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# Investment Responsibility of Professional Trustees

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# INVESTMENT RESPONSIBILITY OF PROFESSIONAL TRUSTEES

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A significant portion of the funds invested in the modern securities market is derived from the assets of various types of trust accounts.[1] Professional trustees such as banks and investment firms, due to their expertise, have played a large role in managing these trust investments.[2] Despite their particular skill and knowledge in handling investments, professional fiduciaries in New York are not held to a higher standard of care and responsibility than nonexpert trustees.[3] New York's use of a single standard for both the professional and layman trustee is difficult to justify, especially in light of the fact that other professionals are required to exercise a greater degree of care than laymen in matters of judgment or suffer costly consequences.[4]

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[1] *See, e.g.*, J. COHEN & E. ZINBARG, INVESTMENT ANALYSIS AND PORTFOLIO MANAGEMENT 662-731 (1967). *See also* P. HARBRECHT, PENSION FUNDS AND ECONOMIC POWER 23-29 (1959); D. VAUGHN, SURVEY OF INVESTMENTS 492-96 (2d ed. 1974).

A trust is an arrangement under which a fiduciary holds legal title to property subject to an obligation to keep or use the property for the benefit of one or more other persons. RESTATEMENT (SECOND) OF TRUSTS § 2 (1959). The trustee manages the trust according to the dictates of the trust instrument, *id.* §§ 3(3), 164(a), which often expressly empowers him to produce income by making investments. If a trustee exceeds the limits of his authority, his acts may be void. G. BOGERT, TRUSTS AND TRUSTEES § 551 (2d ed. 1960). In general, the fiduciary is required to exercise prudence and reason in managing the trust. *Id.* § 612.

[2] By the 19th century, corporations had been empowered to administer trusts. Thereafter, banks increasingly undertook the management of trust accounts, while many trust companies began to engage in banking. 2 A. SCOTT, TRUSTS § 96.5 (3d ed. 1967).

Personal trust departments of trust companies and commercial banks apparently manage larger investment portfolios than all other financial institutions combined. *Institutional Investors and Corporate Stock—A Background Study* 66-68 (R. Goldsmith ed. 1973). It has been stated, however, that their share of the investment market is shrinking. *See id.* at 68. *See generally id.* at 66-71, 253-56; Friedman, *The Dynastic Trust*, 73 YALE L.J. 547 (1964) [hereinafter cited as Friedman].

[3] *In re* Pate's Estate, 84 N.Y.S.2d 853, 868 (Sur. Ct. N.Y. County 1948), *aff'd mem.*, 276 App. Div. 1008, 95 N.Y.S.2d 903 (1st Dep't 1950); *see, e.g.*, *In re* Bank of N.Y., 35 N.Y.2d 512, 518-19, 323 N.E.2d 700, 704, 364 N.Y.S.2d 164, 169 (1974); *In re* Fulton Trust Co., 257 N.Y. 132, 136-137, 177 N.E. 397, 398 (1931); *In re* Union Trust Co., 219 N.Y. 514, 521, 114 N.E. 1057, 1059 (1916); Cobb v. Gramatan Nat'l Bank & Trust Co., 261 App. Div. 1086, 1086, 26 N.Y.S.2d 917, 919 (2d Dep't 1941) (mem.); *In re* City Bank Farmers Trust Co., 189 Misc. 942, 945, 68 N.Y.S.2d 43, 46 (Sup. Ct. N.Y. County 1947). *See generally* RESTATEMENT (SECOND) OF TRUSTS § 174 (1959).

[4] *See, e.g.*, Toth v. Community Hosp., 22 N.Y.2d 255, 262, 239 N.E.2d 368, 372, 292 N.Y.S.2d 440, 447 (1968); note 54 and accompanying text *infra*. *See generally* Kaplin,

This Article will discuss the standard of care owed by corporate or professional fiduciaries under New York law. After an examination of the current status of the law, it will be argued that New York should opt for criteria which demand greater investment care from a corporate trustee.

## Historical Background

Fiduciaries generally need not display infallibility nor prescience in making investment decisions;[5] they are required to act in good faith and exercise "such diligence and such prudence in the care and management [of the fund] as in general, prudent men of discretion and intelligence . . . employ in their own like affairs."[6] This "prudent man" rule was formulated in an 1830 Massachusetts case, *Harvard College v. Amory*.[7] There, an action was brought by the remaindermen of a testamentary trust who contended that the trustees had invested in corporate stocks which were financially hazardous.[8] Finding that the trustees had acted with skill and discretion,[9] the Supreme Judicial Court of Massachusetts held the stock purchases to be proper.[10] By way of dicta, the court observed:

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*Professional Power and Judicial Review: The Health Professions*, 44 Geo. Wash. L. Rev. 710 (1976); Stewart, *Tightening Legal Constraints on Professionals*, 7 N.C. Cent. L.J. 271 (1976); Comment, *The Washington Consumer Protection Act vs. The Learned Professional*, 10 Gonz. L. Rev. 435 (1975).

Interestingly enough, in the securities regulation area recent attempts have been made to expand significantly the liability of brokers, accountants, and lawyers. *See, e.g.*, Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) (accountants); SEC v. National Student Marketing Corp., [1976-1977 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,027 (D.D.C. May 2, 1977) (lawyers).

[5] *In re* Bank of N.Y., 35 N.Y.2d 512, 519, 323 N.E.2d 700, 704, 364 N.Y.S.2d 164, 169 (1974); *In re* Hubbell, 302 N.Y. 246, 257, 97 N.E.2d 888, 893 (1951); *see In re* Estate of Heidenreich, 85 Misc. 2d 135, 138, 378 N.Y.S.2d 982, 985 (Sur. Ct. Nassau County 1976).

[6] *In re* Bank of N. Y., 35 N.Y.2d 512, 518-19, 323 N.E.2d 700, 704, 364 N.Y.S.2d 164, 169 (1974) (quoting *In re* Fulton Trust Co., 257 N.Y. 132, 136, 177 N.E. 397, 398 (1931)); Costello v. Costello, 209 N.Y. 252, 261, 103 N.E. 148, 152 (1913); King v. Talbot, 40 N.Y. 76, 85-86 (1869); *see* N.Y. Est., Powers & Trusts Law § 11-2.2 (McKinney Supp. 1976-1977).

[7] 26 Mass. (9 Pick.) 446 (1831).

[8] *Id.* at 451-52, 455-56. The decedent had provided by will for the establishment of a trust producing income for his spouse. Upon his wife's death, the remainder of the trust was to be divided equally between Harvard College and Massachusetts General Hospital. *Id.* at 446-47. Approximately one-half of the trust consisted of stock issued by two manufacturing companies. The remaining portion of the fund was made up of shares in a bank and an insurance company. *Id.* at 449. By October 1828, the book value of the manufacturing stock had decreased almost 30%. *Id.* at 450.

