

THE UNIFORM PRUDENT INVESTOR ACT OF TEXAS

As Enacted by the 78th Texas Legislature (2003)

Effective January 1, 2004

**With the Official Comments of
The National Conference of Commissioners on Uniform State Laws
and
The Real Estate, Probate and Trust Law Section
of the State Bar of Texas**

The comments and prefatory note to the Uniform Prudent Investor Act are copyrighted
© 1994 by the National Conference of Commissioners on Uniform State Laws. Used with permission.

**And With the Comments, Observations and Suggestions of
Glenn M. Karisch
Barnes & Karisch, P. C.
2901-D Bee Caves Road
Austin, Texas 78746
(512) 328-8355
FAX (512) 328-8413
www.texasprobate.com**

© 2003 by Glenn M. Karisch

Table of Contents

INTRODUCTION	5
UNIFORM ACT PREFATORY NOTE	6
TEXAS TRUST CODE CHAPTER 117. UNIFORM PRUDENT INVESTOR ACT	9
Sec. 117.001. SHORT TITLE.	9
Sec. 117.002. UNIFORMITY OF APPLICATION AND CONSTRUCTION.	9
Sec. 117.003. PRUDENT INVESTOR RULE.	9
Sec. 117.004. STANDARD OF CARE; PORTFOLIO STRATEGY; RISK AND RETURN OBJECTIVES.	10
Sec. 117.005. DIVERSIFICATION.	14
Sec. 117.006. DUTIES AT INCEPTION OF TRUSTEESHIP.	17
Sec. 117.007. LOYALTY.	18
Sec. 117.008. IMPARTIALITY.	19
Sec. 117.009. INVESTMENT COSTS.	20
Sec. 117.010. REVIEWING COMPLIANCE.	20
Sec. 117.011. DELEGATION OF INVESTMENT AND MANAGEMENT FUNCTIONS.	21
Sec. 117.012. LANGUAGE INVOKING STANDARD OF CHAPTER.	26
EFFECTIVE DATE PROVISION	29

INTRODUCTION

The 78th Texas Legislature enacted a Texas version of the Uniform Prudent Investor Act of 1994. HB 2240 becomes effective January 1, 2004. This legislation was part of the 2003 legislative package of the Real Estate, Probate and Trust Law Section of the State Bar of Texas. The Section studied three uniform acts promulgated by the National Conference of Commissioners on Uniform State Laws (NCCUSL) – the Uniform Prudent Investor Act of 1994, the Uniform Principal and Income Act of 1997 and the Uniform Trust Code of 2000 – for more than two years. The Section urged the adoption of Texas versions of two of those acts – Prudent Investor and Principal and Income – in 2003, and both were enacted into law.

Following are the provisions of the Uniform Prudent Investor Act of 1994 (the “Act”) as enacted in Texas, the official NCCUSL notes and comments to the Act and each section of the Act (identified as “Uniform Act Notes” or “Uniform Act Comments”) and the official comments of the Real Estate, Probate and Trust Law Section of the State Bar of Texas (the “Section”) on the Texas variations of the Act (identified as “Texas Bar Comments”).

Also included are the section-by-section comments, observations and suggestions of Glenn M. Karisch. Glenn was the chair of the Trust Code Committee in 2001 – 2003, while the Uniform Prudent Investor Act was being studied by the Section. Glenn’s comments are contained in boxes and italicized.

UNIFORM ACT PREFATORY NOTE

Over the quarter century from the late 1960's the investment practices of fiduciaries experienced significant change. The Uniform Prudent Investor Act (UPIA) undertakes to update trust investment law in recognition of the alterations that have occurred in investment practice. These changes have occurred under the influence of a large and broadly accepted body of empirical and theoretical knowledge about the behavior of capital markets, often described as "modern portfolio theory."

This Act draws upon the revised standards for prudent trust investment promulgated by the American Law Institute in its Restatement (Third) of Trusts: Prudent Investor Rule (1992) [hereinafter Restatement of Trusts 3d: Prudent Investor Rule; also referred to as 1992 Restatement].

Objectives of the Act. UPIA makes five fundamental alterations in the former criteria for prudent investing. All are to be found in the Restatement of Trusts 3d: Prudent Investor Rule.

(1) The standard of prudence is applied to any investment as part of the total portfolio, rather than to individual investments. In the trust setting the term "portfolio" embraces all the trust's assets. UPIA § 2(b) [Texas Trust Code § 117.004(b)].

(2) The tradeoff in all investing between risk and return is identified as the fiduciary's central consideration. UPIA § 2(b) [Texas Trust Code § 117.004(b)].

(3) All categorical restrictions on types of investments have been abrogated; the trustee can invest in anything that plays an appropriate role in achieving the risk/return objectives of the trust and that meets the other requirements of prudent investing. UPIA § 2(e) [Texas Trust Code § 117.004(e)].

(4) The long familiar requirement that fiduciaries diversify their investments has been integrated into the definition of prudent investing. UPIA § 3 [Texas Trust Code § 117.005].

(5) The much criticized former rule of trust law forbidding the trustee to delegate investment and management functions has been reversed. Delegation is now permitted, subject to safeguards. UPIA § 9 [Texas Trust Code § 117.011].

Literature. These changes in trust investment law have been presaged in an extensive body of practical and scholarly writing. See especially the discussion and reporter's notes by Edward C. Halbach, Jr., in Restatement of Trusts 3d: Prudent Investor Rule (1992); see also Edward C. Halbach, Jr., Trust Investment Law in the Third Restatement, 27 Real Property, Probate & Trust J. 407 (1992); Bevis Longstreth, Modern Investment Management and the Prudent Man Rule (1986); Jeffrey N. Gordon, The Puzzling Persistence of the Constrained Prudent Man Rule, 62 N.Y.U.L. Rev. 52 (1987); John H. Langbein & Richard A. Posner, The Revolution in Trust Investment Law, 62 A.B.A.J. 887 (1976); Note, The Regulation of Risky Investments, 83 Harvard L. Rev. 603 (1970). A succinct account of the main findings of modern portfolio theory, written for lawyers, is Jonathan R. Macey, An Introduction to Modern Financial Theory (1991) (American College of Trust & Estate Counsel Foundation). A leading introductory text on modern portfolio theory is R.A. Brealey, An Introduction to Risk and Return from Common Stocks (2d ed. 1983).

Legislation. Most states have legislation governing trust-investment law. This Act promotes uniformity of state law on the basis of the new consensus reflected in the Restatement of Trusts 3d: Prudent Investor Rule. Some states have already acted. California, Delaware, Georgia, Minnesota, Tennessee, and Washington revised their prudent investor legislation to emphasize the total-portfolio standard of care in advance of the 1992 Restatement. These statutes are extracted and discussed in Restatement of Trusts 3d: Prudent Investor Rule § 227, reporter’s note, at 60-66 (1992).

