
**EMPTY PROMISES:
SETTLOR’S INTENT, THE UNIFORM TRUST CODE,
AND THE FUTURE OF TRUST INVESTMENT LAW**

JEFFREY A. COOPER*

INTRODUCTION	1166
I. EVOLUTION OF THE RULE.....	1171
A. <i>The Roots of the Dilemma</i>	1171
B. <i>Applying the Emerging Rule</i>	1174
II. UNDESIRABLE CONSEQUENCES.....	1177
A. <i>Undermines an Established Statutory Scheme</i>	1178
1. The First Victim: The UTC Itself.....	1178
2. The Second Victim: The UPIA	1179
B. <i>Alters the Fiduciary Relationship</i>	1182
C. <i>Opens the Floodgates of Litigation</i>	1184
D. <i>Unleashes the Tyranny of the Majority</i>	1185
1. Forced to Join the Investment Herd.....	1186
2. Repudiating Warren Buffett?	1190
E. <i>Ignores Key Goals of Estate Planning</i>	1191
1. Personal Benefit	1192
2. Spiritual Benefit	1193
F. <i>Defeats Estate Tax Planning</i>	1196
1. The ILIT	1196
2. The GRAT	1198
III. THE SETTLORS RESPOND.....	1201
A. <i>The Ignorant Trustee</i>	1201
B. <i>The Convenient Beneficiaries</i>	1203
C. <i>The Desirable Jurisdiction</i>	1204
D. <i>The Avoidance of Trust Law</i>	1206
1. Informal Avoidance: Secret Trusts.....	1206
2. Formal Avoidance: Choosing Other Entities.....	1207
IV. TOWARDS A BETTER APPROACH.....	1210
A. <i>Mistake</i>	1210

* Associate Professor of Law, Quinnipiac University School of Law. A.B., Harvard College; J.D., Yale Law School; LL.M. (Taxation), New York University School of Law. My thanks to Ed Cooper, Gert Cooper, David Hermenze, John Langbein, Ed Manigault, Alexandra Stevens, and Josh Tate for their thoughtful comments regarding this work, participants at the Faculty Forum at Quinnipiac University School of Law for their insights and enthusiasm, Brooke Whiteley for her able research assistance, and Dean Brad Saxton for his financial support of this work. I also wish to acknowledge Stew Sterk and Bob Whitman for providing both extensive comments and sage guidance. Any errors are mine alone.

B. <i>Changed Circumstances</i>	1212
CONCLUSION.....	1215

Many trust documents contain specific investment management directives, such as a mandate that the trustee retain a specific investment. Whereas trust investment law historically has honored the intent of the settlors who impose such restrictions, some would read the Uniform Trust Code (“UTC”) to codify a very different rule. Under this emerging rule, the enforceability of a trust investment restriction would hinge upon objective notions of prudence and efficiency, without regard to a settlor’s subjective intent.

Although the UTC is now the law in nearly half the states, this potentially revolutionary change has received almost no scholarly attention. The scant literature on this subject emphasizes the potential benefits of the emerging rule, predicting it will liberate trust beneficiaries from irrational investment restraints and promote the most efficient deployment of trust investment resources. However, the literature lacks a critical analysis of the effect the emerging rule would have on future trust settlors. This Article fills that void, revealing how the emerging rule would produce a series of undesirable consequences and would weaken trust law by incentivizing trust settlors to avoid its undesirable provisions.

Viewed from this perspective, the emerging benefit-the-beneficiaries rule simply cannot achieve its desired impact, and the promises it offers trust beneficiaries will prove to be empty ones. As such, trust investment law would be better served by expansion of what some might consider less ambitious doctrines – ones which seek to aid the beneficiaries of settlors who have made mistakes or failed to anticipate changed circumstances, but which provide no aid in cases where a settlor intentionally and thoughtfully impaired beneficiaries’ economic rights. Trust investment law cannot meaningfully redress those latter cases. It should not destroy itself by trying.

INTRODUCTION

It is an accepted principle of trust law that a private trust¹ exists to benefit the beneficiaries thereof. When a trust settlor² gratuitously places assets in

¹ A trust is an arrangement for the ownership of property involving three parties (or sets of parties): a *settlor* who conveys property to a *trustee* to be used for the benefit of one or more *beneficiaries*. A trust can be established during the settlor’s lifetime (an “inter vivos trust”) or at her death (a “testamentary trust”). Typically, a written document such as a trust agreement or a last will and testament governs the trust. There are two fundamental categories of trusts: those established for the benefit of ascertainable beneficiaries (“private trusts”) and those established for charitable purposes (“charitable trusts”). For a more detailed introduction to the basics of trust law, see JESSIE DUKEMINIER ET AL., *WILLS, TRUSTS, AND ESTATES* 485-493 (7th ed. 2005) (discussing the historical background, uses, and structure of private trusts).

² A “settlor” alternatively may be referred to as a “grantor,” “testator,” or “decedent.” For simplicity, I use the term “settlor” throughout this Article.

trust for the benefit of others, she relinquishes dominion and control over those assets.³ Provisions of both probate law⁴ and tax law⁵ operate to ensure that the settlor retains no beneficial interest in the gifted funds. Similarly, the trustee who administers trust assets is held to the highest fiduciary duty of loyalty,⁶ bound to exercise his given authority in the sole interest of the trust beneficiaries.⁷ All traditional sources of trust law, from the major treatises⁸ to

³ While correct with respect to most types of trusts discussed in this Article, this statement is an oversimplification. For example, the same person may be both the settlor and a beneficiary of certain trusts established as part of a sophisticated estate plan. *See infra* Part II.F.2 (discussing Grantor Retained Annuity Trusts). In addition, a settlor may establish a trust for her own lifetime benefit as a means of streamlining and simplifying the administration of her estate at death. For more on the use of such “revocable trusts” or “living trusts,” see Dennis M. Patrick, *Living Trusts: Snake Oil or Better than Sliced Bread?*, 27 WM. MITCHELL L. REV. 1083, 1092-1104 (2000).

⁴ As a general rule, once she has executed and funded the trust, a settlor no longer has legal standing to challenge the trustee’s actions. John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 664 (1995) [hereinafter Langbein, *Contractarian Basis*]. For a detailed discussion and critique of this historical rule, see generally Michael R. Houston, Comment, *Estate of Wall v. Commissioner: An Answer to the Problem of Settlor Standing in Trust Law?*, 99 NW. U. L. REV. 1723 (2005) (considering the extent to which a settlor’s power to remove and replace a trustee provides a suitable substitute for settlor standing). *See also* Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 666-69 (2004) (exploring the agency costs which result from the settlor’s lack of standing).

⁵ If the settlor retains any direct or indirect interest in trust funds, those funds will be subject to federal estate taxation at her death. *See* I.R.C. §§ 2036, 2038 (2000). To the extent that many settlors establish private trusts in order to minimize estate taxation, these tax provisions provide a powerful incentive for settlors to fully part with dominion and control over trust assets. *See generally* Mary Ann Mancini, *The Tax Consequences of Retained Interests and Powers*, SM005 ALI-ABA 69 (2006).

⁶ Judge Cardozo penned the classic description of the duty of loyalty:

Many forms of conduct permissible in a workaday world for those acting at arm’s length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.

Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928). For a more modern judicial exposition on the duty of loyalty, see *In re Estate of Rothko*, 379 N.Y.S.2d 923, 932-52, 965-78 (Sur. Ct. 1975) (removing and surcharging fiduciaries for self-interested transactions involving the estate of the famous painter, Mark Rothko), *modified*, 392 N.Y.S.2d 870 (App. Div. 1977), *aff’d*, 372 N.E.2d 291 (N.Y. 1977).

⁷ For criticism of the “sole interest” rule, see John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 YALE L.J. 929, 934-57, 980-87 (2005) (advocating the replacement of the “sole interest” standard with a “best interest” one). *But see* Melanie B. Leslie, *In Defense of the No Further Inquiry Rule: A Response to Professor John Langbein*, 47 WM. & MARY L. REV. 541, 544-46, 550-86 (2005) (advocating retention of the “sole interest” standard).

the Restatement,⁹ agree that a trust must be administered to benefit its beneficiaries.

Given this backdrop, it hardly seems surprising that the Uniform Trust Code (“UTC”)¹⁰ now codifies the rule that a trust exists to benefit its beneficiaries (the “benefit-the-beneficiaries rule”).¹¹ Yet appearances can be deceiving. Notwithstanding its nondescript text, and perhaps contrary to the intent of state legislatures which have adopted it,¹² the UTC may significantly undermine established trust law.

At issue are not the words of the UTC, but rather their meaning. Specifically, whereas trust law typically accorded a trust settlor nearly unfettered latitude to determine which trust terms and restrictions would benefit her chosen beneficiaries, one can read the UTC to deny her this power. Most visible among those advocating such a reading is Professor John Langbein, a member of the committee that drafted the UTC and one of trust law’s most influential voices. Under Professor Langbein’s formulation of the benefit-the-beneficiaries rule, the “benefit” of a trust provision is determined

⁸ See AMY MORRIS HESS ET AL., *THE LAW OF TRUSTS AND TRUSTEES* § 1 (3d ed. 2007) (“A trustee holds trust property ‘for the benefit of’ the beneficiary.”); 1 AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, *THE LAW OF TRUSTS* § 2.6 (4th ed. 1987) (“A trust is created only where the title to property is held by one person for the benefit of another.”).

⁹ The rule appears twice in the Restatement. See RESTATEMENT (THIRD) OF TRUSTS § 78 (2007) (“Except as otherwise provided in the terms of the trust, a trustee has a duty to administer the trust solely in the interest of the beneficiaries”); RESTATEMENT (THIRD) OF TRUSTS § 27(2) (2003) (“[A] private trust, its terms, and its administration must be for the benefit of its beneficiaries”). Significantly, as indicated by the quoted text, section 78 appears to frame the benefit-the-beneficiaries rule as a default one which the settlor may modify “in the terms of the trust.”

¹⁰ The UTC represents “the first national codification of the law of trusts.” UNIF. TRUST CODE prefatory note (amended 2005), 7C U.L.A. 364 (2006). Twenty states and the District of Columbia have adopted the UTC. See NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS, UNIF. LAW COMM’RS, *A FEW FACTS ABOUT THE . . . UNIFORM TRUST CODE* (2008), http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-utc2000.asp.

¹¹ Section 404 of the UTC directs that “[a] trust and its terms must be for the benefit of its beneficiaries.” UNIF. TRUST CODE § 404, 7C U.L.A. 484. Per section 105(b)(3) of the UTC, this requirement is a mandatory one that the settlor cannot waive. *Id.* § 105(b)(3), 7C U.L.A. 428.

¹² See *infra* notes 48-55 and accompanying text. The comments to the UTC, which are intended to inform legislative understanding of the Code’s impact, do not sufficiently reflect the emerging reading of the benefit-the-beneficiaries rule. As such, a state legislature relying on these comments for guidance might fail to comprehend the UTC’s potential impact. Professor English, the UTC’s reporter, has taken this suggestion one step further, opining that even when state legislatures carefully review and debate provisions of the UTC, subtle issues of interpretation may be beyond their expertise. See David M. English, *The Kansas Uniform Trust Code*, 51 U. KAN. L. REV. 311, 322 (2003) (suggesting that modifications made to the UTC by the Kansas legislature “were perhaps not fully understood”).

by reference to objective notions of prudence and efficiency¹³ rather than the settlor's subjective intent.¹⁴

Carried to its logical extreme, this emerging reading of the benefit-the-beneficiaries rule (the "emerging rule") could redefine the area of trust investment management.¹⁵ Trust documents frequently include specific investment management directives, such as a mandate that the trustee retain a certain portfolio investment or family business. Whereas trust law historically has honored such restrictions,¹⁶ the emerging rule seemingly would enforce only those which maximize economic value for the trust beneficiaries.¹⁷ If the settlor's chosen restrictions fail this objective test of economic benefit, they simply can be cast aside.

At first blush, the emerging rule has considerable allure. It seems to encourage the most efficient deployment of investment resources by setting aside irrational investment restraints imposed by long-forgotten settlors, the proverbial "dead hands" that haunt trust law.¹⁸ A deeper review, however, reveals a significant flaw. Many investment restrictions are not the undesirable

¹³ John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 NW. U. L. REV. 1105, 1112 (2004) [hereinafter Langbein, *Mandatory Rules*] (characterizing the rule as imposing an objective standard which "sets outer limits on the settlor's power to abridge the default law").

¹⁴ Langbein characterizes the rule as an "intent-defeating" one which serves "an anti-dead-hand policy." *Id.* at 1105.

¹⁵ The term "emerging rule" is both integral to an understanding of my thesis in this Article, yet frustratingly difficult to define. My primary concern is how future courts will interpret the verbiage of the UTC in light of modern scholarship that accords increased importance to beneficiaries' economic interests and deemphasizes the subjective expectations of trust settlors. I use the term "emerging rule" to refer to the nascent argument that the benefit-the-beneficiaries rule increasingly should restrict a settlor's ability to impose investment restrictions that fail an objective test of prudence. While I read Professor Langbein's writings to support that vision, I do not wish to imply that he would intend, or even favor, all the potential applications of the rule discussed in Part II of this Article. To the contrary, many consequences of the emerging rule may be ones neither Professor Langbein nor the UTC's drafters intended. This possibility only adds to the importance of the literature clearly reflecting these potential consequences.

¹⁶ See *infra* Part I.A.

¹⁷ Langbein, *Mandatory Rules*, *supra* note 13, at 1111 ("In the future, . . . I believe that the benefit-the-beneficiaries rule . . . will interact with the growing understanding of sound fiduciary investing practices to restrain the settlor's power to direct a course of investment imparting risk and return objectives contrary to the interests of the beneficiaries.").

¹⁸ As Professor Sterk phrases the relevant question: "[F]or how long should current decisions be controlled by the dead hand of a settlor who has long since met his maker?" Stewart E. Sterk, *Trust Protectors, Agency Costs, and Fiduciary Duty*, 27 CARDOZO L. REV. 2761, 2763 (2006) (citing LEWIS M. SIMES, PUBLIC POLICY AND THE DEAD HAND (1955)). For a summary of the major arguments in support of limiting dead hand control, see Gregory S. Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189, 1257-64 (1985).

remnants of irrational dead hands, but are carefully-designed provisions intended to further a living settlor's unique estate planning goals. Applying an objective, dispassionate test of "benefit" would cut too deeply, setting aside these important restrictions as freely as it would set aside those imposed by less thoughtful trust settlors.

A cascade of undesirable consequences would result. Trust law would become less comprehensible and less flexible, as what appear to be default guidelines governing trust investment management would morph into rigid requirements. A variety of common estate planning techniques would lose much of their allure. The interpersonal aspects of wealth transmission would be frustrated, as personal visions of trust settlors become subjugated to the dispassionate dictates of modern investment theory.

In response to these unwelcome changes, many trust settlors, and their creative estate planning counsel, may conclude that modern trust law simply fails to meet their needs. They will respond by adopting the laws of more favorable jurisdictions and utilizing more favorable estate planning structures, thereby outflanking the emerging rule and rejecting the dictates of modern trust law. The misguided effort to make modern trust law more efficient instead would have fostered its irrelevance.

Taken from this perspective, a perspective not adequately reflected in the current literature, the emerging benefit-the-beneficiaries rule would imperil trust law. In this Article, I explore the likely repercussions and argue that we can avoid these negative consequences only by reversing the modern trend. The benefit-the-beneficiaries rule should not be read to impose a purely objective test of whether trust restrictions will maximize the beneficiaries' wealth. Rather, it should be read as imposing the more subjective test of whether such restrictions are likely to further or to frustrate the settlor's lawful intent and objectives in establishing the trust. Only if trust investment provisions fail to serve the settlor's goals should they be set aside. A contrary reading of the UTC should be rejected.¹⁹

The Article is organized as follows. In Part I, I lay the foundation for my analysis, exploring the evolution of the benefit-the-beneficiaries rule from

¹⁹ My primary argument is one of interpretation, contending that even those states that have enacted the UTC remain free to reject the emerging reading of UTC section 404. Professor Langbein appears to frame the debate the same way, twice suggesting that the meaning of the rule will continue to evolve "in the future." Langbein, *Mandatory Rules*, *supra* note 13, at 1105, 1111. Having said that, state legislatures wishing to foreclose Professor Langbein's reading of UTC section 404 would be well advised to clarify that "benefit" is a subjective term which only can be evaluated with respect to the beneficiaries' interests as defined by the settlor. Ohio has taken this approach. *See infra* note 191. Ohio also has converted the mandatory rule into a default one which the settlor can modify. *See infra* note 191. While making the rule a mere default would mitigate many of its undesirable consequences and eliminate the most problematic incentive effects, it still would offend a plain reading of the UTC's text. *See infra* Part II.A.1. For a discussion of a related modification state legislatures might wish to consider, see *infra* note 234.

common law to the UTC and assessing its implications for a variety of trust investment restrictions. In Part II, I explore the potential negative consequences of applying the emerging rule to investment restrictions, illustrating how doing so would undermine an established statutory regime and threaten fundamental principles of modern estate planning. In Part III, I consider the likely responses of future trust settlors and their estate planning counsel, illustrating how the emerging rule could weaken trust law by incentivizing trust settlors to avoid its undesirable provisions. In Part IV, I suggest a direction for future scholarship by briefly considering how other doctrines can serve to address many of the inefficiencies caused by imprudent investment restrictions without destroying desirable aspects of traditional trust law.

Through this analysis, I conclude that however well-intentioned, the emerging benefit-the-beneficiaries rule simply cannot achieve its desired effects. In a world where trust settlors are free to choose favorable jurisdictions and favorable legal regimes, even a supposedly mandatory rule will not force their hands. Ultimately, settlors seeking to control the fate of their funds will find means to achieve their ends, casting aside legal regimes which undermine, rather than enhance, their ability to do so. Such will be the ultimate downfall of the emerging benefit-the-beneficiaries rule. Those interpreting the UTC now must decide whether trust law itself will suffer a similar fate.

I. EVOLUTION OF THE RULE

A. *The Roots of the Dilemma*

Historically, the settlor's intent was the defining force in trust law – the “polestar” which guided all aspects of trust administration.²⁰ Exceptions to this general rule were few and far between, limited to cases where a trust provision encouraged illegal activity,²¹ fostered immorality,²² or otherwise violated public policy.²³ Beyond these relatively rare exceptions, the settlor

²⁰ *In re Sherman Trust* 179 N.W. 109, 112 (Iowa 1920) (citing *Wilberding v. Miller*, 106 N.E. 665, 667 (Ohio 1913)).

