012) (identical to UPIA); W. Va. Code § 44-6C-2(e) (2012) (identical to UPIA); Wis. Stat. § 881.02(3)(e) (2011) (replaces "trustee" with "fiduciary"); Wyo. Stat. Ann. § 4-10-902(e) (2011) (identical to UPIA).

Fifteen states have made more than editorial changes, but still permit every type of investment. *See* Cal. Prob. Code § 16047(e) (West 2012); Del. Code Ann. tit. 12, § 3302(b) (2011); Fla. Stat. § 518.11(1)(b) (2012); 760 Ill. Comp. Stat. 5/5(a)(2) (2011); La. Rev. Stat. Ann. § 9:2127 (2011) (last sentence reads: "In investing within the limitations of the foregoing standard, a trustee is authorized to retain and acquire every kind of property."); Mich. Comp. Laws § 700.1503(1) (2012); Mont. Code Ann. § 72-34-603(5) (2011); Nev. Rev. Stat. § 164.745(5) (2010); N.J. Stat. Ann. § 3B:20-11.3(c) (West 2011); N.Y. Est. Powers & Trusts Law § 11-2.3(b)(4)(A) (McKinney 2011); Ohio Rev. Code Ann. § 5809.03(A) (LexisNexis 2011); 20 Pa. Code Stat. § 7203(b) (2011); S.D. Codified Laws § 55-5-7 (2011); Tenn. Code Ann. § 35-14-104(e) (2012); Wash. Rev. Code § 11.100.020(1) (2012).

51 *See infra* Part II.F.

52 Query whether the legislatures in Maryland and Kentucky meant to restrict trust investments by the non-inclusion of UPIA § 2(e).

was no mandatory duty to diversify trust investments.[53] The UPIA integrated diversification into the very definition of prudent investing by carving it out as a distinct duty.[54] Diversification is a fundamental tenant of prudent investing under the UPIA.[55] UPIA § 3 provides: "[a] trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying."

Forty-eight states and the District of Columbia have adopted a provision identical to UPIA § 3 or containing only slight editorial modifications.[56] Delaware does not statutorily impose a duty to diversify,

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[53] *See* P.G. Guthrie, Annotation, *Duty of Trustee to Diversify Investments, and Liability for Failure to Do So*, 24 A.L.R.3d 730 (1969) & 1992 Supp. at 78-79.

[54] The Prefatory Note to the UPIA states: "The long familiar requirement that fiduciaries diversify their investments has been integrated into the definition of prudent investing." UPIA, *supra* note 26, Prefatory Note.

[55] *Id.*

[56] Thirty-one states have adopted UPIA § 3 without changes or have made only minor editorial changes. *See* ALASKA STAT. § 13.36.235 (2012) (identical to UPIA); ARIZ. REV. STAT. ANN. § 14-10903 (2012) (identical to UPIA); ARK. CODE ANN. § 28-73-903 (2011) (identical to UPIA); COLO. REV. STAT. § 15-1.1-103 (2012) (identical to UPIA); CONN. GEN. STAT. § 45a-541c (2012) (identical to UPIA); D.C. CODE. § 19-1309.03 (2012) (identical to UPIA); IDAHO CODE ANN. § 68-503 (2012) (identical to UPIA); IND. CODE § 30-4-3.5-3 (2011) (identical to UPIA); KAN. STAT. ANN. § 58-24a03 (2011) (replaces "trustee" with term "fiduciary" both places it appears in the statute); ME. REV. STAT. tit. 18-B, § 903 (2011) (identical to UPIA); MICH. COMP. LAWS § 700.1504 (2012) (several editorial changes including replacing "trustee" with "fiduciary" both places it appears in the statute); MINN. STAT. § 501B.151(3) (2012) (identical to UPIA); MISS. CODE ANN. § 91-9-605 (2011) (identical to UPIA); MO. REV. STAT. § 469.903 (2011) (identical to UPIA); NEB. REV. STAT. § 30-3885 (2011) (identical to UPIA); NEV. REV. STAT. § 164.75 (2010) (identical to UPIA); N.H. REV. STAT. ANN. § 564-B:9-903 (2011) (identical to UPIA); N.J. STAT. ANN. § 3B:20-11.4 (West 2011) (replaces "trustee" with "fiduciary" both places it appears); N.M. STAT. ANN. § 45-7-604 (2011) (identical to UPIA); N.C. GEN. STAT. § 36C-9-903 (2011) (identical to UPIA); N.D. CENT. CODE § 59-17-03 (2011) (identical to UPIA); OHIO REV. CODE ANN. § 5809.03(B) (LexisNexis 2011) (replaces "the" with "a" before the word "trust"); OKLA. STAT. tit. 60, § 175.63 (2011) (identical to UPIA); OR. REV. STAT. § 130.756 (2012) (identical to UPIA); R.I. GEN. LAWS § 18-15-3 (2011) (identical to UPIA); S.C. CODE ANN. § 62-7-933(D) (2011) (identical to UPIA); TEX. PROP. CODE ANN. § 17.005 (West 2011) (identical to UPIA); UTAH CODE ANN. § 75-7-903 (LexisNexis 2011) (identical to UPIA); VT. STAT. ANN. tit. 14A, § 903 (2012) (identical to UPIA); VA. CODE ANN. § 26-45.5 (2012) (identical to UPIA); W. VA. CODE § 44-6C-3 (2012) (identical to UPIA); WYO. STAT. ANN. § 4-10-903 (2011) (identical to UPIA).

Seventeen states have modified UPIA § 3 to some degree but retain the duty to diversify. *See* ALA. CODE § 19-3B- 903 (2012); CAL. PROB. CODE § 16048 (West 2012); FLA. STAT. § 518.11(1)(c) (2012); GA. CODE ANN. § 53-12-341 (2011); HAW. REV. STAT. § 554c-3 (2011); 760 ILL. COMP. STAT. 5/5(a)(3) (2011); IOWA CODE § 633A.4303 (2012); KY. REV. STAT. ANN. § 286.3-277(3) (West 2011); MD. CODE ANN., EST. & TRUSTS § 15-114(b)(4) (LexisNexis 2012); MASS. GEN. LAWS ch. 203C, § 4 (2011); MONT. CODE ANN. 72-34-605 (2011); N.Y. EST. POWERS & TRUSTS LAW § 11-2.3(c) (McKinney 2011); 20 PA.

however case law imposes the duty.[57] Louisiana Statute § 9:2127 does not mention diversification but the comments to the state statute provide: "Diversification usually is necessary to reduce risk." In summary, it appears all of the states and the District of Columbia statutorily impose a duty to diversify; however, as discussed in this subpart, several states create exceptions for trusts existing before the enactment of the act, several states ease the duty with respect to inception assets, and several states carve out certain assets from the duty to diversify.

1. *Effective Dates*

Every state now imposes on the corporate trustee the duty to diversify. However, in Georgia and Pennsylvania the enacted statutory duty does not apply to trusts existing on a certain date.

Georgia applies its version of the UPIA to all existing trusts regardless of when created.[58] It requires that the trustee diversify investments.[59] However, as to any trust which became irrevocable before January 1, 2011, the duty to diversify does not apply

> to the trust to the extent such trust instrument directs or permits the trustee to retain, invest, exchange, or reinvest assets without regard to any duty to diversify, without the need to diversify or create a diversity of investments, or without liability for either deprecation or failing to diversify, or contains other similar language expressing a settlor's intent to provide similar discretion; or (b) absent gross neglect, with respect to an asset that was transferred to the trustee of such trust by any settlor or gratuitous transferor.[60]

The scope of this provision is unclear since a trust containing such a provision would be deemed to waive the duty to diversify regardless of when the trust was executed. However, the statute does change the investment standard to gross neglect as to inception assets held in trusts that were irrevocable before January 1, 2011.[61]

Pennsylvania imposes upon the trustee the duty to diversify but specifically amended UPIA § 3 by providing that the duty to diversify does not apply to trusts which became irrevocable prior to December

CONS. STAT. § 7204 (2011); S.D. CODIFIED LAWS § 55-5-8 (2011); TENN. CODE ANN. § 35-14-105 (2012); WASH. REV. CODE § 11.100.045 (2012); WIS. STAT. § 881.01(4) (2011).

57 *See* Merrill Lynch Trust Co., FSB v. Campbell, No. 1803-VCN, 2009 WL 2913893 (Del Ch. Sept. 2, 2009); Law v. Law, 753 A.2d 443 (Del. 2000).

58 GA. CODE ANN. § 53-12-1(b).

59 § 53-12-341.

60 § 53-12-341(3).

61 See further discussion of statutes modifying the standard of care *infra* at Part II(B).

25, 1999.[62] The duty to diversify was not imposed upon existing trusts because Pennsylvania had not required diversification and "retroactivity would have required drafters of old trusts to have been clairvoyant to have negated a non-existent duty to diversify."[63] Pennsylvania applies its modified version of the UPIA to all trusts but carves out a separate effective date for the duty to diversify.[64]

Kentucky's modified version of the UPIA only applies to banks and trust companies acting in a fiduciary capacity.[65] The statute does not apply to individuals who serve as trustee.

Maryland's prudent investor statute applies to a trust company, an investment advisor that is controlled by or under common control with a trust company, or to any person that elects to have the statute apply.[66] The statute does not apply to individuals serving as trustees unless they elect to have the UPIA apply.[67]

2. *Inception Assets*

Under the law prior to enactment of the UPIA, most states had statutes which softened the application of the prudent person rule for assets received upon the commencement of the fiduciary relationship, hereinafter "inception assets."[68] UPIA § 4 eliminates any special treatment for inception assets.[69] Under the UPIA, the duty to diversify applies to all assets, including those contributed by the grantor (hereinafter "grantor contributed assets"[70]) and those purchased by a

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62 20 Pa. Cons. Stat. § 7204(b) (2011).

63 *In re* Scheidmantel, 868 A.2d 464, 480 (Pa. Super. Ct. 2005).

64 *Id.*

65 Ky. Rev. Stat. Ann. § 286.3 277(1) (West 2011).

66 Md. Code Ann., Est. & Trusts § 15-114(a)(2) (LexisNexis 2012).

67 § 15-114(g).

68 U.S. Trust, *Fiduciary Powers*, 1983 Prac. Drafting, 153, 162 (Apr.1983) and Appendix A thereto set forth the law in each state. The author uses the term "inception assets" to refer to "grantor contributed assets" and those assets purchased by a prior trustee.

69 U.S. Trust, *Diversification and Retention of Inception Assets*, 2002 Prac. Drafting, 7026, 7035 (Oct. 2002) [hereinafter *Diversification and Retention*]. UPIA § 4 provides, "Within a reasonable time after accepting a trusteeship or receiving trust assets, a trustee shall review the trust assets and make and implement decisions concerning the retention and disposition of assets, in order to bring the trust portfolio into compliance with the purposes, terms, distribution requirements, and other circumstances of the trust, and with the requirements of this [Act]."

70 The use of the term "grantor" would include any assets contributed by anyone to the trust. Notwithstanding the duty to diversify inception assets under current law in New York, New York Surrogates have recently stated that inception assets undergo a less strict standard than other assets. *In re* Kopec, 885 N.Y.S.2d 401, 405 (Sur. Ct. 2009) asserts, "[s]tocks owned by the decedent undergo a somewhat softer analysis: retention of a portfolio owned by decedent may be prudent even where the independent purchase of

prior trustee.[71] The duty to diversify all of the trust assets applies in the District of Columbia and all of the states except Alabama, Maryland, Pennsylvania, Tennessee, and Washington.[72]

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the same stocks by the fiduciary may not." The Monroe County Surrogate cites to three cases which predate the enactment of modern investment provisions in New York. Likewise, in *In re HSBC Bank USA, N.A.*, No. DO-0659, slip op. 52234(U), 2010 WL 5186667, at *17 (N.Y. Sur. Ct. Feb. 24, 2010), the New York Surrogate noted, "[o]ur Court of Appeals [referencing *In re* Hahn, 426 N.Y.S.2d 924 (App. Div. 1983) also referenced in *In re* Kopec 885 N.Y.S.2d 401, and *In re* Clark, 257 N.Y. 132 (1931)] in determining whether a trustee has breached its fiduciary duty, has made a distinction between 'the acts of trustees in making investment of trust funds, and their acts in making, or failing to make, prompt disposition of securities received from the hands of the creator of the trust.'" The Surrogate cites to cases predating New York's statutory enactment of a duty to review initial assets. N.Y. EST. POWERS & TRUSTS LAW § 11-2.3(b)(3)(D) (McKinney 2011) (enacted in 1994). The application of this "softer" analysis may be inconsistent with the statute.

71 *Diversification and Retention*, *supra* note 69, at 7035. The author uses the term "inception assets" to include grantor contributed assets and those assets purchased by the prior trustee.

72 Arguably, Minnesota and Wisconsin could be added to this list. Minnesota has enacted identical provisions to UPIA § 3 and § 4. MINN. STAT. §501B.151(3)-(4) (2012). MINN. STAT. § 501B.151(8) provides,

> Disposal of property. Unless the trust instrument or a court order specifically directs otherwise, a trustee need not dispose of any property, real, personal, or mixed, or any kind of investment, in the trust, however acquired, until the trustee determines in the exercise of a sound discretion that it is advisable to dispose of the property. Nothing in this subdivision excuses the trustee from the duty to exercise discretion at reasonable intervals and to determine at those intervals the advisability of retaining or disposing of property.