Drafters in Illinois in 1991 worked from the April 1990 “Proposed Final Draft” of the Restatement of Trusts 3d: Prudent Investor Rule and enacted legislation that is closely modeled on the new Restatement. 760 ILCS § 5/5 (prudent investing); and § 5/5.1 (delegation) (1992). As the Comments to this Uniform Prudent Investor Act reflect, the Act draws upon the Illinois statute in several sections. Virginia revised its prudent investor act in a similar vein in 1992. Virginia Code § 26-45.1 (prudent investing) (1992). Florida revised its statute in 1993. Florida Laws, ch. 93-257, amending Florida Statutes § 518.11 (prudent investing) and creating § 518.112 (delegation). New York legislation drawing on the new Restatement and on a preliminary version of this Uniform Prudent Investor Act was enacted in 1994. N.Y. Assembly Bill 11683-B, Ch. 609 (1994), adding Estates, Powers and Trusts Law § 11-2.3 (Prudent Investor Act).

Remedies. This Act does not undertake to address issues of remedy law or the computation of damages in trust matters. Remedies are the subject of a reasonably distinct body of doctrine. See generally Restatement (Second) of Trusts §§ 197-226A (1959) [hereinafter cited as Restatement of Trusts 2d; also referred to as 1959 Restatement].

Implications for charitable and pension trusts. This Act is centrally concerned with the investment responsibilities arising under the private gratuitous trust, which is the common vehicle for conditioned wealth transfer within the family. Nevertheless, the prudent investor rule also bears on charitable and pension trusts, among others. “In making investments of trust funds the trustee of a charitable trust is under a duty similar to that of the trustee of a private trust.” Restatement of Trusts 2d § 389 (1959). The Employee Retirement Income Security Act (ERISA), the federal regulatory scheme for pension trusts enacted in 1974, absorbs trust-investment law through the prudence standard of ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a). The Supreme Court has said: “ERISA’s legislative history confirms that the Act’s fiduciary responsibility provisions ‘codif[y] and mak[e] applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts.’” *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110-11 (1989) (footnote omitted).

Other fiduciary relationships. The Uniform Prudent Investor Act regulates the investment responsibilities of trustees. Other fiduciaries – such as executors, conservators, and guardians of the property – sometimes have responsibilities over assets that are governed by the standards of prudent investment. It will often be appropriate for states to adapt the law governing investment by trustees under this Act to these other fiduciary regimes, taking account of such changed circumstances as the relatively short duration of most executorships and the intensity of court supervision of conservators and guardians in some jurisdictions. The present Act does not undertake to adjust trust-investment law to the special circumstances of the state schemes for administering decedents’ estates or conducting the affairs of protected persons.

Although the Uniform Prudent Investor Act by its terms applies to trusts and not to charitable corporations, the standards of the Act can be expected to inform the investment responsibilities of directors and officers of charitable corporations. As the 1992 Restatement observes, “the duties of the

members of the governing board of a charitable corporation are generally similar to the duties of the trustee of a charitable trust.” Restatement of Trusts 3d: Prudent Investor Rule § 379, Comment *b*, at 190 (1992). See also *id.* § 389, Comment *b*, at 190-91 (absent contrary statute or other provision, prudent investor rule applies to investment of funds held for charitable corporations).

TEXAS TRUST CODE CHAPTER 117. UNIFORM PRUDENT INVESTOR ACT

Sec. 117.001. SHORT TITLE. This chapter may be cited as the "Uniform Prudent Investor Act."

Sec. 117.002. UNIFORMITY OF APPLICATION AND CONSTRUCTION. This chapter shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among the states enacting it.

Sec. 117.003. PRUDENT INVESTOR RULE. (a) Except as otherwise provided in Subsection (b), a trustee who invests and manages trust assets owes a duty to the beneficiaries of the trust to comply with the prudent investor rule set forth in this chapter.

(b) The prudent investor rule, a default rule, may be expanded, restricted, eliminated, or otherwise altered by the provisions of a trust. A trustee is not liable to a beneficiary to the extent that the trustee acted in reasonable reliance on the provisions of the trust.

It is important to remember that the prudent investor rule is a default rule which can be overridden in the trust instrument. However, it may take more to override the rule that one might normally think. See Texas Trust Code §117.012 and the comments thereto, below.

Uniform Act Comment

This section imposes the obligation of prudence in the conduct of investment functions and identifies further sections of the Act that specify the attributes of prudent conduct.

Origins. The prudence standard for trust investing traces back to *Harvard College v. Amory*, 26 Mass. (9 Pick.) 446 (1830). Trustees should “observe how men of prudence, discretion and intelligence 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.” *Id.* at 461.

Prior legislation. The Model Prudent Man Rule Statute (1942), sponsored by the American Bankers Association, undertook to codify the language of the *Amory* case. See Mayo A. Shattuck, *The Development of the Prudent Man Rule for Fiduciary Investment in the United States in the Twentieth Century*, 12 Ohio State L.J. 491, at 501 (1951); for the text of the model act, which inspired many state statutes, see *id.* at 508-09. Another prominent codification of the *Amory* standard is Uniform Probate Code § 7-302 (1969), which provides that “the trustee shall observe the standards in dealing with the trust assets that would be observed by a prudent man dealing with the property of another”

Congress has imposed a comparable prudence standard for the administration of pension and employee benefit trusts in the Employee Retirement Income Security Act (ERISA), enacted in 1974.

ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a), provides that “a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims”

Prior Restatement. The Restatement of Trusts 2d (1959) also tracked the language of the *Amory* case: “In making investments of trust funds the trustee is under a duty to the beneficiary . . . to make such investments and only such investments as a prudent man would make of his own property having in view the preservation of the estate and the amount and regularity of the income to be derived” Restatement of Trusts 2d § 227 (1959).

Objective standard. The concept of prudence in the judicial opinions and legislation is essentially relational or comparative. It resembles in this respect the “reasonable person” rule of tort law. A prudent trustee behaves as other trustees similarly situated would behave. The standard is, therefore, objective rather than subjective. Sections 2 through 9 of this Act [Texas Trust Code §§117.004 – 117.011] identify the main factors that bear on prudent investment behavior.

Variation. Almost all of the rules of trust law are default rules, that is, rules that the settlor may alter or abrogate. Subsection (b) carries forward this traditional attribute of trust law. Traditional trust law also allows the beneficiaries of the trust to excuse its performance, when they are all capable and not misinformed. Restatement of Trusts 2d § 216 (1959).

Texas Bar Comment

Adoption of the prudent investor rule reflects a significant departure from prior Texas law. The prudent investor rule is the majority rule among the states, so its adoption brings Texas in line with the national trend.

Sec. 117.004. STANDARD OF CARE; PORTFOLIO STRATEGY; RISK AND RETURN OBJECTIVES. (a) A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

(b) 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.

(c) 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 and intangible 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; and
 - (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.
- (d) A trustee shall make a reasonable effort to verify facts relevant to the investment and management of trust assets.
- (e) Except as otherwise provided by and subject to this subtitle, a trustee may invest in any kind of property or type of investment consistent with the standards of this chapter.
- (f) A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee's representation that the trustee has special skills or expertise, has a duty to use those special skills or expertise.

This section states the heart of the prudent investor rule. Note that the factors to be considered by the trustee are broad. This section and the sections that follow clearly place a burden on the trustee to investigate many factors affecting the trust and its investments and to make necessary changes. Note also that a trustee who has special skills or experience or is named trustee in reliance upon the trustee's representation that the trustee has special skills and expertise, has a duty to use those special skills and expertise. Thus, corporate trustees will be held to a higher standard than most nonprofessional trustees.