²¹ *See, e.g., Splain v. Hogard*, Nos. G033278, G033720, 2005 WL 648156, at *4-5 (Cal. Ct. App. Mar. 22, 2005) (invalidating a trust designed to evade taxes); *Leavitt v. Palmer*, 3 N.Y. 19, 36-40 (1849) (invalidating a trust designed to violate banking laws); *In re Estate of Sage*, 412 N.Y.S.2d 764, 765-70 (Sur. Ct. 1979) (prohibiting the use of trust funds to pay bribes).

²² *See, e.g., Kingsley v. Broward*, 19 Fla. 722, 742-47 (1883) (voiding deed that granted a portion of an estate to afterborn illegitimate children insofar as it would encourage the birth of illegitimate children).

²³ *See, e.g., Greenwich Trust Co. v. Tyson*, 27 A.2d 166, 170-74 (Conn. 1942) (invalidating trust provisions that defrauded creditors); *Girard Trust Co. v. Schmitz*, 20 A.2d 21, 27-37 (N.J. Ch. 1941) (invalidating trust provisions that interfered with sibling

was free to decide which trust terms and investment restrictions would best serve her chosen beneficiaries.²⁴

With the passage of time, a subtle shift has taken place within fiduciary law. While the case law repeatedly reaffirms the traditional primacy of a settlor's intent,²⁵ the literature increasingly emphasizes the needs of trust beneficiaries²⁶ and the dictates of modern investment theory.²⁷ As such, whereas the settlor's word was once the sole source of authority, increasingly now "[t]here are three voices to which the fiduciary must listen: the settlor[,] . . . the beneficiaries[,] . . . and the market."²⁸

Amid this evolving landscape emerges the UTC. Unfortunately, the UTC's text reflects rather than resolves this brewing uncertainty in trust law. On the one hand, the UTC carries forward the baseline rule that trust law is the default law which the settlor may freely abrogate.²⁹ The official comments emphasize the UTC's deference to the settlor's intent, clarifying that "[a]bsent some other restriction, a settlor is always free to specify the trust's terms to which the

relationships); *In re Carples' Estate*, 250 N.Y.S. 680, 681-89 (Sur. Ct. 1931) (invalidating trust provisions that interfered with a mother-child relationship); *Graves v. First Nat'l Bank*, 138 N.W.2d 584, 588-92 (N.D. 1965) (invalidating trust provisions that encouraged divorce); *In re Devlin's Trust Estate*, 130 A. 238, 238-40 (Pa. 1925) (invalidating trust provisions that interfered with religious freedom).

²⁴ This is not to suggest that the case law is completely devoid of examples of courts negating investment restrictions found to be objectively imprudent. See RESTATEMENT (THIRD) OF TRUSTS § 27 cmt. b (2003). However, while Professor Langbein correctly notes that the emerging rule is grounded in such cases, he also predicts the emerging rule will move well beyond these historic roots. Langbein, *Mandatory Rules*, *supra* note 13, at 1111 ("The characteristic sphere for the application of the anti-dead-hand rule has been the fringe world of the eccentric settlor: the crackpot who wants to brick up her house, or build statues of himself, or dictate children's marital choices. In the future, however, I believe that the benefit-the-beneficiaries rule will set limits upon a more common form of settlor direction, the value-impairing investment instruction.").

²⁵ See, e.g., *Bryan v. Dethlefs*, 959 So. 2d 314, 317 (Fla. Dist. Ct. App. 2007) ("The polestar of trust or will interpretation is the settlor's intent."); *Thorson v. Neb. Dep't of Health & Human Servs.*, 740 N.W.2d 27, 33 (Neb. 2007) ("The primary rule of construction for trusts is that a court must, if possible, ascertain the intention of the testator or creator."); *In re Lowy*, 931 A.2d 552, 556 (N.H. 2007) ("When we construe a trust, the intention of a settlor is paramount . . .").

²⁶ See *supra* notes 13-18 and accompanying text.

²⁷ See *infra* notes 61-62 and accompanying text.

²⁸ *In re Will of Dumont*, No. 1956TT443, 2004 WL 1468746, at *5 (N.Y. Sur. Ct. June 25, 2004).

²⁹ UTC section 105(a) provides the default rule as follows: "Except as otherwise provided in the terms of the trust, this [Code] governs the duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficiary." UNIF. TRUST CODE § 105(a) (amended 2005), 7C U.L.A. 428 (2006) (emphasis added).

trustee must comply.”³⁰ On the other hand, the UTC fundamentally departs from prior law³¹ by establishing fourteen “mandatory rules” that a trust settlor cannot waive.³² Among these rules is the UTC’s benefit-the-beneficiaries rule: the requirement that “[a] trust and its terms be for the benefit of its beneficiaries.”³³

The UTC itself offers no clear guidance on what those words mean.³⁴ Do they merely restate well-established principles of trust law? Or are they the seeds of revolution – a subtle legislative shift which will fundamentally alter the relative power of trust settlors and beneficiaries? Professor Langbein has filled the void created by the UTC’s silence, characterizing the benefit-the-beneficiaries rule as one which restrains a settlor’s traditional freedom to

³⁰ *Id.* § 105 cmt., 7C U.L.A. 432. While comments to uniform acts are not binding authority, they offer crucial insight into the drafters’ rationale, effectively “reflecting the legislative intent of enacting states.” Edward C. Halbach, Jr. & Lawrence W. Waggoner, *The UPC’s New Survivorship and Antilapse Provisions*, 55 ALB. L. REV. 1091, 1103 n.49 (1992).

³¹ David M. English, *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 67 MO. L. REV. 143, 155 (2002) (“[P]rior to the UTC, neither the *Restatement*, nor treatise writers, nor state legislatures had attempted to describe the principles of law that are not subject to the settlor’s control.”).

³² UNIF. TRUST CODE § 105(b), 7C U.L.A. 428-29. The UTC’s insertion of mandatory elements into traditionally default trust law raises a number of policy implications that are beyond the scope of this Article. For an expansive overview of the topic, see generally Alan Newman, *The Intention of the Settlor Under the Uniform Trust Code: Whose Property Is It Anyway?*, 38 AKRON L. REV. 649 (2005) (analyzing the UTC’s mandatory rules). For a detailed consideration of one of these mandatory rules, with citations to relevant literature, see T.P. Gallanis, *The Trustee’s Duty to Inform*, 85 N.C. L. REV. 1595, 1617-21 (2007) (discussing the trustee’s duty to provide information to trust beneficiaries). This literature concerning the UTC’s mandatory rules is a small part of a far larger scholarly debate regarding default rules. For an introduction to the broader literature, see Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 87-118 (1989) (analyzing alternative types of “default” and “immutable” rules); Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of Its Context*, 73 FORDHAM L. REV. 1031, 1033-94 (2004) (applying theories of default rules to questions in probate law); Brett H. McDonnell, *Sticky Defaults and Altering Rules in Corporate Law*, 60 SMU L. REV. 383, 386-93 (2007) (surveying the relevant literature).

³³ UNIF. TRUST CODE § 404, 7C U.L.A. 484; *see also id.* § 105(b)(3), 7C U.L.A. 428 (making the rule mandatory).

³⁴ As discussed *infra* Part II.A, by failing to clarify the meaning of the benefit-the-beneficiaries rule, the UTC’s drafters failed to achieve a fundamental general purpose of uniform acts, namely, increasing the clarity and accessibility of state law. The Uniform Probate Code similarly has been criticized on this basis. *See, e.g.*, Hirsch, *supra* note 32, at 1036 (arguing that the Uniform Law Commissioners being “tight-lipped” about the meaning of a key provision has resulted in a “theoretical grab-bag” of interpretations).

negate default notions of investment prudence.³⁵ Read in this light, the UTC's benefit-the-beneficiaries rule would mark a significant shift in trust law.

B. *Applying the Emerging Rule*

Although the true impact of the emerging rule has yet to be felt, the literature supports the viewpoint that the potential changes could be enormous. Consider an example posed by Professor Langbein. A settlor directs against diversification of a portfolio invested entirely in IBM stock, reasoning as follows: "I worked for IBM for 35 years, they were wonderful to me, they helped me buy the stock, and the stock zoomed in value throughout my career. You just cannot do better."³⁶ This hypothetical settlor's primary goal, like that of many trust settlors, is providing for his chosen beneficiaries' economic well-being. His chosen means, investing solely in his single favorite stock, are calculated to further those goals. In his mind, his means and goals are in accord, and his chosen trust investment directive will maximize his beneficiaries' wealth.³⁷

Unfortunately, this settlor is simply wrong. However well-intentioned he may be, his chosen investment directive is an irrational one. Modern understandings of financial markets completely dispel the settlor's argument that "you just cannot do better" than to invest your entire portfolio in a single company's stock.³⁸ The settlor who thinks he is helping his chosen beneficiaries by so restricting the investment of their trust funds is a fool – a fool for whom Professor Langbein rightly has little sympathy. Langbein argues that "[w]hat is happening in this case is that the settlor is imposing his supposed investment wisdom on the trust in circumstances in which the

³⁵ See *supra* notes 13-14 and accompanying text.

³⁶ John H. Langbein, *The Uniform Prudent Investor Act and the Future of Trust Investing*, 81 IOWA L. REV. 641, 664 (1996) [hereinafter Langbein, *Trust Investing*]. The example proved a prescient one. See *In re Estate of Saxton*, 686 N.Y.S.2d 573, 575-81 (Sur. Ct. 1998) (surcharging trustee for failing to diversify trust portfolio invested entirely in IBM stock), *aff'd as modified*, 712 N.Y.S.2d 225 (App. Div. 2000).

³⁷ This characterization seems correct in light of the settlor's assertion that "[y]ou just cannot do better" than to invest in IBM. He clearly thought his investment directive would optimize the trust's investment results.

³⁸ Research reveals that a portfolio invested in a single stock is unlikely to outperform a diversified portfolio yet will bear twice as much investment risk. Richard A. Booth, *The Efficient Market, Portfolio Theory, and the Downward Sloping Demand Hypothesis*, 68 N.Y.U. L. REV. 1187, 1197 (1993) (citing relevant studies); see also Jeffrey A. Cooper, *Speak Clearly and Listen Well: Negating the Duty to Diversify Trust Investments*, 33 OHIO N.U. L. REV. 903, 906-10 (2007) (discussing the benefits of diversification).

investment strategy is objectively stupid and imprudent.”³⁹ The proper judicial response, per Langbein, is to set aside the provision.⁴⁰

This result marks a clear departure from established trust law. The settlor’s prohibition on the sale of IBM stock meets the traditional standard for enforceability: it is neither illegal, immoral, nor against public policy.⁴¹ It is merely foolish. As such, ignoring this investment restriction requires a new doctrine – a new standard for setting aside the settlor’s clearly-expressed intent. The emerging benefit-the-beneficiaries rule provides the necessary justification.

This first example is merely the tip of the proverbial iceberg. If the benefit-the-beneficiaries rule operates to negate the foolish settlor’s directive to retain IBM stock, it similarly serves to annul a wide variety of other trust investment restrictions. To illustrate the potential scope of this change, suppose the settlor said something different when he established his trust funded with IBM stock. Imagine that the directive to retain IBM was justified as follows: “I worked for IBM for thirty-five years and I believe that company is poised to enter a period of unprecedented growth. The market fundamentally misperceives the company’s business prospects and its stock is grossly undervalued.” Alternatively, suppose the settlor prohibited the sale of a closely-held family business, expressing his sentiments as follows: “I built this business over thirty-five years and it has become a great source of pride. You clearly could make more money by liquidating the company and investing in a diversified stock portfolio. However, keeping this business intact will honor our family name and should provide you with more than enough income.”

These alternate formulations stand in marked contrast to the foolish settlor who directed retention of IBM stock merely because the company was “good” to him. These latter settlors evidence a far greater understanding of financial markets and investment strategy. They carefully crafted their chosen directives against diversification to further their specific purposes in establishing these trusts. Their individual motivations and means differ significantly: one of these settlors offers a logical rationale for why diversification would not maximize his beneficiaries’ wealth, while the second compellingly argues that diversification would undermine trust purposes that transcend the accumulation of wealth. Despite these differences, both settlors have in common their sophistication, their thoughtfulness, and their clear vision for the management of trust funds.

Another commonality is that the emerging rule is likely to undermine both settlors’ investment restrictions.

³⁹ Langbein, *Trust Investing*, *supra* note 36, at 664.

⁴⁰ *Id.* at 665. I agree with Professor Langbein’s conclusion that this investment restriction should be stricken, yet I would arrive at this result through fundamentally different means. See *infra* Part IV.A.

⁴¹ See *supra* notes 21-23 and accompanying text.

Under modern investment theory, the settlor who believes IBM is significantly undervalued in the marketplace is as irrational as the foolish settlor who became attached to IBM stock simply because the company was good to him. Given the efficiency of the stock market⁴² and the widespread availability of corporate information,⁴³ it is simply unreasonable for this settlor to believe he possesses sufficiently unique information about IBM to justify the risks inherent in holding an undiversified block of stock. As such, if the emerging rule is the basis for ignoring the wishes of the settlor who thinks IBM is a “good” company, it just as easily would negate the wishes of the settlor who thinks it is an “undervalued” one.

A similar fate confronts the investment directives imposed by the third settlor, who directed retention of his family business as a means of perpetuating a family legacy. Many family businesses simply do not survive the transition into the hands of a future generation.⁴⁴ A settlor who foists such

⁴² According to the influential Efficient Capital Market Hypothesis (“ECMH”), stock market prices properly reflect all publicly-known information. See Lawrence A. Cunningham, *From Random Walks to Chaotic Crashes: The Linear Genealogy of the Efficient Capital Market Hypothesis*, 62 GEO. WASH. L. REV. 546, 548 (1994). As colorfully stated in a bestselling book on the subject, ECMH would predict that “a blindfolded monkey throwing darts at a newspaper’s financial pages could select a portfolio that would do just as well as one selected by the experts.” BURTON G. MALKIEL, *A RANDOM WALK DOWN WALL STREET: THE TIME-TESTED STRATEGY FOR SUCCESSFUL INVESTING* 24 (2003). Since “financial analysts in pin-striped suits do not like being compared with bare-assed apes,” ECMH is predictably unpopular among professional securities analysts. *Id.* ECMH has been the subject of more scholarly criticism as well. See, e.g., Lynn A. Stout, *How Efficient Markets Undervalue Stocks: CAPM and ECMH Under Conditions of Uncertainty and Disagreement*, 19 CARDOZO L. REV. 475, 483-92 (1997) (arguing that ECMH does not properly explain investor behavior).

⁴³ Increased public access to investment information, augmented by the rise of the Internet, should make securities markets increasingly efficient. See Paul Gerard Johnson, *The Virtual Investor, The Virtual Fiduciary: The Internet and its Potential Effects on Investors*, 16 ANN. REV. BANKING L. 431, 434 (1997) (analyzing “the Internet as a source of investment information and empowerment”). In addition, a rule recently promulgated by the Securities and Exchange Commission, denominated Regulation FD, requires company executives to disseminate all material financial information to the entire investment public at the same time. General Rule Regarding Selective Disclosure, 17 C.F.R. § 243.100 (2007). For the history of Regulation FD, see D. Casey Kobi, *Wall Street v. Main Street: The SEC’s New Regulation FD and Its Impact on Market Participants*, 77 IND. L.J. 551, 552-82 (2002). For a criticism of Regulation FD, see Peter Talosig III, *Regulation FD – Fairly Disruptive? An Increase in Capital Market Inefficiency*, 9 FORDHAM J. CORP. & FIN. L. 637, 696-714 (2004) (arguing that Regulation FD curtails the release of information and makes securities markets less efficient).

⁴⁴ John J. Scroggin, *Protecting and Preserving the Family: The True Goal of Estate Planning, Part II – Some of the Tools*, PROB. & PROP., Jul.-Aug. 2002, at 34, 37 (describing how only seventy percent of family-owned businesses survive in the hands of a second generation of owners, while fewer than five percent exist after three generations).

a business upon her children thus improperly restrains the family's future investment choices, or so the modern argument goes. Professor Langbein considered a similar example and concluded that such a restriction often represents an unseemly effort "to steer the firm's and the family's affairs from the grave," in which case, it should be ignored.⁴⁵

Moving through these various examples, we see the emerging rule cutting a wider and wider path through trust law. The emerging rule ignores provisions mandating concentrated holdings of family businesses as easily as those relating to publicly traded stocks. It sets aside directives imposed by thoughtful settlors as freely as those imposed by foolish ones. Perhaps of greatest concern, the emerging rule would invalidate trust investment restrictions not merely when they undermine the settlor's overarching goals, but also when they serve those goals.

These examples thus reveal the ultimate impact of the emerging benefit-the-beneficiaries rule. As Professor Langbein freely admits, the emerging rule is an "intent defeating" one.⁴⁶ Its application is not limited to cases where a well-intentioned settlor imposes a foolish investment restriction that would undermine his larger goals. Rather, the emerging rule can operate to negate trust provisions simply because they fail an external test of prudence, even if the provisions would accomplish exactly what the settlor subjectively intended. Under this regime, it ultimately matters not what trust terms the settlor thinks are best. Rather, that determination is for the trustee to make, and judges and juries to review.

Through this analysis, we can see the full potential of the emerging benefit-the-beneficiaries rule. The governing trust document does not become a source of binding authority, the "polestar" of trust administration,⁴⁷ but rather a mere starting point – a series of presumptively valid instructions which the trustee will freely ignore when in the beneficiaries' best interests to do so. As discussed in the following Part of this Article, that regime represents the fundamentally wrong direction for modern trust law.

II. UNDESIRABLE CONSEQUENCES

The emerging rule would produce a variety of undesirable consequences, undermining desirable principles of current trust law and frustrating key aspects of modern estate planning. In this Part, I analyze six such consequences.

⁴⁵ Langbein, *Mandatory Rules*, *supra* note 13, at 1116-17.

⁴⁶ *Id.* at 1105.

⁴⁷ See *supra* note 20 and accompanying text (discussing the traditional role of settlor's intent as the "polestar" of trust law).

A. *Undermines an Established Statutory Scheme*

The emerging benefit-the-beneficiaries rule offends a plain reading of widely-adopted trust investment statutes and undermines a well-established legal regime.

