NON-TRUSTEE POWER HOLDERS IN AMERICAN TRUST LAW: DUTIES AND LIABILITIES

Abstract

This paper evaluates the powers and duties of trust directors in state law, the Restatement of Trust and the Uniform Trust Code (UTC). The paper then evaluates whether new Uniform Directed Trust Act (UDTA) adopted in July 2017 resolves the the controversial issues that states have faced in developing laws related to non-trustee director's powers and duties.

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1. Introduction

Non-trustee power holders, or non-trustee directors or trust directors, as they are also called, have the power to direct trustees. Generally, the trustees of trusts are responsible for trust administration. With non-trustee power holders, the trustees are directed by non-trustee power-holders, so trustees have to act under the direction. "Power to direct" refers to the power given to a non-trustee over the trustee to *consent to* or *direct* what the trustee does. Unlike state laws about powers and duties of trustees, the laws that determine the powers and duties of non-trustee directors are not settled.[1] This paper evaluates the powers and duties of trust directors in states with directed trustee statutes, and under the Restatement of Trust and the Uniform Trust Code (UTC). It also evaluates the new Uniform Directed Trust Act (UDTA) adopted in July 2017 and discusses whether the Uniform Codes for directed trusts resolve the controversial issues that states have faced in developing laws related to non-trustee director's powers and duties.

There are many issues that come with the use of non-trustee directors. These issues revolve around the key questions of *who holds the powers* and *who has the duty* when there are non-trustee directors directing trustees. This essay evaluates these questions in depth with primary focus on the questions about (a) the powers of trust directors, (b) the duties and liabilities of trust directors, and (c) the duties and liabilities of directed trustees. This paper first evaluates how the states, the Restatement and the UTC address these issues. The paper analyzes the advantages and

[1] The existing uniform trusts and estates acts address the issues regarding powers and duties in directed trusteeship inadequately and the existing nonuniform state laws are in disarray. (Memorandum from the Uniform Law Comm. on United Directed Trust Act (June 9, 2017))

disadvantages of the different approaches taken and discusses the primary unresolved issues with the current approaches. The paper then evaluates how the UDTA addresses these issues and examines whether the UDTA succeeds in resolving the problems with the current approach.

2. Definition of Non-Trustee Powerholders

Non-trustee power holders, also called trust directors, hold various types of powers ranging from powers to amend and revoke the trust, powers of appointment to distribute property to beneficiaries, powers to invest or to distribute specific assets, depending on how the powers are defined in the state statute. Non-trustee powerholders have been used in US trust law for many years.[2] Appointment of such a role bifurcates power over the trust into a non-trustee, who might or might not have fiduciary responsibility, and to a trustee, who is a fiduciary.

When there is a non-trustee powerholder with authority to direct all or some of the actions of the trustee, the trustee becomes a "directed trustee" and the trustee's role gets relegated to just an administrative role.[3]

There are two kinds of non-trustee powerholders or trust directors: trust advisors and trust protectors.

Trust Advisors

Trust Advisors are appointed if a settlor wants more knowledgeable individuals or entities to have decision making power over the investment or/and distribution decisions of the trust. Trust Advisors may be appointed for specific limited purposes based on the expertise of

[2] The role of trust advisors were vwell defined by the 1960s. See *Trust Advisers*, 78 HARV. L. REV. 1230 (1965). The early cases concerning trust advisors date back to the 1950s. Kathleen R. Sherby and Justin T. Flach, *"Directed Trust"? or Enhanced Trust Flexibility"? Is there a Difference? Effective use of "Trust Advisors" and Trust Protectors" as Third Party Decision Makers*, A.I. CLE, Course Material, March 24, 2015 (discussing case law on trust advisers dating to the 1950s)

[3] A trustee in an administrative role does not have fiduciary duty to the beneficiaries.

the advisor. A settlor may require that a trustee just gets *consent* from a trust advisor prior to making a decision. Alternatively, a settlor may require that a trustee act only with *direction* from a trust advisor for any decision.[4] Trust advisors are generally fiduciaries.

Modern trust statutes allow settlors to select separate trust advisors for investment purposes and distribution purposes. Investment Trust Advisors are tasked with the responsibility *to consent to or direct* a trustee on investment decisions of trust property. Distribution Trust Advisors do the same for distribution of trust assets.

Trust Advisors could be experienced family members or institutional advisors. A settlor might choose a family member as a trustee but may choose the settlor's financial advisor as the Investment Trust Advisor. The trustee would follow the direction of the Investment Trust Advisor on matters of investment of trust properties but would be responsible for the distribution of the assets to the beneficiaries.

Trust Protectors

Trust Protectors became popular in the United States through use of trust protectors in off shore trusts. Americans established trusts in foreign jurisdictions to avoid tax liability and reach of creditors. In order to maintain control by U.S. individuals, however, these settlors established U.S. based trust protectors who had power over foreign trustees, including powers to amend the trust or change trust jurisdiction.[5] Trusts started using trust protectors for domestic trusts starting

[4] Trust advisors with power to consent and the power to direct trustees are both fiduciaries. The distinction between the power to consent and power to direct is discussed in *Trust Advisers*, 78 Harv. L. Rev. 1230, 1, 1-3 (1964) (discussion of slight differences in power to consent and power to direct). For the purpose of this essay, the distinctions do not make material difference.

[5] See Lawrence A. Frolik, *Trust Protectors: Why They Have Become "The Next Big Thing",* 50 REAL PROP., TR. & EST. J., 267, 268-273, Fall, 2015 (discussing the evolution of trust protectors)

in the late 1990s, after domestic self-settled spendthrift trusts started becoming common.[6] Spendthrift trust protect the assets from creditors. Self-settled trusts are trusts whether the settlor is the beneficiary. Previously trusts that protected from creditors were not self-settled trusts. In 1997 South Dakota became the first state to codify the trust protector role and many states have followed with their own statutes.[7] Like the trust protectors of offshore trusts, Trust Protectors of domestic trusts "protect" the trust and can have more power than a traditional trustee or a typical trust advisor. Certain powers given to the protectors that are not granted to a trustee or a trust advisor could include (a) power to amend a trust to take advantage of changes in tax laws, (b) authority to change trustees, (c) authority to change the site of the trust. In limited situations, trust protectors are also given the power to appoint beneficiaries. Trust Protectors allow the settlor to have control over the nature of the trust, long after the passing of the settlor.

Trust protectors are given expansive powers. The history of trust protectors in the United States illuminates why trust protectors have traditionally been given expansive powers. Offshore trust protectors were trusted family members or trusted attorney advisors that settlor appointed to oversee the offshore trusts. The power given to these protectors were personal powers and not fiduciary power. Personal powers can be exercised for whatever reason, provided the exercise is not a fraud on the power.[8] That is to say, the power cannot be used in contravention of the settlor's clear instructions, even though the power is technically available. For example, a trust protector with the power to change beneficiaries cannot remove the settlor's family and name the trust protector's family as beneficiaries. Such abuse would be an obvious fraud on the power to which a settlor would have never agreed. With personal powers, trust protectors have been given

[6] *Id* at 270-271. The first state to enact domestic self-settled trust law was Alaska in 1997.
[7] George Taylor Bogert, George Gleason Bogert, Amy Morris Hess, *Bogert's The Law of Trusts and Trustees* §137 (2017).
[8] Andrew T. Huber, *Trust Protectors: The Role Continues to Evolve*, 31 PROB. & PROP. MAG., Jan/Feb .2017.

broad powers to act for the settlor. The trust protector is an individual or an entity, who the settlor perceives to understand the wishes of the settlor and the trust protector is given those powers, so the trust protector can act for the best interest of the trust and the settlor and not necessarily just for the beneficiaries.

It is established trust law that a trustee has to act for the benefit of the beneficiaries.[9] The issue of whether a trust protector should have fiduciary responsibilities to beneficiaries or whether a trust protector should have just personal duties to the settlor is an open issue and is addressed below.

3. Designation of Powers Between Non-Trustee Directors and Trustee

The states are not consistent on what powers settlors can confer on directors and how these powers are determined. Many states just "enable" settlors to give powers to trust directors without providing any guidance to what those powers are. These statutes generally do not define different types of trust directors. Other states specifically list the types of powers that settlors can give to trust directors. In such states, trust directors would be defined as trust advisors or trust protectors depending on the powers listed in statute. It is not uncommon for such states to have defined powers for both trust advisors and trust protectors.