Uniform Act Comment

Section 2 [Texas Trust Code §117.004] is the heart of the Act. Subsections (a), (b), and (c) are patterned loosely on the language of the Restatement of Trusts 3d: Prudent Investor Rule § 227 (1992), and on the 1991 Illinois statute, 760 § ILCS 5/5a (1992). Subsection (f) is derived from Uniform Probate

Code § 7-302 (1969).

Objective standard. Subsection (a) of this Act carries forward the relational and objective standard made familiar in the *Amory* case, in earlier prudent investor legislation, and in the Restatements. Early formulations of the prudent person rule were sometimes troubled by the effort to distinguish between the standard of a prudent person investing for another and investing on his or her own account. The language of subsection (a), by relating the trustee's duty to "the purposes, terms, distribution requirements, and other circumstances of the trust," should put such questions to rest. The standard is the standard of the prudent investor similarly situated.

Portfolio standard. Subsection (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. In the trust setting the term "portfolio" embraces the entire trust estate.

Risk and return. Subsection (b) also sounds the main theme of modern investment practice, sensitivity to the risk/return curve. See generally the works cited in the Prefatory Note to this Act, under "Literature." 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. A trust whose main purpose is to support an elderly widow of modest means will have a lower risk tolerance than a trust to accumulate for a young scion of great wealth.

Subsection (b) of this Act follows Restatement of Trusts 3d: Prudent Investor Rule § 227(a), which provides that the standard of prudent investing "requires the exercise of reasonable care, skill, and caution, and is to be applied to investments not in isolation but in the context of the trust portfolio and as a part of an overall investment strategy, which should incorporate risk and return objectives reasonably suitable to the trust."

Factors affecting investment. Subsection (c) points to certain of the factors that commonly bear on risk/return preferences in fiduciary investing. This listing is nonexclusive. Tax considerations, such as preserving the stepped up basis on death under Internal Revenue Code § 1014 for low-basis assets, have traditionally been exceptionally important in estate planning for affluent persons. Under the present recognition rules of the federal income tax, taxable investors, including trust beneficiaries, are in general best served by an investment strategy that minimizes the taxation incident to portfolio turnover. See generally Robert H. Jeffrey & Robert D. Arnott, *Is Your Alpha Big Enough to Cover Its Taxes?*, *Journal of Portfolio Management* 15 (Spring 1993).

Another familiar example of how tax considerations bear upon trust investing: In a regime of pass-through taxation, it may be prudent for the trust to buy lower yielding tax-exempt securities for high-bracket taxpayers, whereas it would ordinarily be imprudent for the trustees of a charitable trust, whose income is tax exempt, to accept the lowered yields associated with tax-exempt securities.

When tax considerations affect beneficiaries differently, the trustee's duty of impartiality requires attention to the competing interests of each of them.

Subsection (c)(8), allowing the trustee to take into account any preferences of the beneficiaries respecting heirlooms or other prized assets, derives from the Illinois act, 760 ILCS § 5/5(a)(4) (1992).

Duty to monitor. Subsections (a) through (d) apply both to investing and managing trust assets. “Managing” embraces monitoring, that is, the trustee’s continuing responsibility for oversight of the suitability of investments already made as well as the trustee’s decisions respecting new investments.

Duty to investigate. 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. E.g., *Estate of Collins*, 72 Cal. App. 3d 663, 139 Cal. Rptr. 644 (1977) (trustees lent on a junior mortgage on unimproved real estate, failed to have land appraised, and accepted an unaudited financial statement; held liable for losses).

Abrogating categoric restrictions. Subsection 2(e) [Texas Trust Code §117.004(e)] clarifies that no particular kind of property or type of investment is inherently imprudent. Traditional trust law was encumbered with a variety of categoric exclusions, such as prohibitions on junior mortgages or new ventures. In some states legislation created so-called “legal lists” of approved trust investments. The universe of investment products changes incessantly. Investments that were at one time thought too risky, such as equities, or more recently, futures, are now used in fiduciary portfolios. By contrast, the investment that was at one time thought ideal for trusts, the long-term bond, has been discovered to import a level of risk and volatility – in this case, inflation risk – that had not been anticipated. Accordingly, section 2(e) [Texas Trust Code §117.004(e)] of this Act follows Restatement of Trusts 3d: Prudent Investor Rule in abrogating categoric restrictions. The Restatement says: “Specific investments or techniques are not per se prudent or imprudent. The riskiness of a specific property, and thus the propriety of its inclusion in the trust estate, is not judged in the abstract but in terms of its anticipated effect on the particular trust’s portfolio.” Restatement of Trusts 3d: Prudent Investor Rule § 227, Comment f, at 24 (1992). The premise of subsection 2(e) [Texas Trust Code §117.004(e)] is that trust beneficiaries are better protected by the Act’s emphasis on close attention to risk/return objectives as prescribed in subsection 2(b) [Texas Trust Code §117.004(b)] than in attempts to identify categories of investment that are per se prudent or imprudent.

The Act impliedly disavows the emphasis in older law on avoiding “speculative” or “risky” investments. Low levels of risk may be appropriate in some trust settings but inappropriate in others. It is the trustee’s task to invest at a risk level that is suitable to the purposes of the trust.

The abolition of categoric restrictions against types of investment in no way alters the trustee’s conventional duty of loyalty, which is reiterated for the purposes of this Act in Section 5 [Texas Trust Code §117.007)]. For example, were the trustee to invest in a second mortgage on a piece of real property owned by the trustee, the investment would be wrongful on account of the trustee’s breach of the duty to abstain from self-dealing, even though the investment would no longer automatically offend the former categoric restriction against fiduciary investments in junior mortgages.

Professional fiduciaries. The distinction taken in subsection (f) between amateur and professional trustees is familiar law. The prudent investor standard applies to a range of fiduciaries, from the most sophisticated professional investment management firms and corporate fiduciaries, to family members of minimal experience. Because the standard of prudence is relational, it follows that the standard for professional trustees is the standard of prudent professionals; for amateurs, it is the standard of prudent amateurs. Restatement of Trusts 2d § 174 (1959) provides: “The trustee is under a duty to the beneficiary in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property; and if the trustee has or procures his appointment as trustee by representing that he has greater skill than that of a man of ordinary prudence, he is under a duty to

exercise such skill.” Case law strongly supports the concept of the higher standard of care for the trustee representing itself to be expert or professional. See Annot., Standard of Care Required of Trustee Representing Itself to Have Expert Knowledge or Skill, 91 A.L.R. 3d 904 (1979) & 1992 Supp. at 48-49.

The Drafting Committee declined the suggestion that the Act should create an exception to the prudent investor rule (or to the diversification requirement of Section 3 [Texas Trust Code §117.005]) in the case of smaller trusts. The Committee believes that subsections (b) and (c) of the Act emphasize factors that are sensitive to the traits of small trusts; and that subsection (f) adjusts helpfully for the distinction between professional and amateur trusteeship. Furthermore, it is always open to the settlor of a trust under Section 1(b) of the Act [Texas Trust Code §117.003(b)] to reduce the trustee’s standard of care if the settlor deems such a step appropriate. The official comments to the 1992 Restatement observe that pooled investments, such as mutual funds and bank common trust funds, are especially suitable for small trusts. Restatement of Trusts 3d: Prudent Investor Rule § 227, Comments *h, m*, at 28, 51; reporter’s note to Comment *g*, *id.* at 83.

