

ACTION IN THE CHASM: DEFINING DUTIES OF THE TRUSTEE’S DELEGATES

Comment

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The first question begged by the title, is “what is the chasm?”¹ The answer to that, within the confines of this Comment, is the space that either legislative or judicial action leaves undefined.² The specific chasm in this piece is that of the duties owed by a person to whom the trustee delegates fiduciary authority.³ In most instances, this will be an agent of the trust, whose duties to the beneficiaries are undefined by the contract or the trust instrument, which makes the agent’s liability an open question.⁴ This question of liability is an area that remains unanswered by the judiciary and substantially so by legislators as well.⁵

I. OVERVIEW: ANECDOTE, PROBLEM, AND SUMMARY OF ANALYSIS

Bill Merriweather passed away, and left, in trust, his farmland for the next generation.⁶ Shortly after Mr. Merriweather’s death, the trustee found oil and gas resources on the place. These resources earned large amounts of cash, and the trustee added the cash to the corpus of the trust for the later exploitation of Bill’s grandchildren.⁷ Throughout the administration of the trust, the trustee faced difficult decisions, especially in the area of business, an area in which the trustee lacked knowledge.⁸ To set himself up for success, the trustee delegated power, as a prudent investor would, to see that the diversified interests were looked after properly.⁹ The trust instrument contained provisions giving the trustee express power to delegate the farming operation—the only profitable venture on the place when Mr. Merriweather was alive—to John Forrest. Because of the expansion of trust assets to date, the Merriweather trust has separate people managing each of its asset classes, securities, oil and gas property, and commercial real estate.¹⁰

In many states, the agent’s relationship to the trust defines liability.¹¹ One clearly defined liability is the fiduciary duty of the trustee.¹² The nature of the relationship between the trustee and the trust beneficiary defines the duties of the trust.¹³ However, the question of liability arises when a fiduciary, a trustee, delegate’s discretionary responsibility to outside sources and that person takes

1. *See infra* Part I.

2. *See infra* Part I.

3. *See infra* Part I.

4. *See infra* Part I.

5. *See infra* Part I.

6. *See infra* Part II.

7. *See infra* Part II.

8. *See infra* Part II.

9. *See infra* Part II.

10. *See infra* Part II.

11. *See infra* Part II.

12. *See infra* Part II.

13. *See infra* Part IV.

action that would constitute a breach of a fiduciary duty had the trustee been the one to take the action.¹⁴

This Comment will analyze the best courtroom arguments that can be made and the basis for legislative action to remedy this type of problem.¹⁵ Part II of this Comment will detail the actors and their respective duties, Part III of this Comment will discuss the delegation process and the statutes that allow delegation, and finally, Part IV of this Comment will discuss both judicial and legislative solutions to the various issues presented.¹⁶ The thrust of this Comment's analysis will be focused on determining whether there is a proper legislative or judicial basis for imposing similar duties on agents of a trust when such agents have been delegated fiduciary discretion.¹⁷

This question arose in the years following the advent of the Modern Portfolio Theory and the introduction of the Prudent Investor Rule.¹⁸ Prior to the idea of multi-party trusts, actors other than the trustee were foreign and heretic.¹⁹ However, since then, trustees have been given lawful authority to delegate the management authority given to them by settlors, so long as such delegation is done in a prudent manner.²⁰ As in all things, the law develops in the undertow behind the current, and in this case, delegates acted, under the control of the trustee, for the benefit of the beneficiary, with no clear definition of the duties owed to the trust beneficiaries.²¹

II. TRUST ACTORS & RELATIONSHIPS

The purpose of this Section is to define the relationships and duties of different trust actors; this discussion provides the background for the analysis Section of this Comment.²² There are five actors whose duties arise mainly from the trust instrument, put into the settlor's action.²³ The first is the most formal of the five actors—the trustee.²⁴ Second is the directed trustee, whose sole responsibility is to follow the trust director's orders.²⁵ Next is the trust protector, whose is responsible for running the human relations side of the trust, namely hiring and firing the trustee.²⁶ The fourth actor is the trust advisor,

14. See *infra* Part IV.

15. See *infra* Parts II–IV.

16. See *infra* Parts II–IV.

17. See *infra* Part III.

18. See *infra* Part III.

19. Note, *Liability of a Trustee for the Negligence or Default of an Agent*, 43 HARV. L. REV. 1122, 1122–23 (1930).

20. See UNIF. PRUDENT INVESTOR ACT (1994); UNIF. TRUST CODE § 807 (2010).

21. See *infra* Part II.E.

22. See *infra* Part III.

23. See *infra* Part II.A–E.

24. See *infra* Part II.A.

25. See *infra* Part II.B.

26. See *infra* Part II.C.

whose duty it is to direct the activities of the trustee.²⁷ The final actor is the delegate, or the agent of the trust, who is unnamed in the trust instrument but who delegates discretionary fiduciary responsibility, formerly reserved to the trustee, alone.²⁸

Oftentimes, the purpose of a trust is to preserve wealth or to care for a person or a group of people, and settlors often select trustees based on the premise that, in giving legal title to an experienced and disinterested third party, whom the settlor trusts, the trust will be benefited.²⁹ Trustees gain little to no personal benefit through any of the actions they take on behalf of the trust; accordingly, any action that trustees take is taken behalf of the trust beneficiaries, in accordance with their fiduciary obligations.³⁰ The act of delegation is certainly no exception to the rule of disinterested selflessness.³¹ According to the Uniform Trust Code, “[a] trustee may delegate duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances.”³² Such language gives a trustee the authority to delegate, and it removes the threat of liability, so long as the trustee’s delegation would have been proper under the circumstances, had it been made by a prudent trustee of comparable skill.³³ Trustees delegate their duties to the agents of the trust, whose duties are the focus of this Comment.³⁴

Before discussing the delegate’s duties, it is important to understand how the relationship between the trustee and the trust’s agent is created.³⁵ For purposes of this Comment, a delegate is someone whom the trustee confers fiduciary duties.³⁶ In years prior to the adoption of the Prudent Investor Rule, such discretionary duties were non-delegable.³⁷ The actors mentioned in the next few paragraphs all owe fiduciary duties to the trust beneficiaries because of the role that they play in managing the trust.³⁸ Prior to multi-party trusts and the Modern Portfolio Theory of investing, such divisions of labor would have been the trustee’s responsibility.³⁹

27. See *infra* Part II.D and accompanying notes. Neither adviser nor advisor is an incorrect use of the term. *Id.*

28. See *infra* Part III.B.

29. See RESTATEMENT (THIRD) OF TRUSTS § 27 cmt. 2 (2007) (laying out the purposes for which a trust may be started).

30. *Id.* (noting that the trustee must act for the benefit of the beneficiaries); see also *id.* § 70 (containing the powers and duties of trustees).

31. See UNIF. TRUST CODE § 807(a) (2010).

32. *Id.*

33. See *id.*

34. See *id.*

35. See *id.*

36. See generally *id.* (creating all of the duties of delegates).

37. See *Liability of a Trustee for the Negligence or Default of an Agent*, *supra* note 19.

38. See UNIF. PRUDENT INVESTOR ACT (1994); TEX. PROP. CODE ANN. § 114.003 (West 2007); see also Philip J. Ruce, *The Trustee and the Trust Protector: A Question of Fiduciary Power. Should a Trust Protector Be Held to a Fiduciary Standard*, 59 DRAKE L. REV. 67 (2010).