1. The First Victim: The UTC Itself

In contrast to previous codifications of trust law, which scattered fragments of governing authority across various statutes,⁴⁸ the UTC is intended to consolidate all trust law in a single, easily accessible, source.⁴⁹ If the UTC's benefit-the-beneficiaries rule is interpreted to severely limit a settlor's ability to negate default provisions of trust law, then the UTC simply fails to achieve its stated goals.

A plain reading of the UTC suggests that its benefit-the-beneficiaries rule serves to reiterate, rather than revolutionize, established trust law. The actual text of the UTC, mandating that "[a] trust and its terms must be for the benefit of its beneficiaries,"⁵⁰ merely echoes well-established principles of fiduciary law.⁵¹ The relevant comments are equally disarming, clarifying both that the trustee's obligation towards the trust beneficiaries is to "benefit those beneficiaries in accordance with their interests *as defined in the trust's terms*,"⁵² and that the settlor "has considerable latitude in specifying how a particular trust purpose is to be pursued."⁵³ All the UTC facially requires is that the trust terms "reasonably relate" to the trust purposes and do not deploy trust funds towards "frivolous or capricious" ends.⁵⁴ Taken together, these provisions appear to do nothing more than reiterate traditional restrictions on a settlor's power.⁵⁵

In addition to suggesting that the UTC leaves unchanged the settlor's traditional authority to define general trust terms, the drafters clearly state that the UTC is of particularly limited applicability in the specialized area of trust *investment* law. Specifically, neither section 105(b)(3) nor any of the other mandatory rules in section 105(b) even reference article 9 of the UTC, the

⁴⁸ UNIF. TRUST CODE prefatory note (amended 2005), 7C U.L.A. 364 (2006).

⁴⁹ *Id.*

⁵⁰ *Id.* § 404, 7C U.L.A. 484.

⁵¹ The notion that a trust exists to benefit the beneficiaries hardly appears to be a revolutionary contribution to trust law. *See supra* notes 8-9 and accompanying text.

⁵² UNIF. TRUST CODE § 404 cmt., 7C U.L.A. 485 (emphasis added). As noted *supra* note 30, comments to uniform acts effectively represent the "legislative history" of those acts.

⁵³ UNIF. TRUST CODE § 404 cmt., 7C U.L.A. 485 (citing RESTATEMENT (THIRD) OF TRUSTS § 27(2) (Tentative Draft No. 2, approved 1999)) (emphasis added).

⁵⁴ *Id.*

⁵⁵ *See supra* notes 20-23 and accompanying text (discussing the deference traditionally accorded to a settlor's intent while noting exceptions whereby courts invalidated trust provisions that "encouraged illegal activity, fostered immorality, or otherwise violated public policy").

article specifically related to trust investments.⁵⁶ To the contrary, the UTC's explicit approach to trust investment law is to defer⁵⁷ to the provisions of the widely-adopted Uniform Prudent Investor Act ("UPIA").⁵⁸ States that have previously adopted the UPIA are encouraged to recodify their *existing* UPIA as article 9 of the UTC,⁵⁹ while the remaining states are invited to enact the UPIA under the UTC's umbrella.⁶⁰ This deference to the existing UPIA thus represents another manner in which the UTC facially reaffirms established trust law rather than fundamentally altering it.

Taken together, these numerous provisions of the UTC seemingly grant a trust settlor unfettered discretion to define the nature of the beneficiaries' interests in a trust and to draft investment management guidelines that the settlor believes will serve those interests. As such, the emerging rule would completely override the plain language of these provisions, adding a supervening requirement that any exercise of the settlor's vast discretion meet an unwritten test of benefiting the beneficiaries. This approach would render the UTC a fundamentally incomprehensible piece of trust legislation, requiring a reader seeking to understand the UTC's meaning to look to the pages of law reviews rather than the UTC's own text. Under this emerging regime, modern trust law would be neither comprehensive nor easily accessible, and the UTC would be nothing that it promises to be.

2. The Second Victim: The UPIA

As discussed above, the emerging benefit-the-beneficiaries rule would create significant disharmony within the UTC. It also would generate unacceptable conflicts between the UTC and the UPIA, stealthily subsuming the latter Act's fundamental purpose and well-established default posture.

In order to understand the nature of the UPIA, one must first understand the prevailing theory of investment management – modern portfolio theory.⁶¹

⁵⁶ UNIF. TRUST CODE art. 9, 7C U.L.A. 642 (incorporating the Uniform Prudent Investor Act as article 9 of the UTC).

⁵⁷ English, *supra* note 31, at 145 ("Given its importance and already widespread acceptance, the UTC does not modify the smaller Uniform Prudent Investor Act but incorporates it without change.").

⁵⁸ UNIF. PRUDENT INVESTOR ACT, 7B U.L.A. 1 (1994). Forty-four states, the District of Columbia, and the U.S. Virgin Islands have adopted the UPIA or significant portions thereof. See NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, UNIF. LAW COMM'RS, A FEW FACTS ABOUT THE... UNIFORM PRUDENT INVESTOR ACT (2008), http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-upria.asp.

⁵⁹ UNIF. TRUST CODE art. 9 cmt., 7C U.L.A. 642.

⁶⁰ See *id.* prefatory note, 7C U.L.A. 368 (stating that article 9 "provides a place for a jurisdiction to enact, reenact or codify its version of the Uniform Prudent Investor Act.").

⁶¹ Modern portfolio theory originated with the work of Harry Markowitz. See generally Harry Markowitz, *Portfolio Selection*, 7 J. FIN. 77 (1952). For a brief overview of modern portfolio theory, see Martin D. Begleiter, *Does the Prudent Investor Need the Uniform Prudent Investor Act – An Empirical Study of Trust Investment Practices*, 51 ME. L. REV.

Shaped by decades of investment management research, modern portfolio theory provides compelling academic support for the notion that certain investment actions, such as adequately diversifying portfolios, avoiding speculation, and minimizing investment costs, are per se prudent.⁶² The UPIA incorporates these tenets of modern portfolio theory.⁶³

However, despite the compelling logic of modern portfolio theory, the UPIA allows individual settlors to reject it. By its own terms, the UPIA is a pure default statute, providing rules that “may be expanded, restricted, eliminated, or otherwise altered by the provisions of a trust.”⁶⁴ If the UTC now adds an additional, unwaivable, requirement that the settlor’s exercise of this expansive discretion must objectively benefit the beneficiaries, then the UTC completely overrides the default posture of the UPIA.

The issue of portfolio diversification provides a clear example of the confusion the emerging rule would create. Under the UPIA, a trustee is directed to diversify a portfolio rather than concentrate investment risk in a small number of trust investments.⁶⁵ This general rule is subject to two major exceptions. First, the trustee is authorized to depart from the general rule whenever “the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying.”⁶⁶ Second, the requirement of diversification, like all provisions of the UPIA, is merely a default rule which the settlor may reject.⁶⁷ The emerging benefit-the-beneficiaries rule would effectively add a major restriction to this second exception, allowing a settlor to negate the default duty to diversify only when doing so benefits the beneficiaries.

This additional restriction completely undermines the structure of the UPIA. As noted above, the UPIA already authorizes a trustee to retain an undiversified portfolio when doing so would “better serve” the beneficiaries.⁶⁸ As such, the UPIA’s additional verbiage unilaterally empowering the settlor to negate default investment rules has meaning only if it enables the settlor to mandate an undiversified portfolio even when the beneficiaries would be better served by diversifying. Since the emerging rule effectively would deny the settlor that power, it would convert the previously default duty to diversify into a mandatory one that the “circumstances” can excuse, but which the settlor

27, 33-38 (1999); Jeffrey N. Gordon, *The Puzzling Persistence of the Constrained Prudent Man Rule*, 62 N.Y.U. L. REV. 52, 73 n.90 (1987) (cataloging literature related to modern portfolio theory). For a more detailed guide to modern portfolio theory, see W. SCOTT SIMON, *THE PRUDENT INVESTOR ACT: A GUIDE TO UNDERSTANDING* 35-59 (2002).

⁶² SIMON, *supra* note 61, at 35-59.

⁶³ UNIF. PRUDENT INVESTOR ACT prefatory note, 7B U.L.A. 3.

⁶⁴ *Id.* § 1(b), 7B U.L.A. 15.

⁶⁵ *Id.* § 3, 7B U.L.A. 29.

⁶⁶ *Id.*

⁶⁷ See *supra* note 64 and accompanying text.

⁶⁸ See *supra* note 66 and accompanying text.

cannot abrogate. That reading would undermine the UPIA's fundamental structure and would offend clear principles of statutory interpretation by rendering superfluous a portion of its text.⁶⁹

Professor Langbein argues against such an inflexible reading of the emerging rule,⁷⁰ but his argument itself reveals much. Langbein suggests that the emerging rule indeed would prevent an irrational settlor from flouting modern portfolio theory by waiving the UPIA's default provisions mandating diversification, but would allow a more thoughtful settlor truly seeking to benefit the beneficiaries to waive such provisions. For example, Langbein suggests that either tax considerations or a desire to retain a family business might justify departure from the default rule.⁷¹ These two exceptions are nothing new. In fact, they appear in the comments to the UPIA itself as exemplifying the type of "circumstances" which negate the trustee's default duty to diversify.⁷² As such, the flexibility Professor Langbein cites in defense of the emerging rule is the flexibility that already exists within the UPIA. The emerging rule does not create that aspect of the UPIA; it threatens it.

This conflict between the emerging rule and the UPIA's established regime extends well beyond questions of investment diversification. The UPIA defines all of a trustee's obligations by subjective reference to the settlor's expectations and the terms of the governing trust document.⁷³ The emerging rule takes the opposite approach, allowing objective notions of prudence to circumscribe a settlor's chosen trust terms. The two approaches simply cannot be reconciled. Despite assertions to the contrary, the emerging rule would completely undermine the UPIA's default nature, effectively limiting the grantor's power to negate default notions of prudence to those cases where it is objectively prudent to do so. Such a power would be no power at all.

In sum, the UTC is offered as a clear and comprehensible statute which facially defers to the UPIA's existing statutory framework for investment of trust funds. If the benefit-the-beneficiaries rule provides an overriding objective standard for the enforceability of trust restrictions, then the impact of the UTC is exactly the opposite of everything it claims to be: it fundamentally overrides one of the central provisions of the UPIA and does so in a cryptic and convoluted manner.

⁶⁹ See *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001))).

⁷⁰ See Langbein, *Trust Investing*, *supra* note 36, at 665.

⁷¹ *Id.*

⁷² UNIF. PRUDENT INVESTOR ACT § 3 cmt., 7B U.L.A. 29.

⁷³ See *id.* § 2 cmt., 7B U.L.A. 21.

B. *Alters the Fiduciary Relationship*

A second undesirable consequence of the emerging rule is that it would fundamentally alter the trustee's traditional posture in trust administration matters. The trustee no longer would be interpreter and enforcer of the settlor's directives. Rather, he would become a skeptical challenger, constantly questioning the very source of authority under which he is empowered to act. This shift in roles would spawn three predictable negative effects.

First, the emerging rule would weaken a fundamental pillar of trust law by undermining its traditional contractarian principles. In significant part, a trust document is understood to reflect a contract, "a deal[] between settlor and trustee, about how the trustee will manage and apply the trust assets for the benefit of the beneficiaries."⁷⁴ This contractarian approach encourages settlors to embrace trust law by offering them greater ability to bind a trustee to follow their stated wishes.⁷⁵ The emerging rule undermines such contractarian principles, as the trustee increasingly becomes obligated to ignore the "deal" he entered into whenever doing so would serve the objective needs of the trust beneficiaries. The change makes trust law less attractive to trust settlors and can be expected to have a chilling impact on the establishment of trusts.

For those who nevertheless proceed to establish trusts, this fundamental shift in trust law would have a second, very practical, effect: it will increase the cost of administering those trusts. The job responsibilities of trustees would increase markedly under this emerging regime as trustees must undertake a new obligation of evaluating the economic effect, and thus the enforceability, of every trust provision. To fulfill these new responsibilities, trustees would incur increased compliance and administrative costs – expenses which predictably would result either in increased fees for fiduciary services or a reduction in the number of potential fiduciaries willing to serve in that capacity.⁷⁶

In addition, higher legal fees for routine trust administration would result. Typically, the lawyer who drafts a trust document also represents the trustee

⁷⁴ Langbein, *Contractarian Basis*, *supra* note 4, at 652. Professor Langbein's approach departed from the previously established view of trusts as primarily proprietary in nature. For a detailed discussion of these two competing viewpoints of the nature of a trust, see Sitkoff, *supra* note 4, at 627-33.

⁷⁵ See Gallanis, *supra* note 32, at 1618-19 (contrasting a contractual approach, which gives settlors "maximum flexibility to structure the terms of the bargain with the trustee," with a proprietary one, which is more likely to "impinge upon the wishes of the settlor in order to protect the property rights held by the beneficiary").

⁷⁶ Cf. Langbein, *Contractarian Basis*, *supra* note 4, at 657 (suggesting that many trustees willingly accept fiduciary roles because "compliance with trust fiduciary law is ordinarily not onerous").

seeking to interpret that document.⁷⁷ This approach is not only efficient, requiring just one lawyer to serve both settlor and fiduciary, but it also likely fosters better results by providing the trustee unfettered access to the attorney-draftsman. However, if the modern regime increasingly requires that a trustee further the beneficiaries' interests *despite* the settlor's intent, it becomes ethically problematic for the attorney who represented a settlor in the drafting of a trust to also represent the trustee in administration of that trust.⁷⁸ Suddenly, we need, and must compensate, twice as many trust lawyers.⁷⁹

In sum, the emerging rule alters established notions of the relationship between settlors and trustees, requiring those parties to abandon efficient rules predicated on such notions. This realignment of interests will produce a new regime that is both more cumbersome and more costly than the one it seeks to replace.

⁷⁷ Joel C. Dobris, *Ethical Problems for Lawyers upon Trust Terminations: Conflicts of Interest*, 38 U. MIAMI L. REV. 1, 2 (1983). Going one step further, in many cases the draftsman actually serves as the trustee. Cf. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 02-426 (2002) (concluding that a lawyer may act as both draftsman and trustee when the client has made an "informed decision" to employ the lawyer in this dual role). For a criticism of this practice, see Joseph W. deFuria, Jr., *A Matter of Ethics Ignored: The Attorney-Draftsman as Testamentary Fiduciary*, 36 U. KAN. L. REV. 275, 309 (1988) (advocating that ethical rules be modified to bar the practice). But see Bradley R. Cook, *New Developments Alter the Role of Estate Planners in Recommending Fiduciaries*, 16 EST. PLAN. 356, 356 (1989) (arguing that overly-strict ethical rules will put lawyers at a competitive disadvantage relative to banks and trust companies); Paula A. Monopoli, *Drafting Attorneys as Fiduciaries: Fashioning an Optimal Ethical Rule for Conflicts of Interest*, 66 U. PITT. L. REV. 411, 438 (2005) (contending that barring attorneys from acting as trustees would create a shortage of "well-trained fiduciaries").

⁷⁸ The increased risk of conflicts between settlor and trustee might prohibit an attorney from representing both parties. See MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2) (2006) (prohibiting representation of a client where "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person"). Even before the emerging benefit-the-beneficiaries rule complicated the landscape, Professor Pennell called the ethical issues surrounding the representation of fiduciaries "as confused and distressing as any to be found anywhere in the estate planning practice." Jeffrey N. Pennell, *Ethics Issues: "You Can't Teach Ethics,"* in 35TH ANNUAL EST. PLAN. INST. 657, 701 (PLI Tax Law & Est. Plan., Course Handbook Series No. 2902, 2004). For a more detailed exposition, see generally Jeffrey N. Pennell, *Representations Involving Fiduciary Entities: Who Is the Client?*, 62 FORDHAM L. REV. 1319 (1994).

⁷⁹ As one who makes his living helping to train future trust lawyers, I am not necessarily opposed to the result. However, it clearly represents a more expensive approach than the current one.

C. *Opens the Floodgates of Litigation*

A third undesirable consequence of the emerging rule is that it could open the proverbial floodgates of trust litigation by altering the balance of power between trust settlors and trust beneficiaries.

As discussed above, even though trust law has long considered a settlor's intent to be the "polestar" of trust interpretation, settlors have never enjoyed completely unfettered ability to customize the provisions of a trust.⁸⁰ For example, a trust provision intended to further an illegal or immoral purpose typically is given no effect.⁸¹ The same is true of a trust provision which directs the waste or destruction of trust property.⁸² The emerging rule would add another category of prohibitions to this traditional list: trust provisions which are "value-impairing," or objectively imprudent.⁸³

From the standpoint of trust litigation, that change could be revolutionary in two ways. First, there appears to be little demand among trust settlors to establish trusts to engage in the type of conduct that trust law has traditionally prohibited. There simply is no suggestion that settlors are lining up to establish trusts to run drug cartels or oversee the wasteful destruction of property. As such, prohibiting this conduct does little to impact the testamentary freedom of the vast majority of trust settlors. Second, the type of illegal and immoral trust provisions that trust law refuses to effectuate are not only extremely rare, but they also tend to be rather obvious.⁸⁴ Together, these factors serve to temper the volume of litigation brought by beneficiaries seeking to set aside such provisions, minimizing the judicial resources expended on adjudicating these controversies.

Adding merely imprudent trust provisions into the mix would significantly alter these historical dynamics. Consider the earlier example of a provision directing that a closely-held family business started by one generation be continued for the next. Is this a provision common in modern trusts? It is.⁸⁵ Is it illegal or immoral? Certainly not.⁸⁶ But is it value-maximizing? Is it objectively prudent? Are the beneficiaries best served by such a provision? On such questions implicated by the emerging benefit-the-beneficiaries rule, reasonable minds can clearly disagree.

⁸⁰ See *supra* notes 20-23 and accompanying text.

⁸¹ See *supra* notes 21-22 and accompanying text.

⁸² See Lior Jacob Strabilevitz, *The Right to Destroy*, 114 *Yale L.J.* 781, 838 (2005).

⁸³ See Langbein, *Mandatory Rules*, *supra* note 13, at 1111.

⁸⁴ The law already defines illegal conduct via applicable criminal statutes, while courts have long recognized our inherent ability to discern immoral conduct. See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (describing hard-core pornography by saying: "I know it when I see it . . .").