As noted by one commentator, "neither the text nor the position of this provision in the Minnesota statute confines its effect to inception assets. If, however, it applies to the trustee's reinvestments, it is a qualification of the Act to a significant, if uncertain, degree." *Diversification and Retention*, *supra* note 69, at 7036. The commentator opines the quoted statute should be read in connection with MINN. STAT. § 501B.81(1) which provides, "The trustee may retain trust assets until, in the judgment of the trustee, disposition of the assets should be made, without regard to any effect retention may have on the diversification of the assets of the trust." This statute must be incorporated by reference in the governing instrument to be effective. Since Minnesota has also adopted UPIA § 3, thereby imposing upon the trustee the duty to diversify, to give effect to this provision, arguably, §§ 501B.151(8) and 501B.81 waive the duty to diversify for only grantor-contributed assets and assets received from a prior trustee. Since § 501B.81 only applies if it is incorporated by reference, then the grantor has waived the default duty to diversify required in Minnesota. In essence, the statute creates alternative default provisions which grantors can elect into. The trustee still has the duty to prudently manage the assets and to determine that their retention effectuates the purposes of the trust. Since the statute only applies if it is elected into, it is not a default provision and therefore the author concludes that it falls into a class different than the other states granting default preference to inception assets.

WIS. STAT. § 881.05(1) (2011) provides,

Pennsylvania's UPIA provides: "[a] fiduciary, in the exercise of reasonable care, skill and caution, may retain any asset received in kind, even though the asset constitutes a disproportionally large share of the portfolio."[73] Presumably, the reference to property "received in kind" refers at a minimum to grantor contributed assets. Arguably, it would also apply to the assets received from a prior trustee. Due to its placement in the statutory section immediately after its modified UPIA § 3, it appears that the quoted language is a substitute for UPIA § 4, lending support to the argument that the duty to review existing assets, including the duty to diversify, does not apply to any assets received from a prior trustee or to any assets received by the grantor regardless of when received. Query whether the statute was meant to only apply to grantor contributed assets. The trustee still has the duty to prudently manage and monitor the concentration but doesn't have the duty to diversify inception assets.

Similar to Pennsylvania, Washington adopted a modified version of UPIA § 3 and did not adopt UPIA § 4. Washington law provides:

> Subject to express provisions to the contrary in the trust instrument, any fiduciary may hold and retain any real or personal property received into or acquired by the trust from any source. Except as to trust property acquired for consideration, a fiduciary may hold and retain any such property without need for diversification as to kinds or amount and whether or not the property is income producing.[74]

The second sentence waives the duty to diversify for those assets which were acquired by a means other than "for consideration." Presumably, the focus is on whether the "fiduciary" acquired the assets for consideration rather than the grantor. Surely, the statute does not require the trustee to determine if the grantor acquired the assets for considera-

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> Unless the trust instrument or a court order specifically directs otherwise, a trustee shall not be required to dispose of any property, real or personal, or mixed, in the estate or trust, however acquired, until the trustee determines in the exercise of a sound discretion that it is advisable to dispose of the same; but nothing herein contained shall excuse the trustee from the duty to exercise discretion at reasonable intervals and to determine at such times the advisability of retaining or disposing of such property.

This statute seems simply to state the duty of prudence. Arguably, it simply says the trustee need not sell an asset until it exercises sound discretion within a reasonable time. Possibly the statute was enacted in response to a court case or there is legislative history which puts more color around the statute. But, as written, it seems to merely state the common law duty to act prudently in a prudent period of time.

73 20 PA. CONS. STAT. § 7205 (2011).

74 WASH. REV. CODE § 11.100.060 (2012).

tion.[75] Presumably, the fiduciary would not have a duty to diversify those assets that the trust received from the grantor by gift or devise.[76] Since the focus is presumably on the fiduciary, an issue arises whether the focus is on the current fiduciary or whether the statute uses the term more broadly to also cover prior fiduciaries of the same trust. If the term is to be interpreted more broadly, then the current trustee would have a duty to diversify those assets received from a prior trustee if those assets were purchased by the prior trustee but not those assets that were not purchased. The second sentence is limited to those assets not acquired for consideration; it only addresses diversification and non-incoming producing property. The first sentence is broader. Does the first sentence permit retention of an inception asset even though retention no longer serves a trust purpose (e.g. the beneficiaries are no longer using the vacation home)? Does the first sentence even permit the trustee to purchase an asset and retain it provided it is not a concentration? The statute lacks clarity on a number of issues.

Maryland requires a trustee to review "fiduciary assets within a reasonable time after acceptance of the fiduciary appointment and make and implement decisions concerning the retention or disposition of investments existing prior to the appointment in order to conform with this section."[77] A later provision in the same statute provides that the "fiduciary shall have no liability for continuing to hold fiduciary assets existing at the time the fiduciary appointment was accepted or subsequently added pursuant to proper authority if, and as long as, the fiduciary, in the exercise of good faith and reasonable prudence, considers the retention to be in the best interest of the beneficiaries or in the furtherance of the goals of the governing instrument."[78] The statute waives the duty to diversify grantor contributed assets and assets received from a prior trustee. The trustee has the duty to determine whether retention of these assets is in the best interests of the beneficiaries and whether the assets effectuate the purposes of the trust. Since the trustee has the duty to sell assets that are not in the best interest of the beneficiaries or that do not effectuate a trust purpose, it appears the statute may only

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[75] In *Rhodehamel v. Rhodehamel*, No. C07-0081Z, 2008 WL 249042, at*12 (W.D. Wash. Jan. 29, 2008), the court referenced WASH. REV. CODE § 11.100.060 and held that this statute relieved the trustee from any duty to diversify stock in Eli Lilly which was part of the original trust corpus of the revocable trust and was not acquired for consideration. While not stating so expressly, the court focused on whether the trustee, rather than the grantor, acquired the stock for consideration.

[76] The statute would not apply to those assets the fiduciary purchased from the grantor.

[77] MD. CODE ANN., EST. & TRUSTS § 15 114(a)(2) (LexisNexis 2012).

[78] § 15-114(c)(3).

waive the duty to diversify inception assets.[79] Because the quoted provision does not clearly state that the duty to diversify is waived as to inception assets and because it is not located in the same section of the statute as the duty to diversify, there is a lack of clarity as to its exact scope.

Alabama and Tennessee have adopted UPIA §§ 3 and 4; however, they have modified UPIA § 3 by adding a new subsection (b) which reads as follows in Tennessee:

> In the absence of express provisions to the contrary in the governing instrument, a fiduciary may without liability continue to hold property received into a trust at its inception or subsequently added to it or acquired pursuant to proper authority if and as long as the fiduciary, in the exercise of good faith and prudence, discretion and intelligence, may consider that retention is in the best interest of the trust and its beneficiaries or in furtherance of the goals of the trustor as determined from that instrument. . ..”[80]

This statute and the similar statute in Alabama do not suffer with the same ambiguity regarding focus as the statute in Maryland does since the inception asset provisions are located in the same section of the statute as the duty to diversify. The default provisions are meant to modify the duty to diversify grantor contributed assets. Arguably, the statute would also waive the duty to diversify all assets received from a prior trustee (even those purchased by the prior trustee) since those assets would be acquired by the trustee “pursuant to proper authority.”[81] Similar to that of Maryland, the Alabama and Tennessee statutes require

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[79] *Id.* Arguably, the statute would permit retention of an asset the trustee purchased.

[80] Tenn. Code Ann. § 35-14-105(b)(1) (2012). Alabama contains a very similar provision except Alabama’s statute does not contain the phrase “discretion and intelligence” and uses the phrase “furtherance of the purposes of the trust” rather than “furtherance of the goals of the trustor as determined from that instrument.” *See* Ala. Code § 19-3B-903(b) (2012). Alabama specifically provides that the waiver of the duty to diversify with respect to inception assets applies to “successor-in-interest to the original property” and “may also include, among other things, stock in the trustee if a corporation and stock in any corporation controlling, controlled by, or under common controls with the trustee.” Tennessee’s statute clearly modifies the duty to diversify grantor contributed assets and possibly those assets received from a prior trustee because Tennessee’s statute provides the duty to diversify is modified by the provision of subsection (b). In Alabama, a similar subsection (b) has been added but the duty to diversify contained in subsection (a) is not expressly modified by it. Presumably the duty to diversify in both states is modified by this provision.

[81] It could even be argued that the quoted provision would also cover assets that the fiduciary acquired by purchase since most trusts grant the trustee the power to purchase assets and therefore the acquisition would be made “pursuant to proper authority.”

the trustee to determine whether the inception assets effectuate the purposes of the trust, and, if not, then the assets must be sold.[82]

While Alabama, Maryland, Pennsylvania, Tennessee and Washington impose upon the trustee the duty to diversify, they modify that duty with respect to inception assets.[83] Trustees should bear in mind these state modifications, including the noted ambiguities, when investing trust assets governed by the laws of these states.

3. *Specific Asset Carve Out*

Certain states impose upon the trustee the duty to diversify but relieve the trustee from that duty for certain assets.

(a). *Montana's Specific Asset Carve Out*

Montana imposes upon the trustee the duty to diversify but relieves the trustee from that duty with respect to farm or ranch property, closely held family businesses, timber interests, and interests in oil, gas, or minerals.[84] The trustee may retain those assets unless otherwise directed by a majority of the adult beneficiaries.[85] The statute continues: "[a] trustee's exercise of discretion to retain assets of the character described in this subsection is not a breach of the trustee's duty to diversify investments."[86] The statute is not limited to grantor contributed assets. Presumably, the trustee would have no duty to diversify the referenced assets even if purchased by a prior trustee. In fact, the statute could be read so as to permit retention of these assets even if purchased by the current trustee.

(b). *Life Insurance Carve Out*

Thirteen states have carved out an exception from the duty to diversify and from the duty to invest with care, skill and caution with respect to life insurance.[87] Some of the states relieve the trustee from a

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TENN. CODE ANN. § 35-14-105(b)(1). However, such an interpretation would eviscerate the duty to diversify altogether.

82 ALA. CODE § 19-3B-903(b); TENN. CODE ANN. § 35-14-105(b)(1).

83 ALA. CODE § 19-3B-903(b); MD. CODE ANN., EST. & TRUSTS § 15-114(b)(4) (LexisNexis 2012); 20 PA. CONS. STAT. § 7205 (2011); TENN. CODE ANN. § 35-14-105(b)(1); WASH. REV. CODE § 11.100.060 (2012).

84 MONT. CODE ANN. § 72-34-605(2) (2011).

85 *Id.*

86 *Id.*

87 *See* ALA. CODE § 19-3B-818 (2012); ARIZ. REV. STAT. ANN. § 14-10908 (2012); DEL. CODE ANN. tit. 12, § 3302(d) (2011); FLA. STAT. § 736.0902(1)(e) (2012); N.C. GEN. STAT. § 36C-9-903.1 (2011); N.D. CENT. CODE § 26.1-33-44 (2011); OHIO REV. CODE ANN. § 5809.031; 20 PA. CONS. STAT. § 7208; S.C. CODE ANN. § 62-7-933(J) (2011); S.D.

list of duties with respect to the life insurance policy,[88] while others provide that the trustee cannot be held liable for any loss arising from the trustee's failure to perform certain duties.[89] All but one of these thirteen states permit a trustee to acquire and retain the policy.[90] Certain states provide protection for life insurance policies on the life of the grantor,[91] the grantor's spouse,[92] and policies on their joint lives.[93] Some states even provide relief for policies on the grantor's children,[94]

CODIFIED LAWS § 55-5-17 (2011); TENN. CODE ANN. § 35-14-105(c) (2012); VA. CODE ANN. § 26-45.4(G) (2012); WYO. STAT. ANN. § 4-10-902(g) (2011).

88 *See* FLA. STAT. § 736.0902(1) (2012); N.C. GEN. STAT. § 36C-9-903.1(a); N.D. CENT. CODE § 26.1-33-44; OHIO REV. CODE ANN. § 5809.031; S.C. CODE ANN. § 62-7-933(J)(1); S.D. CODIFIED LAWS § 55-5-17(a); TENN. CODE ANN. § 35-14-105(c)(1); VA. CODE ANN. § 26-45.4(G).

89 *See* ALA. CODE § 19-3B-818; ARIZ. REV. STAT. ANN. § 14-10908; DEL. CODE ANN. tit. 12, § 3302(d); 20 PA. CONS. STAT. § 7208 (2011); WYO. STAT. ANN. § 4-10-902(g).

90 *See* ALA. CODE § 19-3B-818 ("retain" or "purchased"); ARIZ. REV. STAT. ANN. § 14-10908 ("acquire or retain"); DEL. CODE ANN. tit. 12, § 3302(d) ("acquire or retain"); FLA. STAT. § 736.0902(1) ("acquired or retained"); N.C. GEN. STAT. § 36C-9-903.1(a) ("acquiring or retaining"; N.D. CENT. CODE § 26.1-33-44 ("acquisition, retention, or ownership"); OHIO REV. CODE ANN. § 5809.031 ("acquisition, retention, or ownership"); 20 PA. CONS. STAT. § 7208 ("acquire or retain"); S.C. CODE ANN. § 62-7-933(J)(1) (addresses acquiring property but is silent as to retention); S.D. CODIFIED LAWS § 55-5-17(a) ("acquiring, retaining, or disposing"); TENN. CODE ANN. § 35-14-105(c)(1) ("acquisition, retention, or ownership"); VA. CODE ANN. § 26-45.4(G) (permits a trustee to hold any life insurance policies acquired by gift or pursuant to an express permission or direction in the governing instrument to be relieved of certain investment duties. Virginia's statute is not as broad as the statutes in the other states); WYO. STAT. ANN. § 4-10-902(g) ("acquire or retain").