39. See *Liability of a Trustee for the Negligence or Default of an Agent*, *supra* note 19.

A. Trustee

Relevant provisions of applicable state statutes govern the trustee's duties, and universally speaking, the Uniform Prudent Investor Act (UPIA) has guided most states.⁴⁰ Many state laws changed because of the UPIA.⁴¹ When the American Law Institute (ALI) promulgated the UPIA as a uniform act, the UPIA reflected the change in the investing world.⁴² The purpose of the UPIA was to align the trustee's responsibilities with the Modern Portfolio Theory of investing.⁴³

The duty imposed on the trustee is embodied in many different statutes and judge-made rules.⁴⁴ This Comment evaluates the laws in Texas, Nevada, Delaware, and Virginia—these states' statutory schemes are used to define such duties.⁴⁵ For instance, the Texas Property Code defines the trustee as “the person holding the property in trust, including an original, additional, or successor trustee, whether or not the person is appointed or confirmed by a court.”⁴⁶

B. Directed Trustee

“If the terms of a trust give a person the power to direct certain actions of the trustee, the trustee shall act in accordance with the person's direction.”⁴⁷ For instance, the settlor may want to retain control of commercial real estate assets while alive, and if the settlor includes an instruction in the trust instrument that so provides, the trustee is obligated to follow such direction.⁴⁸ If a trust instrument contains powers to direct, then the instructions in the instrument control, unless either of the following exceptions is present: “(1) the direction is manifestly contrary to the terms of the trust; or (2) the trustee knows the direction would constitute a serious breach of a fiduciary duty that the person holding the power to direct owes to the beneficiaries of the trust.”⁴⁹ By including powers to direct, settlors can effectively maintain control of trust assets, or they can separate the decision making process.⁵⁰ A person “who holds a power to direct is presumptively a fiduciary required to act in good faith

40. See UNIF. PRUDENT INVESTOR ACT.

41. See *id.*

42. *Id.*

43. See *Prefatory Note*, UNIF. PRUDENT INVESTOR ACT, at 1–2 (1994) [hereinafter UPIA with *Prefatory Note*], available at http://www.uniformlaws.org/shared/docs/prudent%20investor/upia_final_94.pdf.

44. See, e.g., UNIF. PRUDENT INVESTOR ACT; TEX. PROP. CODE ANN. § 117.011 (West 2007); NEV. REV. STAT. ANN. § 164.670 (West 2007).

45. See *id.*

46. TEX. PROP. CODE ANN. § 111.004(18).

47. *Id.* § 114.003(b).

48. See *id.*

49. *Id.*

50. See *id.*; see also RESTATEMENT (THIRD) OF TRUSTS § 75 (2007) (explaining the power to create a directed trust).

with regard to the purposes of the trust[.]”⁵¹ Trustees are guided by co-trustees, trust protectors, and trust advisors named in the creating document.⁵²

C. Trust Protector

“‘[A] trust protector is an individual (or committee or entity) who is not a trustee but who is nevertheless granted powers under the trust that supersede corresponding powers of the trustee.’”⁵³ Trust protectors are typically responsible for hiring and firing trustees upon poor performance.⁵⁴ The usual basis for these management decisions are the self-interested actions of trustees or other actions that stand in contrast to their fiduciary duties.⁵⁵ Trust protectors can also serve as a kind of guardian who can change the terms of the trust or help to adapt the trust to suit the needs of a changing family dynamic.⁵⁶ In effect, a trust protector is another representative of the settlor, even more removed than the trustee, whose purpose is to see to the direction and maintenance of the trust.⁵⁷ Because of this great responsibility, there is persuasive secondary authority that states that trust protectors owe fiduciary duties to trust beneficiaries.⁵⁸

D. Trust Adviser

“A trust adviser is a person who has power to control a trustee in the exercise of some or all of his powers. Trust advisers are most frequently used to control investments, either in private testamentary trusts or corporate employee-benefit plans.”⁵⁹ Trust advisers are highly similar to trust protectors—they assist the trustee in making decisions concerning the trust.⁶⁰ In most occasions, settlors generally respect trust advisers, and as such, a trust adviser’s opinion often carries great weight when a settlor makes decisions about trust activities.⁶¹ Trust advisers owe fiduciary duties to the trust because of the role they have in the decision-making process.⁶²

51. TEX. PROP. CODE ANN. § 114.003(c).

52. See Ruce *supra* note 38, at 95.

53. *Id.* at 68 (quoting Alexander A. Bove, Jr. & Melissa Langa, *Peter Protector in Trust Neverland: The Real Story of the Trust Protector*, LAW FIRM OF BOVE & LANGA, P.C., http://www.bovelanga.com/publications/news_briefs/trusts_and_estates_forum/Real%20Story%20of%20Trust%20Protector.pdf (last visited June 18, 2014)).

54. See *id.* at 73.

55. See *id.* at 74.

56. See *id.* at 80.

57. See *id.* at 68.

58. See *id.* at 84; see also UNIF. TRUST CODE § 807 (2010).

59. Note, *Trust Advisers*, 78 HARV. L. REV. 1230, 1230 (1965).

60. See *id.*

61. See *id.* at 1231.

62. See *id.*

E. Delegate

The focus of this Comment is on the final group of trust actors—delegates. The specific analysis will center on delegates whom the settlor did not include in the trust instrument and whom the trustee instructs to perform such tasks that are traditionally part of the trustee's fiduciary responsibilities.⁶³ Some of these tasks include the management of trust property and trust distributions, as well as other like functions, that, when handled by the trustee, carry fiduciary responsibilities.⁶⁴ This Comment treats such delegate as the equivalent of an agent of the trust.

All of the actors herein, from trustees to delegates, share a common characteristic—discretion concerning matters that, before 1995, were squarely within a trustee's duties.⁶⁵ At the creation of the trust, the settlor divides the legal title and the equitable title, and with regard to the trust property, these particular actors share all of the legal duties.⁶⁶ With the advent of the Prudent Investor Rule and multi-party trusts, trustees assign these duties, along with titles like “the trust protector,” “the advisor,” or “the directed trustee,” to outside parties.⁶⁷ The issue addressed in this Comment is that trustees are not liable to the trust beneficiaries for the actions of their agents, and additionally, agents are not directly liable to beneficiaries for their actions; therefore, trust beneficiaries are left without a remedy against the legal caretakers of any property held for them, in trust.⁶⁸ The purpose of this Comment is to explain a responsible route for beneficiaries and litigators to hold agents, who exercise the same fiduciary discretion as any of the earlier-mentioned actors, accountable for their actions.⁶⁹

III. POWER OF THE TRUSTEE TO DELEGATE & RESULTING AGENCY RELATIONSHIP

This Section will discuss the statutory and common law creation of the delegate's authority.⁷⁰ There are two parts to the creation of the delegate's position: first, the state law gives the trustee the right to delegate the fiduciary discretion that the settlor gives to the trustee in the trust instrument; and second, once the delegation has occurred, the relationship and the corresponding duties

63. See *infra* Part III.

64. See RESTATEMENT (THIRD) OF TRUSTS § 70 (2007).

65. John H. Langbein, *Reversing the Nondelegation Rule of Trust-Investment Law*, 59 MO. L. REV. 105, 108–15 (1994).

66. GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 141 (rev. 2d ed. 1993) [hereinafter BOGERT].

67. See TEX. PROP. CODE ANN. § 114.003(c) (West 2007); see also Ruce, *supra* note 38, at 71; *Trust Advisers*, *supra* note 59.