⁸⁵ See Henry Christensen, III & Michael L. Graham, *100 Years Is a Long Time – New Concepts and Practical Planning Ideas*, SN025 ALI-ABA 149 (suggesting that many settlors direct the retention of closely-held assets).

⁸⁶ I assume the underlying business is a legal one.

One can expect such uncertainty to foster significant fiduciary litigation. Trust beneficiaries often are a litigious bunch.⁸⁷ The emerging benefit-the-beneficiaries rule would suddenly provide beneficiaries with a new basis for seeking to overturn a settlor's estate planning regime. The question of what course of conduct would benefit the beneficiaries will be so unclear in many cases that every trust beneficiary who wished to do so could seemingly find a good-faith basis for litigation.

Since most beneficiaries settle their lawsuits rather than adjudicate the merits of their claims,⁸⁸ the emerging rule would provide a powerful tool for a beneficiary seeking to provoke a settlement. The result is a potential dramatic expansion of nuisance lawsuits. This unwelcome trend would be compounded by the fact that the propriety of a trustee's investment decisions is a question of fact,⁸⁹ and thus a challenge on such a basis would typically survive a motion for summary judgment.

In sum, the benefit-the-beneficiaries rule would provide a powerful new arrow in the quiver of beneficiaries seeking to extort a settlement from a trustee unwilling to engage in protracted litigation. This result serves neither the needs of trust settlors nor those of society generally.

D. *Unleashes the Tyranny of the Majority*

Another unsettling consequence of the emerging rule is that it could serve to channel all trust investments into whatever investment management style is in vogue and prevent trust settlors from instituting contrary investment styles.⁹⁰

⁸⁷ See Rust E. Reid et al., *Privilege and Confidentiality Issues When a Lawyer Represents a Fiduciary*, 30 REAL PROP. PROB. & TR. J. 541, 600 (1996) (“[L]itigious beneficiaries anxiously await a chance to second guess both the lawyer and the fiduciary.”). Of course, some “litigious” trust beneficiaries may have valid grievances which the law should redress. See generally Robert Whitman & Kumar Paturi, *Improving Mechanisms for Resolving Complaints of Powerless Trust Beneficiaries*, 16 QUINNIPIAC PROB. L.J. 64 (2002) (discussing the plight of trust beneficiaries that cannot obtain the information or access to legal services needed to protect their interests). Nevertheless, as Professor Whitman and Mr. Paturi compellingly argue, such beneficiaries would be better served by streamlining and facilitating alternative forms of dispute resolution rather than fostering increased formal litigation. *Id.* at 72.

⁸⁸ Steven M. Fast, *Structuring Trusts to Avoid Beneficiary Dissatisfaction*, SG012 ALI-ABA 29 (2001).

⁸⁹ *In re Estate of Janes*, 630 N.Y.S.2d 472, 474 (Sur. Ct. 1995) (citing *In re Clarke's Estate*, 12 N.Y.2d 183, 186 (1962)).

⁹⁰ I do not contend that proponents of the emerging rule would favor this result. Nevertheless, for the reasons discussed in this Section, I believe the rule would likely have this effect.

This not only undesirably narrows the universe of available investment options,⁹¹ but may also frustrate the goals of many trust settlors.

1. Forced to Join the Investment Herd

Popular notions of investment management have frequently led investors to financial ruin. The stock market crashes of 1929⁹² and 1987⁹³ both were results of euphoric public sentiment driving investment markets to unrealistic and unsustainable valuations.⁹⁴ Similar examples of this phenomenon can be found throughout world history.⁹⁵ Given the investing public's tendency towards such "irrational exuberance,"⁹⁶ many great investors have increased

⁹¹ This would undermine one of the fundamental goals of the UPIA, namely to widen the available universe of trust investments. UNIF. PRUDENT INVESTOR ACT § 2 cmt., 7B U.L.A. 22 (1994).

⁹² In 1929, a dramatic crash of the U.S. stock market presaged the Great Depression. For a history of the market decline and its aftermath, see generally JOHN KENNETH GALBRAITH, *THE GREAT CRASH 1929* (1997). Galbraith attributes the crash in large part to "a great speculative orgy" fueled by "a pervasive sense of confidence and optimism and conviction that ordinary people were meant to be rich." *Id.* at 169. For another account of the economic and social causes of the Great Depression, see generally MAURY KLEIN, *RAINBOW'S END: THE CRASH OF 1929* (2001).

⁹³ On October 19, 1987, the Dow Jones Industrial Average fell 508 points, the worst one-day percentage decline in history. Lawrence J. DeMaria, *Stocks Plunge 508 Points, a Drop of 22.6%; 604 Million Volume Nearly Doubles Record*, N.Y. TIMES, Oct. 20, 1987, at A1. As was the case in 1929, the 1987 crash was a product of "a wave of reckless speculation." JOHN EHRMAN, *THE EIGHTIES: AMERICA IN THE AGE OF REAGAN* 114 (2005).

⁹⁴ In a prescient article, Professor Galbraith argued that the market's speculative fervor in 1987 appeared reminiscent of that seen just before the crash of 1929. John Kenneth Galbraith, *The 1929 Parallel*, ATLANTIC MONTHLY, Jan. 1987, at 62 [hereinafter Galbraith, *1929 Parallel*]. Typifying the public sentiment preceding the 1987 crash is the fact that *The New York Times* originally solicited Galbraith's piece but ultimately rejected it as being "too alarming." JOHN KENNETH GALBRAITH, *A SHORT HISTORY OF FINANCIAL EUPHORIA* 9-10 (Viking 1993) (1990) [hereinafter GALBRAITH, *EUPHORIA*].

⁹⁵ For a comprehensive and entertaining look at the subject, see generally CHARLES MACKAY, *EXTRAORDINARY POPULAR DELUSIONS AND THE MADNESS OF CROWDS* (L.C. Page & Co. 1932) (1841).

Most recently, in September 2008, the U.S. stock market saw its largest one day decline in stock value since the 1987 crash, with the Dow Jones industrial falling 778 points. Vikas Bajaj & Michael M. Grynbaum, *For Stocks, Worst Single-Day Drop in Two Decades*, N.Y. TIMES, Sept. 30, 2008, at A1. The economic crisis led the government to approve a \$700 billion economic bailout package to help curb the financial devastation. David M. Herszenhorn, *Bailout Plan Wins Approval; Democrats Vow Tighter Rules*, N.Y. TIMES, Oct. 4, 2008, at A1.

⁹⁶ Alan Greenspan, then Chairman of the Federal Reserve Board, coined the phrase during a 1996 speech, musing: "[H]ow do we know when irrational exuberance has unduly escalated asset values . . . ?" See Richard W. Stevenson, *A Buried Message Loudly Heard*, N.Y. TIMES, Dec. 7, 1996, at 35. The words have become the most famous uttered during

portfolio returns, and reduced portfolio risk, by eschewing popular investment trends and pursuing “contrarian” investment styles.⁹⁷

The emerging rule threatens to prohibit many contrarian investment directives, even those integral to a settlor’s purpose in establishing a trust. An example will illustrate this phenomenon. Assume that it is early 2000. A sage investor has made a great fortune and decides that she has accumulated sufficient assets to support herself and several future generations of her family – enough wealth that all her trustee needs to do is preserve her accumulated assets, not continue to grow them. As such, this hypothetical settlor establishes a trust for her children and directs that the trust be invested entirely in U.S. Treasury Bills.⁹⁸ She rationalizes this investment with the thought that even in the event of a global economic meltdown, these short term U.S. government obligations would retain their value. Her mandated investment directive would thus insulate her children from the whims of the world’s financial markets and ensure they would always have funds on which to live. Through this strategy, the beneficiaries would never grow richer. But they would never suffer a catastrophic loss.

This hypothetical settlor has a clear purpose for her trust: she wants to preserve her beneficiaries’ wealth rather than enhance it. In pursuit of this goal, she has imposed a precise investment restriction which directly furthers the purposes of the trust. Would a court applying the emerging benefit-the-beneficiaries rule respect this settlor’s intent? The likely answer is no. Since she deviates so widely from mainstream investment sentiment, it is easy to dismiss this settlor as a fear-monger and marginalize her views as illogical and value-impairing.⁹⁹ As such, the emerging rule would provide a basis for ignoring these restrictions.

This result is dictated by the simple fact that few investors in the year 2000 shared our hypothetical settlor’s investment vision. While our settlor wanted

Greenspan’s long tenure, inspiring the title of a bestselling book and becoming a catch phrase for the excessive stock market speculation of the late 1990s. ROBERT J. SHILLER, *IRRATIONAL EXUBERANCE 1* (2d ed. 2005).

⁹⁷ For an introduction to contrarian investing, see ANTHONY M. GALLEA & WILLIAM PATALON III, *CONTRARIAN INVESTING*, at ix (1998) (summarizing the fundamental principle of this investment approach as “sell euphoria, buy panic”).

⁹⁸ Because of their liquidity, short duration, and backing by the full faith and credit of the U.S. government, treasury bills are considered the safest possible investment. See JOHN DOWNES & JORDAN ELLIOT GOODMAN, *BARRON’S FINANCE & INVESTMENT HANDBOOK* 226-27 (6th ed. 2003).

⁹⁹ Such was the real world experience of Maureen Allyn, chief economist at the global investment firm of Scudder, Stevens & Clark. When her firm was sold in 1998, Allyn invested her proceeds in U.S. treasuries and municipal bonds. MAGGIE MAHAR, *BULL!: A HISTORY OF THE BOOM, 1982-1999*, at 279-81, 287 (2003). Most of Allyn’s contemporaries on Wall Street considered her investment decision a completely irrational one and responded “with that mixture of pity and annoyance reserved for those who fail to appreciate a New Paradigm.” *Id.* at 287.

to keep her trust funds completely out of the stock market, the prevailing professional wisdom was that all long-term investors simply had to include stocks in their portfolios.¹⁰⁰ While our settlor feared a dark future for the investment markets, magazine and newspaper headlines boldly projected the Dow Jones Industrial Average¹⁰¹ to grow from 11,497 on January 1, 2000¹⁰² to 25,000 by 2010,¹⁰³ and 3,000,000 by the end of the century.¹⁰⁴ At a time when the nation was so enamored with the stock market that even professional reporters hinted that they would not “dare suggest” the market might be overvalued,¹⁰⁵ our settlor wrongly deprived her beneficiaries of the ability to pursue these further investment riches.

Given this public consensus, our settlor’s restrictions would have been easy to classify as value-impairing ones.¹⁰⁶ The emerging rule thus would have freed this settlor’s trustees from these irrational investment shackles, enabling them to join the herd pursuing the ever-expanding investment bubble of 2000.¹⁰⁷ When that bubble burst, her chosen beneficiaries would have shared the misery of countless others as the stock market lost more than half its value in the ensuing three years.¹⁰⁸

¹⁰⁰ Floyd Norris, *Toward Dow 3,000,000 and Other Millennial Ruminations*, N.Y. TIMES, Jan. 1, 2000, at C1 (reporting the prevailing market sentiment that “no long-term investor should ever get out of stocks”).

¹⁰¹ The Dow Jones Industrial Average, an unweighted average of thirty widely-held U.S. stocks, is the “oldest and most-quoted market indicator.” DOWNES & GOODMAN, *supra* note 98, at 838. For an overview of a number of other market indices, see *id.* at 837-43.

¹⁰² Tom Petruno, *1999 Goes into the Record Book on Wall Street*, L.A. TIMES, Jan. 1, 2000, at C1.

¹⁰³ See Manuel Schiffres, *Ladies and Gentlemen . . . Dow 25,000*, KIPLINGER’S PERS. FIN. MAG., Jan. 1, 2000, at 36.

¹⁰⁴ Norris, *supra* note 100.

¹⁰⁵ Joseph Nocera, *Broken Records: A Fitting Farewell to the Nasdaq Decade*, FORTUNE, Jan. 10, 2000, at 210 (“Once upon a time, we would have . . . [warned] of a speculative frenzy that couldn’t possibly last. Now we don’t dare suggest such a thing.”). Further evidence of the prevailing investment climate of the time can be found in the fact that of over 33,000 recommendations issued by Wall Street securities analysts in 1999 to “buy,” “sell,” or “hold” specific stocks, only 125 were recommendations to “sell.” BENJAMIN MARK COLE, *THE PIED PIPERS OF WALL STREET: HOW ANALYSTS SELL YOU DOWN THE RIVER* 97 (2001).

¹⁰⁶ A study of American financial history supports this conclusion that cautious and prudent investment strategies are frequently branded as value-impairing. See GALBRAITH, *EUPHORIA*, *supra* note 94, at 6 (arguing that public sentiment typically marginalizes investors who express doubts about lofty market valuations).

¹⁰⁷ As Professor Cunningham succinctly warns: “Following the herd may seem rational and intelligent – until it stampedes straight off the cliff.” LAWRENCE A. CUNNINGHAM, *HOW TO THINK LIKE BENJAMIN GRAHAM AND INVEST LIKE WARREN BUFFETT* 5 (2001).

¹⁰⁸ Floyd Norris, *Stocks Surge, Ending Streak of Six Weeks with Losses*, N.Y. TIMES, Oct. 12, 2002, at C1. The devastation could have been far worse. For example, the U.S. stock market lost 86.2% of its value during the Great Depression. *Id.* While the Depression is

The result of this hypothetical is problematic not simply because history proved this trust settlor's fears to be justified. Rather, the concern lies in the structural inability of a trust settlor to guard against an economic or investment scenario which the mainstream of investors dismiss – a limitation that can frustrate a settlor's most basic estate planning goals. As revealed by this example, under the emerging rule the investment community's judgment can subsume that of the settlor, setting her trust fund on course toward a highly unlikely, but theoretically possible,¹⁰⁹ doomsday.¹¹⁰ The prevailing wisdom of the stock market may force the trustee to do exactly what a settlor does not want him to do, undermining the fundamental purpose of a trust merely because it seems foolish to those that history may prove to be the true fools.

Trust law should claim no victory in such a result. Far from the case of the controlling settlor imposing a value-impairing investment restriction out of ignorance or a psychological need for control, this settlor is doing so in order to provide her beneficiaries with the safest possible source of funds. The

ancient history for many, significant stock market losses are not. On seventeen separate occasions since 1963, one of the world's financial markets has lost in excess of 50% of its value in a single year, including annual losses of 75% in Taiwan, 64% in Sweden, and 63% in the United Kingdom. SHILLER, *supra* note 96, at 134. Larger, longer-term declines have been equally prevalent in recent history. For example, Spain's stock market lost 86.6% of its value between December 1974 and December 1979, just one of some twenty recent instances in which a nation's stock market lost more than two-thirds of its value within a five-year period. *Id.* at 136.

¹⁰⁹ Even those professional investors who advocate contrarian investment strategies and warn against the foolishness of following popular investment sentiments can miss the point that an unprecedented market collapse remains possible, even if unlikely. As one such author emphatically argued in 1998: "Treasury bonds and government bonds, gilt-edged securities for centuries, are now surefire ways to destroy your nest egg. Conversely, . . . common stocks[] have become outstanding vehicles to protect and enhance your capital. Yes, all the prudent rules of savings we learned at our fathers' knees are out the window." DAVID DREMAN, *CONTRARIAN INVESTMENT STRATEGIES: THE NEXT GENERATION* 28-29 (1998). Dreman based his analysis on historical U.S. market data, concluding that since stocks historically have outperformed government bonds, they always will. *Id.* at 305-10. Dreman's error is so pervasive that the SEC requires all advertising for mutual funds to remind investors that "past performance does not guarantee future results." 17 C.F.R. § 230.482(b)(3)(i) (2007).

¹¹⁰ Given my argument that objective irrationality alone should be an insufficient basis for voiding trust investment restrictions, I thus far have felt little need to defend the merits of this hypothetical settlor's decision to preserve her beneficiaries' wealth rather than enhance it. However, a recent exposition on the notion of risk suggests that the settlor may be acting perfectly rationally. Given the client's vast wealth, the marginal utility of any potential investment gain is less than the disutility that would be caused by an equivalent loss. See PETER L. BERNSTEIN, *AGAINST THE GODS: THE REMARKABLE STORY OF RISK* 112 (1996) (drawing upon the work of eighteenth-century Swiss mathematician Daniel Bernoulli). As such, from a utility standpoint, the settlor is correct that her beneficiaries have more to lose by investing in stocks than they have to gain.

prevailing wisdom of the market and mainstream investment theory both argue that she is being far too conservative, logic which she acknowledged but intentionally defied. Her fundamental purpose in establishing the trust thus is accorded no respect. Under the guise of seeking to benefit the beneficiaries, the tyranny of the majority¹¹¹ wrongly undermines the clear intent of this well-intentioned settlor.

2. Repudiating Warren Buffett?

Unfortunately, the market-wary settlor discussed in the preceding Section would not be the only type of investor potentially cast aside by the emerging rule. Rather, the emerging rule would structurally repudiate any settlors who rejected prevailing market wisdom or who wished to mandate contrarian investment styles. This significant flaw in the emerging rule is revealed by the fact that the list of investors so impacted would include the person whose name has become a synonym for investment success, Warren Buffett.

Warren Buffett has been one of the country's most successful investors.¹¹² Between the ages of twenty-six and thirty-nine, Buffett parlayed \$100 of personal funds into a \$25 million investment portfolio,¹¹³ just one step in a series of financial successes that would swell his net worth to nearly \$43 billion by 2004.¹¹⁴ He has justifiably become one of the most influential figures in the investment world, with his unique investment style both widely revered and frequently emulated. He is exactly the type of thoughtful,

¹¹¹ The phrase is obviously borrowed from Alexis de Tocqueville, who warned that once majority public opinion forms in America, "there are . . . no obstacles that can . . . delay its advance, and allow it the time to hear the complaints of those it crushes as it passes." ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 237 (Harvey C. Mansfield & Delba Winthrop eds. & trans. 2000). Tocqueville saw lawyers as a partial antidote to this dangerous trend, concluding that "[w]hen the American people let themselves be intoxicated by their passions or become so self-indulgent as to be carried away by their ideas, the lawyers make themselves feel an almost invisible brake that moderates and arrests them." *Id.* at 256. An undeniably astute social commentator, Tocqueville also observed that America's lawyers "form the superior political class and the most intellectual portion of society." *Id.*

¹¹² A *New York Times* bestselling biography of Buffett would consider this characterization of Buffett an understatement. According to that source, Buffett is simply: "The World's Greatest Investor." ROBERT G. HAGSTROM, *THE WARREN BUFFETT WAY* 1 (2d ed. 2005) [hereinafter HAGSTROM, BUFFETT WAY].