Statutes that enable the power of direction without providing any guidance on the powers are called "enabling statutes." Statutes that give more guidance by prescribing the specific powers held by the directors are called "off-the-rack statutes." They are "off-the-rack" because

[9] James P. Spica, *Onus Fiduciae Est Omnis Divisa in Partes Tres: A Statutory Proposal for Partitioning Trusteeship*, 49 REAL PROP. TR. & EST. LAW J. 349, 350-351 (2014) (discussing essential obligations of a trustee).

these statutes give a list of enumerated powers that a settlor can choose from the "rack" of powers and include in the trust instrument.

Non-trustee power directors hold powers to *direct* or *consent to* actions of trustees. The power to direct gives a trust director power to tell the trustee how to act within the terms of the trust. The *power to consent* gives a director power to consent to the actions of the trustee within the terms of the trust. In this paper, both the power to direct or to consent is defined as "power of direction."

Enabling Statutes

Enabling statutes authorize creation of directed trusteeship by permitting a settlor to give a third party, a "non-trustee," power to direct the trustee in trust administration. In enabling statutes these powers are not specifically defined and the statutes do not distinguish the powers for trust advisors and trust protectors. The settlor has to draft the powers for non-trustee powerholders depending on whether the settlor wants the powerholder to take on the rule of a trust advisor or a trust protector. A settlor is depending on the drafting ability of his or her attorney in enabling statute states.

Many states with enabling statutes have adopted the language from the Restatement (Third) of Trusts or from the Uniform Trust Code. The Restatement (Third) of Trust § 75 (2007) says that states can write statutes that allow settlors to grant a non-trustee director "*power to direct or otherwise control certain conduct of the trustee*." The Restatement allows the director to direct or control the *conduct* of the trustee, i.e., the Restatement allows the non-trustee director to control or direct how the trustee acts. This could be construed as a somewhat broader power than granted by the UTC. The UTC §808(b) says that states can write statutes that give settlors the power to appoint non-trustee directors who have the "*power to direct certain actions of the*

trustee." The power of non-trustee director, in UTC §808(b), is restricted to the power to direct "certain actions" of the trustee. The UTC does not define "certain actions" other than mention in comments that advisors have been used for certain trustee functions, such as the power to direct investors or manage a closely held business and that the trust protector in recent times includes grant of greater powers, sometimes including the power to amend or terminate the trust. Comments to UTC §808. However, the UTC does not limit powers exclusively to the ones mentioned in the comments.

The states that have adopted either the Restatement or the UTC §808 include Alabama, Arkansas, District of Columbia, Florida, Kansas, Kentucky, Maine, Massachusetts, Montana, Nebraska, New Mexico, North Dakota, Pennsylvania, Texas, Virginia, and West Virginia.

Some states have very open-ended statutes. These statues do not express the settlor's ability to appoint trust directors; that power can only be inferred. Iowa's directed trustee statute for instance, ratifies the power of non-trustee director to direct a trustee but does not state what those powers are. Iowa statute just recognizes person "other than a beneficiary who holds a power to direct."[10] The statute does not provide any specifics about the powers or role of such a person other than to say that the person is a fiduciary required to act in good faith with respect to the trust and the interests of the beneficiaries. Utah directed trust statute is similar to Iowa in that it recognizes a non-trustee director without defining any powers for such a power holder.[11] As in Utah statute, Iowa specifies the duties of the non-trustee power holders as being "presumptively fiduciary."

[10] IOWA TR. CODE § 633A.4207 (2006)
[11] UTAH UNIF. TR. CODE § 75-7-906(3) (1956)

Some other states, such as Oregon, is somewhat more explicit about the powers that a trust director can have. "A trust instrument may appoint a person to act as an adviser for the purpose of directing or approving decisions made by the trustee, including decisions related to distribution of trust assets and to the purchase, sale or exchange of trust investments."[12]

Advantages of Enabling Statutes

The strongest advantage of an enabling statute is that it allows flexibility to settlors to draft the powers of non-trustee power holders as they see fit. Non-trustee power holders are used in varied capacity by settlors, ranging from overseeing a single estate asset to amendment of the trust. The settlors who are clear on what they want of a trust director could use this flexibility to design the trust director powers in the trust instrument.

Another advantage is that the settlor is more likely to be aware of what kinds of powers they are giving non-trustee power holders in the trust than if they used boilerplate language. The settlor has to decide, with the advice of an attorney, the kind of non-trustee powerholder that he or she wants – the settlor has to create the "job description" for this role. This is more likely to put the settlor on notice about the role of this person in his or her trust.

When the settlor himself or herself creates the "job description" for a non-trustee director, this job description is more likely to define the functions and powers of a non-trustee director to more closely reflect the settlor's intent. This is an important advantage of enabling statutes.

Another advantage of an enabling statute is that the sparse description of powers of a non-trustee director in an enabling statute keeps the statute relevant even if the trends in the roles and functions of non-trustee directors change. The statute is not bound by any one or more

[12] OR. REV. STAT. ANN. §130.735(1) (2014).

description so would not have to amended, even if a type of trust director becomes obsolete or a new function for a trust director develops. As laws and technology change, the trust director role could evolve. Trust protectors present a good example of the trust director's evolving role. In the 1990s, offshore trusts were established to protect trusts from creditors. As states adopted spendthrift self-settled trust statutes, offshore trusts moved onshore and the role of offshore trust protectors also moved onshore; offshore trust protectors fell out of use. An enabling statute does not necessarily distinguish between an onshore or offshore trust protector. An enabling statute would "enable" the power to direct, which would apply to all kinds of trust directors.

Similarly, as digital technology advances and social media and other digital information become significant, such information have become important assets for estate planning.[13] States currently do not have statutes concerning management of digital assets. State statutes would have to be amended to include management of such assets. Digital assets are neither invested, nor distributed. However, the enabling powers in statutes allow trust instruments to craft language that would apply to management of digital assets as the settlor would deem appropriate.

Disadvantages of Enabling Statutes

Enabling statutes lack guidance on how to restrict the powers of a non-trustee power holders. Expansive powers can be granted to a director. This can be of concern in states where a non-trustee is not mandated to be a fiduciary, such as in Delaware where the trust, "*may provide that any such adviser (including a protector) shall act in a nonfiduciary capacity*."[14] Expansive powers of someone not subject to fiduciary duty can possibly harm the trust or the beneficiaries.

[13] Patrice P. Jean and Vanessa Ann Woods, *Estate Planning for the Digital Afterlife*, LAW J. NEWSL., Dec. 2016, http://www.lawjournalnewsletters.com/sites/lawjournalnewsletters/2016/12/02/estate-planning-for-the-digital-afterlife-2/

[14] 12 DEL. CODE ANN. §3313(a) (2014)

Allocating powers to a non-trustee director is not simple. There are unexpected pitfalls that an unexperienced draft might not be aware of. The drafter might define the powers of the non-trustee director in a way that conflicts with the powers of the trustee or could be unclear about who has the duty to act. The drafter might not give sufficient power to the non-trustee director or to the directed trustee. This would occur if a directed trustee only has the power to follow direction but the drafter fails to give the director comprehensive power of direction over the trust. The trust might have "empty chair" problem, which comes about when neither the trust director nor the directed trustee has a fiduciary duty, as discussed further in the *Duties and Liabilities* section of this paper. A drafter has to be aware of all these potential pitfalls, making drafting of non-trustee director provision a complicated task.

Enabling statutes provide minimal guidance on how the trusts are to be drafted. The enabling statutes do not provide details regarding roles of the parties - non-trustee directors and directed trustees and the onus of drafting the roles is on the settlor. This responsibility makes "simple" enabling statutes more complicated for the settlor because the settlor, with his or her attorney, is now fully responsible for drafting legally valid powers for a non-trustee director. For this reason, the implementation of enabling statutes are more complicated in practice that off-the-rack statutes which have statutorily drafted language.

This is difficulty in drafting the role of a non-trustee director also makes it virtually impossible for settlors to create trust directors without the help of skilled drafters. Those who cannot afford such talent are not likely to take advantage of trust director enabling statutes. This could discourage even middle-class and small business owners from taking advantage of using non-trustee directors that could better serve their needs. This arises from the lack of details in enabling statutes.

The cost of drafting directed trustee provisions could lead settlors to use less skilled but cheaper legal professionals or even unskilled self-help to draft directed trustee provisions. This could lead to inept drafting resulting in trusts that have conflicts and gaps. Such trusts would fail to adequately serve the settlors' interests and could lead to more litigation in the future. The beneficiaries of the trust would have to bear the costs of such litigation.