68. See UNIF. PRUDENT INVESTOR ACT (1994).

69. See *infra* Part IV.A–B.

70. See *infra* Part III.A–B.

imposed by the common law of agency dictate the duties of the agent.⁷¹ In most instances, when a trustee delegates fiduciary authority, the relationship between the delegate and the trustee will be that of an agent and a principal.⁷² Agents have a specific set of duties that they owe the principal, and because of that, when examining the duties owed by delegates, such relationship is important place to start.⁷³ Below, Part A discusses the statutes that give trustees authority to delegate fiduciary responsibility, and Part B discusses the formation of the agency relationship, as well as the duties inherent in that relationship.⁷⁴

A. Delegation Standard

Without the Prudent Investor Rule and the various delegation statutes, this Comment would be of minimal relevance, as trustees would not have any power to delegate.⁷⁵ As previously mentioned, this Comment focuses on the Uniform Acts, as well as the laws in Texas, Virginia, Delaware, and Nevada.⁷⁶ These were selected as relevant trust states, where the Prudent Investor Rule and delegation statutes have been put in place—this makes this Comment particularly relevant to trust practitioners in these states.⁷⁷ Each of these states give trustees the power to delegate fiduciary responsibilities, and they allow trustees to use discretion, subject to principles of prudent management.⁷⁸ All of these states have made a significant jump from prior thought—where trustees would never delegate authority—to present thought—where trustees can be deemed to have breached a duty by failing to delegate responsibility that the they are incompetent to handle.⁷⁹

1. Uniform Prudent Investor Act

The ALI brought the UPIA forward in 1995, with five objectives to update the duties of the trustee.⁸⁰ The first was to expand the trustee's interest to encompass the entire "portfolio," rather than to look at single investments.⁸¹ The second objective was that "[t]he tradeoff in all investing between risk and return [was] identified as the fiduciary's central consideration."⁸² The third was

71. See *infra* Part III.A–B.

72. See RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006) (defining the agency relationship).

73. See *id.* § 8.01 (2006) (defining the duty of loyalty).

74. See *infra* Part III.A–B.

75. See UNIF. PRUDENT INVESTOR ACT (1994).

76. TEX. PROP. CODE ANN. § 117.003 (West 2007); NEV. REV. STAT. ANN. § 164.665 (West 2007); DEL. CODE ANN. tit. 12, § 3302 (West 2012); VA. CODE ANN. § 64.2-766 (West 2012).

77. See *infra* Part II.

78. See UNIF. PRUDENT INVESTOR ACT (1994).

79. See *id.* (stating that the trustee owes a duty to manage the trust property as a prudent manager would).

80. UPIA with Prefatory Note, *supra* note 43.

81. See *id.*

82. *Id.*

to destroy the distinctions between different types of investments and envelope the duty required for all investments into a single duty to act prudently.⁸³ The fourth was to wrap the previous duty to diversify into the duty of prudence.⁸⁴ Finally, the fifth, and the most important objective to this analysis, was to allow the trustee to delegate discretionary duties.⁸⁵

At the time, this fifth objective was a step forward into the Modern Portfolio Theory of investing, allowing all investor actions, so long as they were prudent in light of the aims of the beneficiary or the client.⁸⁶ This allowed for the creation of the new position, the agent of trust, whose duties the statute leaves untouched.⁸⁷ As stated both in the title of the rule and throughout the UPIA, prudence is the duty required of trustees in states that have adopted it.⁸⁸ The rule of prudence sets out the idea that the portfolio, as a whole, should be the purview of the investor, rather than looking to each individual investment.⁸⁹

Section 807 of the Uniform Trust Code authorizes a trustee to delegate authority when a prudent manager would have the ability to do so under similar circumstances.⁹⁰ The editor's notes to § 807 explain that the language in this section came from § 9 of the UPIA.⁹¹ Section 9 of the UPIA indicates that a "trustee shall exercise reasonable care, skill, and caution in selecting an agent."⁹² This initial use of reasonable care, skill, and judgment protects trustees from vicarious liability for the actions of an agent.⁹³ Section 807 made the significant jump from the prior non-delegation rule in trust investing.⁹⁴ Prior to the Prudent Investor Rule and later § 807, when the titles were split and the trustee took charge, the trustee did not have any avenues to delegate responsibility for trust property or to otherwise take advantage of teamwork in the marketplace.⁹⁵ This prior rule was embodied in the 1959 Restatement (Second) of Trusts, but with the introduction of the UPIA and the Restatement (Third) of Trusts, the current has turned abruptly.⁹⁶

83. *See id.*

84. *See id.*

85. *See id.*

86. *See id.* at 6.

87. *See id.*

88. *See id.*

89. *See id.*

90. *See* UNIF. TRUST CODE § 807 (2010).

91. *See id.*

92. UNIF. PRUDENT INVESTOR ACT § 9 (1994).

93. *See id.*

94. Langbein, *supra* note 65.

95. *See id.*

96. *See id.*

2. Texas

Under Texas law, Texas Property Code § 117.011 is the source for a trustee's authority to delegate.⁹⁷ The statute lays out the responsibilities of delegation for the trustee as follows: "A trustee may delegate investment and management functions that a prudent trustee of comparable skills could properly delegate under the circumstances."⁹⁸ Inherent in the UPIA, which Texas has adopted, is the idea that a trustee may act, in any form, only when a prudent investor would act.⁹⁹ This statute is a limitation on the trustee's liability when the trustee delegates fiduciary power prudently.¹⁰⁰ All of this stems from the UPIA and the rule of prudence in portfolio investing.¹⁰¹ While this statute defines the trustee's liability, it does not define the agent's liability—the individual to whose hands the trustee committed the trust resources.¹⁰²

3. Nevada

Nevada Revised Statute § 164.670 is the delegation statute that similarly lays out the duties of the trustee when delegating power away from the trust.¹⁰³ Nevada Revised Statute § 164.670(1) reads as follows:

Subject to any specific limitation set forth in a gift instrument or in law other than [Nevada Revised Statute §§] 164.640 to 164.680, inclusive, an institution may delegate to an external agent the management and investment of an institutional fund to the extent that an institution could prudently delegate under the circumstances.¹⁰⁴

This statute serves the same purpose as the Texas statute—it allows the trustee to delegate discretionary power, which was previously beyond the trustee's rights.¹⁰⁵ Nevada has also adopted the UPIA.¹⁰⁶ Nevada's statute similarly defines the rights and duties of the trustee, but it does not define the duties of the trustee's agent.¹⁰⁷ The language of Nevada Revised Statute § 164.665 states the following: "[E]ach person responsible for managing and investing an institutional fund shall manage and invest the fund in good faith and with the

97. TEX. PROP. CODE ANN. § 117.011 (West 2007).

98. *Id.* § 117.011(a).

99. *See id.* § 117.003 (Prudent Investor Rule).

100. *See id.*

101. *See id.*

102. *See id.*

103. *See* NEV. REV. STAT. ANN. § 164.670 (West 2007).

104. *Id.* § 164.670(1)

105. *See id.*; *see also* UPIA with Prefatory Note, *supra* note 43, at 17–18.