Matters of proof. Although virtually all express trusts are created by written instrument, oral trusts are known, and accordingly, this Act presupposes no formal requirement that trust terms be in writing. When there is a written trust instrument, modern authority strongly favors allowing evidence extrinsic to the instrument to be consulted for the purpose of ascertaining the settlor’s intent. See Uniform Probate Code § 2-601 (1990), Comment; Restatement (Third) of Property: Donative Transfers (Preliminary Draft No. 2, ch. 11, Sept. 11, 1992).

Sec. 117.005. DIVERSIFICATION. 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.

This section and the one that follows creates a potential problem for trustees of trusts with concentrations of investments that violate prudent diversification standards. The Texas Trust Code used to provide some cover in that it permitted the trustee to retain an asset comprising a part of the initial trust estate without the need for diversification. That provision is gone and is replaced by an affirmative duty to diversify.

This may not be as big of a problem as it first appears to be, since many, if not most, trusts contain express provisions permitting retention of assets without diversification. For example, I found this provision in my boilerplate trust powers:

[The trustee shall have the power to] acquire, by purchase or otherwise, retain, invest, reinvest and manage, temporarily or permanently, any realty or personalty, without diversification as to kind, amount or risk of nonproductivity and without limitation by statute or rule of law.

That provision probably is sufficient to permit the trustee to retain a concentration of a particular trust investment, assuming that it is otherwise prudent to do so. Note, however, that if the trustee relies on a provision such as this to justify a lack of diversification, the trustee may not be "investing and managing the trust assets as a prudent investor" and, therefore, may not be able to use the adjustment power of Trust Code §116.005(a). Also note that, while this provision may override the default rule requiring diversification under Trust Code §117.005, it probably does not constitute a full

waiver or override of the Uniform Prudent Investor Act. In other words, it does not change the investment standard applicable to the trust, it just permits assets to be retained despite the statutory duty to diversify.

The concentration problem is likely to present itself in one of these situations:

- 1. So-called "Family Farm Trusts" -- trusts which are established primarily to hold title to real estate with the implicit purpose of keeping that real estate together. Unless the instrument provides specific authority for retaining the investment, how can the trustee balance keeping the real estate as the primary trust investment with its duty to diversify?*
- 2. Trusts holding substantial interests in closely-held businesses, oil and gas properties, etc. It may be clear to all concerned that the very purpose of the trust is to hold this property, but what does the trustee do if the trust instrument is silent?*
- 3. Trusts holding concentrated holdings in one publicly traded stock (usually the stock of the company that the settlor worked for). Perhaps the settlor has told the trustee and every family member, "never sell the Exxon-Mobil stock," but what does the trustee do if there is nothing in the trust instrument supporting this action?*
- 4. Irrevocable life insurance trusts (ILITs). Talk about a concentration problem! In an ILIT there probably is a single investment prior to the death of the insured -- a life insurance policy. What does the trustee do if the ILIT doesn't override the duty of diversification?*

In analyzing each of these cases, approach the problem in this way:

First, the trustee should consider diversifying if at all possible to comply with Trust Code §117.005 since this is, after all, the law. If this is impossible for political or other reasons, the trustee should consider the following strategies.

Second, see if there is anything in the trust instrument that provides support for keeping the trust invested the way it is invested. As noted above, many, if not most, trusts will contain provisions that give some relief.

Third, if there is nothing in the trust instrument, consider seeking a judicial modification of the trust under Trust Code §112.054. Under that statute, a trust may be modified by court action if, because of circumstances not known to or anticipated by the settlor, compliance with the terms of the trust would defeat or substantially impair the purposes of the trust. In a happy family situation, it may be possible to secure affidavits from all adult beneficiaries and obtain a judicial modification of the trust for a relatively low cost. This gives the trustee the greatest protection from later claims based on a lack of diversification.

Fourth, if a judicial modification is not possible, consider obtaining waivers and releases from adult beneficiaries. Under Trust Code §114.032, this release may even be binding on minor or unascertained beneficiaries in some cases. However, the release is only binding if the beneficiary had "full knowledge," and it may be difficult for the trustee to persuade a jury after the fact that its disclosure supporting the release was adequate. For this reason, this method does not provide the

protection for the trustee that the judicial modification method described above provides.

Fifth, the trustee should see if there are any provisions of the Trust Code which provide protection for the concentration. For example, under Trust Code §117.004(c), the trustee is required to consider many factors in deciding how to invest the trust, including "an asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries." Perhaps this provides some basis for retaining the concentrated investment.

However the trustee decides to handle the concentration issue, it should document its actions and decision-making process. The trustee shouldn't put themselves into a position of defending a lawsuit over a loss due to lack of diversification by saying, "well, we wanted to sell the _____, but the family asked us not to, so we didn't do it."

Uniform Act Comment

The language of this section derives from Restatement of Trusts 2d § 228 (1959). ERISA insists upon a comparable rule for pension trusts. ERISA § 404(a)(1)(C), 29 U.S.C. § 1104(a)(1)(C). Case law overwhelmingly supports the duty to diversify. See Annot., 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.

The 1992 Restatement of Trusts takes the significant step of integrating the diversification requirement into the concept of prudent investing. Section 227(b) of the 1992 Restatement treats diversification as one of the fundamental elements of prudent investing, replacing the separate section 228 of the Restatement of Trusts 2d. The message of the 1992 Restatement, carried forward in Section 3 of this Act, is that prudent investing ordinarily requires diversification.

Circumstances can, however, overcome the duty to diversify. For example, if a tax-sensitive trust owns an underdiversified block of low-basis securities, the tax costs of recognizing the gain may outweigh the advantages of diversifying the holding. The wish to retain a family business is another situation in which the purposes of the trust sometimes override the conventional duty to diversify.

Rationale for diversification. "Diversification reduces risk . . . [because] stock price movements are not uniform. They are imperfectly correlated. This means that if one holds a well diversified portfolio, the gains in one investment will cancel out the losses in another." Jonathan R. Macey, *An Introduction to Modern Financial Theory* 20 (American College of Trust and Estate Counsel Foundation, 1991). For example, during the Arab oil embargo of 1973, international oil stocks suffered declines, but the shares of domestic oil producers and coal companies benefitted. Holding a broad enough portfolio allowed the investor to set off, to some extent, the losses associated with the embargo.

Modern portfolio theory divides risk into the categories of "compensated" and "uncompensated" risk. The risk of owning shares in a mature and well-managed company in a settled industry is less than the risk of owning shares in a start-up high-technology venture. The investor requires a higher expected return to induce the investor to bear the greater risk of disappointment associated with the start-up firm. This is compensated risk – the firm pays the investor for bearing the risk. By contrast, nobody pays the investor for owning too few stocks. The investor who owned only international oils in 1973 was running a risk that could have been reduced by having configured the portfolio differently – to include

investments in different industries. This is uncompensated risk – nobody pays the investor for owning shares in too few industries and too few companies. Risk that can be eliminated by adding different stocks (or bonds) is uncompensated risk. The object of diversification is to minimize this uncompensated risk of having too few investments. “As long as stock prices do not move exactly together, the risk of a diversified portfolio will be less than the average risk of the separate holdings.” R.A. Brealey, *An Introduction to Risk and Return from Common Stocks* 103 (2d ed. 1983).