¹¹³ ROBERT P. MILES, *WARREN BUFFETT WEALTH: PRINCIPLES AND PRACTICAL METHODS USED BY THE WORLD'S GREATEST INVESTOR* 33-34 (2004). While an impressive feat for a man under forty, this was not Buffett's first investment success. At age six, he reportedly "purchased a six-pack of Coke bottles for 25 cents and sold them individually for a nickel each, setting a lifelong benchmark of a 20 percent investment return." *Id.* at 25. At age eleven he made his first successful equity investment, buying three shares of City Service Preferred at \$38 per share and selling them at \$40. *Id.* at 26.

¹¹⁴ HAGSTROM, BUFFETT WAY, *supra* note 112, at 1.

successful investor that should be the standard-bearer of modern trust investing.

Ironically, however, if a settlor tried to mandate Buffett's investment style, the emerging rule would provide a basis to negate that provision. This perverse outcome results from the fact that Buffett's investment philosophy is the "polar opposite of modern portfolio theory,"¹¹⁵ and he rejects many investment principles incorporated into the UPIA. For example, while the UPIA considers diversification a fundamental principle of modern investing,¹¹⁶ Buffett generated much of his fortune through highly-concentrated investments in approximately ten companies' stocks.¹¹⁷ He similarly thumbs his nose at the other "main ingredients" of modern portfolio theory, disagreeing with the prevailing view of risk, while rejecting the efficient market hypothesis.¹¹⁸

Since the emerging rule defines benefit by reference to the prevailing standards of the time, Buffett's rejection of widespread investor sentiment places him in direct conflict with this rule.¹¹⁹ As such, a trust provision mandating Buffett's investment approach would be per se imprudent under the emerging rule.

This result speaks for itself. Something is clearly wrong when an emerging rule of trust investment law repudiates "the world's greatest investor."

E. *Ignores Key Goals of Estate Planning*

A fifth undesirable consequence of the emerging rule results from the fact that it narrowly defines "benefit" to mean wealth maximization. This approach fails to reflect the reality that many settlors engage in estate planning and establish trusts in order to benefit their chosen beneficiaries in a variety of ways – not only financially, but also personally and perhaps even spiritually.¹²⁰

¹¹⁵ ROBERT G. HAGSTROM, *THE WARREN BUFFETT PORTFOLIO: MASTERING THE POWER OF THE FOCUS INVESTMENT STRATEGY* 31 (1999) [hereinafter HAGSTROM, *BUFFETT PORTFOLIO*].

¹¹⁶ See *supra* note 65 and accompanying text.

¹¹⁷ CUNNINGHAM, *supra* note 107, at 13. An example of Buffett's willingness to take concentrated risks on particular stocks can be found in the fact that between 1991 and 1997, Coca-Cola Co. stock represented between 34% and 43% of his entire investment portfolio. HAGSTROM, *BUFFETT PORTFOLIO*, *supra* note 115, at 61.

¹¹⁸ HAGSTROM, *BUFFETT PORTFOLIO*, *supra* note 115, at 29-35. Buffett's business partner, Charlie Munger, evidenced similar disdain for the principles of modern portfolio theory, calling them "a type of dementia I can't even classify." JANET LOWE, *WARREN BUFFETT SPEAKS: WIT AND WISDOM FROM THE WORLD'S GREATEST INVESTOR* 94 (1997).

¹¹⁹ As Buffett told investors in the 1994 Annual Meeting of Berkshire Hathaway: "You can't get rich with a weather vane." LOWE, *supra* note 118, at 96.

¹²⁰ Shelly Steiner, Note, *Incentive Conditions: The Validity of Innovative Financial Parenting by Passing Along Wealth and Values*, 40 VAL. U. L. REV. 897, 897 (2006) (contending that many settlors use trusts not only to transfer wealth to future generations, but also to "pass down their work ethic, religion, educational goals, and philanthropic values"); see also JAMES E. HUGHES, JR., *FAMILY WEALTH – KEEPING IT IN THE FAMILY* 209 (rev. & expanded ed. 2004) (observing "that a family's wealth consists of three forms of

The emerging rule threatens a settlor's ability to pursue these other worthwhile types of benefits.

1. Personal Benefit

Some settlors utilize trusts to achieve personal benefits for their chosen beneficiaries. For example, assume a settlor wishes to fund a trust with a valuable vacation home in order to preserve the home for the use of her two children. Such a trust of necessity requires a stringent investment restriction mandating that the residence be retained for the beneficiaries' use rather than sold.

Both traditional principles of trust law and the emerging rule would respect such an investment restriction. Traditional law would achieve this result because the restriction at issue, retention of a personal residence, is not even remotely illegal or immoral.¹²¹ The emerging rule reaches the same result through a different analysis. Per Professor Langbein, the emerging rule respects this settlor's wishes because the asset at issue – the personal residence – simply is not held for investment.¹²²

While this exception to the emerging rule initially seems to enable the type of personal planning integral to modern estate planning, it actually does not. Exempting assets “not held for investment” from analysis under the emerging rule requires trustees to classify trust holdings into one of two categories, separating assets held for investment from those held for the beneficiaries' personal use. Yet this dichotomy is artificial. Returning to a prior example,¹²³ what of a settlor's directive to retain a family business? Does the settlor intend that the asset be held for investment, and thus subject to the restrictions imposed by the emerging rule? Or is this asset to be held for personal use, perhaps as a source of education, prestige, or employment for younger family members? While the typical settlor probably views retaining the family business as serving both investment and personal goals, the emerging regime does not adequately envision such a middle ground.

Professor Langbein seems to suggest that a middle ground does exist, arguing that the emerging rule might exempt assets that “are not being held for investment (*or not wholly for investment*).”¹²⁴ The rule he applies, however, is

capital – human, intellectual, and financial – and that the management of the first two is the most critical to the successful preservation of a family's wealth”); John J. Scroggin, *Restraining an Inheritance Can Accomplish a Client's Objectives*, 30 EST. PLAN. 124, 124 (2003) (observing that for many clients, “[t]he pivotal goal of estate planning is to protect and preserve the family, not to protect and preserve the assets”).

¹²¹ See *supra* notes 20-24 and accompanying text.

¹²² Langbein, *Mandatory Rules*, *supra* note 13, at 1114-15 (characterizing retention of a residence solely for the beneficiaries' personal use as “another circumstance in which an undiversified portfolio may be quite justified”).

¹²³ See *supra* notes 44-45 and accompanying text.

¹²⁴ Langbein, *Mandatory Rules*, *supra* note 13, at 1114 (emphasis added).

very different from the one he states. For example, in considering a directive to retain a family business as a source of prestige and influence for the beneficiaries, Langbein concludes that the directive will be honored where the benefits “outweigh the superior expected investment returns of a diversified portfolio.”¹²⁵ As such, this provision is enforceable not because the settlor has intended the asset to be held “not wholly for investment,” but rather because the trustee objectively determines that any non-investment benefits outweigh their attendant economic costs.

This approach is inconsistent with the typical goals of trust settlors and is detached from the realities of modern estate planning. Some trusts are established for a variety of purposes, and a settlor may knowingly wish to impair the trust’s economic performance to pursue other ends. The emerging rule would seemingly honor the settlor’s choices only when pursuit of the settlor’s non-financial goals objectively appear to be worth the economic cost. This approach simply fails to meet settlors’ needs, offering them insufficient security that trust law will effectuate their estate planning goals.

2. Spiritual Benefit

The emerging rule similarly undermines a settlor’s ability to safeguard her beneficiaries’ spiritual health through restraints on trust investments. Many trust settlors are concerned not only with beneficiaries’ economic wealth, but also with their personal and moral development.¹²⁶ Some settlors may turn to investment restrictions to help reinforce desired moral values. The arrangement would effectuate an unspoken quid pro quo – future generations are welcome to live off the continuing fruits of the settlor’s past investments, but must do so while embracing the values which guided and constrained the settlor’s accumulation of wealth.

A settlor seeking to impart such values might impose a negative restriction on the selection of trust investments – directing her fiduciaries to avoid certain companies or certain industries. Perhaps, for example, the settlor finds cigarette manufacturers to be morally repugnant and wishes to ensure that her trust beneficiaries are never tainted by an investment in such a firm. Is such a socially responsible¹²⁷ investment directive enforceable?¹²⁸ Under the

¹²⁵ *Id.* at 1116.

¹²⁶ See generally Joshua C. Tate, *Conditional Love: Incentive Trusts and the Inflexibility Problem*, 41 REAL PROP. PROB. & TR. J. 445 (2006) (describing settlors’ use of “incentive trusts” to encourage and reward desirable behavior). See also authorities cited *supra* note 120.

¹²⁷ The term “socially responsible investing” (“SRI”) refers to the process of selecting companies in which to invest based not only on business and economic factors but also after considering the social, environmental, and political impact of those companies and the products they make. Pursuing an SRI strategy typically requires an investor to avoid certain companies and industries, such as those that pollute the environment, employ questionable labor practices, or produce morally-questionable products such as alcohol and tobacco. For an overview of SRI and a brief history of its origins, see JOHN C. HARRINGTON, INVESTING

emerging rule, the answer seems to be that it is not.¹²⁹ From the standpoint of wealth accumulation, categorically abrogating one potential type of investment simply cannot financially benefit the beneficiaries.¹³⁰

Thus, despite her personal wishes, a trust settlor must empower her trustees to profit from enterprises that foster lung cancer, water pollution, and social injustice, because that is the way to maximize the financial interests of the trust beneficiaries.¹³¹ The result deviates from the wishes of increasing numbers of American investors,¹³² while contradicting a clear international trend favoring investment in more socially responsible companies.¹³³

The emerging rule could undermine a settlor's social and political values. It also may violate her fundamental religious beliefs. For example, Islamic law

WITH YOUR CONSCIENCE: HOW TO ACHIEVE HIGH RETURNS USING SOCIALLY RESPONSIBLE INVESTING 3-42 (1992) (tracing the SRI movement from the 1800s to the modern day). For a comprehensive modern look at SRI, including a detailed discussion of the question of the interplay between SRI and fiduciary duties, see generally Joel C. Dobris, *SRI – Shibboleth or Canard (Socially Responsible Investing, That Is)*, 42 REAL PROP. PROB. & TR. J. 755 (2008).

¹²⁸ For a consideration of the reverse question of whether a trustee may engage in socially responsible investing absent the settlor's directive to do so, see Charles E. Rounds, Jr., *Social Investing, IOLTA and the Law of Trusts: The Settlor's Case Against the Political Use of Charitable and Client Funds*, 22 LOY. U. CHI. L.J. 163, 192 (1990) (concluding that unauthorized socially responsible investing violates the trustee's fiduciary duties).

¹²⁹ Professor Langbein has long advocated this result. See John H. Langbein & Richard A. Posner, *Social Investing and the Law of Trusts*, 79 MICH. L. REV. 72, 85-92 (1980) (arguing that socially responsible investing reduces diversification and increases portfolio risk).

¹³⁰ Efforts to quantify the financial impact of SRI restrictions yield conflicting results. See RUSSELL SPARKES, *SOCIALLY RESPONSIBLE INVESTMENT: A GLOBAL REVOLUTION* 243-54 (2002) (demonstrating the difficulties in analyzing SRI by discussing various studies yielding divergent results). Nevertheless, it seems intuitive that an investment restriction that requires categorical avoidance of certain types of investments cannot serve to enhance returns. Proponents of SRI regularly concede this point. See, e.g., HARRINGTON, *supra* note 127, at 55 (quoting a representative of the U.S. Trust Company who concluded that "[s]ome social criteria will have an impact on performance"); ELIZABETH JUDD, *INVESTING WITH A SOCIAL CONSCIENCE* 12 (1990) ("Everyone agrees that restricting investments to those that jibe with an investor's conscience means passing up some stellar financial opportunities . . .").

¹³¹ For the argument that individuals seeking to maximize their investment returns actually should seek out the very stocks that SRI eschews, see generally DAN AHRENS, *INVESTING IN VICE: THE RECESSION-PROOF PORTFOLIO OF BOOZE, BETS, BOMBS, AND BUTTS* (2004) (advocating investments in the alcohol, gambling, defense, tobacco, and adult entertainment industries).

¹³² See SPARKES, *supra* note 130, at 354-59 (detailing the significant growth in socially responsible investing in the U.S.).

¹³³ See *id.* at 367-90 (chronicling the growth of socially responsible investing in Europe and Asia).

(or “Shari’ah”) takes traditional concepts of social investing one step further, not only prohibiting investment in traditional “sin stocks” of companies selling alcohol, tobacco, and weaponry, but also those selling pork products, financial services and entertainment, and those incurring high levels of debt.¹³⁴ An Islamic investor must invest solely in “Shari’ah-compliant” companies that meet these requirements.¹³⁵

Shari’ah-compliant restrictions often run directly counter to traditional notions of prudent trust investing. Specifically, achieving adequate diversification, a fundamental precept of prudent investing,¹³⁶ becomes a significant issue for a Shari’ah-compliant investment portfolio.¹³⁷ For example, five of the ten largest holdings in the Dow Jones Islamic Market Index, a prototypical Shari’ah-compliant portfolio, are oil companies.¹³⁸ Conversely, financial firms are almost completely excluded from this model portfolio.¹³⁹

As is the case with socially responsible investing, little data is available to compare the performance of Shari’ah-compliant portfolios with non-compliant ones.¹⁴⁰ Nevertheless, to the extent these religious principles serve to restrict

¹³⁴ Christopher F. Richardson, *Islamic Finance Opportunities in the Oil and Gas Sector: An Introduction to an Emerging Field*, 42 TEX. INT’L L.J. 119, 125-28 (2006).

¹³⁵ See Mahmoud A. El-Gamal, “Interest” and the Paradox of Contemporary Islamic Law and Finance, 27 FORDHAM INT’L L.J. 108, 133 (2003).

¹³⁶ See *supra* note 65 and accompanying text.

¹³⁷ Rushdi Siddiqui, *Shari’ah Compliance, Performance, and Conversion: The Case of the Dow Jones Islamic Market Index*, 7 CHI. J. INT’L L. 495, 501 (2007) (“[N]ot enough pure Shari’ah-compliant companies exist for a diversified portfolio.”). As a result, many Islamic portfolios of necessity include a number of investments which technically violate the principles of Islamic investing. *Id.* (“[A] little impermissibility, as interpreted by the Shari’ah scholars, is accepted . . .”).

¹³⁸ *Id.* at 512 (including Exxon Mobil Corp., BP PLC, Total S.A., Chevron Corp., and Royal Dutch Shell PLC among the “top ten” holdings of the Dow Jones Islamic Market Index). Of the 282 oil and gas companies that are part of the Dow Jones World Index, 192 meet the criteria for inclusion in the Islamic Market Index. *Id.* at 508, 511. Full information about the Islamic Market Indexes is available at Dow Jones Indexes, <http://www.djindexes.com/mdsidx/?event=showIslamic> (last visited Oct. 4, 2008).

¹³⁹ Only 28 of the 1214 financial firms in the Dow Jones World Index qualify as acceptable Islamic investments. An investor bound by Islamic principles is thus precluded from investing in approximately 98% of the world’s financial services firms. Siddiqui, *supra* note 137, at 508, 511.

¹⁴⁰ Mr. Siddiqui suggests that Shari’ah-compliant portfolios perform as well as their conventional brethren. See *id.* at 512. Data provided by Dow Jones suggests the opposite to be true. The Dow Jones Islamic Market Index generated a 3.14% annualized return for the ten-year period ending September 30, 2008. Dow Jones Indexes, <http://www.djindexes.com/mdsidx/index.cfm?event=showIslamicStats#perf> (last visited Oct. 4, 2008). The unrestricted World Index generated a 5.21% annualized return for the same period. Dow Jones Indexes, <http://www.djindexes.com/mdsidx/index.cfm?event=showTotalMarketStats> (last visited Oct. 4, 2008).

the available pool of potential investments, that action is likely to impede a trust's investment prospects, a notion freely acknowledged among Islamic investors.¹⁴¹ A clause mandating Shari'ah compliance therefore could be set aside under the emerging rule, enabling the Islamic settlor's trust funds to be invested in a manner which fundamentally violates her core religious beliefs.¹⁴²

F. *Defeats Estate Tax Planning*

A final undesirable consequence of the emerging benefit-the-beneficiaries rule is that it would undermine some of the most sophisticated forms of estate tax planning.¹⁴³ In particular, two common estate planning techniques, the Irrevocable Life Insurance Trust ("ILIT") and the Grantor Retained Annuity Trust ("GRAT"), could become largely unworkable under the emerging regime.

1. The ILIT

For many individuals, prudent estate planning involves making inter vivos gifts to family members in order to reduce the imposition of estate and gift taxes.¹⁴⁴ One asset that many individuals will give away most freely is their life insurance, particularly any term life insurance.¹⁴⁵ After all, life insurance

¹⁴¹ See Kathleen Pender, *Faith-Based Funds a Growing Subset of Socially Responsible Investing*, S.F. CHRON., Mar. 12, 2006, at J1 ("In the Islamic [investing] community there's a term, 'COBM,' or the cost of being Muslim.").

¹⁴² Although this is well beyond the scope of this Article, a conflict between the UTC's mandatory rule and principles of Shari'ah-compliant investing might implicate constitutional guarantees of religious freedom.

¹⁴³ Although the literature is silent on the question, I have no reason to believe that proponents of the emerging rule intend to undermine the estate planning techniques discussed in this Section. Nevertheless, I suggest that the emerging rule would have exactly that effect, intended or not.

¹⁴⁴ Inter vivos gifting is a tax-efficient form of wealth transfer for three major reasons. First, any appreciation or income generated by a gifted asset after the time of the gift inures to the donee without imposition of additional estate or gift taxation. Second, certain exemptions from the estate and gift tax apply only to lifetime gifts. See, e.g., I.R.C. § 2503(b) (2000) (establishing a tax-free "annual exclusion" currently equal to \$12,000 per donee). Third, the gift tax is computed on a tax-exclusive basis (i.e., the donor's funds used to pay the gift tax are not themselves subject to gift taxation), whereas the estate tax is computed on a tax-inclusive basis (i.e., the estate tax is computed on the decedent's entire estate, including the portion of the estate that will be used to pay such taxes). For an overview of these and other considerations, see RAY D. MADOFF, CORNELIA R. TENNEY & MARTIN A. HALL, *PRACTICAL GUIDE TO ESTATE PLANNING* § 8.03 (2008 ed.).