Off-the-Rack Statutes

Off the rack statutes, unlike enabling statutes, prescribe a set of powers for non-trustee directors. A settlor can create a directed trusteeship by invoking one or more "off the rack" kinds of powers and then further tailor the powers to his or her particular needs. Several states, including Idaho, Illinois, Mississippi, Missouri, Nevada, New Hampshire, South Dakota, Tennessee, and Wisconsin have off the rack statutes. The states that adopt off-the rack approach do not mandate that the trust instruments adopt any of the powers as drafted in the statute. The off-the-rack approach enables directed trustees and adds specific defined director's powers that a settlor can choose to use.

Example of Off-the-rack statutes

The South Dakota directed trustee statute provides detailed off-the-rack powers with specified powers for different non-trustee power holders. The statute provides for the appointment of a trust protector, an investment trust advisor and a distribution trust advisor. This statute is a typical example of an off-the-rack statute.

South Dakota's SDCL §55-1B-6, defines the powers that a settlor may give to a trust protector. The settlor however is not obligated to give all those powers to a protector. The powers can be incorporated in whole or in part in the will or trust instruments by clear express

intent of the settlor.[15] South Dakota's SDCL §55-1B-6 permits a comprehensive list of powers for a trust protector.[16] A trust protector only has the powers expressed in the trust instrument, but these powers are so comprehensive as to make a trust protector have almost all of the powers of a settlor if all the powers are adopted in the trust instrument. The powers permitted range from powers to direct trust distributions to expansive powers such as to amend the trust, change the beneficial interests of the beneficiaries, remove or appoint a trustee or trust advisor, change the trust law jurisdiction or terminate the trust as well as powers that would be designated to a trust advisor such as power to veto or direct trust distributions.[17] This is typical of off-the-rack statutes. The powers provided in statutes can be adopted according to the settlors' requirements. A settlor can create the trust protector director based on the ingredients provided in statutes.

South Dakota also prescribes the powers a settlor can bestow on a trust advisor. Just like for a trust protector, for a trust advisor power to be effective, it has to be expressed in the trust instrument. The powers of the trust advisor, however, are limited only to investments or

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[15] S.D. Cod. Law §55-1B-8 (2014).

[16] S.D. Cod. Law §55-1B-6 (2014).

[17] Many of the expansive powers for trust protectors allowed by South Dakota's S.D. Cod. Law §55-1B-6 would be considered settlor-like powers. These include the powers to:

(1) Modify or amend the trust instrument to achieve favorable tax status;
(2) Increase or decrease the interests of any beneficiaries to the trust;
(3) Modify the terms of any power of appointment granted by the trust.
(4) Remove and appoint a trustee or trust advisor;
(7) Change situs or governing law of the trust, or both;
(8) Appoint a successor trust protector;
(9) Interpret terms of the trust instrument at the request of the trustee;
(10) Advise the trustee on matters concerning a beneficiary;
(11) Amend or modify the trust instrument to take advantage of laws;
(12) Provide direction regarding notification of qualified beneficiaries; and
(13) Terminate the trust:

There are also some powers that trust advisors could also be responsible for, such as

(14) Veto or direct trust distributions.

See *id.* §55-1B-6 (2014).

distributions depending on whether the trust advisor is appointed for investment purposes or distribution purposes.

The investment trust advisor has powers to direct the trustee with respect to trust investments including the power to select trust investment advisors, delegate their powers, vote proxies for securities held in trust, and to direct the trustee in investment and management of trust assets as provided in the governing instrument.

Distribution trust advisors have the powers to direct the trustee regarding the distribution of trust assets. In Illinois, for instance, which has an off-the-rack statute like South Dakota's, a distribution advisor has the authority to direct the trustee with regard to all decisions relating directly or indirectly to distribution.

Advantages of Off-the-rack Statutes

An advantage of off-the-rack statutes is that they clearly define each type of non-trustee director by the powers that they permit. Trust protector powers permitted in the statute are different from investment trust advisor powers, which are different from that of a distribution trust advisor. If a non-trustee trust director is, for instance, called a trust protector in the trust instrument, and granted any of the trust protector powers in the trust instrument, then other statutes applicable to the trust protector apply to that trust director. Similarly, if a trust director is called a trust advisor – the trust instrument can give the trust adviser any of the permissive powers listed in the statute and all other trust advisor statutes apply unless expressed otherwise in the instrument. By prescribing specific types of powers for specific types of trust directors, off-the-rack statutes define the type of trust director, to whom other statutes applicable to that trust director also apply.

The permissive list of powers for a trust director being clearly delineated in statute has other advantages. Clear definition of the roles for different power holders makes it easier for settlors to understand when and how to create non-trustee directors. Settlors would know what the roles are and are likely to make more informed decisions about utilizing such power holders in their trust instruments.

Clear distinction of roles and specified powers also leads to clearer drafting. Off-the-rack statutes like South Dakota's allow for these powers to be incorporated in whole or in part in the will or trust instrument by express intent of the settlor. This will allow for even not so sophisticated drafters to draft viable trusts with non-trustee power holders. The public with even modest means, which may include people of middle class income, can more easily adopt non-trustee directors to address their estate needs. With enabling statutes, as discussed earlier, the public is not likely to know and understand the options available to them and, those who cannot afford expensive legal help are not likely to adopt non-trustee power holders, even though adoption of such power holders could be to the benefit of the settlor.

Disadvantages of Off-the-rack Statutes

Off-the-rack statutes include details of functions and powers of trust directors in statute. This could be used as boiler plate language in the trust document and could be "cut and pasted" into trust to define the role of a non-trustee director. Unless a settlor is savvy enough to read and understand the language in statute, the ease of cutting and pasting could lead to a director "job description" that is not as reflective of the settlor's intent as it would be if the settlor himself or herself created it.

Off-the-rack statutes are useful only if a settlor's situation is similar to the situation that the statute is drafted for. These statutes do not provide any advantage if a settlor's situation is unique. Similarly, if trends in types of trust directors change, with off-the-rack statutes, there might be need for more statute amendments.

State Adoption of Enabling versus Off- the-Rack statutes.

The states with directed trustee statutes are split in their adoption of enabling and off-the-rack statutes with a slight majority of states with enabling statutes. However, if the states that have recently adopted directed trustee statutes are evaluated, there is a slight recent trend towards adoption of off-the-rack statutes.

Currently, of the states with directed trustee statutes, *twenty-three* states have enabling statutes. Most of the states with enabling statutes have adopted the language of the Uniform Trust Code §808(b). *Eighteen* of the states with directed trust statutes have off-the-rack statutes. Several including South Carolina and Virginia have kept the enabling language of UTC §808(b) but have added off-the-rack provisions in the statutes. There are also many statues who have, what is called in this essay, *off-the-rack light* statutes. These statutes give some guidance on what the powers of non-trustee directors may include, but the statutes are not as comprehensive in defining the roles as other off-the-rack statutes.

The adoption of enabling and off the rack statutes in states that have newly enacted directed trustee statutes indicate that both are popular, with a slight current trend towards off the rack statutes. In the last ten years about *fifteen* states have adopted directed trustee statutes.[18]

[18] The states that adopted directed trustee states in the last decade include: Alaska, Arizona, Illinois, Kentucky, Maryland, Massachusetts, Michigan, Mississipi, Montona, Nevada, North Dakota, Rhode Island, Vermont, West Virginia and Wisconsin. These states did not have directed trust statutes in 2007. Nenno, Richard W, *Directed*

Eight of the fifteen states that have enacted directed trust statutes in the last decade have chosen to adopt some form of off-the-rack statutes, the other *seven* have enacted enabling statutes.

If states like Washington and Indiana, that have proposed directed trust statutes are included, in the last decade, there have been more off-the-rack directed trust statutes than enabling statutes. Both Washington and Indiana's proposed directed trust statute are off-the-rack statutes. Indiana is moving to off-the-rack statute from its current enabling statute. If you count the proposed statutes, *ten adopted or proposed since 2007 are off-the-rack* and *seven are enabling*.

Table 1.1 below gives some insights into the different types of statutes across the states.