There is no automatic rule for identifying how much diversification is enough. The 1992 Restatement says: “Significant diversification advantages can be achieved with a small number of well-selected securities representing different industries Broader diversification is usually to be preferred in trust investing,” and pooled investment vehicles “make thorough diversification practical for most trustees.” Restatement of Trusts 3d: Prudent Investor Rule § 227, General Note on Comments *e-h*, at 77 (1992). See also Macey, *supra*, at 23-24; Brealey, *supra*, at 111-13.

Diversifying by pooling. It is difficult for a small trust fund to diversify thoroughly by constructing its own portfolio of individually selected investments. Transaction costs such as the round-lot (100 share) trading economies make it relatively expensive for a small investor to assemble a broad enough portfolio to minimize uncompensated risk. For this reason, pooled investment vehicles have become the main mechanism for facilitating diversification for the investment needs of smaller trusts.

Most states have legislation authorizing common trust funds; see 3 Austin W. Scott & William F. Fratcher, *The Law of Trusts* § 227.9, at 463-65 n.26 (4th ed. 1988) (collecting citations to state statutes). As of 1992, 35 states and the District of Columbia had enacted the Uniform Common Trust Fund Act (UCTFA) (1938), overcoming the rule against commingling trust assets and expressly enabling banks and trust companies to establish common trust funds. 7 Uniform Laws Ann. 1992 Supp. at 130 (schedule of adopting states). The Prefatory Note to the UCTFA explains: “The purposes of such a common or joint investment fund are to diversify the investment of the several trusts and thus spread the risk of loss, and to make it easy to invest any amount of trust funds quickly and with a small amount of trouble.” 7 Uniform Laws Ann. 402 (1985).

Fiduciary investing in mutual funds. Trusts can also achieve diversification by investing in mutual funds. See Restatement of Trusts 3d: Prudent Investor Rule, § 227, Comment *m*, at 99-100 (1992) (endorsing trust investment in mutual funds). ERISA § 401(b)(1), 29 U.S.C. § 1101(b)(1), expressly authorizes pension trusts to invest in mutual funds, identified as securities “issued by an investment company registered under the Investment Company Act of 1940”

Sec. 117.006. DUTIES AT INCEPTION OF TRUSTEESHIP. 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 chapter.

Prior Texas law permitted a trustee to retain an asset that was part of the initial trust estate without diversification and without liability for loss or depreciation. Many practitioners believe that, notwithstanding this statute, a trustee (especially a corporate trustee) could be held liable for “riding” a particular investment into the ground.

Under the new law, unless the trust instrument expressly permits or requires the trustee to hold onto a particular asset, the trustee must review the assets in the trust at its inception and periodically thereafter and get rid of inappropriate assets.

Uniform Act Comment

Section 4 [Texas Trust Code §117.006], requiring the trustee to dispose of unsuitable assets within a reasonable time, is old law, codified in Restatement of Trusts 3d: Prudent Investor Rule § 229 (1992), lightly revising Restatement of Trusts 2d § 230 (1959). The duty extends as well to investments that were proper when purchased but subsequently become improper. Restatement of Trusts 2d § 231 (1959). The same standards apply to successor trustees, see Restatement of Trusts 2d § 196 (1959).

The question of what period of time is reasonable turns on the totality of factors affecting the asset and the trust. The 1959 Restatement took the view that “[o]rdinarily any time within a year is reasonable, but under some circumstances a year may be too long a time and under other circumstances a trustee is not liable although he fails to effect the conversion for more than a year.” Restatement of Trusts 2d § 230, comment *b* (1959). The 1992 Restatement retreated from this rule of thumb, saying, “No positive rule can be stated with respect to what constitutes a reasonable time for the sale or exchange of securities.” Restatement of Trusts 3d: Prudent Investor Rule § 229, comment *b* (1992).

The criteria and circumstances identified in Section 2 of this Act [Texas Trust Code §117.004] as bearing upon the prudence of decisions to invest and manage trust assets also pertain to the prudence of decisions to retain or dispose of inception assets under this section.

Texas Bar Comment

This section is a significant departure from prior Texas law, which allowed a trustee to retain the initial trust estate without diversification and without liability for loss or depreciation. See former Texas Property Code § 113.003. This change is consistent with the overall purpose and effect of the prudent investor rule.

Sec. 117.007. LOYALTY. A trustee shall invest and manage the trust assets solely in the interest of the beneficiaries.

There has always been a duty of loyalty under Texas law, but prior to the enactment of the Uniform Prudent Investor Act the duty was a common law duty. Now Texas’s statutes contain a general statement of the duty of loyalty.

Uniform Act Comment

The duty of loyalty is perhaps the most characteristic rule of trust law, requiring the trustee to act

exclusively for the beneficiaries, as opposed to acting for the trustee’s own interest or that of third parties. The language of Section 4 [*sic*] of this Act [Texas Trust Code §117.006] derives from Restatement of Trusts 3d: Prudent Investor Rule § 170 (1992), which makes minute changes in Restatement of Trusts 2d § 170 (1959).

The concept that the duty of prudence in trust administration, especially in investing and managing trust assets, entails adherence to the duty of loyalty is familiar. ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B), extracted in the Comment to Section 1 of this Act [Texas Trust Code §117.003], effectively merges the requirements of prudence and loyalty. A fiduciary cannot be prudent in the conduct of investment functions if the fiduciary is sacrificing the interests of the beneficiaries.

The duty of loyalty is not limited to settings entailing self-dealing or conflict of interest in which the trustee would benefit personally from the trust. “The trustee is under a duty to the beneficiary in administering the trust not to be guided by the interest of any third person. Thus, it is improper for the trustee to sell trust property to a third person for the purpose of benefitting the third person rather than the trust.” Restatement of Trusts 2d § 170, comment *q*, at 371 (1959).

No form of so-called “social investing” is consistent with the duty of loyalty if the investment activity entails sacrificing the interests of trust beneficiaries – for example, by accepting below-market returns – in favor of the interests of the persons supposedly benefitted by pursuing the particular social cause. See, e.g., John H. Langbein & Richard Posner, *Social Investing and the Law of Trusts*, 79 Michigan L. Rev. 72, 96-97 (1980) (collecting authority). For pension trust assets, see generally Ian D. Lanoff, *The Social Investment of Private Pension Plan Assets: May it Be Done Lawfully under ERISA?*, 31 Labor L.J. 387 (1980). Commentators supporting social investing tend to concede the overriding force of the duty of loyalty. They argue instead that particular schemes of social investing may not result in below-market returns. See, e.g., Marcia O’Brien Hylton, “Socially Responsible” Investing: Doing Good Versus Doing Well in an Inefficient Market, 42 American U.L. Rev. 1 (1992). In 1994 the Department of Labor issued an Interpretive Bulletin reviewing its prior analysis of social investing questions and reiterating that pension trust fiduciaries may invest only in conformity with the prudence and loyalty standards of ERISA §§ 403-404. Interpretive Bulletin 94-1, 59 Fed. Regis. 32606 (Jun. 22, 1994), to be codified as 29 CFR § 2509.94-1. The Bulletin reminds fiduciary investors that they are prohibited from “subordinat[ing] the interests of participants and beneficiaries in their retirement income to unrelated objectives.”