[9] *See id.* at 463-65. The court indicated that a trustee should not be held liable unless his conduct rises to the level of "gross neglect and wilful mismanagement." *Id.* at 461.

[10] *Id.* at 463.

> All that can be required of a trustee to invest, is, that he shall conduct himself faithfully and exercise a sound discretion. He is to observe how men of prudence, discretion and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested.[11]

This statement has been accepted by courts[12] and commentators[13] alike as the rule of law by which the actions of fiduciaries are judged.

A number of years after this landmark decision, the New York Court of Appeals, in *King v. Talbot*,[14] adopted the prudent man rule as the criterion governing fiduciary investments in New York. Pointing to the *Harvard College* case with approval,[15] the *King* court

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[11] *Id.* at 461 (footnote omitted).

[12] *See, e.g.*, Whittemore v. United States, 383 F.2d 824, 835 n.25 (8th Cir. 1967); Doss v. United States, 326 F. Supp. 1320, 1325 (N.D. Tex. 1971) (prudent man standard incorporated into Texas statute); Steiner v. Hawaiian Trust Co., 47 Haw. 548, 561-62, 393 P.2d 96, 104-05 (1964) (codification of prudent man standard); O'Brien v. Dwight, 363 Mass. 256, 294, 294 N.E.2d 363, 385 (1973); Fidelity Union Trust Co. v. Price, 11 N.J. 90, 93-96, 93 A.2d 321, 322-23 (1952) (prudent man standard adopted by New Jersey statute); Sheets v. J.G. Flynt Tobacco Co., 195 N.C. 149, 152-53, 141 S.E. 355, 357 (1928); Estate of Stetson, 463 Pa. 64, 74 n.4, 345 A.2d 679, 684 n.4 (1975) (prudent man standard contained in Pennsylvania statute).

[13] *See, e.g.*, Friedman, *supra* note 2, at 551-54; Scott, *The Law of Trusts, 1941-1945*, 59 HARV. L. REV. 157, 180 (1945); Ward & Shockney, *The Texas Trust Act: Investment Power of a Trustee*, 37 TEX. L. REV. 66, 68-72 (1958).

[14] 40 N.Y. 76 (1869).

[15] The prudent man standard adopted in *King* differed significantly from the rule set forth in Harvard College v. Amory, 26 Mass. (9 Pick.) 446 (1831). Judge Woodruff, writing for the *King* court, agreed with the *Harvard College* decision that the trust fund should be kept secure and productive, but added a requirement that "the fund . . . always be subject to future recall for the benefit of the *cestui que trust*." *Id.* at 88. As a result, bank, insurance, and other private stocks were excluded from the class of prudent investments. *Id.* One commentator has observed that this additional requirement of recallability resulted in New York's eventual adoption of the legal list. *See* 9C P. ROHAN, NEW YORK CIVIL PRACTICE ¶ 11-2.2[4], at 11-427 to -428 & n.65 (1977) [hereinafter cited as ROHAN]. For a discussion of the legal list see notes 21-27 and accompanying text *infra*.

The recallability requirement in *King* seems to have been prompted by several factors. In the late 1860's, when the *King* case was decided, government bonds were readily available and sold at high premiums, in contrast to their depreciated value at the time of the *Harvard College* decision. This may have led to the *King* court's belief that nongovernmental securities are more uncertain than those issued by the government. *See* 40 N.Y. at 88-89. The court apparently had little doubt that the government bonds would retain their value and continue to be a productive and safe means of trust investment. In addition, the trust in *Harvard College* was a dynastic trust, designed to be perpetuated for as long as possible, whereas the *King* decision concerned a caretaker trust, which is primarily income producing and usually requires greater liquidity than a dynastic trust. Friedman, *supra* note 2, at 556. This would seem to have further influenced Judge Woodruff's conclusion that the fund "should always be subject to future recall." 40 N.Y. at 88.

stated that "the just and true rule is, that the trustee is bound to employ such diligence and such prudence . . . as . . . prudent men of discretion and intelligence . . . employ in their own like affairs."[16] The Court of Appeals stressed that a trustee is under a duty to act in accordance with the objectives of a trust; therefore, he must endeavor to preserve the corpus and produce a reasonable income.[17] Consequently, the court warned that speculative investments would not be tolerated.[18]

After the acceptance of the prudent man rule by the courts,[19] the New York Legislature limited the investment discretion of trustees, apparently in an attempt to protect trust beneficiaries.[20] At the turn of the century, the legislature passed the fiduciary investment act permitting trustees to invest only in bonds or stocks issued by New York cities.[21] This statute was the original "legal list"[22] of permissible fiduciary investments.[23] Until 1950,[24] the legal. list had

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[16] 40 N.Y. at 85-86.

[17] *Id.* at 86.

[18] *Id.* The court proscribed "all speculation, all investments [for] an uncertain and doubtful rise in the market, and, of course, everything that does not take into view the nature and object of the trust, and the consequences of a mistake in the selection of the investment to be made." *Id.*

[19] Augmenting the prudent man rule are certain judicially-created principles designed to prevent improper actions on the part of the trustee. Thus, the trustee may not invest trust funds to produce a profit for himself. 3 WARREN'S HEATON PROCEDURE AND LAW OF SURROGATE'S COURT OF THE STATE OF NEW YORK § 264, ¶ 3, at 47-9 (O. Warren & G. Markuson 6th ed. 1977) [hereinafter cited as WARREN'S HEATON]. Similarly, self-dealing, *In re* Title Guar. & Trust Co., 291 N.Y. 376, 52 N.E.2d 909 (1943), and investing in anticipation of an uncertain or doubtful rise in the market are proscribed. *In re* Barrett's Estate, 82 N.Y.S.2d 137, 144 (Sur. Ct. Westchester County 1948).

[20] Due to the development of a legal list by 1914, *see* notes 21 & 22 and accompanying text *infra*, the courts had little opportunity to label specific investments prudent or imprudent. Instead, the judiciary developed certain principles to supplement the legal list. *See, e.g.*, 2 E. FINGAR, D. BOOKSTAVER & J. MCQUAID, NEW YORK WILLS AND TRUSTS § 12.09 (rev. 2d ed. 1976).

A trustee's authority to invest was no greater than that provided by the instrument establishing the trust. On the other hand, the trust instrument could have permitted the trustee to invest in securities not included on the legal list. *See In re* Doelger, 254 App. Div. 178, 183, 4 N.Y.S.2d 334, 339 (1st Dep't), *aff'd*, 279 N.Y. 646, 18 N.E.2d 42 (1938); N.Y. EST., POWERS & TRUSTS LAW § 11-2.2(a)(1) (McKinney 1967); 3 WARREN'S HEATON, *supra* note 19, § 266, ¶2.

[21] Ch. 65, § 1, [1889] N.Y. Laws 63.

[22] Many jurisdictions have passed legislation to regulate the investment of trust funds in securities. When such legislation clearly prescribes specific permissible investments it takes on the appearance of a list, and therefore is referred to as the "legal list." *See* RESTATEMENT (SECOND) OF TRUSTS § 227, Comment p (1959).