91 ALA. CODE § 19-3B-818 (may retain any policy contributed by a settlor or purchased by the trustee upon the settlor's request); ARIZ. REV. STAT. ANN. § 14-10908; DEL. CODE ANN. tit. 12, § 3302(d); FLA. STAT. § 736.0902(2) (referencing a policy on a person who is insured and provided funds to the trustee to acquire or pay premiums); N.C. GEN. STAT. § 36C-9-903.1(a); N.D. CENT. CODE § 26.1-33-44; OHIO REV. CODE ANN. § 5809.031 (covering any person); 20 PA. CONS. STAT. § 7208; S.C. CODE ANN. § 62-7-933(J)(1); S.D. CODIFIED LAWS § 55-5-17(a); TENN. CODE ANN. § 35-14-105(c)(1); VA. CODE ANN. § 26-45.4(G) (permitting the trustee to be relieved from certain investment duties on any life insurance policies acquired by gift or pursuant to express permission, but not limiting the policies to certain insured individuals); WYO. STAT. ANN. § 4-10-902(g).

92 ARIZ. REV. STAT. ANN. § 14-10908 (2012); DEL. CODE ANN. tit. 12, § 3302(d) (2011); FLA. STAT. § 736.0902(2) (2012); N.D. CENT. CODE § 26.1-33-44; 20 PA CONS. STAT. ANN. § 7208 (1999); WYO. STAT. ANN. § 4-10-902(g) (2011).

93 *See* ARIZ. REV. STAT. ANN. § 14-10908; DEL. CODE ANN. tit. 12, § 3302(d); FLA. STAT. § 736.0902(2); N.C. GEN. STAT. § 36C-9-903.1(a) (2011); 20 PA. CONS. STAT. § 7208; S.C. CODE ANN. § 62-7-933(J)(1) (2011); S.D. CODIFIED LAWS § 55-5-17(a) (2011); TENN. CODE ANN. § 35-14-105(c)(1) (2012); WYO. STAT. ANN. § 4-10-902(g).

94 N.D. CENT. CODE § 26.1-33-44 (2011); S.C. CODE ANN. § 62-7-933(J)(1); TENN. CODE ANN. § 35-14-105(c)(1).

grandchildren,[95] or parents.[96] The statutes relieve the trustee from any duty to (1) determine whether the contract is or remains a proper investment;[97] (2) investigate the financial strength or changes in the financial strength of the life insurance company;[98](3) make a determination of whether to exercise any policy option available under the contract;[99] (4) make a determination of whether to diversify;[100] (5) inquire about changes in the health or financial condition of the insured or insureds relative to such contract;[101] and exercise non-forfeiture provision available under the contract.[102] Certain of the states require that the trustee notice the beneficiaries or other individuals in order to be relieved from liability.[103]

A comparison of the law in these thirteen states illustrates that the trustee will have a continuing duty with respect to certain policies and may have certain duties with respect to all policies. For example, only six states relieve a trustee from investment duties with respect to life

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95 N.D. Cent. Code § 26.1-33-44; Tenn. Code Ann. § 35-14-105(c)(1).

96 N.D. Cent. Code § 26.1-33-44; S.C. Code Ann. § 62-7-933(J)(1); Tenn. Code Ann. § 35-14-105(c)(1).

97 Ariz. Rev. Stat. Ann. § 14-10908 (2012); Del. Code ann. tit. 12, § 3302(d)(1) (2011); Fla. Stat. § 736.0902(1)(b) (2012); N.C. Gen. Stat. § 36c-9-903.1(a)(1); N.D. Cent. Code § 26.1-33-44; Ohio Rev. Code Ann. § 5809.031(A)(1); 20 Pa. Cons. Stat. § 7208 (2011); S.C. Code ann. § 62-7-933(J)(1)(a); S.D. Codified laws § 55-5-17(a)(1); Tenn. Code ann. § 35-14-105(c)(1)(A); Va. Code Ann. § 26-45.4(G)(i) (2012); Wyo. Stat. Ann. § 4-10-902(G)(i) (2011).

98 Ariz. Rev. Stat. Ann. § 14-10908; Del. Code Ann. tit. 12, § 3302(d)(2); Fla. Stat. § 736.0902(1)(c); Ohio Rev. Code Ann. § 5809.031(A)(4); 20 Pa. Cons. Stat. § 7208; S.D. Codified Laws § 55-5-17(a)(2) (2011); Tenn. Code Ann. § 35-14-105(c)(1)(A)(ii) (2012); Wyo. Stat. Ann. § 4-10-902(G)(ii).

99 Del. Code. Ann. tit. 12, § 3302(d)(3); Fla. Stat. § 736.0902(1)(d); N.C. Gen. Stat. § 36C-9-903.1(a)(iii) (2011); N.D. Cent. Code § 26.1-33-44 (2011); Ohio Rev. Code Ann. § 5809.01(A)(3); S.C. Code Ann. § 62-7-933(J)(1)(b) (2011); S.D. Codified Laws § 55-5-17(a)(3); Tenn. Code Ann. § 35-14-105(c)(1)(C); Va. Code Ann. § 26-45.4(G)(iii); Wyo. Stat. Ann. § 4-10-902(g)(iii).

100 Ala. Code § 19-3b-818 (2012); Ariz. Rev. Stat. Ann. § 14-10908; Del. Code Ann. tit. 12, § 3302(d)(4); Fla. Stat. § 736.0902(1)(e); N.C. Gen. Stat. § 36C-9-903.1(A)(iii) (2011); N.D. Cent. Code § 26.1-33-44; Ohio Rev. Code Ann. § 5809.01(A)(2); 20 Pa. Cons. Stat. § 7208; S.C. Code Ann. § 62-7-933(J)(1)(C); S.D. Codified Laws § 55-5-17(4); Tenn. Code Ann. § 35-14-105(c)(1)(B); Va. Code Ann. § 26-45.4(G)(ii); Wyo. Stat. Ann. § 4-10-902(g)(iv).

101 Del. Code Ann. tit. 12, § 3302(d)(5) (2011); Fla. Stat. § 736.0902(1)(f); S.D. Codified Laws § 55-5-17(5); Ohio Rev. Code Ann. § 5809.01(A)(5); Wyo. Stat. Ann. § 4-10-902(g)(v).

102 Ariz. Rev. Stat. Ann. § 14-10908 (2012); 20 Pa. Cons. Stat. § 7208 (2011). Arguably, this duty is encompassed in the duty to determine policy options.

103 Del. Code Ann. tit. 12, § 3302(d) (requires notice to the insured individuals); Fla. Stat. § 736.0902(5)(b) (2012); N.C. Gen. Stat. § 36c-9-903.1(b); S.D. Codified Laws § 55-5-17(b) (2011); Wyo. Stat. Ann. § 4-10-902(g) (2011) (requires notice to the insured individual).

insurance policies on the grantor's spouse.[104] Six states expressly relieve a trustee from any duty to investigate the financial strength or changes in the financial strength of the life insurance company.[105] Can it be inferred that the trustees in the six other states still have this duty since it is not expressly listed? A careful and detailed examination of the applicable state statutes is a necessity. Few broad principles can be applied to the manner in which states have carved out an exception for life insurance.

(c). *Fiduciary Owning Its Own Shares and Affiliated Investments*[106]

Federal regulations prohibit a national bank from retaining or acquiring its own shares or shares in its affiliates, unless authorized by applicable law.[107] Likewise, the duty of loyalty would prohibit a trustee from holding its own securities in a fiduciary account.[108] Unless state law permits a corporate fiduciary to retain or acquire its own shares, the corporate trustee would be obligated to sell any stock held by the trust in the fiduciary. Alabama, Delaware, Maryland, Tennessee and Washington have modified the UPIA to specifically permit a trustee to retain its own stock and that of its affiliate in a fiduciary account if contributed to the trust by the grantor, in other words, grantor contributed assets.[109] These five states only allow retention of the stock contributed by the grantor. They do not permit the trustee's acquisition of its stock. In Alabama, Tennessee and Washington, the applicable statute would allow retention even if the shares represent a concentration.[110] In Dela-

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104 *See supra* note 92.

105 *See supra* note 98.

106 Ga. Code Ann. § 53-12-261(f) (2011), 760 Ill. Comp. Stat. 5/5.2 (2011), Kan. Stat. Ann. § 58-24a18(b) (2011), and S.C. Code Ann. § 62-7-933(c)(5)(b) (2011) have inserted into their modified UPIA provisions which permit a corporate fiduciary to invest in an investment company or investment fiduciary funds even though the bank or trust company provides services to the investment company or investment fiduciary funds. These statutes do not authorize the corporate trustee to retain or acquire its own shares or that of its affiliate. These statutes differ from those discussed in the text of this subpart.

107 107 12 C.F.R. § 9.12(a) (2012).

108 Unif. Trust Code § 802 (2005).

109 Ala. Code § 19-3b-903 (2012); Del. Code Ann. tit. 12, § 3305 (2011); Md. Code Ann., Est. & Trusts § 15-114(c)(4) (LexisNexis 2012); Tenn. Code Ann. § 35-14-105(b)(1) (2012); Wash. Rev. Code § 11.100.060 (2012).

110 *See supra* Part I(D)(2).

ware and Maryland the statutes merely waive the duty of loyalty, but do not waive the duty of diversification.[111]

E. Delegation

The UPIA's fifth fundamental alteration to prudent investing permits a trustee to delegate investment functions.[112] Under former law, the trustee was under a duty not to delegate to others acts which the trustee could reasonably be required personally to perform.[113] UPIA § 9(a) permits a trustee to "delegate investment and management functions that a prudent trustee of comparable skills could properly delegate under the circumstances." UTC § 807(a) provides, "[a] trustee may delegate duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances. The trustee shall exercise reasonable care, skill, and caution." Forty-seven states and the District of Columbia permit delegation of investment functions, some incorporate UPIA § 9 but add modifications, others incorporate UTC § 807(a) but add modifications, and others create their own delegation provisions.[114]

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111 Delaware's statute does not statutorily impose a duty to diversify but court cases have imposed the duty. *See supra* note 57. MD. CODE ANN., EST. & TRUSTS § 15-114(b)(4) imposes a duty to diversify.

112 UPIA, *supra* note 26, § 9.

113 RESTATEMENT (SECOND) TRUSTS § 171 (1959).

114 ALA. CODE § 19-3B-807 (2012); ALASKA STAT. § 13.36.270(a) (2012); ARIZ. REV. STAT. ANN. § 14–10807 (2012); CAL. PROB. CODE § 16052 (West 2012); COLO. REV. STAT. § 15-1.1-109 (2012); CONN. GEN. STAT § 45a-541i (2012); DEL. CODE. ANN. tit. 12, § 3322 (2011); D.C. CODE § 19-1308.07 (2012); FLA. STAT. § 518.112(1)-(2)(a) (2012); GA. CODE ANN. § 53-12-345 (2011); HAW. REV. STAT. § 554c-9 (2011); IDAHO CODE ANN. § 68-509 (2012); 760 ILL. COMP. STAT. 5/5.1(b) (2011); IND. CODE § 30-4-3.5-9 (2011); IOWA CODE § 633A.4206 (2012); KAN. STAT. ANN. § 58-24a09 (2011); LA. REV. STAT. ANN. § 9:2087 (2011); ME. REV. STAT. tit. 18-B, § 807 (2011); MASS. GEN. LAWS ch. 203C, § 10 (2011); MICH. COMP. LAWS § 700.1510 (2012); MISS. CODE ANN. § 91-9-617 (2011); MO. REV. STAT. § 469.909 (2011); MONT. CODE ANN. § 72-34-609 (2011); NEB. REV. STAT. § 30-3888 (2011); NEV. REV. STAT. § 164.770 (2010); N.H. REV. STAT. ANN. § 564-B:8-807 (2011); N.J. STAT. ANN. § 3B:20-11.10 (West 2011); N.M. STAT. ANN. § 45-7-601 (2011); N.Y. EST. POWERS & TRUSTS LAW § 11-2.3(b)(4)(C) (McKinney 2011); N.C. GEN. STAT. § 36C-8-807 (2011); N.D. CENT. CODE § 59-16-07 (2011); OHIO REV. CODE ANN. § 5809.06 (LexisNexis 2011); OKLA. STAT. tit. 60, § 175.69 (2011); OR. REV. STAT. § 130.680 (2012); 20 PA. CONS. STAT. § 7206 (2011); R.I. GEN. LAWS § 18-15-9 (2011); S.C. CODE ANN. § 62-7-807 (2011); S.D. CODIFIED LAWS § 55-5-16 (2011); TENN. CODE ANN. § 35-14-111 (2012); VT. STAT. ANN. tit. 14A, § 807 (2012); VA. CODE ANN. § 26-45.10 (2012); W. VA. CODE § 44-6C-9 (2012); WIS. STAT. § 881.01(10) (2011); WYO. STAT. ANN. § 4-10-909 (2011). Maryland, Minnesota and Utah did not adopt UPIA § 9 or UTC § 807(a).

1. *Uniform Trust Code Differences*

Uniform Trust Code ("UTC") § 807(a) is broader in scope than UPIA § 9(a). The latter addresses delegating "investment and management functions" while the former addresses delegating "duties and powers." The broader standard in the UTC encompasses the narrower standard in the UPIA. The UTC makes several other minor editorial changes to UPIA § 9 but it's unlikely these changes would impact an interpretation of the two statutes. Thus, a state's adoption of UTC § 807 is an adoption of UPIA § 9.