Sec. 117.008. IMPARTIALITY. If a trust has two or more beneficiaries, the trustee shall act impartially in investing and managing the trust assets, taking into account any differing interests of the beneficiaries.

There has always been a duty of impartiality under Texas law, but prior to the enactment of the Uniform Prudent Investor Act the duty was a common law duty. Now Texas’s statutes contain a general statement of the duty of impartiality. The Uniform Principal and Income Act also contains a duty of impartiality as it applies to the trustee’s decisions regarding allocation of receipts and disbursements between income and principal. See Texas Trust Code §116.004(b).

Uniform Act Comment

The duty of impartiality derives from the duty of loyalty. When the trustee owes duties to more than one beneficiary, loyalty requires the trustee to respect the interests of all the beneficiaries. Prudence in investing and administration requires the trustee to take account of the interests of all the beneficiaries for whom the trustee is acting, especially the conflicts between the interests of beneficiaries interested in income and those interested in principal.

The language of Section 6 [Texas Trust Code §117.008] derives from Restatement of Trusts 2d § 183 (1959); see also *id.*, § 232. Multiple beneficiaries may be beneficiaries in succession (such as life and remainder interests) or beneficiaries with simultaneous interests (as when the income interest in a trust is being divided among several beneficiaries).

The trustee's duty of impartiality commonly affects the conduct of investment and management functions in the sphere of principal and income allocations. This Act prescribes no regime for allocating receipts and expenses. The details of such allocations are commonly handled under specialized legislation, such as the Revised Uniform Principal and Income Act (1962) (which is presently under study by the Uniform Law Commission with a view toward further revision [*see* Texas Trust Code Chapter 116 – The Uniform Principal and Income Act]).

Sec. 117.009. INVESTMENT COSTS. In investing and managing trust assets, a trustee may only incur costs that are appropriate and reasonable in relation to the assets, the purposes of the trust, and the skills of the trustee.

Consideration of costs is made a part of the prudent investor rule. Thus, the trustee must be conscious of costs, and avail itself of cost-saving measures that are reasonable to employ, in order to comply with the prudent investor rule.

Uniform Act Comment

Wasting beneficiaries' money is imprudent. In devising and implementing strategies for the investment and management of trust assets, trustees are obliged to minimize costs.

The language of Section 7 [Texas Trust Code §117.009] derives from Restatement of Trusts 2d § 188 (1959). The Restatement of Trusts 3d says: "Concerns over compensation and other charges are not an obstacle to a reasonable course of action using mutual funds and other pooling arrangements, but they do require special attention by a trustee. . . . [I]t is important for trustees to make careful cost comparisons, particularly among similar products of a specific type being considered for a trust portfolio." Restatement of Trusts 3d: Prudent Investor Rule § 227, comment *m*, at 58 (1992).

Sec. 117.010. REVIEWING COMPLIANCE. 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.

Uniform Act Comment

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*.

Sec. 117.011. DELEGATION OF INVESTMENT AND MANAGEMENT FUNCTIONS. (a) A trustee may delegate investment and management functions that a prudent trustee of comparable skills could properly delegate under the circumstances. The trustee shall exercise reasonable care, skill, and caution in:

(1) selecting an agent;

(2) establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust; and

(3) periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation.

The delegation statute marks a significant departure from the common law and prior Texas statutory law. Under the common law, a trustee could use the services of an agent to handle investments, but the trustee remained liable to the trust and the beneficiaries for the actions of the agent. Section 117.011 permits a trustee meeting its requirements to delegate duties to an agent and avoid liability for the misdeeds of the agent.

Other subsections of Section 117.001 raise the bar on a trustee seeking to make a delegation and avoid liability for the misdeeds of the agent, but the threshold issues regarding delegation are stated in subsection (a): if the trustee fails to meet the requirements of subsection (a), then the rest of the requirements are immaterial.

Subsection (a) first permits a trustee to delegate only if a “prudent trustee of comparable skills could properly delegate under the circumstances.” Under the common law, no delegation by a trustee made it possible for a trustee to avoid liability, so if this phrase is read to mean “a prudent trustee subject to the common law,” it makes no sense. Therefore, it must mean that the skills of the trustee wishing to make the delegation has something to do with the ability of the trustee to avoid liability for the actions of the agent. For example, perhaps there are times where it would be prudent for an unskilled trustee to delegate when it would not be prudent for a skilled trustee to delegate, so only the unskilled trustee could avoid liability by delegating.

Subsection (a) then requires the trustee to “exercise reasonable care, skill, and caution” in:

1. Selecting the agent – This may require the trustee to evaluate several potential agents rather than picking the first one that comes along. It also may require the trustee to investigate the creditworthiness of the agent, its performance history, its safeguards against loss due to negligence, theft, etc., its insurance, etc.

2. *Establishing the scope and terms of the delegation – The scope and terms must be “consistent with the purposes and terms of the trust.” This may mean that the agent must agree to apply the standards imposed by the trust instrument, or it may only mean that the investment goals of the agent are consistent with the investment goals of the trust. This is an area ripe for litigation, especially if the effect of a delegation is to deny the trust beneficiaries recourse for mishandling the trust’s investments. A beneficiary might reasonably show that a trustee delegating to an agent who refuses (or is unable) to step into the trustee’s shoes and pay damages for its actions like the trustee would pay damages has failed to meet this requirement. One defense a trustee may make is that every possible agent required the same or similar terms, so the terms must have been reasonable or else delegation would be impossible.*

3. *Periodically reviewing the performance of the agent – The trustee cannot merely delegate and then stop watching what the agent does. Clearly a trustee will be better able to meet this requirement if it has in place procedures for periodic review of its agent.*

(b) In performing a delegated function, an agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation.

This is a significant change from prior Texas law. Under the prior delegation statute, the agent was required to agree to be subject to the Texas trust investment standard and to assume liability for a failure to follow that standard. Under subsection (b) the agent merely owes a duty to the trust to “exercise reasonable care to comply with the terms of the delegation.” Thus, if the agent is able to get the trustee to agree to delegation terms that fail to hold the agent to the trust’s standards, then the agent merely has to meet the terms of the delegation. One would hope that if the trustee fails to make the agent agree to meet the trust’s standards then the trustee would have failed to exercise reasonable care, skill, and caution in establishing the scope and terms of the delegation and, therefore, would fail to meet the requirements of subsection (a) above.

(c) A trustee who complies with the requirements of Subsection (a) is not liable to the beneficiaries or to the trust for the decisions or actions of the agent to whom the function was delegated, unless:

(1) the agent is an affiliate of the trustee; or

(2) under the terms of the delegation:

(A) the trustee or a beneficiary of the trust is required to arbitrate disputes with the agent; or

(B) the period for bringing an action by the trustee or a beneficiary of the trust with respect to an agent's actions is shortened from that which is applicable to trustees under the law of this state.