[23] A fiduciary did not satisfy his obligations confining his investments to those securities contained on the legal list. The trustee was required to use care, skill, and caution in making an investment, even when the particular security purchased was present on the list. Delafield

been composed generally of fixed income securities such as federal, state, and municipal obligations and bonds and mortgages on real property.[25] It was then qualitatively revised to authorize the pur-

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v. Barret, 270 N.Y. 43, 48-49, 200 N.E. 67, 68-69 (1936); *In re* City Bank Farmers Trust Co., 189 Misc. 942, 946, 68 N.Y.S.2d 43, 47 (Sup. Ct. N.Y. County 1947); *In re* Doyle, 191 Misc. 860, 862, 79 N.Y.S.2d 695, 697 (Sur. Ct. Kings County 1948).

[24] Prior to 1950, the legal list was periodically revised and recodified. *See, e.g.*, ch. 417, § 9, [1897] N.Y. Laws 510 (consolidation into Personal Property Law); ch. 295, § 1, [1902] N.Y. Laws 852 (fiduciaries authorized to invest in those securities in which savings banks could invest); ch. 369, § 239, [1914] N.Y. Laws 1379 (consolidation into Banking Law); ch. 448, § 2, [1928] N.Y. Laws 983 (authorization to invest in securities of gas, telephone, and electric utilities); ch. 352, § 1, [1938] N.Y. Laws 1009 (authorization to invest in certain industrial bonds).

[25] *See* ch. 369, § 239, [1914] N.Y. Laws 1379. Eventually the legal list embraced nearly all major types of investment securities. Prior to its repeal in 1970, the list included the following classes of permissible investments:

> 1) Obligations of the United States or those for which the faith of the United States is pledged . . . . Ch. 952, § 11-2.2(a)(1)(A), [1966] N.Y. Laws 2859.
> 2) Farm loan bonds . . . issued by federal land banks; federal intermediate credit bank debentures . . . issued by federal intermediate credit banks; collateral trust debentures issued by the banks for cooperatives including consolidated collateral trust debentures; and bonds, debentures, consolidated debentures or other obligations of any federal home loan bank or banks or of the federal national mortgage association. *Id.* § 11-2.2(a)(1)(B), [1966] N.Y. Laws 2859.
> 3) Obligations of [New York] issued pursuant to the authority of any law of [New York], and obligations of any city, county, town, village, school district, poor district, or fire district in [New York] . . . . *Id.* § 11-2.2(a)(1)(C), [1966] N.Y. Laws 2860.
> 4) Obligations of any state other than New York, or of any territory of the United States, and obligations . . . of any city, county or other political subdivision of any state of the United States other than New York . . . . *Id.* § 11-2.2(a)(1)(D), [1966] N.Y. Laws 2860.
> 5) Obligations of any revenue or tax supported authority . . . created under the laws of any state . . . or under the laws of the United States . . . . *Id.* § 11-2.2(a)(1)(E).
> 6) Obligations of the Dominion of Canada . . . . *Id.* § 11-2.2(a)(1)(H), [1966] N.Y. Laws 2861.
> 7) Obligations of any province of the Dominion of Canada . . . . Ch. 686, § 123, [1967] N.Y. Laws 1750.
> 8) Bonds and mortgages . . . on unencumbered real property in [New York] . . . . *Id.* § 124.
> 9) Deposits in the special interest or thrift department of [commercial banks] in [New York] . . . or deposits in savings banks incorporated under the laws of [New York]. *Id.*, at 1751.
> 10) Shares of federal savings and loan associations located in [New York] . . . or of [New York] savings and loan associations . . . . Ch. 515, § 1, [1968] N.Y. Laws 1877.
> 11) Bonds, notes and other obligations of a public housing authority or agency located . . . in New York . . . . Ch. 952, § 11-2.2(a)(1)(M), [1966] N.Y. Laws 2862.
> 12) [O]ther securities of corporations organized and existing under the laws of the United States . . . or of any state of the United States . . . [with certain qualifica-

chase of other securities, including common and preferred stock, but such investments could not exceed thirty-five percent, and later fifty percent,[26] of the value of the entire trust fund.[27]

In response to mounting criticism,[28] New York abandoned the rigid and perhaps arbitrary legal list and statutorily adopted the prudent man rule,[29] which presently is codified in section 11-2.2 of the Estates, Powers and Trust Law (EPTL).[30] This statute permits a fiduciary holding investment funds on or after May 1, 1970 to purchase *any* security that "would be acquired by prudent men of discretion and intelligence in such matters who are seeking a reasonable income and preservation of their capital," provided that such

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> tions]. Ch. 952, § 11-2.2(a)(1)(O), [1966] N.Y. Laws 2862, *as amended by*, ch. 686, § 125, [1967] N.Y. Laws 1751, *and* ch. 567, § 1, [1968] N.Y. Laws 1977.
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> 13) Nothing . . . shall limit the effect of any will, agreement, court order or other instrument creating or defining the investment powers of a fiduciary . . . . Ch. 952, § 11-2.2(a)(1)(P), [1966] N.Y. Laws 2864.

*See* 9C ROHAN, *supra* note 15, at ¶ 11-2.2[2] n.27.

[26] Ch. 901, § 1, [1965] N.Y. Laws 2114.

[27] Ch. 464, § 1, [1950] N.Y. Laws 1203.

[28] It was felt that New York beneficiaries and remaindermen were unjustifiably placed at a comparative disadvantage due to the retention of the restrictive legal list. *See* Memorandum of State Department of Banking, *reprinted in* [1970] N.Y. Laws 2903, 2904 (McKinney); TEMPORARY STATE COMM'N ON THE MODERNIZATION, REVISION AND SIMPLIFICATION OF THE LAW OF ESTATES, FOURTH REPORT, N.Y. LEG. DOC. 19, at 539-45 (1965). *See generally* Barclay, *Prudent Man Rule Developments*, 100 TRUSTS & EST. 459, 459 (1961); Friedman, *supra* note 2 at 567-71; Ward & Schockney, *The Texas Trust Act: Investment Power of a Trustee*, 37 TEX. L. REV. 66, 70 (1958).

Since the 1940's, the trend clearly has been to abandon the legal list in favor of statutes containing the prudent man rule. RESTATEMENT (SECOND) OF TRUSTS § 227, Comment p (1959); G. BOGERT & G. BOGERT, THE LAW OF TRUSTS § 106, at 388-89 (5th ed. 1973); Scott, *The Law of Trusts, 1941-1945*, 59 HARV. L. REV. 157, 180 (1945). Indeed, most jurisdictions now have incorporated the prudent man rule into their statutory framework. *See, e.g.*, FLA. STAT. ANN. § 737.302 (West 1976); ILL. ANN. STAT. ch. 148, § 105 (Smith-Hurd Supp. 1977); N.Y. EST., POWERS & TRUST LAW § 11-2.2(a)(1) (McKinney Supp. 1976-1977); 20 PA. CONS. STAT. ANN. § 7302(b) (Purdon 1975); WASH. REV. CODE § 30.24.020 (1974); WIS. STAT. ANN. § 881.01 (West Spec. Pam. 1977).