2. *Co-Trustee*

Six states specifically provide that a co-trustee may delegate investment and management functions to another co-trustee with greater investment skills.[115] Presumably, this ability is implied in UPIA § 9(a) since a trustee is permitted to delegate and there is no provision restricting a co-trustee from being the designee.

3. *Agent's Qualifications*

UPIA § 9 requires the trustee to exercise reasonable care, skill, and caution in selecting an agent. The UPIA does not provide any additional color as to the agent's qualifications. Missouri and New York require the trustee to take "into account the nature and the value of the assets subject to such delegation and the expertise" of the agent.[116] Illinois provides that the trustee "must conduct an inquiry into the experience, performance history, professional licensing or registration, if any, and financial stability."[117] Kansas requires the trustee to "conduct an inquiry into the experience, performance history, errors and omissions coverage, professional licensing or registration, and financial stability of the investment agent."[118] New Jersey requires the trustee to have "sound financial standing."[119] Query whether these statutory provisions are encompassed in a review performed with skill, caution and care. However, since these states require these items to be examined, a wise trustee will document that these items have been separately reviewed.

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[115] Ariz. Rev. Stat. Ann. § 14–10907(E); Del. Code. Ann. tit. 12, § 3322(b); Miss. Code Ann. § 91-9-617(e); N.J. Stat. Ann. § 3B-20-11.10(e); Ohio Rev. Code Ann. § 5807(A)(1); 20 Pa. Cons. stat. § 7206(e). The statutory modifications in Arizona, Mississippi and Pennsylvania are nearly identical. *See* Ariz. Rev. Stat. Ann § 14–10907(E); Del. Code. Ann. tit. 12, § 3322(b); Miss. Code Ann. § 91-9-617(e).

[116] Mo. Rev. Stat. § 469.909; N.Y. Est. Powers & Trusts Law § 11-2.3(b)(4)(C).

[117] 760 Ill. Comp. Stat. 5/5.1(b)(2).

[118] Kan. Stat. Ann. § 58-24a09(a)(2).

[119] N.J. Stat. Ann. § 3B:20-11.10(a)(1) (West 2011).

4. *Terms of the Delegation*

UPIA § 9(a)(2) requires the trustee to establish "the scope and terms of the delegation, consistent with the purposes and terms of the trust." UTC § 807(a)(2) is identical to UPIA § 9(a)(2). Florida,[120] Illinois,[121] Kansas[122] and Pennsylvania[123] require the trustee to establish the "specific" terms of the delegation.[124] Arguably, a delegation of all investment duties may not be specific enough.

5. *Agent's Standard of Care*

UPIA § 9(b) requires an agent while performing a delegated function to exercise "reasonable care to comply with the terms of the delegation." UTC 807(b) is identical. The agent's duty is to comply with the terms of the delegation. Six states have modified UPIA § 9(b) to require the agent not only to comply with the terms of the delegation but also to exercise the delegated function according to a certain standard.[125] Four states specifically provide that the agent is held to the same standards as the trustee.[126]

6. *Review of Agent's Performance*

UPIA § 9(a)(3) requires the trustee to periodically review "the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation." UTC § 807(a)(3) is identical to UPIA § 9(a)(3). Six states have modified the statute by requiring the trustee to monitor the agent's "overall" performance.[127] Of these six states, three of them require that the trustee monitor the "overall" per-

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120 FLA. STAT. § 518.112(1) (2012).

121 760 ILL. COMP. STAT. 5/5.1(b)(1) (2011).

122 KAN. STAT. ANN. § 58-24a09(a)(1) (2011).

123 20 PA. CONS. STAT. § 7206(b) (2011).

124 The origin of the word "specific" is likely comment j to the RESTATEMENT (THIRD) OF TRUSTS which provides: "[t]he trustee must exercise care, skill, and caution in establishing the scope and specific terms of any delegation, and must keep reasonably informed in order to monitor the execution of investment decisions or plans." Florida's UPIA § 4 is identical to § 90(b) of the RESTATEMENT (THIRD) OF TRUSTS.

125 CONN. GEN. STAT. ANN. § 42(a)-541i(b) (2012) ("reasonable care, skill and caution"); IND. CODE ANN. § 30-4-3.5-9(b) (2011) ("reasonable care"); LA. REV. STAT. ANN. § 9:2087(D)(2) (2011) ("care and skill"); MISS. CODE. ANN. § 91-9-617(b) (2011) ("reasonable care, skill and caution"); N.Y. EST. POWERS & TRUSTS LAW § 11-2.3(c)(2) (McKinney 2011) ("reasonable care, skill and caution"); 20 PA. CONS. STAT. § 7206(c) (2011) ("reasonable care, skill and caution").

126 FLA. STAT. § 518.112 (2012); 760 ILL. COMP. STAT. 5/5.1(b)(4)-(5) (2011); KAN. STAT. ANN. § 58-24a09(b)-(c); N.J. STAT. ANN. § 3B:20-11.10(b) (West 2011).

127 CAL. PROB. CODE § 16052 (West 2012); FLA. STAT. § 518.112(1); 760 ILL. COMP. STAT. 5/5.1(b)(1); IOWA CODE § 633A.4206 (2012); KAN. STAT. ANN. § 58-24a09(a)(1) (2011); MONT. CODE ANN. § 72-34-609(1)(c) (2011).

formance of the "specific" terms of the delegation.[128] Georgia, Iowa and Louisiana require the trustee not only to monitor but also to take action to remedy any breach by the agent.[129] Nevada replaces the word "monitor" with "verify."[130] Query whether any of these state modifications impact an interpretation of UPIA § 9(a)(3).

7. *Notice*

The UPIA and the UTC do not require that the trustee notify the beneficiaries when investment functions are delegated. Likewise, South Dakota's statute does not require notice; however, it provides that

> the trustee may seek the prior approval for the delegation from all known beneficiaries of the trust or from the court. If such approval is given in writing by all known beneficiaries or by the court, the trustee is not liable for the acts of the person to whom the authority is delegated except in the cases of gross misconduct or gross negligence by the delegating trustee in the selection or monitoring of the agent.[131]

New Jersey requires the trustee to "provide reasonable advance written notice on each occasion upon which the fiduciary intends to delegate investment and management functions pursuant to [§ 3B:20-11.10(f)], including the identity of the agent."[132]

8. *Exoneration*

The official comments to the UPIA § 9 provide:

> The trustee's duties of care, skill, and caution in framing the terms of the delegation [see UPIA § 9(a)(2) which requires the trustee to establish the scope and terms of the delegation, consistent with the purposes and terms of the trust] should protect the beneficiary against overbroad delegation. For example, a trustee could not prudently agree to an investment management agreement containing an exculpation clause that leaves the trust without recourse against reckless mismanagement.

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128 Fla. Stat. Ann. § 518.112; 760 Ill. Comp. Stat. 5/5.1(b)(1); Kan. Stat. Ann. § 58-24a09(a)(1); 20 Pa. Cons. Stat. § 7207(b) (2011).

129 Iowa Code § 633A.4206(2)(d); La. Rev. Stat. Ann. § 9:2087(D)(1) (2011); Ga. Code Ann. § 53-12-345 (2011). *But see* UPIA, *supra* note 26, § 9(a)(3).

130 Nev. Rev. Stat. § 164.770(1)(c) (2010).

131 S.D. Codified Laws § 55-5-16 (2011).

132 N.J. Stat. Ann. § 3B:20-11.10(f) (West 2011). New Jersey imposes upon the trustee the duty to control the overall costs of the delegation, "including making a reduction in the amount of corpus commissions otherwise allowable to the fiduciary with respect to the trust assets for which investment responsibility has been delegated. . .." N.J. Stat. Ann. § 3B:20-11.8.

> Leaving one's beneficiaries remediless against willful wrongdoing is inconsistent with the duty to use care and caution in formulating the terms of the delegation. This sense that it is imprudent to expose beneficiaries to broad exculpation clauses underlies both federal and state legislation restricting exculpation clauses. . ..

Connecticut, Louisiana and New York have amended UPIA § 9 to provide that an attempted exoneration of an agent from liability for failure to exercise reasonable care is contrary to public policy.[133]

9. *Changes to Jurisdictional Provisions*

UPIA § 9(d) provides: "[b]y accepting the delegation of a trust function from the trustee of a trust that is subject to the law of this State, an agent submits to the jurisdiction of the courts of this State." UTC § 807(d) is for the most part identical.[134] Five states have amended UPIA § 9(d) by providing that the agent submits to the jurisdiction even if the delegation agreement provides otherwise.[135] Arizona[136] Mississippi[137] and Pennsylvania[138] provide that an investment in a mutual fund is not a delegation of investment function and neither the mutual fund nor its advisor is an investment agent.

F. Summary

All five fundamental alterations to the former criteria for investing have been adopted by at least forty-four states and the District of Columbia in a form identical or nearly identical to the UPIA or its counterpart in the UTC. Three of these fundamental provisions have been adopted by forty-eight states and the District of Columbia.[139] Broadly, it can be said that trustees throughout the United States must invest in accordance with the five fundamental principles expressed in the UPIA; however, as set forth in this Part and in the following Part of this article, there is rich diversity among the states on numerous provisions.

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133 Conn. Gen. Stat. § 45a-541i(b) (2012); La. Rev. Stat. Ann. § 9:2087(D)(2) (2011); N.Y. Est. Powers & Trusts Law § 11-2.3(c)(2) (McKinney 2011).

134 UTC § 807(d) is nearly identical except for the following two changes: (1) the article "a" replaces the article "the" before the word "delegation;" and (2) the phrase "a trust function" is replaced with "powers or duties."

135 Ga. Code Ann. § 53-12-345(d) (2011) (amends UPIA § 9(d) by also providing that the agent waives the defense of lack of personal jurisdiction); N.J. Stat. Ann. § 3B:20-11.10(d); N.Y. Est. Powers & Trusts Law § 11-2.3(c)(2); 20 Pa. Cons. Stat. § 7206(d) (2011); Wyo. Stat. Ann. § 4-100-909(d) (2011).

136 Ariz. Rev. Stat. Ann. § 14-10907(f) (2012).

137 Miss. Code. Ann. § 91-9-617(f) (2011).

138 20 Pa. Cons. Stat. § 7206(f) (2011).

139 *See supra* Parts I(A), (C), (D).

II. Additional State Modifications to the UPIA

In addition to those modifications set forth in Part I, the forty-one states and the District of Columbia that have enacted the UPIA have modified other sections.[140]

A. Express Requirement

The UPIA is a default rule.[141] UPIA § 1(b) provides the prudent investor rule "may be expanded, restricted, eliminated, or otherwise altered by the provisions of a trust." UTC § 103(18) defines the phrase "terms of a trust" to include the written trust agreement and oral expressions to the extent state law allows oral expressions as evidence to interpret the trust agreement.[142] The grantor's oral expressions can serve to guide the trustee if such expressions are admissible to interpret the trust agreement under applicable law.[143] For those states that have enacted the UTC without modifying § 103(18), the provisions of the UPIA can be modified by oral expressions if they meet the evidentiary requirements of the governing law. Forty-seven states and the District

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140 *See supra* note 32 and accompanying text.

141 UPIA, *supra* note 26, § 1(b). As stated in the comments to UPIA § 1, "[a]lmost all of the rules of trust law are default rules, that is, rules that the settlor may alter or abrogate. UPIA § 1(b) carries forward this traditional attribute of trust law." Like most statutory trust provisions, the duty to diversify is a default provision. *See* 1 Austin W. Scott et al., Scott and Ascher on Trusts § 2.2.4, at 42-49 (5th ed. 2007); *see also* John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 Yale L. J. 625, 650 (1995). Unif. Trust Code § 105(b) (2005) provides: "[t]he terms of a trust prevail over any provision of this [Code] except. . ..[the statute continues with 14 provisions that cannot be overridden by the trust]."

142 Restatement (third) of trusts § 90 cmt. b states:

> The phrase "terms of the trust" is broadly defined to include intentions of the settlor manifested in any way that admits of proof in a judicial proceeding. . . Thus, the trust terms, expressed and implied, may be derived from written or spoken words, circumstances surrounding the establishment of the trust, and sometimes statutory language that is automatically imported into trusts or by which some trusts are established.

See also 1 Scott et al., *supra* note 141, § 2.2.4 for a discussion of what is meant by "the terms of the trust." Comments to UPIA § 2 provide, "[w]hen there is a written trust instrument, modern authority strongly favors allowing evidence extrinsic to the instrument to be consulted for the purposes of ascertaining the settlor's intent." UPIA, *supra* note 26, § 2, cmt. (Matters of Proof).