106. NEV. REV. STAT. ANN. § 164.665.

107. *See id.*

care an ordinarily prudent person in a like position would exercise under similar circumstances.”¹⁰⁸

4. Delaware

Title 12, § 3322 of the Delaware Code allows a trustee to delegate duties; it defines an agent's duties as well, stating, “The agent must observe the same standard of care required of the fiduciary.”¹⁰⁹ This is a significant step on Delaware's part—few, if any, other states have taken steps to clear the confusion as to the duties of the trustee's delegate.¹¹⁰ Delaware's Prudent Investor Rule is located in Title 12, § 3302 of the Delaware Code.¹¹¹ The statute states that, in every action taken on behalf of the trust, the trustee must act with the “care, skill, prudence and diligence under the circumstances then prevailing.”¹¹² Under this rule, an investor or a trustee can make management decisions based on the prudence of the total investment scheme.¹¹³ Again, this rule reinforces the modern portfolio view embraced by the ALI.¹¹⁴

5. Virginia

In Virginia, the law on delegation flows from its adoption of the Prudent Investor Rule. Virginia Code § 64.2-766 states as follows: “A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.”¹¹⁵ The Virginia Code adopts the same principles set forth in all of the above-mentioned statutes.¹¹⁶ Section 64.2-769 of the Virginia Code is the delegation statute, which allows a trustee to delegate powers and duties when a prudent investor could have properly done the same.¹¹⁷

As is obvious throughout the states in question, the Prudent Investor Rule and the ability to delegate are not only widespread but are also universally accepted.¹¹⁸ The trustee's ability to delegate discretionary power to others is the question addressed by this Comment. The argument made in this Comment rests on the premise that an agency relationship is created at the time of the

108. *Id.* (laying out the standard for the prudent investor standard that replaced the prudent man standard—the key difference between the two is in the application of the rule, applying the portfolio theory of modern investing).

109. DEL. CODE ANN. tit. 12, § 3322 (West 2007).

110. *See* discussion *supra* Part I.

111. DEL. CODE ANN. tit. 12, § 3322.

112. *Id.* § 3302.

113. *See id.*

114. *See* UPIA with Prefatory Note, *supra* note 43.

115. VA. CODE ANN. § 64.2-766 (West 2012) (Prudent Administration).

116. *See id.*; *see also supra* Part III.A.1–4.

117. VA. CODE ANN. § 64.2-769 (Delegation By Trustee).

118. *See, e.g., supra* Part III.A.1–5.

delegation; the following Section will discuss why this premise is not only correct but also why it is important.¹¹⁹

B. Agency Standards

An agency relationship is formed when a person consents to work for the benefit of and under the control of another.¹²⁰ When a trustee delegates authority, it is exactly the type of situation contemplated by the common law of agency.¹²¹ For example, when a trustee delegates the management of trust property to a professional, the property manager works under the trustee's control, for the benefit of the trust—the property manager is an agent of the trust.¹²² The agency is created at the signing of the contract for delegation, and the agency-principal duties attach to the relationship.¹²³ Texas, Delaware, Nevada, and Virginia have all adopted the Restatement (Third) of Agency; accordingly, the analysis of all of these survey states is the same.¹²⁴

Another contiguous point of analysis is the agent's duty in any other setting: "An agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship."¹²⁵ This duty extends to this setting to show that the agent owes a fiduciary duty to the principal—in this setting, the trustee is the principal.¹²⁶ Given the meaning of the fiduciary duty, the agent must act with the trustee's interests in mind.¹²⁷ Because of the Prudent Investor Rule, one of the trustee's chief interests is that of the client—the beneficiaries; therefore, because of the relationship between agents and their principals, agents must act with the interest of the beneficiaries as their own principal interest.¹²⁸

This duty of loyalty on the part of the agent eliminates self-interest as a motivating factor when an agent is acting on the part of the principal.¹²⁹ Eliminating any self-interest protects the principal from possible vulnerability, due to the agency relationship that exposes the principal's property or the principal's interests to the risk of the agent's self-interested action.¹³⁰ However, the following question arises: whether such duty is owed only to the trustee or

119. See *infra* Part III.B and accompanying notes.

120. RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006).

121. See *id.*

122. See *id.*

123. See *id.*

124. See, e.g., *Nat'l Plan Adm'rs, Inc. v. Nat'l Health Ins. Co.*, 235 S.W.3d 695, 695 (Tex. 2007); *Estate of Eller v. Barton*, 31 A.3d 895, 895 (Del. 2011); *George L. Brown Ins. v. Star Ins. Co.*, 237 P.3d 92, 92 (Nev. 2010).

125. RESTATEMENT (THIRD) OF AGENCY § 8.01.

126. See *id.*

127. See *id.*

128. See *id.*

129. See *id.*

130. See *id.*

whether it extends to the agent of the trust as well.¹³¹ ““In agency[,] the property is vested solely in the person on whose behalf the agent acts, but in trusteeship[,] it is vested in the trustee himself, no less than in the beneficiary.””¹³²

IV. POSSIBLE SOLUTIONS

As with any problem, reasonable minds will differ as to the proper solution. Moving forward, the simplest solution for practitioners is to impose these duties, through contract, at the outset of the agency relationship.¹³³ If the parties’ duties are clearly defined, and if both parties consent to the duties imposed, then the problems mentioned in the following paragraphs become drastically less important.¹³⁴ To create a fiduciary duty owed directly to the beneficiary, the contract must be clearly written to that end.¹³⁵

Solutions other than contracts are either judicial or legislative in nature. Courts could provide a judicial remedy for an agent’s breach; however, this is a new path, and it presents a risk of non-persuasion or judicial refusal. One of the benefits of the courts is that a judicial solution allows for case-by-case flexibility, which, in an area of law that has not been fully explored, is preferable.¹³⁶ This flexibility, in contrast to the hard, fast effect of legislative action, could be more beneficial in the short run.¹³⁷ Further, the records built in the courtroom could be extremely helpful in determining the appropriate legislative solution.¹³⁸

However, the stability element of legislative action weighs heavy in the balance, tending to create an atmosphere where all trust parties know the rules of the game; thus, there is less chance of an unexpected outcome.¹³⁹ One of the chief issues weighing against the case-by-case judicial analysis is the retrospective nature of adjudicatory proceedings.¹⁴⁰ Individuals are not free from being adjudged wrong tomorrow for doing the right thing today; however,

131. *See id.*

132. BOGERT, *supra* note 66, § 15 (quoting JOHN WILLIAM SALMOND, JURISPRUDENCE 309 (11th ed. 1957)).

133. *See supra* Part III.B.

134. *See supra* Part III.

135. RESTATEMENT (SECOND) OF CONTRACTS § 302 (1981).

136. SEC v. Chenery Corp. (Chenery II), 332 U.S. 194, 203 (1947) (explaining, in the administrative context, the benefits of judicial and legislative action). *Chenery II* is one of the Supreme Court’s exposés of the costs and benefits of both types of problem solving. *Id.* Though it is mainly precedent for administrative agencies, it does do an excellent examination of the costs and benefits of using adjudicative or legislative methods to solve policy problems. *Id.* at 202–04.

137. *See id.*

138. *See id.* at 203.