[29] Ch. 321, §§ 1-2, [1970] N.Y. Laws 1694. An explanation of the workings of the prudent man rule is contained in the memorandum of the New York Department of Banking filed in support of the legislation:

> The prudent man rule is not a license to speculate. Instead, it applies the ultimate test of prudence to each investment. This rule served well in Massachusetts for 135 years and for shorter periods in 30 other states, while beneficiaries and remaindermen of New York funds have suffered because of New York's more restrictive statutes. It is especially in New York, where financial information and advice and competent legal advice are readily available, that fiduciaries should be expected to know or to learn how to invest prudently.

Memorandum of State Department of Banking, *reprinted in* [1970] N.Y. Laws 2903, 2904 (McKinney).

[30] N.Y. EST., POWERS & TRUSTS LAW § 11-2.2(a)(1) (McKinney Supp. 1976-1977).

investment is not prohibited by "any will, agreement, court order or other instrument creating or defining the investment powers of a fiduciary."[31]

## The Prudent Man Rule in New York

The wording of EPTL section 11-2.2 is similar to the language employed by the *Harvard College* court in enunciating the prudent man rule.[32] Although returning to the prudent man rule may appear a step backwards, that principle is a modern and dynamic standard by which a fiduciary may guide himself in selecting and retaining investments and under which courts may evaluate his performance. By abandoning the legal list and adopting the prudent man rule, New York has chosen the standard which has proven to be the most flexible for judging fiduciary performance.[33] Indeed, the utility of the prudent man rule lies in its lack of specificity, as this permits the propriety of the trustee's investment decisions to be measured in light of the business and economic circumstances existing at the time they were made.[34]

In making investment determinations under the prudent man rule, a fiduciary should consider several factors, including the current economic situation, the amount of income to be produced for the beneficiaries, and the amount of capital in the trust.[35] Addition-

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[31] *Id.*

[32] 26 Mass. (9 Pick.) 446 (1831). *See* notes 7-13 and accompanying text *supra.*

[33] As noted by one commentator, "[s]ince the legislature cannot be omniscient, legal lists cannot be perfect; thus the prudent-man rule seems preferable since it is better able to adjust to changing market conditions and business practices." Ward & Shockney, *The Texas Trust Act: Investment Powers of a Trustee,* 37 Tex. L. Rev. 66, 70 (1958). *See* Shattuck, *The Development of the Prudent Man Rule for Fiduciary Investment in the United States in the Twentieth Century,* 12 Ohio St. L. J. 491, 506 (1951).

[34] The prudence of a trustee's investment decision is measured according to the prevailing economic circumstances at the time of the investment, without regard to subsequent market events. *In re* Clark, 257 N.Y. 132, 136, 177 N.E. 397, 398 (1931); *cf.* New York Credit Men's Adjustment Bureau, Inc., v. Weiss, 305 N.Y. 1, 12, 110 N.E.2d 387, 401 (1953) (Desmond, J., dissenting); Guaranty Trust Co. v. Fisk, 244 App. Div. 200, 204, 278 N.Y.S. 809, 813 (1st Dep't 1935), *aff'd mem.,* 270 N.Y. 550, 200 N.E. 312 (1936). *See also* G. Bogert, Trusts and Trustees § 541, at 447 (2d ed. 1960).

[35] More specifically, a trustee should examine:

> (1) the marketability of the particular investment; (2) the length of the term of the investment, for example, the maturity date, if any, the callability or redeemability, if any; (3) the probable duration of the trust; (4) the probable condition of the market with respect to the value of the particular investment at the termination of the trust especially if at the termination of the trust the investment must be converted into money for the purpose of distribution; (5) the probable condition of the market with the respect to reinvestment at the time when the particular investment matures; (6) the aggregate value of the trust estate and the nature of the other

ally, it should be remembered that the trustee is not authorized to make or retain trust investments that are speculative, even where they are of such promise and character that a prudent person might make them for himself.[36] New York courts have held that

> [t]he primary object of the creation of a trust is the preservation and perpetuity of the fund until the purposes of the trust have been accomplished. This object [would be] endangered and may be entirely defeated by exposing the estate to the perils of speculative pursuits which are always subject to the hazard of great loss.[37]

If a trustee, therefore, is to make a choice between income and safety, he probably should select the safe investment.[38] When faced with investment decisions, the fiduciary may seek advice from other professionals, but generally the trustee himself must select the investment.[39] Although other jurisdictions hold that the trustee owes the beneficiary a duty to diversify investments in an effort to decrease the possibility of loss,[40] in New York diversification is not

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> investments; (7) the requirements of the beneficiary or beneficiaries, particularly with respect to the amount of the income; (8) the other assets of the beneficiary or beneficiaries including earning capacity; (9) the effect of the investment in increasing or diminishing liability for taxes; (10) the likelihood of inflation.

RESTATEMENT (SECOND) OF TRUSTS § 227, Comment o (1959).

[36] King v. Talbot, 40 N.Y. 76, 86 (1869), *discussed in* notes 14-18 and accompanying text *supra*; *In re* Will of Carnell, 260 App. Div. 287, 290, 21 N.Y.S.2d 376, 379-80 (3d Dep't), *aff'd mem.*, 284 N.Y. 624, 29 N.E.2d 935 (1940); 3 A. SCOTT, TRUSTS § 227, at 1806 (3d ed. 1967).

[37] *In re* Will of Carnell, 260 App. Div. 287, 292, 21 N.Y.S.2d 376, 381 (3d Dep't), *aff'd mem.*, 284 N.Y. 624, 29 N.E.2d 935 (1940); *accord,* King v. Talbot, 40 N.Y. 76, 86 (1869); *In re* Will of Adam, 3 Misc. 2d 12, 14, 155 N.Y.S.2d 165, 168 (Sur. Ct. Wayne County 1956); *In re* Estate of Halperin, 201 Misc. 763, 767, 106 N.Y.S.2d 96, 100 (Sur. Ct. Kings County 1951); *In re* Putnam's Estate, 42 N.Y.S.2d 367, 368 (Sur. Ct. N.Y. County 1943).

[38] *See* Harvard College v. Amory, 26 Mass. (9 Pick.) 446, 460 (1831), *discussed in* notes 7-13 and accompanying text *supra*; King v. Talbot, 40 N.Y. 76, 88-89 (1869), *discussed in* notes 14-18 and accompanying text *supra.*

[39] RESTATEMENT (SECOND) OF TRUSTS § 227, Comment b (1959), provides that

> [t]he trustee does not use due care in making an investment unless he makes an investigation as to the safety of the investment and the probable income to be derived therefrom. Ordinarily this involves securing information from sources on which prudent men in the community customarily rely. He may take into consideration advice given to him by attorneys, bankers, brokers and others whom prudent men in the community regard as qualified to give advice, but he is not ordinarily justified in relying solely on such advice, but must exercise his own judgment.