¹⁴⁵ There are two major forms of life insurance: "term" insurance and "permanent" (or "cash value") insurance. Term insurance is akin to automobile or homeowner's insurance insofar as the insured pays an annual premium each year for one year of coverage. Permanent insurance differs in that the policy actually grows in value each year. The owner of a permanent policy thus may be able to cash in that policy or borrow against its cash

proceeds are paid only after the insured's death, a time at which the insured is rather unlikely to generate any personal enjoyment from the use of the proceeds.¹⁴⁶ As such, while most settlors initially balk at the thought of parting with control of income-producing or business assets, life insurance gifts involve a "relative lack of pain."¹⁴⁷

When transferring their life insurance, many well-advised settlors establish a trust for family members rather than making an outright gift.¹⁴⁸ This structure can avoid many of the administrative difficulties that arise from having insurance owned by multiple family members,¹⁴⁹ as well as maximize gift tax planning opportunities.¹⁵⁰ The specialized trust utilized to hold life insurance is known as an Irrevocable Life Insurance Trust.¹⁵¹ A properly structured ILIT will enable the settlor to give away her life insurance without the imposition of any estate or gift taxation.¹⁵²

Inherent in the decision to implement an ILIT, and reflected in the trust's name, is the settlor's expectation that the trust will own solely life insurance. However, the emerging rule could subvert this expectation and undermine this common technique. Viewed through the narrow lens of modern portfolio

value in a future year. Since the donor who gives away such a policy loses access to this cash value, the decision to give away permanent insurance involves more complex planning considerations than are implicated with a gift of pure term insurance. For a brief summary of various insurance products, see LOUIS A. MEZZULLO, AN ESTATE PLANNER'S GUIDE TO LIFE INSURANCE 7-10 (2000). For a more detailed analysis of these products, see RICHARD A. SCHWARTZ & CATHERINE R. TURNER, LIFE INSURANCE DUE CARE: CARRIERS, PRODUCTS, AND ILLUSTRATIONS 165-286 (2d ed. 1994).

¹⁴⁶ In this way, life insurance materially differs from other assets which may generate income during the settlor's life and thus would be more difficult (both economically and psychologically) for a living settlor to give away. See HUGHES, JR., *supra* note 120, at 97 ("In the thirty-five years I have practiced law, giving up ownership of anything is the most difficult issue my clients have faced . . .").

¹⁴⁷ STEPHAN R. LEIMBERG ET AL., THE NEW NEW BOOK OF TRUSTS 217 (3d ed. 2002).

¹⁴⁸ See Robert A. Goldman, *Why Life Insurance Should Be Estate Tax Exempt*, PROB. & PROP., Jan.-Feb. 1995, at 30, 30 (detailing five reasons why a gift of life insurance in trust is preferable to an outright gift).

¹⁴⁹ See MEZZULLO, *supra* note 145, at 37 (characterizing an ILIT as "the only way" to give life insurance efficiently to multiple beneficiaries).

¹⁵⁰ An ILIT can be structured as a "Crummey trust," gifts to which can qualify for the \$12,000 per donee annual exclusion from federal gift tax under I.R.C. § 2503(b) (2000). See *Crummey v. Comm'r*, 397 F.2d 82, 88 (9th Cir. 1968) (authorizing the technique); *Estate of Cristofani v. Comm'r*, 97 T.C. 74, 83-84 (1991) (reaffirming *Crummey* and expanding its scope).

¹⁵¹ For a detailed introduction to ILITs, including sample forms and analysis of tax consequences, see generally LAWRENCE BRODY, THE IRREVOCABLE LIFE INSURANCE TRUST: FORMS WITH DRAFTING NOTES (2d ed. 1999). See also Richard C. Baier, *Drafting Flexibility into an Irrevocable Life Insurance Trust*, PROB. & PROP., Sept.-Oct. 2005, at 62, 62-65 (offering ILIT drafting suggestions).

¹⁵² Baier, *supra* note 151, at 65.

theory, the investment of an entire trust portfolio in life insurance policies is no more prudent than a decision to retain an undiversified stock portfolio. As such, even if holding a specific life insurance policy would further the settlor's sole purpose in establishing the trust, a trustee seeking to comply with the emerging rule might well diversify into other investments.¹⁵³

Under this emerging regime, a settlor would be left with two choices: keep her life insurance and expose the proceeds to transfer taxation, or gift those policies away to a trustee who might liquidate them in full or in part. Since the settlor cannot achieve what she wants – to merely re-title her life insurance policies into an ILIT – she might simply decide not to implement the ILIT at all. To the extent the settlor makes this choice, the emerging benefit-the-beneficiaries rule would have served only to expose the beneficiaries' insurance proceeds to previously avoidable estate taxation – a bizarre “benefit” indeed.

2. The GRAT

The Grantor Retained Annuity Trust is one of the most attractive estate planning tools available to a wealthy settlor.¹⁵⁴ In this arrangement, the settlor establishes a trust for a set period of years, during which time she will receive a fixed annual annuity payment from the trust.¹⁵⁵ At the conclusion of the chosen term, any remaining trust assets pass to the settlor's designated beneficiaries, typically her children or a trust for their benefit.¹⁵⁶ The great allure of the technique is that the settlor's taxable gift to the beneficiaries is calculated based on extremely favorable valuation tables rather than on the actual performance of the trust.¹⁵⁷ The gift computed under these tables may be little or nothing, even though the GRAT beneficiaries ultimately may receive substantial wealth.

The following example will help illustrate the typical structure and potential tax benefits of a GRAT. Assume a settlor establishes a two-year GRAT and funds it with \$1,000,000 of IBM stock. Depending on IRS interest rates in

¹⁵³ At least one state legislature has addressed this concern by exempting most trust-owned life insurance policies from the UPIA's default duty to diversify. TENN. CODE ANN. § 35-14-105(c)(1)(B) (2007).

¹⁵⁴ Unlike many other sophisticated estate planning techniques, the GRAT is sanctioned by the Internal Revenue Code. See I.R.C. § 2702; 26 C.F.R. §§ 25.2702-0 to -3 (2007).

¹⁵⁵ Steve R. Akers, *Going the Extra Mile with GRATs – Reflections on Optimal Planning Strategies*, PROB. & PROP., Nov.-Dec. 2004, at 24, 24.

¹⁵⁶ *Id.* at 24-25.

¹⁵⁷ For a detailed explanation of the required computations, see Lawrence P. Katzenstein, *Running the Numbers: An Economic Analysis of GRATs and QPRTs*, SM007 ALI-ABA 467 (2007).

effect at the time,¹⁵⁸ the grantor is entitled to two annuity payments of approximately \$530,000 each.¹⁵⁹ Since the value of the grantor's retained annuity is equal to the full amount contributed to the GRAT, there is no gift tax assessed upon the settlor,¹⁶⁰ and no income, gift, or estate tax imposed on any assets which may ultimately pass to the beneficiaries at the end of the term.¹⁶¹

Despite that enticing upside, there are no offsetting negative tax consequences if a GRAT suffers poor investment performance and is unable to fully satisfy the settlor's reserved annuity payments. In that case, the settlor simply takes back all the available GRAT assets and the arrangement terminates.¹⁶² Since there is no limit to the number of GRATs a settlor may establish, the settlor would be free to simply gift the same assets to another GRAT and try again.

The settlor who decides to implement a GRAT does so in lieu of two far simpler alternatives. First, the settlor could simply retain the underlying property and dispose of it at death. Second, she could give the underlying assets directly to her chosen beneficiaries, or to trusts for their benefit, without retaining any annuity payments. The settlor who chooses a GRAT over these other alternatives does so because she wishes to achieve the best of both approaches – retaining an annuity stream from the gifted property while giving any significant appreciation thereof to her chosen beneficiaries.

Given both the grantor's estate planning goal of passing future appreciation to her chosen beneficiaries and the one-sided gift tax consequences of a GRAT, the typical logic behind GRAT investing differs significantly from that of other forms of trusts.¹⁶³ Most notably, investment volatility generally

¹⁵⁸ The grantor's actuarial interest in a GRAT is computed based upon prevailing interest rates as reported monthly by the IRS. I.R.C. § 7520. For example, for transfers in the month of February 2008, the applicable rate was 4.2%. Rev. Rul. 08-9, 2008-5 I.R.B. 343.

¹⁵⁹ Utilizing the 4.2% applicable interest rate for February 2008, Rev. Rul. 08-9, 2008-5 I.R.B. 343, a settlor seeking to minimize the gift tax consequences of a GRAT would retain an annual annuity of \$531,716.70. These figures were calculated using estate planning software. Estate Planning Tools, <http://www.brentmark.com/estateplanning.htm> (results on file with author).

¹⁶⁰ If the settlor retains an annuity equal in value to the initial GRAT corpus, the gift tax value of the remainder interest is zero. As a result, the settlor owes no gift tax upon creating and funding such a "zeroed-out" GRAT. This approach has been validated by the Tax Court. *Walton v. Comm'r*, 115 T.C. 589, 604 (2000), *acq.* 2003-2 C.B. 964.

¹⁶¹ Akers, *supra* note 155, at 25.

¹⁶² David J. Wilfert & Martha J. Leighton, *Matching the Estate Planning Tool to the Investment Plan*, in *ESTATE PLANNING & ADMINISTRATION* 529, 567 (PLI Tax Law & Est. Plan., Course Handbook Series No. D0-0096, 2002) ("The worst that can happen with a GRAT . . . is that it does not 'work,' in which case the beneficiaries get nothing and the grantor is left with approximately what he would have had if he had done nothing.").

¹⁶³ See Jonathan G. Blattmachr et al., *Next Bout: Drafting and Administration to Maximize GRAT Performance*, *PROB. & PROP.*, Nov.-Dec. 2006, at 16, 20 (arguing that modern portfolio theory "does not necessarily apply . . . in the context of a GRAT").

enhances the potential estate planning benefits of the technique.¹⁶⁴ To maximize this volatility, a GRAT portfolio typically is not diversified.¹⁶⁵

Unfortunately, as logical as it may be from an estate planning and transfer tax perspective, this standard approach to GRAT investing is inconsistent with the emerging benefit-the-beneficiaries rule. As such, the emerging rule could effectively destroy GRATs as estate planning devices.

To see how this would happen, consider the trustee's approach to investment of the hypothetical GRAT outlined above. Typically, the trustee would retain the IBM stock gifted to the GRAT and seek to capitalize on the volatility of the undiversified portfolio.¹⁶⁶ Such an approach, however, is hard to defend as one that will benefit the trust beneficiaries. Specifically, the trustee must take extremely little investment risk in order to provide the settlor with her full annuity payments from the GRAT.¹⁶⁷ Thus, retaining the IBM stock does nothing to assist this trust beneficiary.¹⁶⁸ From the standpoint of the future remaindermen, the trustee's approach is equally indefensible – a textbook example of investment speculation which offers the potential for a huge windfall, but increases the likelihood that these beneficiaries will receive nothing at all.¹⁶⁹

¹⁶⁴ See A. Silvana Giner, *GRITs, GRATs and GRUTs*, in *DRAFTING IRREVOCABLE TRUSTS IN MASSACHUSETTS* § 9.2h.1(b) (2005) (“[T]he GRAT strategy is most useful where assets have significant volatility . . .”); Wilfert & Leighton, *supra* note 162, at 575 (calling volatility a “positive force” in the context of a GRAT).

¹⁶⁵ See Stephen F. Lappert, *IRC Sec. 2702 – GRITs (Including Personal Residence Trusts and QPRTs), GRATs and GRUTs*, in *29TH ANNUAL ESTATE PLANNING UPDATE* 773, 838 (PLI Tax Law & Est. Plan., Course Handbook Series No. D0-001N, 1998) (“[I]t is recommended that GRATs be asset-specific so that the gains from one investment will not be eroded by the losses from another.”).

¹⁶⁶ See *supra* notes 164-165 and accompanying text.

¹⁶⁷ In order to fully satisfy the settlor's retained annuity payments, the GRAT must generate an investment return that meets or exceeds the applicable Treasury interest rate. See *supra* note 158. As such, the settlor will receive maximum benefit from a GRAT established in February 2008 as long as the GRAT portfolio earns a meager 4.2% investment return. See *supra* note 158.

¹⁶⁸ One possible exception is that the settlor would be personally liable for any capital gains tax triggered upon the sale of the GRAT asset. This could be a material consideration in some circumstances. Richard S. Gruner, *When Worlds Collide: Tax Planning Method Patents Meet Tax Practice, Making Attorneys the Latest Patent Infringers*, 8 U. ILL. J.L. TECH. & POL'Y 33, 79 (2008).

¹⁶⁹ An illustration will help prove the point. Assuming the hypothetical GRAT discussed in this Section averages a 7% investment return over the two-year term, the remaindermen will receive a distribution of \$44,246 at the end of the term. If the GRAT investment return increases to 8%, the remaindermen will receive \$60,429, an increase of 35%. Conversely, an investment return of 6% will leave the remaindermen with \$28,264, a decrease of 35%. A return of 4% will leave them with nothing at all. Minor changes in investment return thus have an extremely dramatic impact on the remaindermen of a GRAT, making their trust interest uniquely sensitive to the volatility of an undiversified portfolio. These figures were

Taking into account the settlor's estate tax planning goals, her opportunity to create multiple GRATs, and the favorable gift tax consequences of those GRATs, the trustee would be wise to retain an undiversified portfolio. Yet, a court applying the emerging rule would not operate from that perspective. Rather, when the trustee must defend against a future claim brought by the remaindermen of a single unsuccessful GRAT, the emerging rule will prompt a single question: how was retaining all that IBM stock calculated to benefit the beneficiaries of this particular trust? The trustee may well have no response.

The emerging benefit-the-beneficiaries rule, therefore, requires the trustee to do something the settlor and her estate planner might well consider unthinkable: immediately sell the stock contributed to a GRAT and invest the proceeds in a diversified portfolio. While such an approach seemingly meets the dictates of the emerging rule, it fundamentally undermines the potential effectiveness of the GRAT as a tool for minimizing estate and gift taxation. Thus, just as it did with the ILIT, the emerging rule effectively destroys this established estate planning technique.

III. THE SETTLORS RESPOND

As illustrated above, the emerging rule's assault on dead-hand control would topple key principles of trust law and undermine the estate planning efforts of many trust settlors. However, those settlors and their estate planners have living hands, not dead ones. As such, they can, and predictably will, respond to these undesirable changes in trust law and seek to minimize their impact. Put simply, if trust law seems calculated to reject settlors' clear wishes, then settlors will reject trust law.

In this Part, I consider a number of techniques that creative settlors and skilled estate planners will likely deploy to negate the effect of the emerging rule. As can be said of the emerging rule itself, these countermeasures are problematic by virtue of their imprecision, depriving settlors and beneficiaries of desirable elements of trust law in a quest to avoid the undesirable. Through this two step process – emergence of a rule that fails to serve the needs of trust settlors followed by settlors predictably reacting to that rule – trust law ends up being less useful, and ultimately less relevant, than before. This could be the emerging rule's ultimate impact.

A. *The Ignorant Trustee*

As discussed above, the emerging rule could fundamentally alter the trustee's traditional role.¹⁷⁰ Rather than loyally following the settlor's directives, a trustee frequently would be obligated to challenge those directives and undermine the settlor's intent.

calculated using estate planning software. Estate Planning Tools, <http://www.brentmark.com/estateplanning.htm> (results on file with author).

¹⁷⁰ See *supra* Part II.B.

The settlor, however, is the one who chooses the trustee. This creates a problematic dynamic. A settlor concerned about the emerging rule undermining her estate plan would have a clear incentive to select a trustee who is either too ignorant to know of the emerging rule or too deferential to follow its dictates. The more professional the trustee and the more he understands and adheres to the emerging rule, the less likely a future trust settlor would be to select such a trustee.

The emerging rule thus creates exactly the wrong incentives with respect to the selection of trustees. Modern scholars have rightly expressed great concern with the inefficiencies and agency costs that result from the settlor selecting a trustee to administer the beneficiaries' funds.¹⁷¹ The emerging rule exacerbates this problem by encouraging settlors to saddle trust beneficiaries with trustees chosen not for their wisdom, but rather for their ignorance.

A settlor seeking to find such an ignorant trustee would have many options. Settlor may increasingly turn to friends or relatives to act as fiduciaries, attracted to those individuals because of their lack of professional training and limited understanding of the emerging obligations of a trustee.¹⁷² This would put increasing amounts of trust dollars in decreasingly qualified hands, reversing the current trend toward the use of professional fiduciaries.¹⁷³ Even worse, the resulting competitive pressures may well encourage otherwise competent trustees to turn a blind eye to their emerging fiduciary duties when doing so will help appease trust settlors and secure trust business.¹⁷⁴

Step one for the settlor seeking to avoid the emerging rule may thus be to find a trustee who is too ignorant to understand it.

¹⁷¹ See Sitkoff, *supra* note 4, at 663 (discussing the tensions created by the fact that the settlor chooses a trustee while the beneficiaries bear the burdens of that selection).

¹⁷² See Melanie B. Leslie, *Common Law, Common Sense: Fiduciary Standards and Trustee Identity*, 27 *CARDOZO L. REV.* 2713, 2719 (2006) (“[Settlors] may not expect non-professional trustees to possess . . . an expert’s knowledge of the law.”); Timothy P. O’Sullivan, *Family Harmony: An All Too Frequent Casualty of the Estate Planning Process*, 8 *MARQ. ELDER’S ADVISOR* 253, 263 (2007) (“Family fiduciaries generally are much less informed and less diligent than experienced, competent third parties . . .”). Trust law reinforces this trend by holding nonprofessional trustees to a lower standard of conduct than their professional counterparts. See UNIF. PRUDENT INVESTOR ACT § 2 cmt., 7B U.L.A. 22 (1994) (“[T]he standard for professional trustees is the standard of prudent professionals; for amateurs, it is the standard of prudent amateurs.”); RESTATEMENT (THIRD) OF TRUSTS § 77(3) (2005) (“If the trustee possesses, or procured appointment by purporting to possess, special facilities or greater skill than that of a person of ordinary prudence, the trustee has a duty to use such facilities or skill.”).

¹⁷³ See Sitkoff, *supra* note 4, at 633.