143 *See* Unif. Trust Code § 103(18) cmt. (2005).

of Columbia states have enacted UPIA § 1(b).[144] California,[145] Florida,[146] Illinois,[147] Missouri,[148] Montana,[149]New Jersey,[150] New York,[151]

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144 The following twenty-six states and the District of Columbia states have enacted UPIA § 1(b) with no or only slight modifications: ALA. CODE § 19-3B-901(b) (2012) (replaces "provisions" with the word "terms" both places it appears); ARIZ. REV. STAT. ANN. § 14 - 10901(B)-(C) (2012) (several editorial changes); ARK. CODE ANN. § 28-73-901(b) (2011) (identical to UPIA); COLO. REV. STAT. § 15-1.1-101(b) (2012) (identical to UPIA); CONN. GEN. STAT. § 45a-541a(b) (2012) (several editorial changes); D.C. CODE § 19-1309.01(b) (2012) (several editorial changes); HAW. REV. STAT. § 554c-1(b) (2011) (identical to UPIA); IDAHO CODE ANN. § 68-501(2) (2012) (identical to UPIA); IND. CODE § 30-4-3.5-1(b) (2011) (identical to UPIA); KANSAS STAT. ANN. § 58 - 24a01(b) (2000) (replaces "trustee" with the term "fiduciary" both places it appears); MICH. COMP. LAWS § 700.1502(2) (2012) (several editorial changes); MINN. STAT. § 501B.151(b) (2012) (identical to UPIA); MISS. CODE ANN. § 91-9-601(b) (2011) (identical to UPIA); NEB. REV. STAT. § 30-3883(b) (2011) (identical to UPIA); N.M. STAT. ANN. § 45-7-602(B) (2011) (identical to UPIA); N.D. CENT. CODE § 59-17-01(2) (2011)(identical to UPIA); OKLA. STAT. tit. 60, § 175.61(B) (2011) (identical to UPIA); OR. REV. STAT. § 130.750(2) (2012) (several editorial changes); R.I. GEN. LAWS § 18-15-1(b) (2011) (identical to UPIA); S.C. CODE ANN. § 62-7-933(B)(2) (2011) (several editorial changes); TENN. CODE ANN. § 35-14-103(b) (2012) (removed the word "reasonable"); TEXAS PROP. CODE ANN. § 17.003(b) (West 2011) (identical to UPIA); UTAH CODE ANN. § 75-7-901(2) (LexisNexis 2011) (several editorial changes); VT. STAT. ANN. tit. 14A, § 901(b) (2012) (identical to UPIA); W. VA. CODE § 44-6C-1(B) (2012) (identical to UPIA); WIS. STAT. § 881.01(2)(b) (2011) (several editorial changes); WYO. STAT. ANN. § 4-10-901(b) (2011) (identical to UPIA).

The following twenty-one states have modified or significantly modified the provision but retain the general principle that the provisions of the trust may modify the prudent investor rule: ALASKA STAT. § 13.36.225(b) (2012); CAL. PROB. CODE § 16046(b) (West 2012); DEL. CODE ANN. § 3303(a) (2011); FLA. STAT. § 518.11(2) (2012); 760 ILL. COMP. STAT. 5/5(b) (2011); IOWA CODE § 633A.4201(2) (2012); ME. REV. STAT. tit. 18-B, § 901(2) (2011); MD. CODE ANN., EST. & TRUSTS § 15-114(d) (LexisNexis 2012); MASS. GEN. LAWS ch. 203C, § 2(b) (2011); MO. REV. STAT. § 469.901.2 (2011); MONT. CODE ANN. § 72-34-602(2) (2011); NEV. REV. STAT. § 164.710 (2010); N.H. REV. STAT. ANN. § 564-B:9-901(b) (2011); N.J. STAT. ANN. § 3B:20-11.2(b) (West 2011); N.Y. EST. POWERS & TRUST LAW § 11-2.3(b)(1) (McKinney 2011) ; N.C. GEN. STAT. § 36C-9-901(B) (2011); OHIO REV. CODE ANN. § 5809.01(C) (LexisNexis 2011); 20 PA. CONS. STAT. § 7202(b) (2011); VA. CODE ANN. § 26-45.3(B) (2012); WASH. REV. CODE § 11.100.010 (2012).

Georgia, Kentucky and Louisiana have not enacted a provision similar to UPIA § 1(b). While Georgia's statute does not incorporate UPIA § 1(b), GA. CODE ANN. § 53-12-79(a) (2011) provides the provisions of the Revised Georgia Trust Code, which contains provisions identical and similar to the UPIA, may be varied by the trust instrument. *See* 2010 Ga. Laws 506, enacting the Revised Georgia Trust Code of 2010, effective Jan. 1, 2011, § 1.

145 CAL. PROB. CODE § 16046(b).

146 FLA. STAT. § 518.11(2).

147 760 ILL. COMP. STAT. 5/5(b).

148 MO. REV. STAT. § 469.901.2.

149 MONT. CODE ANN. § 72-34-602(2).

150 N.J. STAT. ANN. § 3B:20-11.2(b) (West 2011).

151 N.Y. EST. POWERS & TRUSTS LAW § 11-2.3(a) (McKinney 2011).

and Washington[152] modify UPIA § 1(b) by requiring that changes to the provisions of the UPIA be made by "express provisions in the trust instrument."[153] By requiring an express provision in the trust instrument, these eight states prohibit oral modifications and implied modifications to the UPIA. Florida's statute continues that "an express provision need not refer specifically to" the statute.[154]

Virginia's modification to UPIA § 1(b) is more expansive. Its statute provides:

> The prudent investor rule, a default rule, may be expanded, restricted, eliminated, or otherwise altered by the provisions of a trust. A general authorization in a controlling document authorizing a trustee to invest in such assets as the trustee, in his sole discretion, may deem best, or other language purporting to expand the trustees investment powers, shall not be construed to waive the rule of subsection A unless the controlling document expressly manifests an intention that it be waived (i) by reference to "prudent man" or "prudent investor" rule, (ii) by reference to power of the trustee to make "speculative" investments, (iii) by an express authorization to acquire or retain a specific asset or type of asset such as a closely held business, or (iv) by other language synonymous with (i), (ii) or (iii)."[155]

Similar to the eight states' statutes referenced in the preceding paragraph, Virginia's statute requires an express override; however, unlike the other states' statutes, Virginia's statute spells out what specificity is required and what language is not sufficient to override the UPIA.

As set forth *supra* in subpart I(D)(2), Alabama permits a trustee to retain inception assets notwithstanding the lack of diversity "in the absence of an express provision to the contrary in the terms of the trust."[156] Thus, the trustee is not required to diversify inception assets unless the trust contains an express provision requiring diversification. As to all other assets, diversification is required unless the terms of the trust expand, restrict, eliminate or otherwise alter the terms; however,

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152 WASH. REV. CODE § 11.100.040 (2012).

153 FLA. STAT. § 518.11(2) (2012) and N.Y. EST. POWERS & TRUSTS LAW § 11-2.3(a) refer to the "governing instrument" rather than the "trust instrument." OHIO REV. CODE ANN. § 5809.01(C) (LexisNexis 2011) provides, "[t]he Ohio Uniform Prudent Investor Act may be expanded, restricted, eliminated, or otherwise altered, without express reference by the instrument creating a trust to the Ohio Uniform Prudent Investor Act or any section of the Revised Code that is part of that act." Ohio's statute provides that an expressed override can occur without reference to the UPIA. It does not prohibit oral or implied modifications.

154 FLA. STAT. § 518.11(2).

155 VA. CODE ANN. § 26-45.3(B) (2012).

156 ALA. CODE § 19-3B-903 (2012).

those terms are not required to be made expressly by the trust instrument.[157]

Delaware's version of the UPIA provides the "governing instrument may expand, restrict, eliminate, or otherwise vary the rights and interests of beneficiaries," including the circumstances, if any, in which the fiduciary must diversify investments.[158] The succeeding section of the statute provides "any such instrument directing the retention of any such property [referencing inception assets] as a trust investment shall be deemed to waive any duty of diversification otherwise applicable to the fiduciary with respect to such property. . . ."[159] Generally, a standard retention clause is insufficient to waive the duty to diversify.[160] It's unclear whether the Delaware statute was intended to override this general rule. The statute does not specify whether the retention provision must specifically refer to the inception asset by name or whether a general description of the class of property (e.g., "real estate") is sufficient. The statute is limited to inception assets.

New Hampshire has enacted the first sentence of UPIA § 1(a) but has added the phrase: "except as provided in RSA 564-B;1-105(b)(2) and (3)."[161] Said sections, from UTC § 105(b)(2) and (3), provide,

> the terms of a trust prevail over any provisions of this chapter except . . .(2) the duty of a trustee to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries; (3) the requirement that a trust and its terms be for the benefit of its beneficiaries, and that the trust have a purpose that is lawful, not contrary to public policy, and possible to achieve.[162]

Since New Hampshire's UPIA is contained in its Uniform Trust Code, it's unclear what was intended by inserting the reference to UPIA § 105(b)(2) and (3) in UPIA § 1(a). On the one hand, the addition is redundant. On the other hand, its insertion may be more significant.

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157 ALA. CODE § 19-3B-901(b).

158 DEL. CODE ANN. tit. 12, § 3303(a) (2011).

159 DEL. CODE ANN. tit. 12, § 3304.

160 Trent S. Kiziah, *The Trustee's Duty to Diversify: An Examination of the Developing Case Law*, 36 ACTEC L.J. 357, 381 (2010). *See* M.L. Cross, Annotation, *Construction and Effect of Instrument Authorizing or Directing Trustee or Executor to Retain Investments Received Under Such Instrument*, 47 A.L.R.2d 187 (1956). RESTATEMENT (THIRD) OF TRUSTS § 92 cmt. d(2) (2003) provides,

> [a] general authorization in an applicable statute or in the terms of the trust to retain investments received as a part of a trust estate does not ordinarily abrogate the trustee's duty with respect to diversification or the trustee's general duty to act with prudence in investment matters.

161 N.H. REV. STAT. ANN. § 564-B:9-901(b) (2011).

162 § 564-B:1-105(b)(2)-(3).

The statute clearly indicates that any modifications to the UPIA are subject to the overriding principle that the modifications must be in the interests of the beneficiaries. The reporter for the UPIA predicts that in the future the benefit-the-beneficiaries preemption doctrine set forth in UTC § 105(b)(3) will restrain the grantor from imposing unreasonable restraints on diversification such as directing the retention of a concentration in a publicly held company.[163] Does New Hampshire's insertion of UTC § 105(b)(3) indicate that modifications provisions will be carefully scrutinized to insure they benefit the beneficiaries?

B. Modification of Standard of Care

The second sentence of UPIA § 1(b) provides, "A trustee is not liable to a beneficiary to the extent that the trustee acted in reasonable reliance on the provisions of the trust." As set forth in the preceding subpart, numerous states have modified UPIA § 1(b) by providing that modifications to the UPIA must be made expressly. Many of the same states have modified the second sentence of UPIA § 1(b) to provide that a trustee is not liable to a beneficiary for the trustee's "good faith reliance" on express provisions.[164] In Tennessee and Maryland, the fiduciary may retain inception assets as long as the fiduciary "in the exercise of good faith and reasonable prudence" considers the retention to be in the best interest of the beneficiaries.[165] These statutes provide greater protection to a trustee who relies on an express provision. Iowa and Washington make it clear that the trust may be modified but in no

[163] John H. Langbein, *Mandatory Rules in the Law of Trusts,* 98 NW. U. L. REV. 1105, 1110, 1112-15 (2004).

[164] CAL. PROB. CODE § 16046(b) (West 2012); DEL. CODE ANN. tit. 12, § 3302(e) (2011); 760 ILL. COMP. STAT. 5/5(b) (2011); MO. REV. STAT. § 469.901.2 (2011); MONT. CODE ANN. § 72-34-602(2) (2011); N.H. REV. STAT. ANN. § 564-B:9-901(b); VA. CODE ANN. § 26-45.3(B) (2012).

[165] MD. CODE ANN., EST. & TRUSTS § 15-114(c)(3) (LexisNexis 2012) permits retention of inception assets "as long as, the fiduciary, in the exercise of good faith and reasonable prudence, considers the retention to be in the best interests of the beneficiaries or in furtherance of the goals of the governing instrument." TENN. CODE ANN. § 35-14-105(b) (2012) permits retention as long as the fiduciary, in the exercise of good faith and reasonable prudence, discretion and intelligence, may consider that retention is in the best interest of the trust and its beneficiaries or is in furtherance of the goals of the trustor as determined from that instrument.

event can a trust authorize a trustee to act in bad faith[166] or relieve the trustee from the duty to act in good faith and with honest judgment.[167]

Illinois provides,

> [t]he trustee's investment decisions and actions are to be judged in terms of the trustee's reasonable business judgment regarding the anticipated effect on the trust portfolio as a whole under the facts and circumstances prevailing at the time of the decision or action. . ..[168]

Florida's statute reads the same except for the use of the term "fiduciary's" rather than "trustee's."[169] Maryland's statute is similar in that it also provides the fiduciary may exercise reasonable business judgment.[170] Illinois' statute was modeled on the Proposed Final Draft of the Restatement of Trusts 3d: Prudent Investor Rule.[171] Florida's and Maryland's statutes are nearly identical to the Illinois statute. Is it possible that the business judgment test was intentionally removed from the Restatement's final draft because it was deemed advisable to have a trust standard rather than a business judgment standard in place? The standard is different.[172] Query whether the business judgment standard is appropriate in a trust context.[173]

C. Reviewing Compliance

UPIA § 8 provides, "Compliance with the prudent investor rule is determined in light of the facts and circumstances existing at the time of a trustee's decision or action and not by hindsight." The Comments to § 8 provides:

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166 IOWA CODE § 633A.4201(2) (2012) provides,

> The terms of the trust may expand, restrict, eliminate, or otherwise alter the duties prescribed by this trust code, and the trustee may reasonably rely on those terms, but nothing in this trust code authorizes a trustee to act in bad faith or in disregard of the purposes of the trust or in the interest of the beneficiaries.