*But see In re* Fulton Trust Co., 257 N.Y. 132, 177 N.E. 397 (1931) (following advice of businessmen mere "error of judgment" for which trustee is not liable). *See also In re* Pinchefski, 179 App. Div. 578, 581, 166 N.Y.S. 204, 205-06 (3d Dep't 1917); *In re* Haynes, 40 Misc. 500, 82 N.Y.S. 792 (Sur. Ct. Kings County 1903).

[40] *See, e.g., In re* Day's Estate, 183 Mass. 499, 67 N.E. 604 (1903); Vest v. Bialson, 365 Mo. 1103, 293 S.W.2d 369 (1956); *In re* Ward, 121 N.J. Eq. 555, 192 A. 68 (1936); Knox County v. Fourth & First Nat'l Bank, 181 Tenn. 569, 182 S.W.2d 980 (1944); RESTATEMENT (SECOND)

mandatory.[41] New York courts, to a large extent, have determined the prudence of a trustee's performance by examining each investment in question rather than by considering the performance of the fund portfolio as an entirety.[42] Thus, failure to diversify, in the absence of other proof of culpable breach of duty, is insufficient to give rise to liability for loss.[43]

These general rules are by no means inclusive, but do give a fair indication of the onerous responsibility which the law places upon the fiduciary. It is therefore not surprising, particularly in view of the economic fluctuations of the past years, that many settlors have turned to banks and trust companies as professional fiduciaries for expert guidance and management of their trust funds.[44] It appears

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OF TRUSTS § 228, Comment a & Illustration I (1959). *See also* 3 A. SCOTT, THE LAW OF TRUSTS §§ 228, 230.3 (3d ed. 1967).

[41] *See, e.g., In re* Beebe's Estate, 52 N.Y.S.2d 736 (Sur. Ct. Kings County 1943), *aff'd mem.*, 268 App. Div. 1051, 52 N.Y.S.2d 796 (2d Dep't 1945) (where trust investments limited to mortgage participations in two properties such lack of diversity did not as a matter of law constitute negligence on the part of the trustee); *In re* Estate of Mendelson, 46 Misc. 2d 960, 261 N.Y.S.2d 525 (Sur. Ct. Albany County 1965) (liability of trustee may not be predicated on failure to diversify); *In re* Sheldon, 160 Misc. 194, 196 (Sur. Ct. Westchester County 1936) (failure to diversify trust does not constitute lack of due care by trustee). *But see* Cobb v. Gramatan Nat'l Bank & Trust Co., 261 App. Div. 1086, 1086, 26 N.Y.S.2d 917, 919 (2d Dep't 1941) (mem.).

[42] *See, e.g., In re* Bank of N.Y., 35 N.Y.2d 512, 517, 323 N.E.2d 700, 703, 364 N.Y.S.2d 164, 168 (1974); *In re* City Bank Farmers Trust Co., 189 Misc. 942, 945, 68 N.Y.S.2d 43, 46 (Sup. Ct. N.Y. County 1947).

In light of the recent "market fund" investment strategy used by large corporate investors, New York may have to consider the overall performance of the fund portfolio, as opposed to individual investments, in determining whether a fiduciary has invested prudently. A "market" or "index" fund is a portfolio of investments which is a microcosm of a broad market such as the New York Stock Exchange. Langbein & Posner, *The Revolution in Trust Investment Law*, 62 A.B.A.J. 887 (1976). A stock, therefore, which constitutes five percent of the total value of all listed New York Stock Exchange securities will make up five percent of the portfolio. The fund is managed under a "buy-and-hold" strategy, which reduces trading costs since the securities are retained in the portfolio rather than traded in anticipation of loss or gain. *Id.* at 888. The market fund strategy is based upon the theory that losses occasioned by stocks which perform poorly will be offset by gains resulting from those which perform well. *Id.* at 889-90.

[43] *See, e.g., In re* Kellogg, 35 Misc. 2d 541, 551, 230 N.Y.S.2d 836, 846 (Sup. Ct. Erie County 1962); *In re* First Nat'l Bank, 25 N.Y.S.2d 221, 225 (Sup. Ct. N.Y. County 1941); *In re* Gottschalk, 167 Misc. 397, 409 (Sur. Ct. N.Y. County 1938); *In re* Estate of Young, 159 Misc. 611, 616, 288 N.Y.S. 569, 575 (Sur. Ct. Westchester County 1936), *rev'd on other grounds*, 249 App. Div. 495, 293 N.Y.S. 97 (2d Dep't), *aff'd mem.*, 274 N.Y. 543, 10 N.E.2d 541 (1937); *In re* Estate of Stupack, 154 Misc. 759, 760, 278 N.Y.S. 403, 404-05 (Sur. Ct. Kings County 1935), *aff'd mem.*, 248 App. Div. 740, 290 N.Y.S. 151 (2d Dep't 1936), *rev'd on other grounds*, 274 N.Y. 198, 8 N.E.2d 485 (1937); *In re* Estate of Balfe, 152 Misc. 739, 755-56, 274 N.Y.S. 284, 302 (Sur. Ct. Orange County 1934), *modified*, 245 App. Div. 22, 280 N.Y.S. 128 (2d Dep't 1935); *In re* Estate of Froelich, 150 Misc. 371, 375, 269 N.Y.S. 541, 546 (Sur. Ct. Kings County 1934). *See* note 41 *supra*.

[44] *See* note 1 *supra*.

anomalous, however, that New York law holds the corporate or professional fiduciary possessing investment and management expertise to the same standard of care and skill as the nonexpert individual acting in the same capacity.[45] In the cases in which this question has been presented, New York appellate courts uniformly have held that the standard of care required by the prudent man rule is the same for both expert and amateur.[46] While several decisions have indicated that a higher standard should be imposed on the professional fiduciary,[47] the implementation of this suggestion has been viewed as a legislative matter.[48]

## EXCEPTIONS TO THE PRUDENT MAN RULE: A HIGHER STANDARD OF CARE FOR THE PROFESSIONAL FIDUCIARY

Most jurisdictions judge a trustee's investment decisions by the prudent man standard.[49] The courts of several states, however, have created a twofold exception to this rule under which a fiduciary is held to a higher standard when he possesses or represents that he possesses greater investment expertise than the ordinary man.[50]

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[45] *See, e.g., In re* Title Guar. & Trust Co., 291 N.Y. 376, 394-95, 52 N.E.2d 909, 917 (1943); Cobb v. Gramatan Nat'l Bank & Trust Co., 261 App. Div. 1086, 1086, 26 N.Y.S.2d 917, 919, (2d Dep't 1941)(mem.); *In re* Estate of Baker, 249 App. Div. 265, 269, 292 N.Y.S. 122, 129 (4th Dep't 1936); Central Hanover Bank & Trust Co. v. Flint, 240 App. Div. 217, 225, 269 N.Y.S. 470, 479 (2d Dep't 1934), *aff'd mem.*, 266 N.Y. 607, 195 N.E. 221 (1935); *In re* People's Trust Co., 169 App. Div. 699, 701, 155 N.Y.S. 639, 641 (2d Dep't 1915); *In re* City Bank Farmers Trust Co., 189 Misc. 942, 945, 68 N.Y.S.2d 43, 46 (Sup. Ct. N.Y. County 1947); note 3 and accompanying text *supra*.