139. *See id.*

140. *See id.*

the judicial solution provides flexibility and an opportunity to build a record for future legislators.¹⁴¹

A. Judicial Solutions

One of the positive outcomes of judicial resolution is a greater level of flexibility, which could mitigate the harsh effects of a rigid statute that is potentially subject to misinterpretation.¹⁴² No two cases are the same, and courts are the perfect forum to resolve particular issues, based on its distinct set of facts.¹⁴³ Alongside the benefit of flexibility, judicial resolution allows jurists to form a record upon which legislators can rely in the future to define the liability of these delegates through legislation.¹⁴⁴ In all cases, there would be a wealth of experience to draw upon, where one can analyze the cause and effect, the riff and return.¹⁴⁵ By allowing the questions of a delegate's liability to be answered in a judicial forum, through their infancy, legislators would be able to develop the story, recognize the competing policies, and determine what actions are most appropriate.¹⁴⁶

There are two theories that could be viable in the courtroom.¹⁴⁷ The first theory is premised on the theories of third-party contracts and establishing the delegate's duty to the trust beneficiary, while acting within the scope of the agency.¹⁴⁸ The second theory is based on the trustee's duties of prudent management with regard to the actions of those to whom the trustee delegated fiduciary discretion.¹⁴⁹ These theories are discussed in this order because the primary aim of this Comment is to hold agents accountable for the actions they take on behalf of trust beneficiaries.

1. Third-Party Beneficiary—Contract Rights

The first theory of recovery for a beneficiary is through third-party contracts, making delegates account for their actions to the person directly affected—the beneficiary.¹⁵⁰ As the owner of the equitable title and as the party for whom the property is held in trust, the beneficiary bears the risk of loss.¹⁵¹ This Section will provide a brief overview of third-party contract law in the

141. *See id.*

142. *See id.*

143. *See id.*

144. *See id.*

145. *See id.*

146. *See id.*

147. *See* RESTATEMENT (THIRD) OF TRUSTS § 78 (2007).

148. *See id.*

149. *See id.* § 77.

150. *See* BOGERT, *supra* note 66, § 183.

151. *See id.*

states that are relevant to this discussion, and it will develop a theory of recovery for a beneficiary against an agent.¹⁵²

As a brief and undisputed interlude, most third-party beneficiaries are either donee beneficiaries or creditor beneficiaries.¹⁵³ This means that the third-party contract had either an incentivized preexisting duty, or the benefactor party simply had good will.¹⁵⁴ In most instances, the beneficiary is a donee beneficiary of the trustee's contract with a third party who provides services to the trust.¹⁵⁵ The theories below are based on the idea that the beneficiary of the trust is benefitting out of the settlor's goodwill. While it is possible to use a trust to repay prior debts, it is more likely to be deemed a donative benefit, primarily because creditor benefits arise most often in creditor/debtor relationships.¹⁵⁶ Bearing this in mind, the following paragraphs serve to describe the legal standards for establishing a third party's ability to enforce a contract, and in our case, the ability of beneficiaries to hold agents of a trust accountable for their actions.¹⁵⁷

2. Restatement

Section 302 of the Restatement (Second) of Contracts governs the rights of a third party in a contract.¹⁵⁸ The first distinction is between intended beneficiaries and incidental beneficiaries to the contract.¹⁵⁹ For a stranger, the beneficiary in this case, to have rights in a contract to which the beneficiary was not a party, the parties would have to contemplate the beneficiary at the time the contract was created.¹⁶⁰ The best evidence of the parties' intent is the actual contract, itself, and to recover, beneficiaries must show, through the clear language of the contract, that they are intended as the beneficiaries of the contract.¹⁶¹ The second distinction is the type of interest discussed above—the distinction between a donee beneficiary and a creditor beneficiary.¹⁶² To show that a third party has rights in a contract based on the Restatement (Second) of Contracts approach, it must be shown that the third party is intended and is

152. *See infra* Part IV.

153. ARTHUR L. CORBIN, CORBIN ON CONTRACTS: ONE VOLUME EDITION § 772 (West 1952).

154. *See id.*

155. *See id.* This is because there is no preexisting duty on the part of the trustee to pay the beneficiary anything other than the trust benefits, and any actions on the part of the trustee are merely the goodwill of the settlor acting through the trustee. *See id.*

156. *See, e.g.,* Tawes v. Barnes, 340 S.W.3d 419, 425 (Tex. 2011).

157. *See infra* Part IV.A.1.a.

158. RESTATEMENT (SECOND) OF CONTRACTS § 302 (1981).

159. *See id.*

160. *See id.* Contrast this with the incidental beneficiary, who benefits from an agreement indirectly or without cognizance of the contracting parties. *See id.* § 315.

161. *See id.* § 302.

162. *See id.*

either a creditor or a donee of the contracting parties.¹⁶³ Because states model their laws after the Restatement (Second) of Contracts approach, the parties' intent is the determining factor in all states analyzed in this Comment.¹⁶⁴

3. Texas

In Texas, "[a] third party may enforce a contract it did not sign when the parties to the contract entered the agreement with the clear and express intention of directly benefitting the third party."¹⁶⁵ The parties' intent is determined from the words and the language of the contract, as used in the ordinary course of business.¹⁶⁶ In effect, in Texas, contracts only create a third-party beneficiary when the contract shows the parties intended for a stranger to benefit from their agreement, through the use of clear contract language, read in its everyday meaning.¹⁶⁷

One of the most recent cases on this issue is *Tawes v. Barnes*, which is the origin of the previous statement of law.¹⁶⁸ In a certified question from the Fifth Circuit, the Supreme Court of Texas opined on a case involving a lessor who asserted rights based on a joint operating agreement to which the lessor was not a party.¹⁶⁹ The plaintiff, who was a lessor in an oil and gas lease, tried to claim a benefit from the landowner's working interest agreement and the resulting royalties.¹⁷⁰ A bankrupt debtor jilted the plaintiff in the case; the debtor claimed that the benefits from the contract would have satisfied a preexisting debt, making the plaintiff a creditor beneficiary to the contract.¹⁷¹ The court found that the plaintiff was not a third-party beneficiary because neither the joint operating agreement nor the working interest agreement contemplated the plaintiff as an intended beneficiary of the parties to the contract.¹⁷²

4. Virginia

Virginia courts also use intent as determinative of the rights of a third party.¹⁷³ "In order to proceed on the third-party beneficiary contract theory, the party claiming the benefit must show that the parties to a contract 'clearly and definitely intended' to confer a benefit upon him."¹⁷⁴ In *Environmental*

163. See *id.*

164. See *id.*

165. *Tawes v. Barnes*, 340 S.W.3d 419, 425 (Tex. 2011) (citing *MCI Telecomms. Corp. v. Tex. Utils. Elec. Co.*, 995 S.W.2d 647, 651 (Tex. 1999)).

166. *Id.* (citing *Luling Oil & Gas Co. v. Humble Oil & Ref. Co.*, 191 S.W.2d 716, 724 (Tex. 1945)).

167. *Id.* at 426.

168. *Id.* at 425.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. See, e.g., *Copenhaver v. Rogers*, 384 S.E.2d 593, 596-97 (1989).

174. *Id.* at 596.