State	*Types of Directed Statute*
AL	Enabling with UTC §808(b) language
AK	Off the rack (new)
AZ	Off the rack (new)
AR	Enabling
CO	Off-the-rack lite
DC	Enabling with UTC §808(b) language
DE	Off the rack lite
FL	Enabling
ID	Off the rack
IL	Off the rack (new)
IN	Enabling (existing) Off the Rack (proposed)
IA	Enabling
KS	Enabling with UTC §808(b) language
KY	Enabling with UTC §808(b) language (new)
ME	Enabling with UTC §808(b) language
MD	Off the rack lite (new)

Trusts: Can Directed Trustees Limit Their Liability?, 2007 A.B.A. SEC REAL PROP. & TR. L. REP. 21. These states had directed trust law by 2015. The statutes of all states were compiled by the Committee on Uniform Directed Trust.

MA	Enabling with UTC §808(b) language (new)
MI	Enabling (new)
Miss	Off the rack (new)
MO	Off the rack
MT	Enabling with UTC §808(b) language (new)
Neb	Enabling with UTC §808(b) language
NV	Off the rack (new)
NH	Off the rack
NM	Enabling with UTC §808(b) language
NY	Proposed
NC	Off the rack lite
ND	Enabling with UTC §808(b) language (new)
OH	Enabling with UTC §808(b) language
OR	Enabling with UTC §808(b) language and additional language
PA	Enabling with UTC §808(b) language
RI	Enabling*
SC	Off the rack
SD	Off the rack
TN	Off the rack
TX	Enabling with UTC §808(b) language
UT	Enabling
VT	Off the rack (new)
VA	Enabling with UTC §808(b) language
WA	Off the rack (proposed)
WV	Enabling with UTC §808(b) language(new)
WI	Off the rack (new)
WY	Off the rack

Table 1.1

Though more states currently use enabling statutes, this could shift if the recent trend towards adoption of off-the-rack continues.

4. Non-Trustee Director Powers in Uniform Directed Trust Act

The United Directed Trust Act (UDTA), finalized in July 2017, takes an enabling approach. Like the Restatements and the Uniform Trust Code, it proposes a uniform code that enables trust directors and directed trustees but does not provide any specific guidance about their powers. According to UDTA§6 (a), a trust director gets its power from the terms of the trust. The power of direction includes *only those powers* granted by the terms of the trust. UDTA§6(b). Unless the terms of the trust property provide otherwise, *a trust director may exercise any further power appropriate* to the exercise or non-exercise of the director's power of direction.[19] The code does not specify what the powers are.

The drafters of the Uniform Directed Trust Act stated that they adopted the enabling approach to promote the settlor's autonomy according to the principle of "freedom of disposition."[20] In other words, by allowing a settlor to determine the powers of a trust director, the settlor has more freedom to dispose of his or her property as the settlor wishes. Besides the principle of freedom of disposition argument, the drafters provide the following justifications for adopting the enabling powers for trust directors:

(a) Enabling statutes are simpler and states are more likely to enact simpler statutes than complicated statutes. The UDTA drafters use the widespread adoption of Delaware's directed trustee statute as an example.

(b) Unlike off-the-rack statutes, which do not provide guidance for settlors interested in atypical forms of directed trusteeship, the enabling approach will allow for all different

[19] U. D. T. A §6(c) (2017)
[20] Memorandum from the Uniform Law Comm. on United Directed Trust Act (June 9, 2017).

types of unforeseen and unique directed trustee relationships without the statutes having to be amended to accommodate the new options.

(c) Thirdly the drafters state that enabling statutes put the settlor on notice about the trust director's powers because the settlor has to affirmatively determine the type of director that he or she wants and the director's specific powers.

This paper evaluates the merits of their arguments for adopting the enabling approach.

Evaluation of the UDTA Approach to Director Powers

(a) Enabling statutes are simpler and the simpler statutes have better enactment success than complicated statutes.

The drafters of the Uniform Directed Trust Act say that they have adopted an enabling approach because simpler statutes have a higher adoption rate. They point to the directed trustee statute in Delaware as an example. However, there are several inconsistencies in this argument.

Firstly, the argument of the drafters of the Uniform Directed Trust Act that simplicity of enabling statutes could lead to more enactment success does not apply when a "simple" statute makes it harder for the settlor to achieve his or her purpose. This could be the case for statutes that apply directly to the public. But statutes regarding trust instruments apply to how trusts are drafted and, though statutes with less guidance may seem simpler, it is more complex to draft a trust instrument with no guidance. So, the usual correlation that the drafters seem to see between statutory simplicity and adoption does not apply when more detailed statutes are helpful in drafting directed trustee provisions in trust instruments.

Secondly, though the drafters of UDTA call Delaware statute enabling, it is not a pure enabling statute. It has many off-the-rack components to it. 12 Del. C. § 3313 (f) provides a permissive list of powers that a trust director can have which "may include but shall not be

limited to" (1) the power to remove and appoint trustees and trust directors, (2) the power to amend the trust, and (3) to change the terms of a power of appointment granted to a beneficiary by the trust. Delaware's list of permissive powers is shorter that many other off-the-rack statutes but nevertheless this list could serve as a guide. Delaware's directed trustee statute, with its permissive list of powers, is only different in degree from the other off-the-rack statutes, which similarly include permissive lists of potential powers, only more so. Since Delaware statute is not an enabling statute in the strict since, the argument that high adoption of Delaware statute could lead to high adoption of enabling statutes is flawed.

Thirdly, the Delaware statute's widespread adoption is likely attributable to other factors including Delaware's laws that are friendly to the settlor, and not necessarily to the type of powers that the directed trustees have. Delaware allows (a) strict and comprehensive asset protection trustees, that protect assets in trusts from creditors, (b) dynasty trusts because the state has no rule against perpetuity, (c) Delaware allows very favorable tax treatments if there are future nonresident beneficiaries of Delaware trusts.[21] Delaware treats any trust with one Delaware trustee as resident trust. The favorable tax treatment with future nonresident beneficiaries and low bar for creating Delaware trust is one of the many reasons that Delaware has a strong trust business.

The Delaware directed trustee statute is one of the first directed trustee statutes in the nation. Delaware courts are also very favorable to trusts. All of these factors and not necessarily the nature of director powers in Delaware trusts lead to strong adoption of directed trustee statutes in the state.

[21] Wilmington Trust, The Delaware Advantage, https://www.wilmingtontrust.com/repositories/wtc_sitecontent/PDF/Top_Ten_Reasons_to_Have_Your_Trust_Managed_in_Delaware.pdf, (2018).

(b) The Enabling approach allows unique directed trusteeships and will not require amendments even if adoption of different forms of directed trusteeships evolve over time.

The drafters argue that the sparse description of powers of a non-trustee director in an enabling statue keeps the statute relevant even if the trends in the roles and functions of non-trustee directors change. As discussed under *Advantages of Enabling Statutes*, if a statute that just enables but does not provide details is not bound by any one or more description so would not have to amended, even if a type of trust director became obsolete or a new function for a trust director developed.

This is an argument with merit. Enabling statutes are broad just by the nature of those statutes. The statutes just open the door to non-trustee directors without defining what powers they can have.

However, the states that have off-the rack approach do not generally mandate that the trust instruments adopt any of the powers as drafted in the statute. The off-the-rack approach enables directed trusteeship and adds specific defined director's powers that a settlor can choose to use. As long as off-the-rack statutes enables directed trusteeship without mandating adoption of any specific powers, off-the-rack statutes can be as flexible and adapt with changes as enabling statutes.

(c) Settlors are put on notice about the powers of the trust directors with enabling statutes, because the settlor is supposed to determine the type of director that he or she wants.

The perceived advantage of enabling statutes is that, a settlor can "design" a trust director and a directed trustee as the settlor wants. The settlors would be put on notice about the powers of the trust directors when a settlor "designs" the role for a trust director. This assumes that the

settlor participates in drafting the trust instrument. If the attorney drafts the document without much involvement from the settlor, this perceived advantage vanishes.

The flexibility of a settlor being able to design the role of a trust director, also comes with a cost. The cost is that the highest cost legal help would be required to "design" the role of a director from scratch. The off-the-rack statutes on the other hand, provide a permissive list of powers that the settlor has the option to use. Statutory defined director powers make more people cognizant of what a trust director can do. A settlor can cherry pick the powers that the settlor wants to give a trust director and include trust directors in his or her trust instruments with lower cost.

Furthermore, with enabling statutes, settlors who try to do their own trusts with self-help books would be shut out of the directed trustee market. The complexity of defining the powers of trust directors would make a directed trustee beyond the reach of self-help settlors. Even if they try to draft a trust with a trust director, it could lead to unforeseen consequences due to possible conflicts in roles of a trustee and a director.