167 WASH. REV. CODE § 11.97.010 (2012) provides, "In no event may a trustee be relieved of the duty to act in good faith and with honest judgment."

168 760 ILL. COMP. STAT. 5/5 (a)(2).

169 FLA. STAT. § 518.11(1)(b) (2012).

170 MD. CODE ANN., EST. & TRUSTS § 15-114(c)(2) (LexisNexis 2012).

171 *See* UPIA, *supra* note 26, Prefatory Note.

172 *See* Stern v. Lucy Webb Hayes Nat'l Training Sch. for Deaconesses & Missionaries, 381 F. Supp. 1003, 1013 (D. D.C. 1974).

173 Jeffrey N. Gordon argues "[s]ince the Business Judgment Rule takes no account of risk taking (except in the limited sense that the risk must be rational in light of the expected return), it is not an appropriate trust law standard." Jeffrey N. Gordon, *The Puzzling Persistence of the Constrained Prudent Man Rule*, 62 N.Y.U. L. REV. 52, 96 (1987).

This section derives from the 1991 Illinois act, 760 ILCS 5/5(a)(2)(1992), which draws upon Restatement of Trusts 3d: Prudent Investor Rule § 227, comment *b*, at 11 (1992). Trustees are not insurers. Not every investment or management decision will turn out in the light of hindsight to have been successful. Hindsight is not the relevant standard. In the language of law and economics, the standard is ex ante, not ex post.

Thirty-one states have enacted a provision identical to UPIA § 8 or made slight editorial modifications.[174] Four states have not enacted this provision or a provision similar to it.[175] The remaining fifteen states and the District of Columbia have modified the section to some degree.[176] Of these fifteen states, eight states have enacted a provision identical to UPIA § 8, but delete the phrase "and not by hindsight."[177] Florida, Illi-

174 Alaska Stat. § 13.36.265 (2012) (identical to UPIA); Ariz. Rev. Stat. Ann. § 14-10905 (2012) (identical to UPIA); Ark. Code Ann. § 28-73-905 (2011) (identical to UPIA); Cal. Prob. Code § 16051 (West 2012); Colo. Rev. Stat. § 15-1.1-108 (2012) (identical to UPIA); Haw. Rev. Stat. § 554c-8 (2011) (identical to UPIA); Idaho Code Ann. § 68-508 (2012) (identical to UPIA); Ind. Code § 30-4-3.5-8 (2011) (identical to UPIA); Iowa Code § 633A.4308 (2012) (identical to UPIA); Kan. Stat. Ann. § 58-24a08 (2011) (replaces "trustee" with term "fiduciary"); Me. Rev. Stat. tit. 18-B, § 905 (2011) (identical to UPIA; even though the title to the section is mislabeled as "Investment Costs"); Miss. Code Ann. § 91-9-615 (2011) (identical to UPIA); Mont. Code Ann. § 72-34-608 (2011) (identical to UPIA); Neb. Rev. Stat. § 30-3887 (2011) (identical to UPIA); Nev. Rev. Stat. § 164.765 (2010) (identical to UPIA); N.H. Rev. Stat. Ann. § 564-B:9-905 (2011) (identical to UPIA); N.M. Stat. Ann. § 45-7-609 (2011) (identical to UPIA); N.C. Gen. Stat. § 36C-9-905 (2011) (identical to UPIA); N.D. Cent. Code § 59-17-05 (2011) (identical to UPIA); Okla. Stat. tit. 60, § 175.68 (2011) (identical to UPIA); Or. Rev. Stat. § 130.770 (2012) (identical to UPIA); R.I. Gen. Laws § 18-15-8 (2011) (identical to UPIA); S.C. Code Ann. § 62-7-933(G) (2011) (identical to UPIA); Tenn. Code Ann. § 35-14-110 (2012) (identical to UPIA); Tex. Prop. Code Ann. § 117.010 (West 2011) (identical to UPIA); Vt. Stat. Ann. tit. 14A, § 905 (2012) (identical to UPIA); Va. Code Ann. § 26-45.9 (2012) (identical to UPIA); W. Va. Code § 44-6C-8 (2012) (identical to UPIA); Wis. Stat. § 881.01(9) (2011) (replaces "trustee" with "fiduciary"); Wyo. Stat. Ann. § 4-10-908 (2011) (insertion of "under this article" after "rule").

175 Kentucky, Louisiana, South Dakota and Washington have not enacted UPIA § 8 or a similar provision.

176 Ala. Code § 19-3B-905 (2012); Conn. Gen. Stat. § 45a-541h (2012); Del. Code Ann. tit. 12, § 3302(c) (2011); D.C. Code § 19-1309.05 (2012); Fla. Stat. § 518.11(1)(b) (2012); Ga. Code Ann. § 53-12-343 (2011); 760 Ill. Comp. Stat. 5/5(a)(2) (2011); Md. Code Ann., Est. & Trusts § 15-114(c)(2) (LexisNexis 2012); Mass. Gen. Laws ch. 203C, § 9 (2011); Mich. Comp. Laws § 700.1509 (2012); Minn. Stat. § 501B.151(6) (2012); Mo. Rev. Stat. § 469.908 (2011); N.J. Stat. Ann. § 3B:20-11.9 (West 2011); N.Y. Est. Powers & Trusts Law § 11-2.3(b)(1) (McKinney 2011); 20 Pa. Cons. Stat. § 7213 (2011); Utah Code Ann. § 75-7-905 (LexisNexis 2011).

177 Conn. Gen. Stat. § 45a-541h, Del. Code Ann. tit. 12, § 3302(c), Fla. Stat. § 518.11(1)(b), 760 Ill. Comp. Stat. 5/5(a)(2), Md. Code Ann., Est. & Trusts § 15-

nois, and Maryland provide that the trustee's investment decisions and actions are to be judged in terms of the trustee's reasonable business judgment.[178] Nine states and the District of Columbia have enacted UPIA § 8 but have inserted at the beginning or end thereof a sentence similar to the following which has been added in Connecticut: "The prudent investor rule expresses a standard of conduct, not outcome."[179] Query whether any of these changes to § 8 materially impact its effect. Arguably, the legislatures modified the UPIA in order to effectuate a change. Case law has yet to provide any insight on these issues.

D. List of Factors

UPIA § 2(c) provides:

> Among circumstances that a trustee shall consider in investing and managing trust assets are such of the following as are relevant to the trust or its beneficiaries:
> (1) general economic conditions;
> (2) the possible effect of inflation or deflation;
> (3) the expected tax consequences of investment decisions or strategies;
> (4) the role that each investment or course of action plays within the overall trust portfolio, which may include financial assets, interests in closely held enterprises, tangible personal property, and real property;
> (5) the expected total return from income and the appreciation of capital;
> (6) other resources of the beneficiaries;
> (7) needs for liquidity, regularity of income, and preservation or appreciation of capital;
> (8) an asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.

114(c)(2), MASS. GEN. LAWS ch. 203C § 9, N.J. STAT. ANN. § 3B:20-11.9, N.Y. EST. POWERS & TRUSTS LAW § 11-2.3(b)(1).

178 FLA. STAT. § 518.11(1)(b); 760 ILL. COMP. STAT. 5/5(a)(2); MD. CODE ANN., EST. & TRUSTS § 15-114(c)(2). See *supra* Part II(B) for further discussion of the business judgment standard.

179 ALA. CODE § 19-3B-905; CONN. GEN. STAT. § 45a-541h; D.C. CODE § 19-1309.05; FLA. STAT. § 518.11(1)(b); MICH. COMP. LAWS § 700.1509; MINN. STAT. § 501B.151(6); MO. REV. STAT. § 469.908; N.J. STAT. ANN. § 3B:20-11.9; N.Y. EST. POWERS & TRUSTS LAW § 11-2.3(b)(1); 20 PA. CONS. STAT. § 7213. UTAH CODE ANN. § 75-7-905 adds an additional sentence to UPIA § 8 which provides, "This section does not require a specific outcome in investing."

The trustee must consider those factors that are relevant. The list is nonexclusive.[180] Forty-seven states and the District of Columbia have enacted UPIA § 2(c), but most of the states have modified it in part.[181] Eight states have replaced "shall consider" with "may consider" in the introductory phrase.[182] This change is more than editorial because these same states did not replace "shall" with "may" in UPIA §§ 2(d), 3, 4, 5 and 6. These eight states have relaxed the investment standard by shifting a mandatory "shall" to a permissive "may." If one of the eight factors listed is not relevant, then this modification is insignificant. But if the factor is relevant, then in a majority of the states, the trustee must consider the factor when investing, but in these eight states the trustee may, but need not, consider the factor. This fairly innocuous change of words can significantly impact the investment process. Query whether the duty to invest and manage as a prudent investor required by UPIA § 2(a) requires the trustee to consider these factors. If so, the permissive standard set forth in these eight states may mislead trustees. A careful trustee would consider the eight listed factors even though in these eight states the statute presumably does not mandate that the trustee do so.

Forty-six states and the District of Columbia have enacted UPIA § 2(c)(2), but five of these states have deleted the reference to "deflation."[183]

UPIA § 2(c)(6) requires the trustee to consider the "other resources of the beneficiaries." It has been enacted in forty-seven states and the District of Columbia.[184] Nine states have modified the subsection by adding at the end thereof,

1. "known to the trustee;"[185]
2. "known to the trustee as determined from information provided by the beneficiaries;"[186]

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180 UPIA, *supra* note 26, § 2(c), cmt. (Factors affecting investment).

181 Delaware, Kentucky, and Louisiana have not adopted UPIA § 2(c).

182 Ala. Code § 19-3B-902(c) (2012), Cal. Prob. Code § 16047(c) (West 2012), Fla. Stat. § 518.11(1)(f) (2012), 760 Ill. Comp. Stat. 5/5(a)(6) (2011), Md. Code Ann., Est. & Trusts § 15-114(c)(5) (LexisNexis 2012), Minn. Stat. § 501B.151(2)(c) (2012), Mont. Code Ann. § 72-34-603(3) (2011), and S.D. Codified Laws § 55-5-11 (2011) have replaced "that a trustee shall consider" with "that are appropriate to consider."

183 Delaware, Kentucky, Louisiana and Pennsylvania have not enacted UPIA § 2(c)(2). The following five state statutes have removed the words "or deflation": Fla. Stat. § 518.11(1)(f), 760 Ill. Comp. Stat. 5/5(a)(6), Md. Code Ann., Est. & Trusts § 15-114(c)(5)(iii), Minn. Stat. § 501B.151(2)(c)(2), and S.D. Codified Laws § 55-5-11.

184 This provision has not been enacted in Georgia, Kentucky and Louisiana.

185 Me. Rev. Stat. tit. 18-B § 902(3)(F) (2011); Minn. Stat. § 501B.151(2)(c)(6); Mo. Rev. Stat. § 469.902.3(6) (2011); N.C. Gen. Stat. § 36C-9-902(c)(6) (2011).

186 Cal. Prob. Code § 16047(c)(6); Mont. Code Ann. § 72-34-603(3)(f).

3. "fiduciary shall have no duty to inquire;"[187] or
4. "reasonably known."[188]

States have also expanded § 2(c)(6) by elaborating on the nature of the resources by expanding the reference to include,

1. "related trusts;"[189]
2. "related trusts, estates, and guardianship;"[190]
3. "and other income;"[191]
4. "other investments and resources, whether held in trust or otherwise;[192]
5. "and the assets of the beneficiaries;"[193]
6. "status of related assets of beneficiaries;[194] or
7. "including earning capacity."[195]

Kansas limits the scope of "beneficiaries" to those "who are eligible to receive discretionary payments of trust income or principal assets."[196]

Some of the states have added to the eight listed factors in UPIA § 2(c) by adding one or more of the following:

1. "size of the portfolio;"[197]
2. "nature and estimated duration of the trust;"[198]
3. "purposes and estimated duration of the trust;"[199]
4. "duty to incur only reasonable and appropriate costs;"[200]
5. "needs of its beneficiaries;"[201]

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187 DEL. CODE ANN. tit. 12, § 3302(c)(3) (2011).

188 N.Y. EST. POWERS & TRUSTS LAW § 11-2.3(b)(3)(B) (McKinney 2011); 20 PA. CONS. STAT. § 7203(c)(8) (2011).

189 CONN. GEN. STAT. § 45a-541b(c)(6) (2012); 760 ILL. COMP. STAT. 5/5(a)(6) (2011); N.Y. EST. POWERS & TRUSTS LAW § 11-2.3(b)(4)(B); 20 PA. CONS. STAT. § 7203(c)(8); S.D. CODIFIED LAWS § 55-5-11 (2011).

190 FLA. STAT. § 518.11(1)(f) (2012).

191 CONN. GEN. STAT. § 45a-541b(c)(6); FLA. STAT. § 518.11(1)(f); N.Y. EST. POWERS & TRUSTS LAW § 11-2.3(b)(4)(B); 20 PA. CONS. STAT. § 7203(c)(8).

192 DEL. CODE ANN. tit. 12, § 3302(c)(3) (2011).

193 FLA. STAT. ANN. § 518.11(1)(f); 760 ILL. COMP. STAT. 5/5(a)(6).

194 MD. CODE ANN., EST. & TRUSTS § 15-114(c)(5)(vii) (LexisNexis 2012).

195 MINN. STAT. § 501B.151(2)(c)(6) (2012); WASH. REV. CODE § 11.100.020(2)(h) (2012).

196 KAN. STAT. ANN. § 58-24a02(c)(6) (2011).

197 ALA. CODE § 19-3B-902(c)(9) (2012); CONN. GEN. STAT. § 45a-541b(c)(9) (2012); MO. REV. STAT. § 469.902(3)(9) (2011); N.Y. EST. POWERS & TRUSTS LAW § 11-2.3(b)(3)(B) (McKinney 2011); 20 PA. CONS. STAT. § 7203(c)(1) (2011).