¹⁷⁴ See Joel C. Dobris, *Changes in the Role and the Form of the Trust at the New Millennium, or, We Don’t Have to Think of England Anymore*, 62 *ALB. L. REV.* 543, 559 n.68 (1998) (noting a rumor that one new trust bank “will not hire any lawyers with prior trust experience because those lawyers are too ‘fussy.’”).

B. *The Convenient Beneficiaries*

The determination of whether an investment directive will benefit the beneficiaries necessarily depends on the identity of those beneficiaries. As such, a second predictable response to the emerging rule would be for settlors to manipulate beneficial interests in trusts, favoring beneficiaries whose interests would be served by pursuing the settlor's desired investment restrictions.

This suggestion is not as extreme as it may at first appear. In many cases, a minor change in the structure of a trust will alter the impact of the emerging rule. For example, consider a hypothetical family business which employs the settlor's three daughters, but not his son. If the settlor places company stock in separate trusts for each child, the emerging rule militates in favor of diversifying the stock held in the son's trust. After all, the son is not involved in the business, and thus the stock owned by his trust is a mere portfolio investment. A clause directing retention of the stock in such a trust could be assailed as simply benefiting the beneficiary's sisters to the detriment of the beneficiary himself, and thus could be void under the emerging rule.

In contrast, if the settlor establishes a single trust for all four children, three of whom are active in the business, a clause directing retention of the business appears quite different in this new context. Certainly, the duties of loyalty¹⁷⁵ and impartiality¹⁷⁶ will still require the trustee to consider the interests of the son when implementing the trust's investment policy. Yet, as long as the son's stock is commingled with his sisters', the benefit-the-beneficiaries rule is marginalized as a potential basis for selling a family business which employs three of the four trust beneficiaries. The settlor thus has an easy way around the emerging doctrine by combining these multiple trusts into one.¹⁷⁷

Even where such a modest change of structure will not insulate the settlor from the emerging rule, it may be possible to simply add additional beneficiaries to stack the deck in favor of the settlor's investment directives. For example, reconsider the example of the settlor who directs her trustees to exclude cigarette companies from the trust portfolio as part of a "socially conscious" trust investment strategy.¹⁷⁸ If this settlor wants to increase the likelihood that her anti-tobacco investment restriction will survive a challenge under the emerging rule, perhaps she should simply add the American Lung

¹⁷⁵ See *supra* notes 6-9 and accompanying text.

¹⁷⁶ See RESTATEMENT (THIRD) OF TRUSTS § 79 (2007) ("A trustee has a duty to administer the trust in a manner that is impartial with respect to the various beneficiaries of the trust . . .").

¹⁷⁷ The son/beneficiary is arguably worse off than he was before the change. Since there is now one trust for all four children, it has become structurally impossible to sell "his" stock without also selling his sisters' shares.

¹⁷⁸ See *supra* Part II.E.2.

Association as a potential trust beneficiary.¹⁷⁹ Once the trust beneficiaries include an organization committed to the eradication of lung cancer, the settlor's bar on investment in cigarette companies becomes a provision which serves the present interests of the trust beneficiaries rather than a profit-draining relic of the settlor's dead hand.¹⁸⁰

Manipulating the number and nature of trust beneficiaries, even in nominal ways, is thus a second means by which trust settlors can negate the impact of the emerging rule. This response produces a rather perverse consequence: instead of aiding trust beneficiaries, the emerging rule would lead settlors to disenfranchise those beneficiaries by combining trusts or by adding additional beneficiaries.

C. *The Desirable Jurisdiction*

The UTC is intended to promote uniformity of trust law among the fifty states.¹⁸¹ There are two key limits to this effort. First, state legislatures remain free to customize the Code as they see fit.¹⁸² Second, a trust settlor, regardless of her state of domicile, has considerable ability to select which state's law will govern a specific trust.¹⁸³ Settlors thus are free to shop for the state law that

¹⁷⁹ This suggestion is not as extreme as it might seem to be. The UTC defines "beneficiary" expansively as any person having "a present or future beneficial interest in a trust, vested or contingent," without regard to the magnitude of that interest. UNIF. TRUST CODE § 103(3)(A) (amended 2005), 7C U.L.A. 413 (2006). As such, possessing even an extremely minimal or extremely contingent interest in a trust makes one a "beneficiary" thereof.

¹⁸⁰ I admit this argument is somewhat inconsistent with my prior argument that the emerging rule is calculated to maximize beneficiaries' wealth rather than serve their other interests. See *supra* Part II.E. Certainly, a ban on investment in cigarette manufacturers does not directly serve the American Lung Association's economic interests. Nevertheless, given the organization's mission, I would expect a court to be extremely sympathetic to a trust provision designed to keep this organization from investing in, and profiting from, the manufacture and sale of such products.

¹⁸¹ See UNIF. TRUST CODE prefatory note, 7C U.L.A. 364.

¹⁸² See, e.g., C. Shawn O'Donnell, Note, *Exploring the Tennessee Uniform Trust Code*, 38 U. MEM. L. REV. 489, 492-93 (2008) (observing that Tennessee customized its version of the UTC).

¹⁸³ Subject to certain limits, a settlor may invoke the law of a favored jurisdiction merely by electing to do so in the governing trust document. See *infra* note 192. While most lawyers utilize the law of the settlor's domicile as a default measure, one source argues that such an approach should be considered legal malpractice. See Michael J. Myers & Rollyn H. Samp, *South Dakota Trust Amendments and Economic Development: The Tort of "Negligent Trust Situs" at its Incipient Stage?*, 44 S.D. L. REV. 662, 662 (1999) (advocating recognition of a cause of action for "Negligent Trust Situs"). These two professors at the University of South Dakota define their proposed tort as follows: "To be ignorant of the South Dakota environment, or the failure to inform clients of its advantages . . ." *Id.*

best meets their needs, while state legislatures are free to customize state trust law to attract wealthy settlers and profitable trust business.

State legislatures have shown a proclivity for implementing changes that will attract trust business to their jurisdictions.¹⁸⁴ Whether by repealing the rule against perpetuities,¹⁸⁵ enhancing creditor protections,¹⁸⁶ or eliminating disfavored taxes,¹⁸⁷ state lawmakers have found ways to lure the “great river of money”¹⁸⁸ passing from one wealthy generation to the next. Consistent with this history, state politicians have already begun modifying or discarding unpopular provisions of the UTC,¹⁸⁹ precipitating yet another “race for the bottom”¹⁹⁰ that will likely lead some jurisdictions to legislatively reverse the emerging benefit-the-beneficiaries rule.¹⁹¹

¹⁸⁴ See Dobris, *supra* note 174, at 574 (“[A]ny change . . . which leads to the loss of trust business in big money center jurisdictions, will lead to amendments of local law in those jurisdictions.”).

¹⁸⁵ See Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356, 359, 412-14 (2005) (discussing how states attracted wealth by repealing the rule against perpetuities).

¹⁸⁶ See Stewart E. Sterk, *Asset Protection Trusts: Trust Law’s Race to the Bottom?*, 85 CORNELL L. REV. 1035, 1037-38 (2000) (discussing how several states have begun to compete for trust wealth by making it easier for settlors to protect trust assets from creditors).

¹⁸⁷ See Jeffrey A. Cooper, *Interstate Competition and State Death Taxes: A Modern Crisis in Historical Perspective*, 33 PEPP. L. REV. 835, 878-81 (2006) (discussing how states attracted wealth by repealing state death taxes).

¹⁸⁸ Dobris, *supra* note 174, at 561.

¹⁸⁹ As one example, every single state legislature to adopt the UTC has modified the unpopular provisions requiring a trustee to keep trust beneficiaries informed regarding trust matters. Gallanis, *supra* note 32, at 1597. Also, every state but one has converted that mandatory rule into a default one. *Id.* at 1609.

¹⁹⁰ The impact of interstate competition on state laws has been studied extensively in the context of corporate law. See, e.g., William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 666 (1974) (using the term “race for the bottom” to describe the states’ efforts to attract corporate business by adopting favorable corporate laws).

¹⁹¹ Ohio has already done just this, deleting the mandatory rule found in UTC section 105(b)(3) and replacing the requirement in section 404 that “[a] trust and its terms must be for the benefit of its beneficiaries,” UNIF. TRUST CODE § 404 (amended 2005), 7C U.L.A. 484 (2006), with a more settlor-friendly provision that “[a] trust exists, and its assets shall be held, for the benefit of its beneficiaries in accordance with the interests of the beneficiaries in the trust.” OHIO REV. CODE ANN. §§ 5801.04(B), 5804.04 (2006). The Joint Committee recommending this Ohio modification did so with reference to Professor Langbein’s essay in the *Northwestern University Law Review*, expressly rejecting the emerging rule. ALAN NEWMAN, REPORT ON HB 416: THE OHIO TRUST CODE 11 (May 2006), available at http://osba.ohioabar.org/docushare/dsweb/Get/Document-19711/OTC_Report_as_enacted.DOC (citing Langbein, *Mandatory Rules*, *supra* note 13, at 1109).

As state legislatures pick apart the UTC and modify unpopular provisions, trust settlors will be free to select the law of the most favorable jurisdiction to govern their trust documents.¹⁹² The result will be a simple means of avoiding the impact of the emerging rule as well as creation of the very patchwork of state laws that uniform acts are intended to avoid.

D. *The Avoidance of Trust Law*

To this point, I have argued that trust settlors will find means *within* trust law to avoid potential implications of the emerging rule, either by altering the provisions of trust documents or ensuring that those documents are overseen by compliant trustees or are governed by the laws of a settlor-friendly jurisdiction. There remains a final, more significant, possibility. Some trust settlors may abandon trust law in its entirety, rejecting express trusts as estate planning devices in favor of other forms of property ownership.

There are two predictable manners in which this might occur. One is through increased utilization of undocumented, “secret” trusts rather than formal ones. The other is through the use of other business entities, most likely limited partnerships or limited liability companies, as the preferred vehicles for estate planning. Widespread use of these options could sound the death knell for trust law, as settlors simply abandon a legal regime that no longer serves their needs.

1. Informal Avoidance: Secret Trusts

The emerging rule might lead to the return of a device rarely seen in modern estate planning: the secret trust.¹⁹³ Returning to a prior example,¹⁹⁴ assume the

¹⁹² UTC section § 107 provides one hurdle for a settlor seeking to adopt the law of a favorable jurisdiction. That section provides that a settlor’s choice of governing law controls unless “contrary to a strong public policy of the jurisdiction having the most significant relationship to the matter at issue.” UNIF. TRUST CODE § 107, 7C U.L.A. 436. This provision creates another potential source of controversy insofar as a settlor seeking to avoid the emerging rule could freely adopt the law of a more favorable jurisdiction unless the emerging rule represents the state’s strong public policy of having the “most significant relationship” to the trust. To the extent the settlor, trustee and beneficiaries have contacts with multiple states, protracted litigation might be necessary to determine: (1) which jurisdiction has the “most significant” nexus to the trust; and (2) whether the emerging rule represents the “strong public policy” of that state. For a detailed exploration of section 107, see generally Eugene F. Scoles, *Choice of Law in Trusts: Uniform Trust Code, Sections 107 and 403*, 67 MO. L. REV. 213 (2002). While conceding that section 107, like prior law, “is subject to the criticism of being a ‘non-rule’ and overly vague,” Professor Scoles is hopeful that judicial deference to the settlor’s stated intent can severely curtail the number of controversies which arise under this provision. *Id.* at 218-19.

¹⁹³ A secret trust is a distribution of property which appears to be an outright bequest but is really founded upon the recipient’s express or implied promise to use the property to benefit another. For a complete discussion, including extensive citations to the case law, see RESTATEMENT (THIRD) OF TRUSTS § 18 (2003).

trust settlor seeking to preserve a valuable vacation home for her children is unwilling to bear the risk that her chosen trustee will sell that property to maximize the trust's economic return. If she believes formal trust law accords insufficient deference to her chosen course of conduct, she simply may avoid that law. To do so, she could give the residence outright to her daughter, who is most emotionally attached to the house (and thus least likely to ever sell it), with the undocumented understanding that the daughter will share the house with her brother. Although the conveyance would appear to be an outright one, in reality it would be a secret trust.

Unfortunately the settlor's seemingly simple approach leaves crucial questions unresolved. For example, who is to resolve controversies between the siblings? What tax implications result from the ownership and use of the residence? Who will plan for the use of the house by future generations? And perhaps of greatest concern, what if the sister in our example simply denies the existence of any obligation to her brother and treats the property as solely her own?

The hypothetical settlor's reliance on a secret trust thus is fraught with peril, providing her chosen beneficiaries with neither the administrative framework nor the statutory protections afforded by formal trust law. Albeit ill-advised, her response is a predictable one which provides a simple means of avoiding a rule she considers unjust and inadvisable.¹⁹⁵ Ironically, while the emerging rule is designed to protect the brother in this example from his mother's irrational vision, it actually provides an incentive for her to disenfranchise him.

2. Formal Avoidance: Choosing Other Entities

The investment goals of many trust settlors could be pursued through various estate planning devices, only one of which is the trust. Whether business¹⁹⁶ or personal assets¹⁹⁷ are involved, the trust competes as a form of

¹⁹⁴ See *supra* Part II.E.1.

¹⁹⁵ Some may contend this prediction is too extreme. My counter is that to the extent the proponents of the emerging rule suggest that many trust investment restrictions are motivated by ego or self-aggrandizement rather than a true desire to benefit chosen beneficiaries, they should expect to encounter trust settlors who will react as I have suggested. It would be disingenuous to simultaneously argue that we need a strong benefit-the-beneficiaries rule to protect us from legions of irrational, egotistical, overly-controlling settlors and then fail to concede that some of those settlors will look to secret trusts as a means of negating the rule that seeks to constrain them.

¹⁹⁶ For a comparison of trusts with other entities used in commercial transactions, see, for example, Henry Hansmann et al., *The New Business Entities in Evolutionary Perspective*, 2005 U. ILL. L. REV. 5, 5-14; John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 YALE L.J. 165, 179 (1997); Robert H. Sitkoff, *Trust as "Uncorporation": A Research Agenda*, 2005 U. ILL. L. REV. 31, 35-48.

¹⁹⁷ For a comparison of trusts with other entities used in estate planning transactions, see Louis A. Mezzullo, *Family Limited Partnerships and Limited Liability Companies*, SJ002 ALI-ABA 615 (2003).

ownership with other legal entities, including corporations, limited liability companies (“LLCs”) and limited partnerships (“LPs”).¹⁹⁸ As such, a settlor seeking to arrange ownership of her assets is free to select the structure of her choice and adopt the legal regime that flows from that choice. For the settlor seeking to impose enforceable investment restrictions, LLCs and LPs (hereinafter collectively referred to as “partnerships”) now may offer a more favorable governing regime than does trust law.¹⁹⁹

Like a trust, a partnership provides a mechanism to separate beneficial ownership of assets from daily management and control.²⁰⁰ However, a crucial distinction is that the investment decisions made by the managing partner²⁰¹ of a partnership are evaluated based on a “business judgment” standard of conduct, a significantly more deferential standard than the “prudent investor” standard applicable to trustees.²⁰² In addition, the governing partnership agreement can be drafted to deter and penalize any challenges to the managing partner’s investment decisions, such as by requiring those who bring unsuccessful claims against the managing partner to pay all of the resulting legal expenses.²⁰³ Finally, a managing partner may have fewer “beneficiaries” to answer to in the first place, since the trustee’s obligation to balance the investment needs of current and future beneficiaries is inapplicable in the partnership context.²⁰⁴

¹⁹⁸ In the estate planning context, limited partnerships often are referred to as family limited partnerships (“FLPs”).

¹⁹⁹ For a detailed analysis of the formation, management, and uses of such entities in estate planning, see John F. Ramsbacher, *The Family Limited Partnership/LLC – The Basic Building Block*, in 37TH ANNUAL ESTATE PLANNING INSTITUTE (PLI Tax Law & Est. Plan., Course Handbook Series No. 8761, 2006); David Tyler Lewis & Christopher J.C. Jones, *Limited Liability Companies as Trust Substitutes, Part 2*, PROB. & PROP., Jan.-Feb. 2004, at 52, 52-56 (exploring advantages of using LLCs rather than trusts in estate planning).

²⁰⁰ Both LPs and LLCs provide a means to centralize management responsibility for an entity. An LP has both “limited” and “general” partners, only the latter of which have investment responsibility and managerial control. In a manager-managed LLC, one or more members are designated as the “managers” and vested with administrative and investment responsibility. The remaining members of the LLC are akin to limited partners and have no managerial control of the entity. J. William Callison, *Venture Capital and Corporate Governance: Evolving the Limited Liability Company to Finance the Entrepreneurial Business*, 26 J. CORP. L. 97, 108 (2000).

²⁰¹ For convenience, I will use the term “managing partner” to refer generically to both the managing partner of an LP and the managing member of an LLC.

²⁰² S. Stacy Eastland, *I.R.C. Section 2036 Defenses for the Family Limited Partnership Technique*, SM007 ALI-ABA 1271 (2007); Mezzullo, *supra* note 197, at 726 (“This lower standard will give comfort to the older family members that the younger family members will not use 20/20 hindsight to challenge the investment decisions . . .”).

²⁰³ See Eastland, *supra* note 202, at 1324.

²⁰⁴ Stanley Rosenberg & Sanford J. Schlesinger, *The Benefits of Family Limited Partnerships in Estate Planning and the Impact of “Anti-Abuse” and “Check-the-Box,”* N.Y. ST. B.J., July-Aug. 1997, at 30, 33.

Utilizing a partnership to bypass undesirable elements of trust law would be a simple task for a modern estate planner. After drafting a trust for her clients' chosen beneficiaries, the lawyer would then add a second layer into the estate plan, placing her client's investment assets into a partnership and funding the trust with partnership interests rather than the underlying assets.²⁰⁵ This two-step approach would shift investment responsibility for the underlying assets from the trustee to the managing partner, who will make those decisions within the parameters of partnership law.

With this proverbial stroke of the lawyer's pen, trust investment law becomes effectively irrelevant. As a mere limited partner, the trustee has no power to impact the investment of the partnership's underlying assets. The only investment option available to the trustee would be to sell the partnership interest itself. However, this is probably not a viable option. In addition to the fact that the partnership agreement may restrict such a sale,²⁰⁶ there would be almost no market for an interest in such an estate planning partnership. As a result, the trust's interest in such a partnership would trade at up to a fifty-percent discount to underlying market value,²⁰⁷ likely far too high a price for the trustee to pay to regain investment control.