[46] *See* note 45 *supra*.

[47] *See* Villard v. Villard, 219 N.Y. 482, 502-03, 114 N.E. 789, 794 (1916); *In re* Estate of Baker, 249 App. Div. 265, 269, 292 N.Y.S. 122, 129 (4th Dep't 1936); *In re* Estate of Rockefeller, 46 Misc. 2d 543, 547, 260 N.Y.S.2d 111, 116 (Sur. Ct. N.Y. County 1965).

[48] *See* Central Hanover Bank & Trust Co. v. Flint, 240 App. Div. 217, 225, 269 N.Y.S. 470, 479 (2d Dep't 1934), *aff'd mem.*, 266 N.Y. 607, 195 N.E. 221 (1935).

[49] *See* TEMPORARY STATE COMM'N ON THE MODERNIZATION, REVISION AND SIMPLIFICATION OF THE LAW OF ESTATES, FOURTH REPORT, N.Y. LEG. DOC. 19 (1965); note 28 *supra*.

[50] *See, e.g.*, Dickerson v. Camden Trust Co., 140 N.J. Eq. 34, 53 A.2d 225 (Ch. 1947), *aff'd*, 1 N.J. 459, 64 A.2d 214 (1949) (citing Tannenbaum v. Seacoast Trust Co., 116 N.J. Misc. 234, 198 A. 855 (1938), *aff'd*, 125 N.J. Eq. 360, 5 A.2d 778 (1939)); *In re* Sedgwick's Will, 74 Ohio App. 444, 59 N.E.2d 616 (1944); Finley v. Exchange Trust Co., 183 Okla. 167, 80 P.2d 296 (1938); *In re* Estate of Killey, 457 Pa. 474, 326 A.2d 372 (1974); *In re* Church's Will, 221 Wis. 472, 266 N.W. 210 (1936). *See also* 2 A. SCOTT, THE LAW OF TRUSTS § 174.1 (3d ed. 1967).

The rationale for holding a professional trustee to a higher standard of care is simple, but compelling. As stated by a California court in *In re* Estate of Beach, 116 Cal. Rptr. 418 (1974), *modified*, 15 Cal. 3d 623, 542 P.2d 994, 125 Cal. Rptr. 570 (1975),

> [t]he present executor, The Bank of California, was something other than "a man of ordinary judgment." The bank is a trust company, a professional in its field. Trust companies solicit business through advertisements and invitations in which

Pursuant to the first portion of this standard, the "possession of skill" exception,[51] which has been adopted by the decisional law of a number of states,[52] a fiduciary is held to a standard of care commensurate with the special skills or expertise that he actually possesses. This is not a novel concept, but rather is analogous to the longstanding rules concerning the duty of care owed by professionals in tort.[53] For example, the law of medical malpractice demands that a physician specialist use whatever superior knowledge, skill, and intelligence he possesses, and his actions are judged accord-

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> they claim greater expertise than individuals. They employ staffs of trust officers, securities analysts, property managers, accountants and attorneys . . . . A rule of care phrased for individual executors is inappropriate for measuring the conduct of trust companies in their executorship role . . . . "A banker, a doctor, a lawyer, may not gain business as a specialist and [then expect to] defend [their] mistakes as a layman."

116 Cal. Rptr. at 421 (citations omitted).

The *Restatement of Trusts*, which has accepted the twofold exception to the prudent man rule, prescribed that

> [t]he trustee is under a duty to the beneficiary in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property; and if the trustee has or procures his appointment by representing that he has greater skill than that of a man of ordinary prudence, he is under a duty to exercise such skill.

RESTATEMENT (SECOND) OF TRUSTS § 174 (1959).

51 The "possession of skill" exception requires a fiduciary having greater skill than the ordinary individual to exercise the skill which he has and to employ the facilities available to him. As stated by one commentator, "[i]f [a professional fiduciary] is in a position to do better than the ordinary man, it is not enough to do what the ordinary man would do." 2 A. SCOTT, THE LAW OF TRUSTS § 174, at 1410 (3d ed. 1967). *See also* Dickerson v. Camden Trust Co., 140 N.J. Eq. 34, 53 A.2d 225 (1947), *aff'd*, 1 N.J. Super. 459, 64 A.2d 214 (1949); Braman v. Central Hanover Bank & Trust Co., 138 N.J. Eq. 165, 47 A.2d 10 (1946). The trustee does not, however, become "a guarantor of value of securities, and if a failure to sell or delay in selling resulting in loss is not due to the fault of the trustee, it is not liable to surcharge." *Id.* at 186, 47 A.2d at 24.

52 *See, e.g.*, Bryan v. Security Trust Co., 296 Ky. 95, 176 S.W.2d 104 (1943); *In re* Schlemm's Estate, 11 N.J. Super. 286, 78 A.2d 156 (1951); Freeman v. Norwalk Cemetery Ass'n, 88 Ohio App. 446, 100 N.E.2d 267 (1950); *In re* Jones' Estate, 344 Pa. 100, 23 A.2d 434 (1942); *In re* Stirling's Estate, 342 Pa. 497, 21 A.2d 72 (1941); Gibson County v. Fourth & First Nat'l Bank, 20 Tenn. App. 168, 96 S.W.2d 184 (1936).

53 As a general proposition, "one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities." RESTATEMENT (SECOND) OF TORTS § 299A (1965). *See, e.g.*, Cowles v. City of Minneapolis, 128 Minn. 452, 151 N.W. 184 (1915) (engineer); Calhoun v. Gale, 29 App. Div. 2d 766, 287 N.Y.S.2d 710 (2d Dep't) (mem.), *aff'd mem.*, 23 N.Y.2d 756, 244 N.E.2d 468, 296 N.Y.S.2d 953 (1968) (surgeon); United Dentists, Inc. v. Bryan, 158 Va. 880, 164 S.E. 554 (1931) (dentist); Ward v. Arnold, 52 Wash. 2d 581, 328 P.2d 164 (1958) (attorney).