Everything in subsection (c) from the word “unless” on was added by the Texas legislature to the version of the Act promulgated by NCCUSL. These three additional requirements must be met in order for the trustee to avoid liability for the actions of the agent (note that they are cumulative of the requirements of subsection (a) and not in place of those requirements):

- 1. The agent must not be an affiliate of the trustee. The trustee may delegate to an affiliate, but the trustee remains liable for the actions of the affiliate.*
- 2. The delegation agreement must not require arbitration. The trustee may delegate to an agent which requires arbitration, but the trustee remains liable for the actions of the agent. Most brokerage firms insist on an arbitration provision in all but the largest cases. This means that banks and trust companies not requiring arbitration are at a competitive advantage in acting as investment agents for trustees.*
- 3. The delegation must not shorten the statute of limitations for claims regarding the agent’s actions from the four-year statute of limitations applicable to fiduciary claims. Again, the trustee may delegate to an agent whose delegation agreement shortens the statute of limitations, but the trustee remains liable for the actions of the agent.*

(d) By 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.

There was a similar provision in the prior Texas law. One would hope that this provision would cause an arbitration provision in a delegation agreement with a Texas trustee to be unenforceable. However, the agent may argue that it is subject to the jurisdiction of Texas courts, but that the court can’t really do anything about it because of the arbitration provision.

Uniform Act Comment

This section of the Act reverses the much-criticized rule that forbade trustees to delegate investment and management functions. The language of this section is derived from Restatement of Trusts 3d: Prudent Investor Rule § 171 (1992), discussed *infra*, and from the 1991 Illinois act, 760 ILCS § 5/5.1(b), (c) (1992).

Former law. The former nondelegation rule survived into the 1959 Restatement: “The trustee is under a duty to the beneficiary not to delegate to others the doing of acts which the trustee can reasonably be required personally to perform.” The rule put a premium on the frequently arbitrary task of distinguishing discretionary functions that were thought to be nondelegable from supposedly ministerial functions that the trustee was allowed to delegate. Restatement of Trusts 2d § 171 (1959).

The Restatement of Trusts 2d admitted in a comment that “There is not a clear-cut line dividing the acts which a trustee can properly delegate from those which he cannot properly delegate.” Instead, the comment directed attention to a list of factors that “may be of importance: (1) the amount of discretion involved; (2) the value and character of the property involved; (3) whether the property is

principal or income; (4) the proximity or remoteness of the subject matter of the trust; (5) the character of the act as one involving professional skill or facilities possessed or not possessed by the trustee himself.” Restatement of Trusts 2d § 171, comment *d* (1959). The 1959 Restatement further said: “A trustee cannot properly delegate to another power to select investments.” Restatement of Trusts 2d § 171, comment *h* (1959).

For discussion and criticism of the former rule see William L. Cary & Craig B. Bright, *The Delegation of Investment Responsibility for Endowment Funds*, 74 *Columbia L. Rev.* 207 (1974); John H. Langbein & Richard A. Posner, *Market Funds and Trust-Investment Law*, 1976 *American Bar Foundation Research J.* 1, 18-24.

The modern trend to favor delegation. The trend of subsequent legislation, culminating in the Restatement of Trusts 3d: Prudent Investor Rule, has been strongly hostile to the nondelegation rule. See John H. Langbein, *Reversing the Nondelegation Rule of Trust-Investment Law*, 59 *Missouri L. Rev.* 105 (1994).

The delegation rule of the Uniform Trustee Powers Act. The Uniform Trustee Powers Act (1964) effectively abrogates the nondelegation rule. It authorizes trustees “to employ persons, including attorneys, auditors, investment advisors, or agents, even if they are associated with the trustee, to advise or assist the trustee in the performance of his administrative duties; to act without independent investigation upon their recommendations; and instead of acting personally, to employ one or more agents to perform any act of administration, whether or not discretionary” Uniform Trustee Powers Act § 3(24), 7B *Uniform Laws Ann.* 743 (1985). The Act has been enacted in 16 states, see “Record of Passage of Uniform and Model Acts as of September 30, 1993,” 1993-94 *Reference Book of Uniform Law Commissioners* (unpaginated, following page 111) (1993).

UMIFA’s delegation rule. The Uniform Management of Institutional Funds Act (1972) (UMIFA), authorizes the governing boards of eleemosynary institutions, who are trustee-like fiduciaries, to delegate investment matters either to a committee of the board or to outside investment advisors, investment counsel, managers, banks, or trust companies. UMIFA § 5, 7A *Uniform Laws Ann.* 705 (1985). UMIFA has been enacted in 38 states, see “Record of Passage of Uniform and Model Acts as of September 30, 1993,” 1993-94 *Reference Book of Uniform Law Commissioners* (unpaginated, following page 111) (1993).

ERISA’s delegation rule. The Employee Retirement Income Security Act of 1974, the federal statute that prescribes fiduciary standards for investing the assets of pension and employee benefit plans, allows a pension or employee benefit plan to provide that “authority to manage, acquire or dispose of assets of the plan is delegated to one or more investment managers” ERISA § 403(a)(2), 29 U.S.C. § 1103(a)(2). Commentators have explained the rationale for ERISA’s encouragement of delegation:

ERISA . . . invites the dissolution of unitary trusteeship. . . . ERISA’s fractionation of traditional trusteeship reflects the complexity of the modern pension trust. Because millions, even billions of dollars can be involved, great care is required in investing and safekeeping plan assets. Administering such plans—computing and honoring benefit entitlements across decades of employment and retirement—is also a complex business. . . . Since, however, neither the sponsor nor any other single entity has a comparative advantage in performing all these functions, the tendency has been for pension plans to use a variety of specialized providers. A consulting actuary, a plan administration firm, or an insurance company may oversee the

design of a plan and arrange for processing benefit claims. Investment industry professionals manage the portfolio (the largest plans spread their pension investments among dozens of money management firms).

John H. Langbein & Bruce A. Wolk, *Pension and Employee Benefit Law* 496 (1990).

The delegation rule of the 1992 Restatement. The Restatement of Trusts 3d: Prudent Investor Rule (1992) repeals the nondelegation rule of Restatement of Trusts 2d § 171 (1959), extracted supra, and replaces it with substitute text that reads:

§ 171. Duty with Respect to Delegation. A trustee has a duty personally to perform the responsibilities of trusteeship except as a prudent person might delegate those responsibilities to others. In deciding whether, to whom, and in what manner to delegate fiduciary authority in the administration of a trust, and thereafter in supervising agents, the trustee is under a duty to the beneficiaries to exercise fiduciary discretion and to act as a prudent person would act in similar circumstances.

Restatement of Trusts 3d: Prudent Investor Rule § 171 (1992). The 1992 Restatement integrates this delegation standard into the prudent investor rule of section 227, providing that “the trustee must . . . act with prudence in deciding whether and how to delegate to others” Restatement of Trusts 3d: Prudent Investor Rule § 227(c) (1992).