Conclusion

Though there are merits to UDTA adoption of enabling statutes – flexibility and adaptability to match the needs and intent of the settlor - the same can be accomplished with off-the-rack statutes as long as the settlors are not mandated to adopt any of the provisions. States generally tend to preserve the enabling quality in off-the-rack statutes. Since the enabling qualities are preserved in state off-the-rack statutes also it is more advantageous to have off-the-rack statutes because these provide the additional benefits of statutory guidance and ease and low cost of drafting. The available data also shows that states that are new to directed trustee statutes tend to favor off-the-rack statutes.

5. Assignment of Duties and Liabilities for Directors and Directed Trustees

It is well established in trust law that trustees have a fiduciary duty to the beneficiaries. However, the fiduciary duty of a trust director is not a well settled issue. Many states require that a trust director, including a trust protector, be a fiduciary. Other states, however, allow the settlor to determine, in the trust instrument, whether a trust director is a fiduciary or not.

With respect to the directed trustee's fiduciary duty, many states do not require the directed trustee to be a fiduciary. If the trust director is a non-fiduciary in such a state, this could create the issue of "empty chair" without anyone with fiduciary duty responsible for the trust. This section discusses the many issues raised by the current patchwork of standards of duty and liabilities for trust directors and directed trustees.

Issues with Director Duties and Liabilities

To Whom is the Duty Owed

An important unresolved issue regarding the duty of trust directors is the issue of to whom the trust directors owe duty. Trustees are fiduciaries and they owe fiduciary duties to the beneficiaries. The core fiduciary duties in trust law consists of (a) duty of prudence[22], (b) duty of loyalty[23] and (c) duty of impartiality to beneficiaries.[24] However, not all states mandate that trust directors, especially trust protectors, be fiduciaries. Some states also allow nonfiduciary trust advisors if the settlor so wishes. South Dakota's SDCL §55-1B-4 is an example of such a statute. "If one or more trust advisors are given authority by the terms of a governing instrument to

[22] RESTATEMENT (THIRD) OF TRUSTS §77 (2003).
[23] RESTATEMENT (THIRD) OF TRUSTS §78 (2003).
[24] RESTATEMENT (THIRD) OF TRUSTS §79 (2003).

direct, consent to, or disapprove a fiduciary's investment decisions, . . . , such trust advisors shall be considered to be fiduciaries when exercising such authority ***unless*** the governing instrument provides otherwise."

When a trust director does not have fiduciary duty, the obvious question is to whom the trust director owes a duty, if anyone. Bove, in his article on *The Case Against the Trust Protector* analyzes the question of duty of nonfiduciary trust director and the duty owed.[25] He focuses on the duty of nonfiduciary trust protectors. Bove argues that the duty of a non-fiduciary director can be evaluated by determining whether a director (a) is an agent of the settlor, or (b) whether a settlor granted the director personal discretion.[26]

If a non-fiduciary trust director is an agent of the settlor, then such a trust director owes a duty only to the principal, so if a trust director is an agent, then the director owes a duty only to the settlor. According to Bove, this is contrary to trust laws. In trust law, a trustee owes duty to beneficiaries. California Probate Code §16002 (a) for instance, says that " [t]he trustee has a duty to administer the trust solely in the interest of the beneficiaries." He said only a minority of treatises support applying the principal agent approach to explain the duty owed by a non-fiduciary trust director.[27]

The other explanation for concluding that trust protectors do not owe a fiduciary duty to beneficiaries is whether a settlor granted the trust director personal discretion. If the settlor intended the protector to exercise power based solely on personal discretion, without regard to the interest of the beneficiaries or the purpose of the trust, then the power would be a personal one. If the trust director's power is personal, the director does not owe a duty to beneficiaries.

[25] Alexander A. Bove, Jr., *The Case Against the Trust Protector*, 37 ACTEC L.J., Summer 11 at 77.
[26] *Id.* at 81-82.
[27] *Id.* at 80.

Andrew T. Huber says that personal power can be exercised as long as the exercise is not a fraud on the power, i.e., the power is not used in contrast to the settlor's clear instructions.[28] This is not fiduciary duty standard – this only assures that what the director does is not in contract to "clear instructions." The source of personal power of a director is the settlor and any duty owed is only to the settlor as expressed in the words of the trust and not necessarily to the beneficiaries.

Bove argues, that if the settlor's intent is to give the protector powers to further that intent, the purposes of the trust and the interests of the beneficiaries, then settlor expects the protector to use his best judgement and exercise the powers in 'good faith with regard to the purposes of the trust and the interests of the beneficiaries.' If the settlor intended the protector to exercise power for the trust and the interests of the beneficiaries, then the protector should owe fiduciary duty to the beneficiaries. [29]

Bove's argument, however, also raises an interesting question about the limits of fiduciary duties owed to beneficiaries by trust directors. The issue is whether the fiduciary duty owed to any beneficiary is absolute or whether it is only within the restrictions of what is expressed in the trust. For instance, a settlor could have the condition that beneficiary A gets the inheritance only if certain conditions are fulfilled, otherwise, beneficiary B gets the inheritance. The fiduciary duty of the trust fiduciary is not absolute to A. The duty is to A unless conditions are not met, then it is to B.

The issue about whom a non-fiduciary trust director owes duty to is still an open question. Many states allow non-fiduciary trust directors, especially non-fiduciary trust protectors. The argument for keeping them as non-fiduciaries is that they stand for the interest of

[28] Andrew T. Huber, 31 *Trust Protectors: The Role Continues to Evolve, Probate and Property Magazine* 1, January/February 2017.
[29] Alexander A. Bove, Jr., *The Case Against the Trust Protector*, 37 ACTEC L.J., Summer 11 at 77.

the settlor. Settlors appoint trust protectors who make changes in the trust to adapt to changing laws, unexpected and questionable behaviors of the beneficiaries and the trustees, without being limited by duty towards beneficiaries. The proponents of non-fiduciary protectors argue that these protectors serve a valuable role of standing for the interest of the settlor.

The downside of non-fiduciary director is that he or she is not accountable to the beneficiary. Bove argues in his article that if the settlor's intent is to give the protector the enforceable power work in furtherance of the settlor's intent it stands to reason that a settlor would want a protector to act on behalf of the beneficiaries as well as that of the trust.[30] However, a settlor might not necessarily be loyal to any particular beneficiary. this might not necessarily be so for individual beneficiaries. A settlor might expect the protector to remove a beneficiary who behaves in a way that is unacceptable to the settlor, such as changing religion or marrying the wrong person. However, with a non-fiduciary director, the danger of a director who substitutes his or her bias to change beneficiaries or to amend trust, if given the power, is real. For these reasons, many states, especially states with recent directed trust laws have required that trust directors be fiduciaries.

"Empty Chair Problem"

The related issue to the issue of the duty of trust director power is the issue of "empty chair." The "empty chair problem" occurs when neither the trust director, nor the directed trustee have fiduciary duty. This lives the beneficiary unprotected without anyone legally bound to be loyal to him or her. In Arizona[31] and Nevada[32], for instance, non-trustee directors are not required to be fiduciaries. The directed trustees in these states are also not fiduciaries and not

[30] *Id.* at 82.
[31] ARIZ. REV. STAT. ANN. § 14-10808(D) (2009).
[32] Nev. REV. STAT. §163.553 (2009).

subject to liability as long as they follow direction. In Arizona, a directed trustee is not subject to liability if the trustee follows the direction of a third party "even if the actions constitute a breach of fiduciary duty, unless the trustee acts in bad faith or with reckless indifference."[33] In such situations, neither the director not the directed trustee is held liable event if the direction does not adhere to trust fiduciary principals to beneficiaries. In these states there is a possibility that neither the non-fiduciary director, nor the directed trustee is held accountable for decisions of the director that harm the beneficiaries.

Issues with Directed Trustee Duties and Liabilities

Directed trustees do not have fiduciary duties. However, states do impose certain duties and liabilities on directed trustees. A directed trustee has the explicit duty to follow direction of the director that comes from his or her role as a directed trustee. In addition to the duty to follow direction, many states also impose an implicit duty to not harm beneficiaries from directions of directors who are not necessarily fiduciaries. But not all states impose this duty.