Staffing Acquisition v. B & R Construction Management, the Supreme Court of Virginia stated that third parties have rights to enforce a contract when “others have agreed between themselves to bestow a benefit upon the third party but one of the parties to the agreement fails to uphold his portion of the bargain.”¹⁷⁵ According to the court, the question of the parties’ intent is one of construction, and in determining intent, the document is to be read as a whole.¹⁷⁶

In *Environmental Staffing*, Virginia’s highest court found that a subcontractor was not a third-party beneficiary to a contract between a general contractor and a developer.¹⁷⁷ The subcontractor alleged that the general contractor, in bonding through an insolvent entity, breached their contract with the developer demanding bonded workmanship.¹⁷⁸ Because of the alleged breach, the subcontractor claimed that the general contractor owed damages for the services rendered.¹⁷⁹ The court said as follows:

The dispositive question before this Court, however, is whether En-Staff was an *intended* beneficiary under the contract. We have recognized a specific limitation to the third-party beneficiary doctrine in that “the third party must show that the contracting parties clearly and definitely intended that the contract confer a benefit upon him.”¹⁸⁰

5. Delaware

In Delaware, when a third party seeks to recover as a stranger to a contract, courts demand the following: (1) intent; (2) donee or creditor status; and (3) materiality.¹⁸¹ Courts that have interpreted these requirements have explained that, as to donee or creditor status, intent is the same as in the law in other states; generally speaking, this means that the benefit must be given as either a “gift or in satisfaction of a pre-existing obligation to that person.”¹⁸² The third element is not found in all jurisdictions—that element is materiality to

175. *Envntl. Staffing Acquisition Corp. v. B & R Const. Mgmt., Inc.*, 725 S.E.2d 550, 553 (Va. 2012) (quoting *Copenhaver*, 384 S.E.2d at 596).

176. *Id.* at 553–54.

177. *Id.* at 553.

178. *Id.*

179. *Id.*

180. *Id.* at 553–54 (quoting *Collins v. First Union Nat’l Bank*, 636 S.E.2d 442, 446–47 (Va. 2006)).

181. *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 196 (3d Cir. 2001).

Under Delaware law, which is the law the parties discuss, to qualify as a third[-]party beneficiary of a contract, (a) the contracting parties must have intended that the third[-]party beneficiary benefit from the contract, (b) the benefit must have been intended as a gift or in satisfaction of a pre-existing obligation to that person, and (c) the intent to benefit the third[-]party must be a material part of the parties’ purpose in entering into the contract.

Id.

182. *Id.*

the contract.¹⁸³ The materiality element seems to be an equitably applied limit to the reaches of third-party beneficiaries within the state.¹⁸⁴

For instance, in *Hadley v. Shaffer*, a court found that the majority holders of a closely held corporation were third-party beneficiaries who were bound by a forum selection clause in a merger agreement.¹⁸⁵ The court ruled this way, in part, because Hadley used rights in the contract (specifically a forum selection clause) to his advantage to dismiss an earlier lawsuit, and it appeared that Hadley attempted to apply the contract only when it was convenient.¹⁸⁶ The court took no part in this, and in the suit, it extended the obligations of the contract to the dodging defendant.¹⁸⁷ Contrast that with *E.I. DuPont de Nemours & Corporation v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, where the parties attempted to enforce an arbitration clause on a stranger to their contract—the contract was not specifically aimed at DuPont, and the parties to the contract showed no evidence that they intended to bind it with the arbitration clause.¹⁸⁸ Courts look to the facts and circumstances to determine whether it would be equitable to impose duties or to give rights to parties who did not sign the agreement.¹⁸⁹

6. Nevada

Nevada courts require intent “‘gleaned from reading the contract as a whole in light of the circumstances under which it was entered.’”¹⁹⁰ In *Canfora v. Coast Hotels and Casinos, Incorporated*, a hotel employee was terribly burned in an accident involving an electrostatic charge, which ignited gasoline fumes.¹⁹¹ The hotel provided medical insurance to its employees and paid for its employee’s medical expenses.¹⁹² In the contract, the hotel reserved the right to seek repayment, and the employee’s son, the beneficiary of the insurance plan, was bound by the terms of the contract, including the repayment clause.¹⁹³ The fact that the son was listed as the beneficiary of the plan was, in the collective mind of the Nevada Supreme Court, clear intent that the son was the intended beneficiary of the contract between the employee and the hotel.¹⁹⁴

183. *See id.*

184. *See, e.g., Hadley v. Shaffer*, No. Civ. A. 99-144-JJF, 2003 WL 21960406, at *5 (D. Del. Aug. 12, 2003) (holding that when a person uses a contract to their benefit, it is inequitable to try to avoid later liability on the same contract based on the materiality element).

185. *Id.*

186. *Id.*

187. *Id.*

188. *E.I. DuPont*, 269 F.3d at 196.

189. *Compare id., with Hadley*, 2003 WL 21960406, at *5.

190. *Canfora v. Coast Hotels & Casinos, Inc.*, 121 P.3d 599, 605 (Nev. 2005) (quoting *Jones v. Aetna Cas. & Sur. Co.*, 33 Cal. Rptr. 2d 291, 296 (Cal. Ct. App. 1994)).

191. *Id.* at 601.

192. *Id.*

193. *Id.*

194. *Id.* at 605.

a. *The Beneficiary of the Trust as a Third Party to Every Trust Agency Contract*

In signing any contract as a trustee, the other signer cannot help but be aware of the fact that there is an interested third party for whom the contract is entered into.¹⁹⁵ By definition, when entering into a contract with someone outside of the trust, the trustee cannot be the only interested party to the contract.¹⁹⁶ Any competent person who contracts with the trustee, in an official capacity, would be on notice of an interested third party—namely the trust beneficiary.¹⁹⁷ Accordingly, contracting parties would have notice that the purpose of their work is to benefit the beneficiary for whom the property is held in trust.¹⁹⁸ This could lead to an inference that the trust beneficiary is an intended third-party beneficiary to the agency agreement, entered into by the trustee.¹⁹⁹

One of the likely obstacles is that because legal title rests with the trustee, there would be no cause of action vested in the beneficiary.²⁰⁰ When a trust is created, the title to the property is split—the legal title is vested in the trustee and the equitable title is vested in the beneficiary.²⁰¹ As such, all legal rights and responsibilities are vested in the trustee, rather than in the beneficiary.²⁰² However, the parties entered into the contract fully aware of the beneficiary's interest in the property and understood that the contract would directly benefit the beneficiary.²⁰³ Thus, many courts would likely find that the parties to the contract intended for the beneficiary to have the rights under the agreement that the trustee entered into, despite the beneficiary's equitable interest.²⁰⁴

Another counterargument could come from Professor Corbin's observations about third-party beneficiary laws and the difficulties in proving that a third party is the intended beneficiary of an agency contract.²⁰⁵ This is likely due to the question of control in the agency—an agent acts for the benefit of the principal, and therefore, any benefits to a third party is generally incidental.²⁰⁶ However, in the trust setting, it is unlikely that the benefits are incidental because of the fact that trustees are always acting for the beneficiaries, in their capacity as the trustee.²⁰⁷

195. See RESTATEMENT (THIRD) OF TRUSTS § 3 (2003) (explaining the definition of trustee).

196. See *id.*

197. See BOGERT, *supra* note 66, § 701.

198. See *id.* (explaining the definition of trustee and beneficiary).

199. See *id.*; see also RESTATEMENT (SECOND) OF CONTRACTS § 302 (1981).

200. See RESTATEMENT (THIRD) OF TRUSTS § 2 (2003).

201. See *id.*

202. See *id.*

203. See *id.* § 3 (explaining the definition of trustee).

204. See discussion *supra* Part III.A and accompanying text.

205. CORBIN, *supra* note 153, § 779E.

206. See *id.*

207. See RESTATEMENT (THIRD) OF TRUSTS § 3 (explaining the definition of trustee).

When the trustee delegates this authority, both parties would have knowledge of their actions, and agents would know that they were working for the benefit of the beneficiary, under the trustee's control.²⁰⁸ At the creation of the trust, the title is split, and loosely speaking, control is given to the trustee and all of the benefits from the property are vested in the trust beneficiaries—this dual interest is what put a delegate on notice that the beneficiary is an interested party.²⁰⁹ Once the delegation has occurred and the agency relationship is created, the delegate has all of the duties of an agent.²¹⁰ There exists quite a bit of overlap between the trustee's duties to the trust and the agent's duties to the principal.²¹¹ Agents and trustees each work for the benefit of the trust beneficiaries.²¹² They both owe fiduciary duties to the trust beneficiaries because the trustee-beneficiary relationship and the agent-principal relationship both involve fiduciary responsibilities to the person who benefits from the work.²¹³