Protecting the beneficiary against unreasonable delegation. There is an intrinsic tension in trust law between granting trustees broad powers that facilitate flexible and efficient trust administration, on the one hand, and protecting trust beneficiaries from the misuse of such powers on the other hand. A broad set of trustees’ powers, such as those found in most lawyer-drafted instruments and exemplified in the Uniform Trustees’ Powers Act, permits the trustee to act vigorously and expeditiously to maximize the interests of the beneficiaries in a variety of transactions and administrative settings. Trust law relies upon the duties of loyalty and prudent administration, and upon procedural safeguards such as periodic accounting and the availability of judicial oversight, to prevent the misuse of these powers. Delegation, which is a species of trustee power, raises the same tension. If the trustee delegates effectively, the beneficiaries obtain the advantage of the agent’s specialized investment skills or whatever other attributes induced the trustee to delegate. But if the trustee delegates to a knave or an incompetent, the delegation can work harm upon the beneficiaries.

Section 9 of the Uniform Prudent Investor Act [Texas Trust Code §117.011] is designed to strike the appropriate balance between the advantages and the hazards of delegation. Section 9 [Texas Trust Code §117.011] authorizes delegation under the limitations of subsections (a) and (b). Section 9(a) [Texas Trust Code §117.011(a)] imposes duties of care, skill, and caution on the trustee in selecting the agent, in establishing the terms of the delegation, and in reviewing the agent’s compliance.

The trustee’s duties of care, skill, and caution in framing the terms of the delegation 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. 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, e.g., ERISA §§ 404(a)(1)(D), 410(a), 29

U.S.C. §§ 1104(a)(1)(D), 1110(a); New York Est. Powers Trusts Law § 11-1.7 (McKinney 1967).

Although subsection (c) of the Act exonerates the trustee from personal responsibility for the agent's conduct when the delegation satisfies the standards of subsection 9(a) [Texas Trust Code §117.011(a)], subsection 9(b) [Texas Trust Code §117.011(b)] makes the agent responsible to the trust. The beneficiaries of the trust can, therefore, rely upon the trustee to enforce the terms of the delegation. [Also see Texas Bar Comment below regarding additional safeguards in the Texas version of this section.]

Costs. The duty to minimize costs that is articulated in Section 7 of this Act [Texas Trust Code §117.009] applies to delegation as well as to other aspects of fiduciary investing. In deciding whether to delegate, the trustee must balance the projected benefits against the likely costs. Similarly, in deciding how to delegate, the trustee must take costs into account. The trustee must be alert to protect the beneficiary from "double dipping." If, for example, the trustee's regular compensation schedule presupposes that the trustee will conduct the investment management function, it should ordinarily follow that the trustee will lower its fee when delegating the investment function to an outside manager.

Texas Bar Comment

This section departs from prior Texas law. Former Texas Property Code § 113.060 allowed the trustee to delegate investment decisions to an agent but required the trustee to remain responsible for the agent's investment decisions unless certain conditions were met.

In order for a trustee to avoid liability for the action of the trustee's agent, the trustee must comply with Subsection (a). In addition, Subsection (c)(1) and (c)(2) provides that the trustee cannot avoid liability for the action of the trustee's agent under this section if the agent is an affiliate of the trustee or if the terms of the delegation require arbitration or shorten the applicable statute of limitations. For the definition of "affiliate," see Texas Trust Code § 111.004(1). These requirements are in addition to the requirement that the trustee comply with Subsection (a); they do not replace this requirement.

Sec. 117.012. LANGUAGE INVOKING STANDARD OF CHAPTER. The following terms or comparable language in the provisions of a trust, unless otherwise limited or modified, authorizes any investment or strategy permitted under this chapter: "investments permissible by law for investment of trust funds," "legal investments," "authorized investments," "using the judgment and care under the circumstances then prevailing that persons 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," "prudent man rule," "prudent trustee rule," "prudent person rule," and "prudent investor rule."

The drafters of the Uniform Prudent Investor Act wanted the prudent investor rule to apply to trusts

which were drafted long before the prudent investor rule was around. Even though the prudent investor rule is a default rule which may be overridden in the trust instrument, Section 117.012 makes several common trust provisions which otherwise would appear to override the prudent investor rule ineffective in doing so. For example, the prudent man rule is a different investment standard – one that the prudent investor is replacing. Nevertheless, Section 117.012 provides that a trust instrument requiring the trustee to comply with the “prudent man rule” will not override the prudent investor rule. For this reason, many old trusts containing provisions which would otherwise be likely to override the prudent investor rule will be ineffective in doing so. Also, a person wishing to draft a trust with a different investment standard had better be explicit that the prudent investor rule shall not apply.

In reviewing existing trust instruments for language which might override the Uniform Prudent Investor Act, don’t forget to look for provisions requiring specific investments or types of investments or prohibiting specific investments or types of investments. These types of provisions are likely to override the new investment standard (at least with respect to those specific investments or types of investments) in spite of Section 117.012.

Example 1: Trust instrument says: “The trustee shall invest the trust assets according to the prudent man rule.” Probable result: Prudent investor rule applies.

Example 2: Trust instrument says: “The trustee shall invest the trust assets according to the standard stated in Texas Trust Code Section 113.056(a).” Probable answer: Prudent investor rule applies.

Example 3: Trust instrument says: “The trustee shall invest the trust assets as he would invest his own assets.” Probable result: Prudent investor rule applies because this language is “comparable” to the language in Section 117.002, although this is a closer case than Examples 1 and 2.

Example 4: Trust instrument says: “Settlor authorizes the trustee to invest in any investments which the trustee may choose in his sole and absolute discretion, and any such investment will be considered an appropriate investment for the trust.” Probable result: This overrides the prudent investor rule, although one can argue that this language is “comparable” to language in Section 117.012.

Example 5: Trust instrument says: “The trustee may retain, without regard to diversification and without liability for any depreciation or loss resulting from the retention, any property that constitutes the initial trust estate of the trust.” Probable result: This overrides the prudent investor rule as it relates to requiring the trustee to sell this investment and diversify. However, the trustee probably must follow the prudent investor rule in all other respects and must follow the rule in toto with respect to property which was not part of the initial trust estate.

Example 6: Trust instrument says: “The trustee shall have the power to acquire, by purchase or otherwise, retain, invest, reinvest and manage, temporarily or permanently, any realty or personalty, without diversification as to kind, amount or risk of nonproductivity and without limitation by statute or rule of law.” Probable result: This overrides the prudent investor rule as it relates to requiring the trustee to diversify investments. However, the trustee probably must follow the prudent investor rule in all other respects.

Example 7: Trust instrument says: “The trustee shall invest only in securities traded on the New York

Stock Exchange.” Probable result: This overrides the prudent investor rule, at least with respect to this type of investment.

Note: The above examples and probable results are just my opinion.

Uniform Act Comment

This provision is taken from the Illinois act, 760 ILCS § 5/5(d) (1992), and is meant to facilitate incorporation of the Act by means of the formulaic language commonly used in trust instruments.

EFFECTIVE DATE PROVISION

SECTION 19. (a) This Act takes effect January 1, 2004, and applies only to a trust existing on or created after that date.

(b) With respect to a trust existing on January 1, 2004, this Act applies only to an act or decision relating to the trust occurring after December 31, 2003.

The Uniform Prudent Investor Act applies to existing trusts, so the investment rules for trusts will change on January 1, 2004.