Depending on whether the directed trustee's duty is merely to follow direction or also to prevent harm to beneficiaries from these directions, the state statutes can be divided into three main categories: (a) statutes that hold a directed trustee liable for following direction that could cause harm to beneficiaries, (b) statutes that hold a directed trustee liable for not following direction property, and (c) statutes that impose no liability standard on directed trustees as long as they follow direction.

The former category of statutes can be considered gatekeeper statutes because these statutes make directed trustees gatekeepers to prevent harmful directions from trust directors. The latter two categories can be termed non-gatekeeper statutes because they just ensure that the directions

[33] ARIZ. REV. STAT. ANN. § 14-10808(B) (2009).

are carried out property or are carried out, and do not hold the directed trustees liable for any harm to beneficiaries from following direction.

Directed Trustee Liable for Following when Standard is Violated - Gatekeeper Standards

Many states hold directed trustee liable for following direction if following direction violates certain standards. These standards are different across states. States, including DE,[34] IL[35] exonerate the directed trustee except for *willful misconduct*. UT exonerates directed trustees except for *willful misconduct* or *gross negligence*.[36] MO does not hold a directed trustee liable unless there is preponderance of evidence showing that action or omission in following direction was done *in bath faith* or *with reckless indifference*. [37]

The UTC and the Restatement also hold directed trustees liable for following direction if a standard is violated. The "standard" in both the UTC and the Restatement is *violation of the terms of the trust* or *the director's fiduciary duty*. The UTC and the Restatement are different on the specifics but in general the liability standard is similar.

The statutes and codes that impose a *liability for following direction* when a standard is violated is more beneficiary friendly. As mentioned earlier, the requirement that directed trustees not follow direction when certain standards are violated places directed trustees in the role of gatekeepers of "harmful" direction. For example, in UTC, if a direction is not consistent with the director's fiduciary duty, the requirement that directed trustee not follow direction, puts the trustee in the role of a gatekeeper who prevents directions contrary to fiduciary duty from being implemented. Similarly, if an implementation of a direction would constitute a *willful*

[34] DEL. CODE ANN. TIT. 17, § 3313 (2014).
[35] 760 ILL. COMP. STAT. ANN. 5/4.01 (f) (1) (2015).
[36] UTAH CODE ANN. § 75-7-906 (1953).
[37] MO. ANN. STAT. § 456.8-808 8 (2012).

misconduct by a trustee, holding the directed trustee liable would discourage the trustee from carrying out the direction and that would prevent harm to the beneficiaries.

This paper first evaluates the gatekeeper standard of the UTC and Restatement and then evaluates the different gatekeeper standards that the states use.

UTC and Restatements

Both the Uniform Trust Code and the Restatements put the onus on the directed trustee to follow direction only if the direction is consistent with the director's fiduciary duty. The directed trustee has the duty *not* to follow direction (duty not to act) if the direction violates the director's fiduciary duty. The Restatement (Third) of Trusts and The Uniform Trust Code holds the directed trustee liable for following directions if the directions are contrary to the terms of the trust or if the directions are against the fiduciary duty of the trust director.

Restatement (Third) of Trusts § 75 (2007) *requires that a directed trustee not follow direction* if "the attempted exercise is contrary to the terms of the trust or the trustee knows or has reason to believe that the attempted exercise violates a fiduciary duty that the power holder owes to the beneficiaries."

The *Uniform Trust Code* also *requires that a directed trustee not follow direction* "unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty."[38]

The difference between the Restatements and UTC is the degree to which the directed trustee must have knowledge of the breach to be held liable. Under the UTC, the directed trustee is liable for following direction that the directed trustee *knows* to constitute a *serious* breach of the

[38] UNIF. TRUST CODE §808(b) (2000).

fiduciary duty of the director. A directed trustee is not liable unless it is *manifestly* contrary to the terms of the trust or he/she follows direction that he/she knows to constitute a *serious* breach of the director's fiduciary duty. In contrast, under the Restatements, a directed trustee is held to a somewhat different standard. – the directed trustee is to follow direction unless the trustee "knows or has reason to believe that the attempted exercise violates the director's fiduciary duty." The Restatement does not excuse the directed trustee for lack of knowledge about the director's fiduciary duties as long as there is reason to believe that the exercise violates the director's fiduciary duty. With the Restatement the directed trustee has higher burden because trustee is liable for following any direction that is contrary to the trust, not just the ones manifestly contrary to the trust. Furthermore, the trustee is liable if he knows or even has reason to know any breach in fiduciary duty, not just serious breach in fiduciary duty.

There are at least twenty-one states that have adopted the language of the UTC §808b. There are relatively few states that have adopted the Restatement language. This could be due to the relative leniency of the UTC language to directed trustees.

The advantage of the common approach that the UTC and the Restatement have taken - that of making the directed trustees be an additional gatekeepers of the directors' fiduciary duty by making them liable if they follow direction that they know (or have reason to believe) breach director fiduciary duty - is that the directed trustees could mitigate violations of fiduciary duties by trust directors by "policing" the directions. This is a beneficiary friendly approach.

However, the UTC and the Restatement will not completely prevent the empty chair problem if the director is a non-fiduciary. In both the UTC and the Restatement, the directed trustee's duty not to follow direction hinges on whether the director has violated a fiduciary duty. If the director has none, then the directed trustee does not have a basis for not following direction.

Also, many question the fairness of holding the directed trustee accountable for the director's failure to abide by the director's fiduciary duties. Firstly, it is a heavy burden on the directed trustee because the trustee has the additional burden of ascertaining that the given directions comply with the director's duties. A directed trustee would have to be well versed on how the fiduciary duty law of the state applies to the director and be able to understand whether each direction falls within what is allowable by the state's fiduciary duty standard. Many trusts name trusted family members, not necessarily institutions, as trustees. Family members are not likely to be familiar with director fiduciary duties, and having a duty to ensure that a direction abides by the director's duties is a heavy burden on the family members. Secondly, if the directed trustee is not capable of ascertaining the fiduciary duty of the director, then it is not fair to impose a liability on the trustee for not knowing the duties of a third party.

State Standards

Many states hold directed trustees liable if they violate certain common law tort standards. Tort standards have lower bar than fiduciary standard, they only prevent more egregious harm than the fiduciary duty standard. The states have attempted to close gaps in fiduciary responsibility towards beneficiaries by instituting these liability standards that hold directed trustees liable for following directions that could harm beneficiaries. The imposition of these standards ensure that directed trustees are gatekeepers that prevent tortious harm. Different states impose different tort standards on the directed trustees including: (a) reckless indifference, (b) negligence, (c) gross negligence, (d) willful misconduct, and (e) intentional misconduct. These standards act as a layer of protection for the trust and the beneficiaries. The states do not hold the directed trustee liable for following direction *unless by following direction the directed trustee violates one or more of these standards*.

Willful Misconduct

The state of Delaware uses the willful misconduct standard. Delaware defines "willful misconduct" as "*intentional wrongdoing* and not mere negligence, gross negligence or recklessness." 12 Del. C. §3301(g) and 12 Del. C. §3301(h)(4). "Wrongdoing" is defined as *malicious conduct or conduct designed to defraud or seek an unconscionable advantage*. Delaware's definition of willful misconduct makes this beyond just willful failure to follow duty. It puts it in the category of a willful act that is malicious or designed to defraud or seek an unconscionable advantage. Wisconsin also has a similar standard for determining directed trustee liability.[39]

Under Delaware's willful misconduct standard, directed trustees are not to follow direction if any direction that they follow can be construed as "willful misconduct" on the part of the directed trustee. Wisconsin also has similar standard for directed trustee. According to Wisconsin's W.S.A. 701.0808(2), "[i[f a trustee acts in accordance with the direction of a directing party or fails to act due to lack of direction from a directing party, *the trustee is not liable for any loss except for acts or omissions that are a result of the trustee's willful misconduct*." Colorado[40] and Illinois also have the willful misconduct standard. Illinois 760 ILCS 5/16.3 (1) provides that if a directed trustee acts "in accordance with such a direction, then *except in cases of willful misconduct on the part of the excluded fiduciary in complying with the direction of the directing party,* the excluded fiduciary is not liable for any loss."

In the states that have the willful misconduct standard if what the directed trustee engages in amounts to willful misconduct when following direction, then the directed trustee is held liable.

[39] WIS. STAT. ANN. §701.0808 (2) (2014).
[40] COLO. REV. STAT. ANN. § 15-16-807 (1) (2014).

This standard makes a directed trustee gatekeeper of harm from carrying out directions that amount to "willful misconduct" as defined in state statute.