54 *See, e.g.*, Hopkins v. Heller, 59 Cal. App. 447, 452, 210 P. 975, 976 (1922); Adkins v. Ropp, 105 Ind. App. 331, 334-35, 14 N.E.2d 727, 728-29 (1938); Rule v. Cheeseman, 181 Kan. 957, 965, 317 P.2d 472, 478 (1957); Carbone v. Warburton, 11 N.J. 418, 425-26, 94 A.2d 680,

ingly.[54] A specialist, therefore, may be adjudged negligent in instances where a general practitioner would not be held liable.[55]

Similarly, the second portion of this judicial exception to the prudent man standard, the "representation of skill" rule, is not a new legal concept, but is akin to the standard applied to an agent who procures employment by representing that he possesses special knowledge or skill.[56] Under this rule, "[i]t would seem that the trustee may incur a liability even though he exercises the care and skill of the ordinary prudent man, and even though he exercises all the skill he has, if he has" procured his appointment as trustee "by representing that he has a higher degree of skill."[57]

*Common Law Adoption of a Higher Standard of Care*

As early as 1936 courts recognized the logic of requiring professional trustees to utilize their expertise in managing the funds entrusted to them. In the Wisconsin case of *In re Church's Will*,[58] a corporate trustee was subjected to a surcharge for failing to present for payment bonds which had been called prior to maturity.[59] Noting that professional trustees often are appointed because "they are considered better qualified for managing trust estates and investments . . . ,"[60] the court held that the trustee was not excused from

683 (1953); Toth v. Community Hosp., 22 N.Y.2d 255, 262, 239 N.E.2d 368, 372, 292 N.Y.S.2d 440, 447 (1968); Atkins v. Clein, 3 Wash. 2d 168, 170-71, 100 P.2d 1, 2-3 (1940). *See also* W. PROSSER, THE LAW OF TORTS § 32, at 163 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS § 299A, Comment d (1965); McCoid, *The Care Required of Medical Practitioners*, 12 VAND. L. REV. 549, 566 (1959).

[55] *See* authorities cited in note 54 *supra*.

[56] *See* F. TIFFANY, HANDBOOK OF THE LAW OF PRINCIPAL AND AGENT § 145 (2d ed. R. Powell 1924); RESTATEMENT (SECOND) OF AGENCY § 379(1), Comment c (1958). *See generally* 16 U. CHI. L. REV. 579, 579-84 (1949); 21 VILL. L. REV. 151 (1975).

[57] 2 A. SCOTT, TRUSTS § 174, at 1411 (3d ed. 1967); *see* G. BOGERT, TRUSTS AND TRUSTEES § 541, at 456-57 (2d ed. 1960).

[58] 221 Wis. 472, 266 N.W. 210 (1936).

[59] *Id.* at 479-86, 266 N.W. at 213-16. In *Church*, the property in question consisted of bonds with a par value of $1000. *Id.* at 474, 266 N.W. at 211. The bonds recited that the issuer could redeem them at any time prior to maturity, provided that notice of intent to redeem was published at least once a week for 3 weeks in a local newspaper of general circulation. *Id.* at 476, 266 N.W. at 212. A premium of one percent of the value of the bonds was to be paid on all bonds so redeemed. *Id.* at 474, 266 N.W. at 212. Although three notices of a call for redemption were published in a local newspaper, the *Church* trustee did not learn of the call until it was too late to redeem the bonds. *Id.* at 478, 266 N.W. at 213. The trial court determined that the trustee was liable for the value of the bonds and the one percent premium. *Id.* at 478-79, 266 N.W. at 213.

[60] *Id.* at 482-83, 266 N.W. at 215. The court reasoned that corporate trustees, because of the large volume of business that they handle, are better equipped than other individuals to manage and keep track of trust account investments. *Id.* at 482, 266 N.W. at 215.

its failure to see the published notice of call, as it was required to keep abreast of the status of securities entrusted to it.[61] Thus, in a factual setting where the ordinary prudent man probably would not have been held accountable, the professional fiduciary was found negligent in the exercise of its duty and held liable for the face value of the bonds.[62]

More recently, some jurisdictions expressly have adopted the twofold exception to the prudent man rule. In *In re Estate of Lohm*,[63] two co-executors of an estate, one of whom was an attorney inexperienced in estate tax matters and the other, a layman, joined by a tax lawyer employed by the estate for his expertise in federal estate tax law, sought to overturn an order reducing the fees charged the estate by them.[64] The fee reduction was ordered to recoup a substantial loss suffered by the estate due to late filing of its federal estate tax return.[65] On appeal, the court held that the parties should be judged according to the skill they actually possessed; thus, the tax lawyer was held to the highest standard and the layman to the lowest.[66]

The decision in *In re Killey*[67] illustrates the application of the representation of skill principle to a corporate trustee. In *Killey*, the remaindermen of a deed of trust commenced an action against the

[61] *Id.* at 483, 266 N.W. at 215. Although the trustee had examined five of the 22 local newspapers, the court nevertheless found a breach of the duty of care. *Id.*

[62] *Id.* at 478-79, 266 N.W. at 213. The *Church* court did not discuss the potential liability of a nonprofessional trustee under similar circumstances. Its opinion, however, indicates that a finding of liability in such a case would have been unlikely. Writing for the court, Justice Fritz, stated that all trustees are "liable for failure to exercise due diligence and at least ordinary care" with respect to the assets of a trust. *Id.* at 479, 266 N.W. at 214. According to the court, this standard requires " 'the exercise of a high degree of fidelity, vigilance, and ability,' " particularly on the part of a professional trustee who charges fees commensurate with the high degree of skill it claims to possess. *Id.* (quoting *In re* Estate of Allis, 191 Wis. 23, 29, 209 N.W. 945, 947 (1926)). Thus, a private trustee, lacking the skill, facilities, and manpower of its corporate counterpart, might have been absolved from liability by the *Church* court.

[63] 440 Pa. 268, 269 A.2d 451 (1970).

[64] *Id.* at 270-273, 269 A.2d at 453-54.

[65] *Id.* at 271-72, 269 A.2d at 453. As a result of the tax lawyer's failure to file the return on time, the estate was unable to take advantage of a favorable federal tax provision relating to securities valuation. The lower court determined that the resultant loss was in excess of $35,000. *Id.*, 269 A.2d at 453-54. To compensate the estate, both lawyers were denied attorney's fees, and a claim for over $43,000 in commissions filed by the executors was reduced to $15,000. *Id.* at 277-79, 269 A.2d at 456-57.