Due to their tax advantages and favorable legal regime, partnerships have already gained widespread acceptance in modern estate planning.²⁰⁸ The emerging benefit-the-beneficiaries rule might now add one further jewel in the partnership's crown, providing a simple mechanism for avoiding the increasingly unfavorable requirements of trust law. As such, while the trust has historically been the estate planning device of first resort, the partnership may soon assume that throne.

²⁰⁵ One downside to this approach is that the gifts of partnership interests to the trust may not qualify for the gift tax "annual exclusion" provided under I.R.C. § 2503(b). See *Hackl v. Comm'r*, 118 T.C. 279, 294-99 (2002).

²⁰⁶ Mezzullo, *supra* note 197, at 645-46 (discussing specific restrictions on transferability).

²⁰⁷ See Karen C. Burke & Grayson M.P. McCouch, *Family Limited Partnerships: Discounts, Options, and Disappearing Value*, 6 FLA. TAX REV. 649, 650 (2004) (estimating a discount of one-third to one-half of the underlying value of the assets); Milton Childs, *Using Family Limited Partnerships for Estate Planning*, 5 MARQ. ELDER'S ADVISOR 193, 198 (2004) (estimating a discount of twenty percent to fifty percent). For a detailed explanation of the applicable valuation discounts, including extensive mathematical computations, see generally Jay T. Brandi, *Estate Tax Valuation and Comparative Discounting for the Limited Liability Company Investment Fund*, J. LEGAL ECON., Fall 2002, at 27.

²⁰⁸ Carol Warnick, *Family Limited Partnerships: Taxes, Courts, and an Uncertain Future – Part I*, COLO. LAW., Mar. 2004, at 61, 61 ("The family limited partnership ('FLP') has ascended to the summit of favored estate planning techniques . . .").

IV. TOWARDS A BETTER APPROACH

To this point, I have explored both the undesirable consequences of the emerging benefit-the-beneficiaries rule and the means by which trust settlors may attempt to avoid its impact. While such analysis represents the primary focus of this Article, it merely lays the foundation for a much larger question: where will trust law go from here?

In this Part, I seek to redirect both the scholarly debate and state legislative agendas toward a better answer to that question – one that relies on doctrines that will serve to enhance, rather than negate, trust settlors' intent. Two such doctrines warrant further consideration as superior alternatives to the emerging benefit-the-beneficiaries rule: the doctrines of mistake and changed circumstances. While these curative doctrines are not a complete solution and cannot redress every instance of inefficient investment directives, they offer a means to combat the undesirable effects of dead-hand investment restrictions without toppling beneficial elements of trust law. On balance, they represent the right direction for future reform.

A. *Mistake*

To err is human. To reform is divine.

Sometimes settlors make mistakes. At common law, courts offered little assistance to the beneficiaries impacted by such a mistake.²⁰⁹ Unequivocal language in wills and trust documents was given its stated effect even when that approach undermined the settlor's clear goals.²¹⁰ The prevailing modern trend is a liberalizing one, seeking to avoid technical obstacles to the effectuation of a settlor's or a testator's intent.²¹¹ This logic has led modern courts to identify and correct mistakes in execution,²¹² expression,²¹³ and even

²⁰⁹ See John H. Langbein & Lawrence W. Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U. PA. L. REV. 521, 521 (1982) (stating the general rule that "courts do not entertain suits to reform wills on the ground of mistake").

²¹⁰ See *id.*

²¹¹ Edward C. Halbach, Jr., *Uniform Acts, Restatements, and Trends in American Trust Law at Century's End*, 88 CAL. L. REV. 1877, 1885 (2000).

²¹² See, e.g., *Snide v. Johnson*, 418 N.E.2d 656, 656-58 (N.Y. 1981) (admitting husband's will to probate even though he and his wife each accidentally executed the other spouse's will).

²¹³ See, e.g., *Reynolds v. Reynolds*, 819 N.E.2d 938, 939-41 (Mass. 2004) (holding that the trust instrument could be reformed to correct a scrivener's error in the trust document).

mistakes of law.²¹⁴ The UTC codifies this emerging trend, liberally authorizing courts to correct the products of mistakes of law or fact.²¹⁵

The doctrine of mistake can play a crucial role in addressing inefficient investment restrictions. Returning to where our analysis began, a liberal application of the doctrine of mistake can resolve the case of the hypothetical settlor who directed his trustee to hold IBM stock out of ignorance, opining that “you can’t do better” than to hold an undiversified portfolio.²¹⁶ That settlor’s overarching purpose was to provide financial benefit to his chosen beneficiaries, and he directed retention of IBM merely as a means toward that larger goal.²¹⁷ But due to his mistaken understanding of basic elements of investment theory, this settlor’s chosen investment restriction more likely will undermine his stated goal than further it.²¹⁸ This value-impairing investment restriction is thus the direct product of a mistake and should be reformed as such.

Applying the doctrine of mistake to this example achieves the same result as would the emerging benefit-the-beneficiaries rule while avoiding many problems the emerging rule would introduce. The doctrine of mistake effectuates a settlor’s intent rather than undermining it. It better aligns the interests of settlors and trustees by honoring the subjective intent of their contractual promises. Additionally, as a curative doctrine, its application could be limited to cases where proponents meet a heightened standard of proof,²¹⁹ thus reducing the danger that the doctrine would spawn nuisance litigation or oppress settlors who tread away from the established investment mainstream. For all these reasons, a settlor aware of such a rule likely would embrace it rather than evade it.

The significant difference between this approach and that of the emerging benefit-the-beneficiaries rule is seen by revisiting a second example – that of the settlor who directed a trust to be held solely in Treasury Bills as a safeguard against potential economic turmoil.²²⁰ This settlor did not say, “you can’t do better” than to invest in such a portfolio, but rather, in effect said,

²¹⁴ See *Erickson v. Erickson*, 716 A.2d 92, 98-101 (Conn. 1998) (allowing extrinsic evidence of the decedent’s true intent in an effort to correct a mistake resulting from an attorney’s misunderstanding of applicable law).

²¹⁵ UNIF. TRUST CODE § 415 (amended 2005), 7C U.L.A. 514-15 (2006). For more on the provision, see English, *supra* note 31, at 174.

²¹⁶ See *supra* Part I.B.

²¹⁷ See *supra* note 37 and accompanying text.

²¹⁸ See *supra* note 38 and accompanying text.

²¹⁹ See John H. Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia’s Tranquil Revolution in Probate Law*, 87 COLUM. L. REV. 1, 53 (1987) (advocating correction of minor defects in execution subject to a “clear and convincing evidence” standard). Professor Langbein’s proffered approach has become the established modern trend. See James Lindgren, *The Fall of Formalism*, 55 ALB. L. REV. 1009, 1014 (1992).

²²⁰ See *supra* Part II.D.1.

“you might do better but I direct you not to try.” The distinction between this example and Professor Langbein’s retired IBM executive is crucial. Langbein’s settlor is ignorant. He thinks his good experience with IBM provides a relevant justification for retaining the corporate stock, a notion debunked by modern portfolio theory. He thus needs our help, and by correcting his mistaken directives we honor his overarching goals rather than undermining them. In contrast, the settlor fearing a doomsday global economic meltdown does not need our help. If she is right, and we have no credible evidence that she is not, then she is smarter than most investors are. Although this settlor’s directive may be unduly conservative, it simply does not represent a mistake.²²¹ As such, the doctrine of mistake, unlike the emerging benefit-the-beneficiaries rule, would defer to this settlor’s directives.

The doctrine of mistake thus strikes the right balance, splitting these two examples along the proper axis. The law treats the mistaken settlor as such, while honoring the dictates of the thoughtful, if overly-conservative one. While only the former settlor’s chosen beneficiaries avoid what objectively appear to be irrational investment restraints, trust law achieves that result without creating the undesirable incentive effects of a more aggressive reformatory regime. The doctrine thus eliminates settlors’ motivation to seek out either a more favorable jurisdiction or a more desirable estate planning entity. This result may be all that trust law can hope to accomplish.

B. *Changed Circumstances*

The doctrine of changed circumstances²²² is a variation of the doctrine of mistake. The distinction is a temporal one. Unlike a classic mistake, which typically exists at the time of the execution of the trust document, the significance of changed circumstances emerges over time as events unfold. The doctrine thus reflects the reality that no matter how hard she tried, “the settlor could not possibly have anticipated all of the decisions a trustee would face.”²²³ This same logic shapes numerous aspects of trust law, justifying the doctrine of *cy pres*,²²⁴ as well as forming the historical basis for the rule against perpetuities.²²⁵

²²¹ The settlor’s primary goal is to preserve capital, which the investment in treasury bills will do. *See supra* note 98 and accompanying text. As such, her directive cannot be classified as a mistake. However, her directive might fail to meet her goal in the event of a significant change in prevailing interest rates or a dramatic decline in the credit quality of U.S. government obligations. Such occurrences might warrant deviating from the settlor’s directive under the doctrine of “changed circumstances.” *See infra* notes 222-223 and accompanying text.

²²² Alternatively, the doctrine may be referred to as “equitable deviation.”

²²³ Sterk, *supra* note 18, at 2762.

²²⁴ *See* Alex M. Johnson, Jr., *Limiting Dead Hand Control of Charitable Trusts: Expanding the Use of the Cy Pres Doctrine*, 21 U. HAW. L. REV. 353, 369 (1999) (“The

Just as modern courts have demonstrated increased willingness to intervene in cases of mistake, they have also shown greater proclivity to address changed circumstances.²²⁶ In so doing, however, jurists have framed the doctrine as one which honors a settlor's perceived intent and have sought to respond to changed circumstances as the settlor would have directed had she anticipated such events.²²⁷ The Restatement similarly casts the doctrine as one which honors the settlor's intent.²²⁸

Expanded application of the doctrine of changed circumstances would enable courts to reform a variety of value-impairing investment restrictions. For example, reconsider the settlor who directed retention of her family business as a means of simultaneously honoring her family legacy and providing income to her chosen beneficiaries.²²⁹ For the reasons discussed in the prior Parts of this Article, trust law should honor this clear restriction. However, the doctrine of changed circumstances can safely apply temporal limits to that restriction. With the passage of time, as the nature of the family business changes, and as family members die or leave its employ, retaining the business might no longer serve the settlor's overarching goals. At the point when the settlor's goals and means have become mutually exclusive, the law must choose which to honor. We may rightly assume that given the choice, this settlor would want her means discarded to further her goals rather than the reverse.²³⁰ The doctrine of changed circumstances implements that choice.

doctrine [of cy pres] was developed to modify charitable trusts whose purpose had become obsolete as a result of changed conditions not . . . foreseen by the original settlor or donor.”).

²²⁵ See *DUKEMINIER ET AL.*, *supra* note 1, at 674-77.

²²⁶ *Sitkoff*, *supra* note 4, at 660-61.

²²⁷ *Id.* at 661.

²²⁸ RESTATEMENT (THIRD) OF TRUSTS § 66(1) (2003) (“The court may modify an administrative or distributive provision of a trust . . . if because of circumstances not anticipated by the settlor the modification or deviation will further the purposes of the trust.”). Because the Restatement is intended to capture both changed circumstances and pre-existing circumstances that were simply unknown to the settlor, the Restatement refers to the doctrine as that of “unanticipated circumstances.” *Id.* § 66 cmt. a. The UTC also incorporates the doctrine of changed circumstances; however, the UTC's approach is potentially problematic. See *infra* note 234.

²²⁹ See *supra* Part I.B.

²³⁰ See Jesse Dukeminier & James E. Krier, *The Rise of the Perpetual Trust*, 50 *UCLA L. REV.* 1303, 1328-29 (2003) (“[W]e can reasonably suppose that, whatever happens, settlors would rather hold to the beneficial purposes of their trust than to precise terms that have come to be inconsistent with those purposes, given subsequent events.”). For a classic example from the case law, see *In re Pulitzer*, 249 N.Y.S. 87 (Sur. Ct. 1931), *aff'd*, 260 N.Y.S. 975 (App. Div. 1932). In *Pulitzer*, the settlor had prohibited sale of a trust's interest in the company that published *The New York World* newspaper. *Id.* at 92. When the trustees petitioned for judicial authorization to sell the newspaper stock to stave off a dire financial emergency, the court concluded that the settlor's primary goal in establishing the trust had been to provide “a fair income for his children and the ultimate reception of the unimpaired corpus by the remaindermen,” and thus negated the retention clause in order to

This treatment stands in contrast to Professor Langbein's proffered approach. Langbein nominally embraces the doctrine of changed circumstances, arguing that it forms the "core policy" underlying the emerging benefit-the-beneficiaries rule.²³¹ However, his vision would morph that doctrine into an intent-defeating one, dishonoring the settlor's intent ab initio rather than seeking to honor it over time.²³² That altered orientation is a fateful one, as it converts the doctrine from an intent-honoring one that settlors would tolerate²³³ to an intent-defeating one that they will reject.²³⁴

If restored to its intent-honoring roots, the doctrine of changed circumstances can address a variety of inefficient investment restrictions in ways that serve both settlors and beneficiaries. It would honor a restriction to hold a vacation residence in trust, but would modify that directive if the trust faced an economic exigency.²³⁵ It would defer to settlor-imposed investment directives but adjust them to reflect developments in global economic

serve the settlor's "dominant purpose." *Id.* at 94. The court thus cast its approach as an intent-furthering one.

²³¹ Langbein, *Mandatory Rules*, *supra* note 13, at 1117.

²³² Langbein, *Contractarian Basis*, *supra* note 4, at 651 n.134 ("[I]f the settlor directs an objectively stupid investment policy, the court will direct deviation even though the settlor anticipates the circumstance.").

²³³ Concededly, even modest temporal restrictions will produce some incentive effects. *See* Joshua C. Tate, *Perpetual Trusts and the Settlor's Intent*, 53 U. KAN. L. REV. 595, 619-20 (2005) (observing that some trust settlors wish to control trust property for generations and will seek out a jurisdiction that allows them to do so). Nevertheless, we may safely assume that a doctrine which serves to modify a settlor's directives in the event of changed circumstances will be more palatable to settlors than a doctrine which negates such directives ab initio.

²³⁴ Unfortunately, the UTC's doctrine of changed circumstances, codified in section 412, invites the same result. Specifically, UTC section 412(a) mirrors the traditional rule that the doctrine is intended to "further the purposes of the trust" and effectuate "the settlor's probable intention." UNIF. TRUST CODE § 412(a) (amended 2005), 7C U.L.A. 507 (2006). However, section 412(b) independently authorizes modification of a trust's administrative terms simply where "continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration." *Id.* § 412(b), 7C U.L.A. 507. This second provision effectively represents another incarnation of the emerging rule, framed without regard to the settlor's intent and operating even absent any changed circumstances. *See id.* § 412 cmt., 7C U.L.A. 508 ("Subsection (b) is also an application of the requirement in Section 404 that a trust and its terms must be for the benefit of its beneficiaries."). Legislatures seeking to avoid the undesirable results of the emerging rule should either delete section 412(b) in its entirety or follow Missouri's lead by replacing section 412(b) with an intent-honoring variation. *See* MO. ANN. STAT. § 456.4-412(2) (West 2007) ("The court may modify the management or administrative terms of a trust if modification will further the purposes of the trust.").

²³⁵ *See, e.g., In re Cove Irrevocable Trust*, 893 A.2d 344 (Vt. 2006) (approving the sale of a vacation home held in trust when necessary to raise liquidity, notwithstanding a specific trust provision directing retention of the residence).

conditions.²³⁶ It would work to maximize,²³⁷ rather than undermine,²³⁸ a settlor's estate tax planning. Yet, it would make these changes only after the settlor's chosen directives have proven to be outdated ones and with an eye toward both honoring the settlor's intent and best replicating the settlor's desired response.

As such, expanding the doctrine of changed circumstances would make trust law more nimble and efficient, but cautiously so. No doubt, this doctrine will not always achieve a more efficient result than could the emerging benefit-the-beneficiaries rule. As the law waits for changed circumstances to reveal themselves, it may react too slowly and too deferentially to fully maximize the beneficiaries' utility. However, from a trust settlor's standpoint, such imperfections may be the doctrine's greatest strengths, leading those settlors to embrace trust law as a legal regime which will err on the side of honoring their intent.

CONCLUSION

At first blush, the emerging benefit-the-beneficiaries rule seems to offer great promises, steadfastly pursuing the interests of today's trust beneficiaries and casting aside the inefficient, dead-hand dictates of yesterday's settlors. However, a closer analysis reveals the emerging rule's potentially undesirable consequences. It introduces significant confusion into the clear legal regime established by the UTC and UPIA. It accords too little deference to a settlor's unique vision and clear directives. It undermines crucial interpersonal and tax-planning elements of modern estate planning.

Perhaps its greatest flaw, however, is its mandatory nature. Trust settlors concerned by the potential consequences of the emerging rule could easily draft around them were the rule a mere default. But this mandatory rule forces a far more dramatic confrontation. For, to avoid trust law's mandatory rules, settlors must find a way to avoid trust law. In this case, they easily can. A variety of competing legal regimes and a number of settlor-friendly jurisdictions stand ready to welcome trust settlors who wish to avoid the emerging rule. As trust settlors pursue those more desirable options, the emerging rule thus could undermine the very relevance of trust law.

Despite its best intentions, the emerging benefit-the-beneficiaries rule simply cannot achieve its desired impact, and the promises it offers trust beneficiaries prove to be empty ones. As such, trust law would be better

²³⁶ See, e.g., *In re Siegel*, 665 N.Y.S.2d 813, 815 (Sur. Ct. 1997) (honoring a directive to invest trust funds solely in bank accounts, but giving the trustee "supplemental authority" to invest in other assets once interest rates fell to the point where the trust could no longer produce necessary income).

²³⁷ See, e.g., *BankBoston v. Marlow*, 701 N.E.2d 304, 307 (Mass. 1998) (modifying trust provisions to minimize the impact of taxes).

²³⁸ See *supra* Part II.F (discussing how the emerging rule could undermine the purposes of both ILITs and GRATs).

served by rejecting the emerging rule and turning instead to what some might consider less ambitious doctrines – ones which seek to aid the beneficiaries of settlors who have made mistakes or failed to anticipate changed circumstances, but which provide no aid in cases where a settlor intentionally and thoughtfully impaired her beneficiaries' economic rights. Trust law cannot meaningfully redress those latter cases. It should not destroy itself by trying.