Reckless Indifference

Reckless indifference is conscious disregard of the harm that one's actions could do to the interests or rights of another. If a directed trustee disregards a harm that a reasonable person should have known, then that would be reckless indifference. As with the willful misconduct standard, it is not sufficient for the trustee to just to follow the direction of a director if this standard is in place. If a director's direction is going to cause harm to the trust and trust beneficiaries and a reasonable person would have known, then, if a directed trustee still follows that direction, the directed trustee could be construed to have acted with reckless indifference.

This standard is somewhat more protective of the trust and the beneficiaries than the willful misconduct standard. In willful misconduct standard, the directed trustee would have to willfully commit an act or omit an act for there to be liability. With reckless indifference, the directed trustee is held liable if he or she just disregards the harm that his or her action or lack of action might cause.

Arizona, Georgia and Missouri hold the directed trustee liable for following direction in bath faith or in reckless indifference. The Arizona statute states that the directed trustee is not liable even if a fiduciary duty is breached as long as the trustee is not acting in bad faith or reckless indifference.[41] The Georgia statute does not hold the directed trustee liable except for "breach of trust committed in bad faith or with reckless indifference to the interests of the beneficiaries." [42]

[41] ARIZ. REV. STAT. ANN. § 14-10808 (B) (2009).
[42] GA. CODE ANN. § 53-12-303(a) (2010).

Intentional Misconduct

The term "intentional misconduct" means conduct by a person with knowledge (at the time of the conduct) that the conduct is harmful to the health or well-being of another person.[43] If a directed trustee knows that the act of following direction causes harm, then following such direction could be construed as "intentional misconduct." This is a standard that is more protective of the intent of the trust and its beneficiaries.

Non-Gatekeeper Standards: States

Other states have statutes that apply standards that attach liability to *how or whether* a directed trustee *carries out direction*, rather *than the impact of the direction* on beneficiaries. These statutes do not use directed trustees as gatekeepers of "harmful" direction. These statutes are focused on ensuring that the directions are carried out properly as defined by the standard.

The standards used by these states could include one or more of the following: (a) good faith, (b) negligence (c) gross negligence, (e) willful misconduct. These states do not hold the directed trustee liable for following the direction unless the directed trustee violates one of more of the standards.

Good Faith Standard

Good faith is a directed trustee friendly standard. In general, the good faith standard is breached through intentional acts of not fulfilling legal obligations, misleading others, entering into an agreement without intention or means to fulfill it or violating basic standards of honesty in dealing with others. As long as a directed trustee follows direction and is honest about what he or she has done or not done, this standard is met. This standard does not require a directed

[43] 42 U.S.C. § 1791(b)(8) (1996).

trustee to consider the consequences of the action to the trust or the beneficiaries. Even if a director gives direction that is harmful to the trust or the beneficiaries, this standard says nothing about the directed trustee's obligations. As long as the directed trustee is honest, this standard is met. If a trust director is not required to be a fiduciary, this standard does not protect the trust or the beneficiaries. Arizona, for instance, has a good faith standard or reckless indifference standard for its directed trustees and the trust protector is not required to be a fiduciary.[44]

Negligence

Negligence requires that the perpetrator has (a) duty (b) there is a breach of that duty (c) this breach cause the damages, and (d) the victim suffers from these damages. Oklahoma 60 Okl.St.Ann. § 175.19 (B) makes a directed trustee free from liability when following the directions of a trust director "except to the extent the excluded trustee is negligent in carrying out the execution of the directed investment or other directed action." The duty of the directed trustee here is to carry out the director's direction, and if the trustee breaches that duty, then he is liable.

This standard is stricter on directed trustees than the good faith standard. It is not just about being honest in following directions. This standard elevates the requirement to a duty of carrying out the directions without negligence. This standard, however, does not hold a directed trustee liable if the direction that he or she is following causes any harm to the trust or the trust beneficiaries.

[44] ARIZ. REV. STAT. ANN. § 14-10808 (2009).

Gross Negligence

Gross negligence is defined many ways, one of which is that it is negligence substantially and appreciably greater than ordinary negligence. Courts have defined "gross negligence" to mean "a failure to observe even slight care; it is carelessness or recklessness to a degree that shows utter indifference to the consequences."[45] Black's Law Dictionary defines gross negligence as "a conscious, voluntary act or omission in reckless disregard of a legal duty and of the consequences to another party."[46] Like in negligence, there has to be a duty for there to be gross negligence. Whether gross negligence standard makes a directed trustee a gate keeper to director's harmful behavior or not depends on which duty the statute attaches the gross negligence standard to.

Utah uses gross negligence standard. A directed trustee is not liable for any loss from following investment direction if "(a) the terms of a trust authorizes a person to give the investment direction to the trustee" and "(b) the trustee acts in accordance with the investment direction given by a person" *except in cases of willful misconduct or gross negligence*. [47] In Utah, the directed trustee is not liable for following direction – unless there is gross negligence. This gross negligence could be construed as gross negligence in carrying out direction, i.e., failure to observe even slight care while carrying out the direction. This interpretation implies that the Utah statute requires that direction be carried out without gross negligence. The statute does not focus on the consequences of the direction – whether it violates fiduciary duty, or whether the direction would cause other harm – the statute focuses on the whatever direction of a trust director be carried out without gross negligence.

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[45] UTAH COURTS (https://www.utcourts.gov/resources/muji/inc_list.asp?action=showRule&id=2).
[46] BLACK'S LAW DICTIONARY 1133 (9th ed. 2009).
[47] UTAH CODE ANN. § 75-7-906 (4) (1953).

Non Gatekeeper – No liability

These statutes would be construed as statutes with the standard that focus only on *whether directions are carried out*. Many state statutes impose no additional standards for liability to directed trustees other than to follow direction. Directed trustees are not gate keepers to direction that might harm beneficiaries, nor are they held to any standard on how they carry out the direction. These states generally require that the trust directors be fiduciaries. The directed trustee has no liability as long and the trustee follows direction. The states that do not have additional liability standards for directed trustees include Alabama, Idaho, Mississippi, Ohio, Oregon and Indiana.

6. Assignment of Duties and Liabilities in UDTA

Duties and Liabilities of Trust Director

The trust director is a fiduciary to the beneficiaries in the Uniform Directed Trust Act. According to UDTA §8, a trust director has the same duty and liability as a trustee "in a like position and under similar circumstances." Trustees have fiduciary duties in state law. Fiduciary duty and corresponding state-defined liabilities are the floor of duty and liability of a trust director. Trust instruments are allowed to add additional duties and liabilities[48], but trust instruments are not allowed to relieve trust directors of fiduciary obligations, as trustees. According to the act, "the terms of the trust may vary the director's duty or liability to the same extent the terms of the trust could vary the duty or liability of a trustee in a like position and under similar circumstances."[49] Trustees are required to be fiduciaries.

[48] UNIF. DIR. TRUST ACT §8(a) (1) (2017).
[49] *See id.* §8(a) (1).

This has very significant policy implications. UDTA defines trust directors as all non-trustee powerholders including trust protectors. The duties and liabilities of a trust director thus also applies to the trust protector. This approach removes the possibility that there could be non-fiduciary non-trustee power holders. The implication is that there will be no "empty chair" of fiduciary duty as long as state adopts UDTA duty for trust directors. The trust director, no matter in what form and with what powers, will be a fiduciary and all the state law duties and liabilities that are applicable to a trustee will be applicable to the director.

Duties and Liabilities of Directed Trustees

UDTA adopts the Delaware standard of liability for a directed trustee.[50] A directed trustee is not liable, unless by complying, the directed trustee engages in *willful misconduct*.[51] UDTA also adopts the Delaware definition of willful misconduct. "'Wilful misconduct' shall mean intentional wrongdoing, not mere negligence, gross negligence or recklessness and "wrongdoing" means malicious conduct or conduct designed to defraud or seek an unconscionable advantage."[52]

As discussed earlier, this is not just dereliction of duty, but "willful misconduct" is action taken with intention to do harm. This is a more beneficiary friendly provision than just dereliction of duty to follow instructions of a trust director. A directed trustee will be held liable if his or her action is found to be a "willful misconduct" whether or not the trustee is following direction.