[66] *Id.* at 273, 269 A.2d at 454. Explaining that a trustee who "has *greater* skill than . . . a man of ordinary prudence . . . must be judged according to the standard of a man with his special skill," the court concluded that the tax lawyer was required to exercise the highest degree of care, and the nonlawyer the lowest. *Id.*

[67] 457 Pa. 474, 326 A.2d 372 (1974).

corporate fiduciary, Industrial Valley Bank and Trust Company (IVB), contending that IVB had breached its fiduciary duty by failing to properly administer the trust.[68] The remaindermen argued on appeal that the lower court decision exempting IVB from liability was erroneous because it evaluated the trustee's performance under the prudent man rule and did not take into account the special skills which IVB represented that it possessed.[69]

The Supreme Court of Pennsylvania, finding the issue to be one of first impression, held that the liability of a corporate trustee should be assessed in light of the representation of skill made by it.[70] In reaching this conclusion, the court stated that a corporate fiduciary holding itself out as having expertise in the handling of trust investments is under a duty to manage trusts in a manner commensurate with its representations.[71]

*Statutory Recognition of a Higher Standard of Care*

The judicially created possession of skill and representation of skill exceptions to the prudent man rule have been incorporated into the Uniform Probate Code,[72] which has been adopted by nine states in the last 5 years.[73] The Uniform Probate Code provides that:

> [T]he trustee shall observe the standards in dealing with the trust assets that would be observed by a prudent man dealing with the property of another, and if the trustee has special skills or is named

[68] *Id.* at 476, 326 A.2d at 374. The remaindermen argued that the trust was mismanaged in that the trustee had given it little attention during the period from 1948 to 1963. In addition, it was contended that the trustee had invested the entire corpus of the trust in its own common trust fund without consulting the remaindermen. While the second claim was dismissed as meritless, the case was remanded to a lower court for reconsideration of the first contention. *Id.* at 476-79, 326 A.2d at 374-75.

[69] *Id.* at 476-77, 326 A.2d at 374.

[70] *Id.* at 477, 326 A.2d at 375. Prior to *Killey*, the Supreme Court of Pennsylvania had never expressed an opinion concerning the representation of skill exception. The court had previously held, however, that the actions of a fiduciary who actually possesses greater skill than the ordinary prudent man must be judged under a heightened standard. *See In re* Estate of Lohm, 440 Pa. 268, 269 A.2d 451 (1970); *In re* Estate of Mastria, 413 Pa. 278, 196 A.2d 653 (1964); *In re* Stirling's Estate, 342 Pa. 497, 21 A.2d 72 (1941).

[71] 457 Pa. at 477-78, 326 A.2d at 375.

[72] UNIFORM PROBATE CODE § 7-302.

[73] *See* ALASKA STAT. § 13.36.075 (1972); ARIZ. REV. STAT. § 14-7302 (West 1975); COLO. REV. STAT. § 15-16-302 (1974); FLA. STAT. ANN. § 737.302 (West 1976); IDAHO CODE § 15-7-302 (Supp. 1977); NEB. REV. STAT. § 30-2813 (1975); N.M. STAT. ANN. § 32A-7-302 (Supp. 1975); N.D. CENT. CODE § 30.1-34.02 (1976); UTAH CODE ANN. § 75-7-302 (Supp. 1977). Other states have enacted portions of the Uniform Probate Code, but have omitted article 7 which defines the standard of care for trust managers. *See* MINN. STAT. ANN. §§ 524.1-101 to .8-103 (West 1975 & Supp. 1977); MONT. REV. CODES ANN. §§ 91A-1-100 to -6-104 (Supp. 1975).

trustee on the basis of representations of special skills or expertise, he is under a duty to use those skills.[74]

By its own wording, the Uniform Probate Code has retained the prudent man rule as the basic measure of a trustee's duties; it places a higher duty upon only those fiduciaries who either have or profess to have greater skill. This approach is identical to that of the states which have adopted a higher standard of care by means of decisional law. In application, it does not demand that the professional trustee perform above his ability, but merely requires that he utilize the skills which he possesses or claims to possess.[75]

## CONCLUSION

The rationale for imposing a higher duty of care upon the professional is logical, reasonable, and compelling; yet, it has not been accepted in New York. There is no reason why a fiduciary should not be required to exercise all the skill and prudence which he actually has or professes to have. A settlor naturally assumes that the trustee will use all the skill he possesses. Indeed, prior to opening his trust account, the settlor may have been guided past a staff of financial analysts who are supplied with sophisticated research data, equipment, and support personnel, and assured that these individuals would devote their energies to managing and maintaining his investments.[76] The settlor and his beneficiaries do not expect such self-proclaimed experts to be able to gain business as specialists and then be permitted to "defend [their] mistakes as" laymen.[77]

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[74] UNIFORM PROBATE CODE § 7-302.

[75] As noted in *In re* Estate of Killey, 457 Pa. 474, 481, 326 A.2d 372, 376 (1974), the established rule is that a professional trustee is not an insurer; he may only be surcharged for actual loss of principal and income caused by his lack of skill and care. *See, e.g.*, Hardy v. Hardy, 217 Ark. 296, 230 S.W. 6 (1950); Pank v. Chicago Title & Trust Co., 314 Ill. App. 53, 40 N.E.2d 787 (1942); *In re* Smith's Estate, 228 Iowa 47, 289 N.W. 694 (1940); Woodruff v. Freehold Trust Co., 112 N.J. Eq. 405, 164 A. 411 (Ch. 1933), *aff'd*, 116 N.J. Eq. 597, 174 A. 707 (Ct. Err. & App. 1934); *In re* Estate of Baker, 249 App. Div. 265, 292 N.Y.S. 122 (4th Dep't 1936); *In re* City Bank Farmers Trust Co., 189 Misc. 942, 68 N.Y.S.2d 43 (Sup. Ct. N.Y. County 1947); *In re* Juilliard's Will, 171 Misc. 661, 13 N.Y.S.2d 315 (Sur. Ct. Orange County 1939), *aff'd*, 259 App. Div. 828, 19 N.Y.S.2d 1020 (2d Dep't 1940).

[76] As the advertisement of Industrial Valley Bank and Trust Company stated:

> [The settlor] can relax in the certainty that our investment is both constant and alert. [A settlor] no longer need be concerned about trying to keep up with fast moving market and financial developments. What has been [his] part-time worry is assigned to us as a full-time job on [his] behalf.

*In re* Estate of Killey, 457 Pa. 474, 482, 326 A.2d 372, 377 (1974).

[77] *In re* Estate of Beach, 116 Cal. Rptr. 418, 421 (1974), *modified*, 15 Cal. 3d 623, 542

By reaching into the past and adopting the economically responsive prudent man rule, New York has taken a major step forward. The flexibility of the prudent man rule should prove satisfactory to both the fiduciary, who must make investment decisions under current economic conditions, and to the courts, which must judge these decisions. In its present application in New York, however, the rule completely ignores the needs of the individuals it was meant to protect, namely, the settlor and his beneficiaries. This inadequacy may be corrected by holding the professional fiduciary to a standard of care commensurate with his actual or claimed expertise. Such a rule already has been adopted in other jurisdictions, either through the common law process or by statutory enactment. Since the courts of New York have not accepted this necessary adjunct to the prudent man rule, perhaps it is time for the legislature to review this area and enact a statute imposing a more rigorous duty upon the professional trustee. This solution is consistent with the interests of the fiduciary, the courts, the settlor, and the beneficiaries.

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P.2d 994, 125 Cal. Rptr. 570 (1975) (quoting Coberly v. Superior Court, 231 Cal. App. 2d 685, 689, 422 Cal. Rptr. 64, 67 (1965).