7. Theory of Prudent Management

For the purposes of this solution, this Section will explore the possibilities, as they might apply to an investment advisor who is delegated responsibility for investing the corpus of a trust.²¹⁴ In approaching and contracting with the delegate, a trustee can create an agency relationship with an advisor when the agent consents to act for the trustee's benefit.²¹⁵ This agency relationship would establish a duty of loyalty on the part of the agent and a duty on the part of the trustee to bring an action for any breach of the duty of loyalty that would constitute a breach of fiduciary duty had the trustee been the one to commit the act.²¹⁶

The trustee is held to the standard of prudent management and never alone, but rather, the trustee acts on behalf of the trust; therefore, if a prudent manager of these assets were to bring suit against a breaching agent, then the

208. See RESTATEMENT (SECOND) OF CONTRACTS § 302 (1981) (explaining that in order for a stranger to have rights, they must be intended as a beneficiary by the parties). When the title is split at the creation of the trust, all equitable or beneficial interest is vested in the beneficiary and the legal interest is in the trustee—in short, the beneficiary gets the benefit of the property, and the trustee gets control. See BOGERT, *supra* note 66, § 701. Therefore, the agent would be working for the benefit of the beneficial owner, under the control of the trustee, and any damage to the trust would be damage against the beneficial interest holder. See *id.*; see also RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006).

209. See RESTATEMENT (THIRD) OF TRUSTS § 3; RESTATEMENT (SECOND) OF CONTRACTS § 302.

210. See RESTATEMENT (SECOND) OF AGENCY §§ 387–98 (1958) (detailing duties of the agent).

211. Compare *id.* (addressing the duties of agents), with BOGERT, *supra* note 66, § 701.

212. See discussion *supra* Part III.A and accompanying text.

213. See discussion *supra* Part III.A and accompanying text.

214. See *supra* Part I.

215. See RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006) (“Agency is the fiduciary relationship that arises when one person (a ‘principal’) manifests assent to another person (an ‘agent’) that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.”).

216. See RESTATEMENT (FIRST) OF AGENCY § 277 (1933) (adopting the Prudent Investor Rule).

trustee would be duty-bound to do the same.²¹⁷ The Prudent Investor Rule states that if trustees act with prudence and skill in selecting delegates, then they are shielded from vicarious liability for the actions of their agents.²¹⁸ However, this proposed theory is not one of vicarious liability, but rather, it is one of direct liability for the trustee's own actions in failing to attempt to recover wrongful damages from a person who caused a loss to the trust.

At the same time, "[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."²¹⁹ This example is given in the comments to § 9 of the UPIA.²²⁰ The trustee has a duty to ensure that the trust does not suffer a loss as a result of the selected agent's breach of duty, and any failure to attempt recovery of the wrongful losses is considered a breach the trustee's duties.²²¹

The agent would be liable to the trustee for the breach of the common law duties the agent owed to the trust as the agent's principal, and the trustee would be duty-bound to bring suit to recover damages from the agent if a prudent manager would initiate such action.²²² Delegates owe duties to trustees, as their principals, and any breach of these duties could result in damage to the trust.²²³ The duty of prudent management dictates that trustees must attempt to recover damages when damages are incurred.²²⁴ Trustees are responsible for preventing losses to the trust, and they are responsible for any damages wrongfully caused, and unrecovered, that would be losses to the trust.²²⁵ If trustees fail to timely bring suit, then they have breached their duty of prudent management, and the trust beneficiaries would have a cause of action.²²⁶

B. Legislative Solutions

As is apparent from the above amalgam of judicial theories, it would perhaps be simpler to employ legislation to allow beneficiaries to bring a cause of action directly against an agent who has been delegated fiduciary responsibility.²²⁷ The beauty of the legislative solution is its simplicity; rather than having to combine hosts of legal theories to describe what the law is, in

217. *See* UNIF. PRUDENT INVESTOR ACT § 1 (1994).

218. *See id.*

219. *Id.* § 9.

220. *See id.*

221. *See id.*

222. *See* RESTATEMENT (SECOND) OF AGENCY §§ 387–98 (1958).

223. *See id.* §§ 377–98.

224. *See* UNIF. PRUDENT INVESTOR ACT § 1.

225. *See id.*

226. *See* BOGERT, *supra* note 66, § 701.

227. *See infra* Part IV.A.

every instance, in the courtroom, legislators have the power to solve this problem with the rap of their gavel. The counterweight to legislative action is the finality of the action—once legislators have spoken on the issue, it cannot be reconfigured without further legislation. The purpose of the legislative fix would be to solidify a cause of action for a beneficiary.²²⁸ There are two legislative fixes to the main problem addressed in this Comment: (1) make any individual who exercises discretion in a fiduciary capacity liable to the beneficiary; or (2) make the trustee accountable to the beneficiary for the actions of an agent.²²⁹

1. Liability of the Agent

This is similar to the judicial theory spoken of previously, and it does not, in any way, change the policy considerations behind the fiduciary duty owed by a trustee.²³⁰ The beneficiary is the person to whom the duty is ultimately owed, and it makes sense for the cause of action to be vested in the beneficiary.²³¹ The language that would best state the aims of the legislation would include a rule that an agent is liable directly to a beneficiary, and any action that would constitute a trustee's breach of fiduciary duty makes the agent directly liable to the beneficiary.²³²

With trust delegates, the beneficiary bears any loss for malignant or negligent acts undertaken by the agent of the trust.²³³ This is part of the relationship between the trustee and the beneficiary, but in bearing this risk, it is both just and equitable for the cause of action to accrue in the beneficiary. Currently, Delaware has something in place that is similar to what is recommended in this Comment.²³⁴ Section 3322 of the Delaware Code states "[t]he agent must observe the same standard of care observed by the fiduciary."²³⁵ This means that, in Delaware, a trustee's delegate owes a fiduciary duty directly to the trust, based on the idea that the delegate is working for the benefit of the beneficiary, under the trustee's control.²³⁶

The purpose of the delegation statutes is to allow a trustee to delegate actions that would have been a part of the trustee's fiduciary responsibility prior to the advent of the UPIA.²³⁷ In looking to the other actors who are given the same type of authority, carrying out the intent of the settlor, such actors all carry

228. See *supra* Part IV.A (detailing the difficulties of finding a legal theory that would give the same cause of action).

229. See *infra* Part V.B.1–2.

230. See *supra* Part IV.A.

231. See BOGERT, *supra* note 66, § 701.

232. Compare *id.*, with RESTATEMENT (SECOND) OF AGENCY §§ 387–98 (1958) (showing that there is significant overlap between the duties of an agent to the principal and the duties of trustee to beneficiary).