198 CONN. GEN. STAT. § 45a-541b(c)(10); MO. REV. STAT. § 469.902(3)(9); N.Y. EST. POWERS & TRUSTS LAW § 11-2.3(b)(3)(B); 20 PA. CONS. STAT. § 7203(c).

199 ALA. CODE § 19-3B-902(c)(10).

200 760 ILL. COMP. STAT. 5/5(a)(6) (2011).

201 DEL. CODE. ANN. tit. 12, § 3302(a) (2011).

6. "distribution requirements of the governing instrument;"[202]
7. "any special circumstances;"[203]
8. "anticipated duration of the account;"[204]
9. "anticipated duration of the trust;"[205] or
10. "reasonableness of any costs associated with the investment."[206]

E. Editorial Changes with Possible Substantive Impact

1. *Deletion of "Beneficiaries" in UPIA §§ 1(a), 2(c) and 2(c)(8)*

Pursuant to UPIA § 1(a), a trustee owes a duty to "the beneficiaries of the trust" to comply with the UPIA. UPIA § 2(c) requires the trustee to consider eight enumerated factors "as are relevant to the trust or its beneficiaries." Section 2(c)(8) requires the trustee to consider an asset's special relationship or special value to "the purposes of the trust or to one or more of the beneficiaries." Maryland and South Dakota have removed the reference to "beneficiaries" in § 2(c) and have not enacted §§ 1(a) and 2(c)(8).[207] Illinois' statute does not contain the reference to "beneficiaries" in § 2(c) or in § 1(a) and has not enacted § 2(c)(8).[208] Florida, Minnesota and Pennsylvania have removed the reference to "beneficiaries" in §§ 1(a) and 2(c) but retain the reference in § 2(c)(8).[209] Washington has removed the reference to "beneficiaries" in § 2(c), retained it in § 1(a) and has not enacted § 2(c)(8).[210] The intent and impact of these deletions are unknown. Is it possible that the references to "beneficiaries" were removed simply because they were deemed redundant. Query whether there was an intent to shift the focus from the beneficiaries to the terms of the trust.[211]

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202 Mo. Rev. Stat. § 469.902(3)(9) (2011).

203 Ga. Code Ann. § 53-12-340(b)(9) (2011).

204 Del. Code Ann. tit. 12, § 3302(a).

205 Ga. Code Ann. § 53-12-340(b)(8).

206 Md. Code Ann., Est. & Trusts § 15-114(c)(5)(vi) (LexisNexis 2012).

207 Md. Code Ann., Est. & Trusts § 15-114(c)(5); S.D. Codified Laws § 55-5-11 (2011).

208 760 Ill. Comp. Stat. 5/5(a)(1), (6) (2011).

209 Fla. Stat. §§ 518.11(1), 518.11(1)(f), 518.11(1)(d) (2012); Minn. Stat. §§ 501B.151(a), 501B.151(2)(c), 501B.151(2)(c)(8) (2012); 20 Pa. Const. Stat. §§ 7201(a), 7203(c), 7203(c)(6) (2011).

210 Wash. Rev. Code §§ 11.100.010, 11.100.020(2) (2012).

211 Since Illinois and Florida enacted their modern investment statutes prior to the adoption of the UPIA, one cannot infer that the legislatures of these states intentionally deleted the UPIA provision.

2. *Reference in UPIA § 1(a)*

UPIA § 1(a) begins with the phrase "except as otherwise provided in subsection (b)." Subsection 1(b) provides the prudent investor rule is a default rule that may be changed by the provisions of a trust. Reading the two subsections together, a trustee owes a duty to the beneficiaries to invest and manage trust assets in accordance with the prudent investor rule set forth in the statute except as otherwise provided by the provisions of the trust. Maine and Oregon have replaced the reference in the introductory phrase to subsection (b) with the state's enactment of UPIA § 2.[212] The reference to UPIA § 2, which sets forth the standard of care, appears nonsensical.

3. *UPIA § 2 Changes*

Because UPIA § 2 is the heart of the UPIA, state statutory modifications to § 2 have greater impact.[213] Even small, apparently editorial, changes may impact how the statutes are interpreted, thereby impacting the manner in which assets are invested. Some of the more significant editorial changes to UPIA § 2 are set forth in this Part. For the most part, only editorial changes occurring in several jurisdictions are examined.

(a). *UPIA § 2(a) Changes*

UPIA § 2(a) requires the trustee to consider the "purposes, terms, distribution requirements, and other circumstances of the trust." Massachusetts, New York and Pennsylvania have enacted UPIA § 2(a) but have deleted the reference to "distribution requirements."[214] Georgia has adopted UPIA § 2(a) but has deleted "other circumstances."[215]

(b). *UPIA § 2(c)(4) Changes*

UPIA § 2(c)(4) directs a trustee to consider the role that each investment or course of action plays within the overall trust portfolio and adds "which may include financial assets, interests in closely held enterprises, tangible and intangible personal property, and real property." Arizona adds to this list "specialty assets" and "alternative invest-

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[212] ME. REV. STAT. tit. 18-B, § 901(1) (2011); OR. REV. STAT. § 130.750(1) (2012).

[213] UPIA, *supra* note 26, § 2, cmt.

[214] MASS. GEN. LAWS ch. 203C, § 3(a) (2011), N.Y. EST. POWERS & TRUSTS LAW § 11-2.3(b)(2) (McKinney 2011), 20 PA. CONST. STAT. § 7203(a) (2011). In fairness, since New York's statute was enacted soon after the Commissioners adopted the UPIA, it is possible that the New York legislature did not intentionally delete the phrase.

[215] GA. CODE ANN. § 53-12-340(a) (2011).

ments."[216] Of the forty-one states that have enacted the UPIA, thirteen states have deleted the entire list.[217]

(c). *UPIA § 2(c)(5) Changes*

UPIA § 2(c)(5) requires the trustee to consider "the expected total return from income and the appreciation of capital." Florida, Illinois, Maryland and South Dakota have inserted the word "yield" after the term "income."[218] While apparently innocuous, the insertion of "yield" does modify the statute.

(d). *UPIA § 2(d) Changes*

UPIA § 2(d) requires a trustee to "make a reasonable effort to verify facts relevant to the investment and management of trust assets." The official comments to the UPIA state, "Subsection (d) carries forward the traditional responsibility of the fiduciary investor to examine information likely to bear importantly on the value or the security of an investment – for example, audit reports or records of title." Twelve states have not enacted this subsection.[219] California, Missouri and Montana replace "verify" with "ascertain."[220] New Jersey revises the subsection as follows:

> The fiduciary shall take reasonable steps to verify facts relevant to the investment and management of trust assets and may rely and be fully protected in relying upon statistical, financial, corporate or other information as to a particular investment, and upon ratings or other opinion as to the financial or other status thereof, contained in or offered by any financial, statistical, investment, rating or other publication or service published for the use of and accepted as reliable by investors in like investments or upon a copy of the prospectus

[216] ARIZ. REV STAT. ANN. § 14-10902(c)(4) (2012).

[217] CAL. PROB. CODE § 16047(c)(4) (West 2012); FLA. STAT. § 518.11(1)(f) (2012); 760 ILL. COMP. STAT. 5/5(a)(6) (2011); MD. CODE ANN., EST. & TRUSTS § 15-114(c)(5)(iv) (LexisNexis 2012); MASS. GEN. LAWS ch. 203C, §§ 3-4 (2011); MINN. STAT. § 501B.151(2)(c)(4) (2012); MO. REV. STAT. § 469.902.3(4) (2011); MONT. CODE ANN. § 72-34-603(3)(d) (2011); N.J. STAT. ANN. § 3B:20-11.3(d)(4) (West 2011); N.Y. EST. POWERS & TRUSTS LAW § 11-2.3(b)(3)(B) (McKinney 2011); 20 PA. CONST. STAT. § 7203(c)(5) (2011); S.D. CODIFIED LAWS § 55-5-11 (2011); WASH. REV. CODE § 11.100.020(1) (2012).

[218] FLA. STAT. § 518.11(1)(f); 760 ILL. COMP. STAT. 5/5(a)(6); MD. CODE ANN., EST. & TRUSTS § 15-114(c)(5)(v); S.D. CODIFIED LAWS § 55-5-11.

[219] Delaware, Florida, Georgia, Illinois, Kentucky, Louisiana, Maryland, Minnesota, New York, Pennsylvania, South Dakota and Washington have not enacted UPIA § 2(d).

[220] CAL. PROB. CODE § 16047(d); MO. REV. STAT. § 469.902(4) (2011); MONT. CODE ANN. § 72-34-603(4).

prepared and filed with the Securities and Exchange Commission in connection with a new issue."[221]

4. *UPIA § 4 Changes*

UPIA § 4 requires a trustee "within a reasonable time after accepting a trusteeship or receiving trust assets" to review the trust assets. The Official Comments to UPIA § 4 provide, "The question of what period of time is reasonable turns on the totality of factors affecting the asset and the trust." The comments note that the 1959 Restatement (Second) of Trusts took the view that a year was ordinarily reasonable but under certain circumstances a year may be too long. UPIA § 4 does not define what a reasonable time period is. New Jersey's statute requires the trustee to act within six months.[222]

5. *UPIA § 10 Changes*

UPIA § 10 lists terms or comparable language located in provisions of a trust which are to be interpreted as invoking the provisions of the UPIA. The four most common phrases are: "prudent man rule," "prudent trustee rule," "prudent person rule," and "prudent investor rule." If a trust contains these terms, the trust invokes the prudent investor rule unless the trust otherwise provides. Thirty-one states have enacted a provision identical to UPIA § 10 or made slight editorial modifications.[223] Eleven additional states and the District of Columbia have enacted UPIA § 10 but have modified it to some degree.[224] Interestingly,

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221 N.J. Stat. Ann. § 3B:20-11.3(e).

222 § 3B:20-11.7.

223 Alaska Stat. § 13.36.275 (2012); Ark. Code Ann. § 28-73-906 (2011); Cal. Prob. Code § 16053 (West 2012); Colo. Rev. Stat. § 15-1.1-110 (2012); D.C. Code §§ 19-1309.01 to 19-1309.06 (2012); Haw. Rev. Stat. § 554c-10 (2011); Idaho Code Ann. § 68-510 (2012); Ind. Code § 30-4-3.5-10 (2011); Iowa Code § 633A.4309 (2012); Kan. Stat. Ann. § 58-24a10 (2011); Me. Rev. Stat. tit. 18-B, § 906 (2011); Minn. Stat. § 501B.151(7) (2012); Miss. Code Ann. § 91-9-619 (2011); Mo. Rev. Stat. § 469.910 (2011); Mont. Code Ann. § 72-34-610 (2011); Neb. Rev. Stat. § 30-3889 (2011); Nev. Rev. Stat. § 164.775 (2010); N.H. Rev. Stat. Ann. § 564-B:9-906 (2011); N.J. Stat. Ann. § 3B:20-11.11 (West 2011); N.M. Stat. Ann. § 45-7-611 (2011); N.D. Cent. Code § 59-17-06 (2011); Ohio Rev. Code Ann. § 5809.07 (LexisNexis 2011); Okla. Stat. tit. 60, § 175.70 (2011); R.I. Gen. Laws § 18-15-10 (2011); S.C. Code Ann. § 62-7-933(l) (2011); Tenn. Code Ann. § 35-14-112 (2012); Tex. Prop. Code Ann. § 117.012 (West 2011); Utah Code Ann. § 75-7-907 (LexisNexis 2011); Vt. Stat. Ann. tit. 14A, § 906 (2012); W. Va. Code § 44-6C-10 (2012); Wis. Stat. § 881.01(11) (2011); Wyo. Stat. Ann. § 4-10-910 (2011).

224 Ala. Code § 19-3B-906 (2012); Conn. Gen. Stat. § 45a-541j (2012); D.C. Code § 19-1309.06; Fla. Stat. § 518.11(4) (2012); 760 Ill. Comp. Stat. 5/5(d) (2011); Mass. Gen. Laws ch. 203C, § 11 (2011); Mich. Comp. Laws § 700.1511 (2012); N.C. Gen. Stat. § 36C-9-901(c) (2011); Or. Rev. Stat. § 130.775 (2012); 20 Pa. Cons. Stat. § 7214 (2011); S.D. Codified Laws § 55-5-14 (2011); Va. Code Ann. § 26-45.11 (2012).

Illinois and South Dakota have enacted the statute but delete the references to "prudent trustee rule" and "prudent investor rule;"[225] Florida has enacted a similar statute but deletes the reference to "prudent man rule;"[226] and Oregon has enacted the statute but deletes the phrase "prudent person rule."[227] The removal of these phrases substantially impacts the effective date of the UPIA in these states.

F. Alabama's Constitutional Restriction

The first sentence of Alabama Code § 19-3B-902(e) provides, "A trustee may invest in any kind of property or type of investment consistent with the standards of this chapter." This sentence is identical to UPIA § 2(e).[228] The second sentence of Alabama Code § 19-3B-902(e) states, "Nothing contained in this section, insofar as such authorization may be prohibited by the Constitution of Alabama of 1901, shall authorize the investment of trust assets in the stock of any private corporation." Alabama's Constitution Art. IV, § 74 and Amend. No. 40, provide, "No act of the legislature shall authorize the investment of any trust fund by . . .trustees in the bonds or stock of any private corporation. . .."[229] In the 1930s, five states had similar Constitutional provisions.[230] According to one view, the provision was to prohibit the legislature from passing laws which favored one corporation over another.[231] This view is based on an expanded view of the Alabama Supreme Court decision of *Sims v. Russell*.[232] The Court in *Sims* addresses whether it was proper for a guardian to secure a loan with a pledge of stock in a national bank. The Court concluded that a loan secured by a pledge of stock in a private company differed from a direct investment in a private company, the latter being prohibited by the Alabama Constitution.[233] The Court had previously held that a direct investment by a guardian in a bond of a private company was not authorized by the Constitution.[234] Alabama's Constitution prohibits the trustee from investing

225 760 ILL. COMP. STAT. 5/5(d); S.D. CODIFIED LAWS § 55-5-14.

226 FLA. STAT. § 518.11(4).

227 OR. REV. STAT. § 130.775.

228 *See* ALA. CODE § 19-3B-902, Ala. cmt.

229 Constitutional provision first appeared in the Alabama Constitution of 1875. *See* Sims v. Russell, 183 So. 862, 864 (Ala. 1938).

230 *See Legal Lists in Trust Investment*, 49 YALE L.J. 891, 893 n.20 (1940). Constitutional provisions forbidding legislative authorizations of corporate stock as permissible trust investments were in place in Alabama, Colorado, Montana, Pennsylvania and Wyoming. All of the states, except Alabama, have repealed this Constitutional prohibition.

231 3 AUSTIN W. SCOTT ET AL., SCOTT AND ASCHER ON TRUSTS § 227.13 (5th ed. 2007).

232 *Sims*, 183 So. 862.

233 *Id.* at 864-65.

234 White v. White, 162 So. 368 (Ala. 1935).

in stocks and bonds issued by a private company. Because the Constitutional prohibition is of ancient origin, Alabama's practitioners draft trusts to expressly authorize investments in private corporations, thereby electing out of the default law due to its extremely severe limitations.

III. Significance of Analysis

A. Purpose is to Promote Uniformity

Uniform Acts are adopted by the National Conference of Commissioners on Uniform State Laws to promote uniformity in the law among the states on subjects as to which uniformity is desirable and practicable.[235] Section 12 of the UPIA provides, "[t]his [Act] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among the States enacting it."[236] The District of Columbia and twenty-five states have enacted UPIA § 12 or the similar statute located in UTC § 1101.[237] To the extent that a state has modified the UPIA, consistency is compromised.

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235 *See* Nat'l Conf. of Comm'rs on Unif. State Laws Const. art 1, § 2 *available at* http://www.nccusl.org/Narrative.aspx?title=Constitution (last visited Apr.6, 2012).

236 Article 9 of the Uniform Trust Code ("UTC") is reserved for the Uniform Prudent Investor Act. Portions or all of six sections of the UPIA are duplicated in the UTC. UPIA § 2(f) is similar to UTC § 806. UPIA § 5 is similar to UTC § 802(a). UPIA § 6 is similar to UTC § 803. UPIA § 7 is similar to UTC § 805. UPIA § 9 is similar to UTC § 807. UPIA § 12 is similar to UTC § 1101. Many of those states that have adopted the UTC have deleted these UPIA sections since similar provisions appear in the UTC. Alabama, Alaska, Arizona, District of Columbia, Maine, North Carolina, North Dakota, South Carolina, and Vermont have deleted all of the duplicate provisions in the UPIA that appear in the UTC. Nebraska, New Hampshire, Ohio, Oregon, and Utah have deleted some of the UPIA sections but retain others. Missouri, Michigan, New Mexico, Tennessee, and Virginia retain many of the UPIA provisions and the UTC provisions. Duplicative statutes appear in many of the states that have enacted both the UPIA and the UTC.

237 Ala. Code § 19-3B-1201 (2012); Alaska Stat. § 13.36.285 (2012); Ark. Code Ann. § 28-73-908 (2011); Colo. Rev. Stat. § 15-1.1-112 (2012); Conn. Gen. Stat. § 45a-541k (2012); D.C. Code § 19-1311.01 (2012); Idaho Code Ann. § 68-512; Ind. Code § 30-4-3.5-12 (2011); Kan. Stat. Ann. § 58-24a12 (2011); Me. Rev. Stat. tit. 18-B, § 907 (2011); Miss. Code Ann. § 91-9-623 (2011); MO. Rev. Stat. § 469.912 (2011); Neb. Rev. Stat. § 30-38,108 (2011); N.H. Rev. Stat. Ann. § 564-B:11-1101 (2011); N.C. Gen. Stat. § 36C-11-1101 (2011); Ohio Rev. Code Ann. § 5809.08(A) (LexisNexis 2011); Okla. Stat. tit. 60, § 175.72 (2011); R.I. Gen. Laws § 18-15-12 (2011); S.C. Code Ann. § 62-7-933(L) (2011); Texas Prop. Code Ann. § 117.002 (West 2011); Utah Code Ann. § 75-7-1101(LexisNexis 2011); Vt. Stat. Ann. tit. 14A, § 1201 (2012); Va. Code Ann. § 26-45.14 (2012); W. Va. Code § 44-6C-12 (2012); Wis. Stat. § 881.01(13) (2011); Wyo. Stat. Ann. § 4-10-1101 (2011).

B. Limited Applicability

A court's decision in one jurisdiction may serve to guide a court in another jurisdiction if the law is similar or identical in both states. This principle is clearly applicable in the District of Columbia and those twenty-five states that have adopted UPIA § 12 or its counter-part in the UTC.[238] While the decision of a court in one jurisdiction will not bind the court of another jurisdiction, it effectuates the application of UPIA § 12 if the courts strive to uniformly apply the law. To the extent the state's UPIA deviates from the UPIA, a court decision interpreting the state's modified UPIA will limit its application in another jurisdiction. For example, an opinion from a state granting preference for inception assets would have limited applicability outside of the subject state due to the uniqueness of the state's provision.[239]

C. Multi-State Trustees

Trustees operating in multiple jurisdictions should bear in mind that a super-majority of the states that have enacted the UPIA have modified it to a certain degree. Many of the modifications are editorial, but many are significant.[240] In light of the uniqueness of many of the states' UPIA modifications, multi-state trustees should develop policies and procedures that recognize the numerous unique state-enacted provisions.

Legal counsel advising multi-state trustees should also bear in mind the changes that the states have made to the UPIA. Rather than making broad statements concerning investment law, legal counsel should focus on the particulars of the trust and the peculiarities of each state's UPIA.

D. Multi-State Analysis Can Assist in Interpreting State's Modification to UPIA

An analysis of the various states' modifications to the UPIA can assist in interpreting each state's statutes. Many of the states have adopted identical changes to the same UPIA section. These multi-state changes reflect heightened emphasis or a deviation from some of the principles of the UPIA. For example, every state permits a grantor to

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238 *See supra* note 237.

239 *See supra* Part I(D)(2).

240 Only Colorado has enacted the UPIA with no changes whatsoever. New Mexico, Oklahoma, Rhode Island and West Virginia have enacted the UPIA with very minor editorial changes. Arkansas, Hawaii, Idaho, Indiana, Nebraska, North Dakota and Vermont have made minor changes. The remaining thirty-three states that have enacted the UPIA and the District of Columbia have made at least one significant modification. For statutory references *see supra* note 32.

expand, restrict, eliminate or otherwise alter the provisions of the UPIA. In many states, the grantor must do so expressly.[241] A multi-state analysis can therefore assist in interpreting the state's modified UPIA.

E. Modifications Impact Investing

Some of the modifications to the UPIA made by the state legislatures impact the manner in which trustees invest trust assets. Even though the UPIA is a default rule which grantors may modify in the trust agreement, the UPIA default rules impact investing.[242] Professors Schanzenbach and Sitkoff have demonstrated that a state's adoption of the UPIA increased the percentage of stocks held by institutional trustees in private trusts.[243] It is reasonable to assume that a state modified the UPIA in order to impact the manner in which trust assets are invested in that state. As set forth *supra* at Part I(D)(2), numerous states have relieved trustees from diversifying inception assets. Presumably, the legislatures in these states concluded that grantors owning concentrations would want their trustees to be relieved of any duty to diversify those concentrations.[244] In some instances, the concentration may represent a substantial portion and in a few cases nearly the entire trust. Retaining that concentration exposes the trust to uncompensated risk and prevents the trustee from minimizing firm-specific risk by investing in assets which are negatively correlated to the concentration.[245] Exempting trustees from the duty to diversify inception assets significantly

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241 *See supra* Part II(A).

242 Stewart E. Sterk, *Rethinking Trust Law Reform: How Prudent Is Modern Prudent Investor Doctrine?*, 95 CORNELL L. REV. 851, 893 (2010).

243 Max M. Schanzenbach & Robert H. Sitkoff, *Did Reform of Prudent Trust Investment Laws Change Trust Portfolio Allocation?* 50 J.L. & ECON. 681 (2007); In his article, Martin D. Begleiter discusses a study he conducted in which he submitted a survey to 239 trust departments in Iowa after that state's adoption of modern investment statute in 1992. Begleiter concluded that "the surveys indicate, that, in regard to personal trusts, corporate trustees under the Iowa intermediate statute do use modern financial theory to formulate trust investment portfolios, but a significant percentage of the respondents remain concerned about liability for using new investment vehicles and techniques." Martin D. Begleiter, *Does the Prudent Investor Need the Uniform Prudent Investor Act –An Emprical Study of Trust Investment Practices*, 51 ME. L. REV. 27, 30 (1999). Bevis Longstreth notes "specific authorization in the trust instrument to invest in certain innovative or novel forms of investment are apparently frequently ignored by trustees unless the investment category is otherwise generally accepted," LONGSTRETH, *supra* note 5, at 17.

244 "[S]tatutory provisions aim to effect the unexpressed intention of the settlor. . ." *Statutory Specification of Trustees' Investments*, 49 HARV. L. REV. 821 n.1 (1936) [hereinafter *Statutory Specification*].

245 Neils Bekkers, Ronald Q. Doeswijk & Trevin W. Lam, *Strategic Asset Allocation: Determining the Optimal Portfolio with Ten Asset Classes*, 12 J. WEALTH MGMT. 61, 67 (2009). For an excellent discussion of how stocks with different correlations reduce risk,

impacts the manner in which the trust assets are invested. Many of the other changes discussed in this article, made by the states such as Montana which has carved out a special provision for certain assets, impact trust investing.[246] To date, no study has been published which examines whether the state modifications discussed herein actually impact investing. Thus, at the present time, we are left with theories and our own personal observations.

F. Modifications Impact Litigation

Although the UPIA is a default rule which the grantor can modify, it establishes a legal norm which frames the level of care required by a trustee.[247] As examined *supra* at Part II(B), several states have modified the UPIA to alter the standard of care required under certain circumstances.[248]

IV. Recommendations

During the last quarter-century, a revolution has occurred in trust investment law. All of the states and the District of Columbia have enacted legislation incorporating modern portfolio theory into the law. While the UPIA has brought a degree of consistency, numerous states have modified the UPIA and some of those modifications substantially impact the manner in which trust assets are invested. Looking forward, the legislators in Alabama may wish to consider initiating an amendment to their constitution to eliminate their anachronistic investment prohibition. The legislators in the five states that give preference for inception assets may wish to revisit the preference given to these assets and if they wish to retain the preference they may wish to clarify whether the preference should only be given to grantor owned assets.[249] Legislators in Florida, Illinois and Maryland should reconsider whether the business judgment standard is the appropriate standard in a trust context.[250] The legislators in the eight states which have modified UPIA § 2(c) by shifting the standard from "shall" to "may" should consider returning to a mandatory requirement.[251] Kentucky and Maryland

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see Edward A. Moses, J. Clay Singleton & Stewart A. Marshall III, *Modern Portfolio Theory and the Prudent Investor Act*, 30 ACTEC J. 166 (2004).

246 *See supra* Part I(D)(3)(a).

247 Sterk, *supra* note 242, at 893

248 Legislatures have a long history of enacting statutes which modify the standard of care established by the common law. For example, in part, legal lists were enacted to provide security to trustees from surcharge actions. *See Statutory Specification*, *supra* note 244, at 824-25.

249 *See supra* Part I(D)(2).

250 *See supra* note 178 and accompanying text.

251 *See supra* note 182 and accompanying text.

may wish to apply the UPIA to individual trustees.[252] The Uniform Law Commission may wish to consider the complexities involving life insurance held by trustees. Arguably, some type of reform is needed since one-fifth of the states have enacted legislation addressing the issue.[253] All of the legislatures, except Colorado's which has adopted the UPIA without modification, may wish to revisit their version of the UPIA to see if their modifications are still consistent with their original intended purposes. The legislatures should refrain from making unnecessary editorial changes which may unintentionally and adversely impact trust investing. Arguably, the desire for uniformity should not trump the rich diversity of our individual states; however, legislatures should carefully consider the full ramifications of deviating from the uniform statute and if they wish to do so, carefully consider the impact even small changes have on the overall statute.

While substantial diversity does exist across the United States, it can be said, with a few notable exceptions, that trustees in the United States must invest in accordance with modern investment principles.

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252 *See supra* notes 65-67 and accompanying text.

253 *See supra* Part I(D)(3)(b).