233. RESTATEMENT (THIRD) OF TRUSTS § 48 (2003).

234. DEL. CODE ANN. tit. 12, § 3322 (West 2007).

235. *Id.*

236. See *id.*; BOGERT, *supra* note 66, § 183; RESTATEMENT (THIRD) OF AGENCY § 1.01.

237. Langbein, *supra* note 65, at 105.

with them a fiduciary duty.²³⁸ Settlers give trust advisers the right to veto management ideas when such ideas are not in the best interest of the trust, and with that power comes fiduciary responsibility.²³⁹ The same can be said of directed trustees and trust protectors—they provide trust services, which, prior to the UPIA, were reserved to trustees.²⁴⁰

Now that these duties have been delegated to someone other than the trustee, the trustee's duties should pass to the same person who is exercising the fiduciary discretion for the benefit of the beneficiary.²⁴¹ When the trustee assigns tasks to an agent, such as management of the trust property or management of liquid assets, the agent is exercising the same discretion that the trustee would be exercising, had the work never left the trustee's hands. This discretion in acting for the benefit of the beneficiary is one of the hallmark reasons for finding that a directed trustee, a trust protector, a trust adviser, or even a trustee owes a fiduciary duty to the trust beneficiary.²⁴²

2. *Liability of the Trustee*

A second option is for trustees to be held liable for the actions of their agents. When a trustee entrusts another with a responsibility that is initially the trustee's, a possible solution could be to impose the duty on the trustee to assure that the trustee's agent's duties are faithfully and competently executed.²⁴³ Texas, Virginia, and Nevada follow this approach—holding the trustee accountable for the losses of the trust.²⁴⁴

Vicarious liability is reserved for those in control of the actions of the responsible party; the legislative solution would ask that the trustee hold the agent accountable for any damage caused to the trust.²⁴⁵ Trustees have special relationships with beneficiaries.²⁴⁶ Trustees have a duty to prevent losses to the trust, which dictates a duty to hold them accountable for the actions of their agents.²⁴⁷ Trustee have a duty to act strictly for the benefit of beneficiaries, and when trustees delegate the power to act for a beneficiary, trustees should hold

238. See UNIF. PRUDENT INVESTOR ACT (1994); TEX. PROP. CODE ANN. § 114.003 (West 2007); see also Ruce, *supra* note 38, at 67; *Trust Advisers*, *supra* note 59.

239. *Trust Advisers*, *supra* note 59.

240. TEX. PROP. CODE ANN. § 114.003; see also Ruce, *supra* note 38, at 38.

241. *Trust Advisers*, *supra* note 59 (recommending that a fiduciary duty be imposed on the adviser of the trust due to the high level of discretionary responsibility that is exercised by the adviser).

242. See UNIF. PRUDENT INVESTOR ACT; TEX. PROP. CODE ANN. § 114.003; see also Ruce, *supra* note 38, at 67; *Trust Advisers*, *supra* note 59, at 1231–34.

243. See UNIF. TRUST CODE § 807(a)(3) (2010) (stating that it is a part of the trustee's duties to periodically inspect the work of the agent to insure compliance with the terms of the delegation).

244. See NEV. REV. STAT. ANN. § 164.670 (West 2007); TEX. PROP. CODE ANN. § 117.011; VA. CODE ANN. § 64.2-769 (West 2012).

245. See RESTATEMENT (THIRD) OF AGENCY § 7.05 (2006).

246. See *id.*

247. See *id.*

their agents accountable for such duties.²⁴⁸ Trustees are under a duty to manage the trust prudently, and part of this duty is to prevent loss, such as recovering losses from a responsible third party.²⁴⁹

UPIA § 9 mentions a delegate's liability.²⁵⁰ "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."²⁵¹ A beneficiary should be able to bring suit against a trustee to account for a breach of duty only if the trustee fails to take the action that is prudent.²⁵² Holding an agent accountable should be part of the duties the trustee owes the beneficiary.²⁵³ Trustees' duties require them to prevent loss to the trust, and one of these duties is to recover damages wrongfully caused by someone under a duty of loyalty to the trust.²⁵⁴ Therefore, any fraudulent act or failure to disclose that materializes into damage to the property, or some other interest of the beneficiary, would become actionable in the trustee; failure to attempt recovery would, and should, be a breach of the trustee's duty of prudent management.²⁵⁵

VII. CONCLUSION

There is never one perfect way to solve a problem; rather, it must be done based on the preferences and combined experience of the affected people. The obvious option for those in states where neither the judiciary nor the legislators appreciate these concepts would be to handle this problem through the law of contracts.²⁵⁶ That being said, much of the remedial work is done post hoc; with that in mind, one must decide which remedy is best, based on the analysis presented: judicial or legislative, trustee or agent. Who should bear the burden of preventing loss, and who should decide the issue?

Based on the analysis and research conducted in preparation for this Comment, the best course of action would be to handle this through legislative action, by imposing the duty directly on the agent.²⁵⁷ Legislative action is preferable to judicial action simply because its stability greatly outweighs the benefit of the judicial procedure's flexibility.²⁵⁸ While this area is not fully

248. UNIF. PRUDENT INVESTOR ACT § 5 (1994).

249. *Id.* § 9.

250. *See id.*

251. *Id.*

252. *See* BOGERT, *supra* note 66, § 701.

253. *See id.*

254. *See id.*

255. *See* UNIF. PRUDENT INVESTOR ACT § 1; RESTATEMENT (SECOND) OF AGENCY § 387-98 (1958); *see also* BOGERT, *supra* note 66, § 701 (explaining the duty of the trustee to act solely for the benefit of the beneficiary).

256. RESTATEMENT (SECOND) OF CONTRACTS § 302 (1981) (indicating that the agent may be made to act as a fiduciary to a non-party if it is clearly intended by the parties).

257. *See supra* Part IV.B.1.

258. *See discussion supra* Part IV.

developed, there is enough information available for legislators to find an adequate basis for imposing such duty.²⁵⁹ One state has already taken steps to this end, and there is little reason why other states cannot follow suit—Delaware's legislation provides the benefit of stability without the burden of retrospective adjudication.²⁶⁰ By judicially imposing these duties, courts would, in effect, reclassify acts that are lawful at the time of commission as unlawful, having failed to notify any of the actors involved.²⁶¹ This sort of retroactive application of newly formed principles is not as favorable as legislation that would put all interested parties on notice of the change in the law.²⁶²

Agents' duties should mirror those shouldered by their principals, and where delegates exercise authority granted to them by trustees, the fiduciary duties imposed on the trustee should carry over to their agents.²⁶³ The settlor, who originally vests the discretion in the trustee, created the trust to have this property managed for the benefit of another.²⁶⁴ Therefore, any actions taken by the trustee should carry with them a fiduciary duty, regardless of whether the trustee actually takes action.²⁶⁵ Both trustees and their delegates work for the benefit of the trust and ultimately, for the beneficiaries; it would be manifestly unjust to give the same discretion to another without imposing the same duties of disinterested loss prevention on the agent.²⁶⁶ These delegates are given the discretionary responsibility to act for the benefit of the trust; the duties that accompany these actions when performed by the trustee should not magically disappear simply because the actor's title has changed. Lawmakers should support the Prudent Investor Rule and the transfer of fiduciary discretion, which comes or should come incident to a delegation, and they should hold agents accountable for the actions they take for the benefit of the trust.

259. See discussion *supra* Part IV.

260. See DEL. CODE ANN. tit. 12, § 3322 (West 2006).

261. See SEC v. Chenery Corp., 332 U.S. 194, 203–04 (1947).

262. See *id.*

263. See BOGERT, *supra* note 66, § 701.

264. See *id.*

265. See discussion *supra* Part IV.A.6.a.

266. See DEL. CODE ANN. tit. 12, § 3322 (West 2006); see also BOGERT, *supra* note 66, § 701.