The approach that the UDTA has taken preserves a duty in the directed trustee to act without willful misconduct. According to the authors of the act this preserves "some minimal fiduciary

[50] Memorandum from the Uniform Law Comm. on United Directed Trust Act (June 9, 2017).
[51] UNIF. DIR. TRUST ACT §9(b) (2017).
[52] 12 DEL. CODE ANN. §3301(g) (2014).

duty in a directed trustee." The directed trustee has the *duty not to follow direction* that would cause harm to beneficiaries. The UDTA preserved the gatekeeper role for directed trustees.

The UDTA approach of preserving willful misconduct duty in a directed trustee avoids the issues with the Restatement and the UTC §808. In both the Restatement and the UTC, the directed trustee has the burden of policing non-trustee director's fiduciary duty. The directed trustee has to decide which directions to follow and which not to follow based on what he or she knows is or has reason to believe is the director's fiduciary duty. Not only is this an onerous responsibility for a directed trustee, who might not be well versed in the details of fiduciary law, this can also lead to inconsistent implementation. The directed trustee will only prevent implementations of directions that he or she knows or has reason to believe are against the director's fiduciary duty, but other directions which are more egregious violations of director's fiduciary duty could be implemented.

However, the UDTA approach to directed trustee duty does not solve all issues concerning the duty of a directed trustee. In particular, the UDTA approach does not resolve the "empty chair" issue. If a state adopts UDTA directed trustee duties *without* adopting the UDTA non-trustee director duties, the state could still face the problem of an "empty chair." If the director is not a fiduciary and directed trustee is held liable for only willful misconduct, then directions that violate fiduciary responsibilities but do not rise to level of willful misconduct could be carried out without liability to either the director, or the trustee.

Possible Resolution – Director and Directed Trustee as a Fiduciary

The better approach may be to mandate that either the director or the directed trustee be a fiduciary. This approach gives more flexibility to settlors who want to use trust protectors. A

fiduciary directed trustee would follow direction only as long as the direction does not violate the directed trustee's fiduciary duty. This resolves the issue with the Restatement and the UTC of the directed trustee having to police a different person's, i.e. the director's, fiduciary duties. This also addresses the possibility of "an empty chair" with a non-fiduciary director and a non-fiduciary trustee. Either a fiduciary directed trustee would follow direction only if allowed by fiduciary principals.

The criticism of this approach could be that this restricts the director's direction to the confines of a directed trustee's fiduciary duty, i.e., only the directions that comply with trustee's fiduciary duty would be implemented. This however is not a valid criticism. This approach gives more flexibility than just having a fiduciary trust director. This approach allows a non-fiduciary trust protector with a fiduciary directed trustee. A trust protector, who is not a fiduciary for instance would be able to make changes as long as any direction given to directed trustee does not violate the trustee's fiduciary duties. For instance, a non-fiduciary protector may be able to amend the trust as long as the implementation of the amendment does not violate the directed trustee's fiduciary duty, i.e., the duty of prudence, loyalty and impartiality to the beneficiaries. Much of the trust protectors directions can be carried out with a fiduciary directed trustee including: amendment of trust, remove trustee or trust advisor, change situs of trust, appoint successor trust. Some traditional trust protector powers such as change of beneficiaries, change power of appointment to beneficiaries might have to adjusted, the settlor would have to specify conditions for changes to powers of appointment to beneficiaries so that the directed trustee could be loyal to the beneficiaries, as specified in the trust, even when following the direction of the trust protector.

This approach would also not elevate the role of the directed trustee to the position that "competes" with the trust director. Even a fiduciary directed trustee would have the duty to act as an administer if that is what is required in a directed trust, as long as following direction as an administrator does not violate the directed trustee's fiduciary duty.

Allowing directed trustees who are fiduciaries would resolve the two key issues concerning duties and liabilities of director vs a vs the directed trustee. The first issue is the question of whom a non-fiduciary owes duty to. If a directed trustee is a fiduciary, that question does not have much practical significance. No matter whom the non-trustee director owes duty to, the directed trustee would owe due to the beneficiaries and, only the directions that comply with directed trustee fiduciary duties would get implemented. The directed trustee would act as a gatekeeper against harm to the beneficiaries by implementing only the directions that are on behalf of the beneficiaries as a class. The second key issue concerning duties and liabilities of director vs directed trustee is the question of "empty chair." The empty chair happens when neither the director nor the directed trustee is a fiduciary and no one is held liable for violations of fiduciary principals. A fiduciary directed trustee ensures that decisions that violate fiduciary duty do not get implemented and thus addresses the "empty chair" issue.

7. Conclusion

The use of non-trustee directors in different capacities has steadily increased in the United States. Trust advisors have been used since the turn of the last century, and trust protectors started being used since about 1960s, first in offshore trusts and then more and more so in domestic trusts. Approximately fifteen states have adopted directed trustee statutes in just the last decade. The states that have adopted directed trusteeship have a patchwork of statutes with varying specificity of powers granted to trustees and different duties and liabilities for non-

trustee directors and the directed trustees. Several states have adopted the directed trustee language from the Restatement of Trusts or the Uniform Trust Code. Similarly, the duties and liabilities of directors and directed trustees are also very different across states. Many states adopt the duties and liabilities of the Uniform Trust Code and others have developed their own standards.

There are many issues that come with the use of non-trustee directors. These issues revolve around the key questions of *who holds the powers* and *who has the duty* when there are non-trustee directors directing the trustees. This essay evaluated these questions in depth, primarily the questions about (a) the powers of trust directors, (b) specificity of those powers in statutes, (c) the duties and liabilities of trust directors, and (d) the duties and liabilities of directed trustees.

The UDTA released in July 2017 has attempted to put together a set of codes to resolve many of the issues regarding the powers and duties in directed trusteeship. The UDTA has approached the enabling approach to director powers and have made it mandatory for directors to be fiduciaries.

However, the approach might not necessarily resolve the issues directed trusteeship. As discussed in the essay, enabling approach to director power limits what statutes can provide. All states that have off-the-rack states allow enabling approach. There is no advantage to restrict statute to just the enabling approach, because off-the-rack statutes with enabling provision provide similar flexibility with much more in terms of ease and lower cost of adoption, making directed trusteeship more accessible.

The UDTA attempts to resolve the issues in duties and liabilities of directed trusteeship by mandating that director be a fiduciary. This is a better approach than states that allow non-fiduciary director and non-fiduciary trustee. However, the better approach might be to give more flexible by requiring either the director or the directed trustee be a fiduciary. This approach would allow trust protectors that can take long term view of the trust without having to worry about the fiduciary responsibilities. A fiduciary directed trustee can be the gate keeper who ensures that the trust protector's long-term views are implemented within fiduciary principals. This is a compromise which allows preservation of traditional powers of trust directors but restricts it to what the trustee can carry out within the trustee's fiduciaries.

Appendix

Directed Trust and Trust Director Duties and Liabilities by State

States	Directed Trustee Duties	Trust Director Duties
AL	Directed trustee *is not liable*	Trust Protector *is a fiduciary*
AK	Directed trustee *is not liable* for following advisor's if the trust says so. Trustee is a fiduciary if there is no trust advisor.	Trust Protector *is not a fiduciary* Trust Advisor *is a fiduciary*.
AZ	Directed trustee is not liable, *unless acts in bad faith or with reckless indifference*	Trust Protector *is not a fiduciary* Trust Director *is a fiduciary* and required to *act in good faith.*
AR	UTC §808(b) duty [Directed trustee shall follow director unless (a) manifestly contrary to trust or (b) trustee knows following direction would lead to serious breach of director's fiduciary duty.]	UTC §808(b) duty – [Trust director *is presumed to be a fiduciary* required to act in good faith towards the trust/beneficiaries. / Liable for breach of fiduciary duty.]
CO	Directed trustee not liable *except in cases of willful misconduct* on the part of the directed trustee.	Trust Director *is a fiduciary*.
DC	UTC §808(b) duty	UTC §808(b) duty
DE	Directed trustee not liable *except in cases of willful misconduct* or *gross negligence*	Trust directors are *considered fiduciaries* unless the government document says otherwise.
FL	UTC §808(b) duty	UTC §808(b) duty
GA	Directed trustee not liable *unless breach of trust committed in bad faith or reckless indifference* to beneficiaries.	
ID	Directed trustee *is not liable*	Trust Protector *is a fiduciary*

Directed Trust and Trust Director Duties and Liabilities by State

States	Directed Trustee Duties	Trust Director Duties
IL	Directed trustee *not liable except for willful conduct*	Trust Protector *is a fiduciary unless trust says otherwise. Even if the trust says otherwise, good faith standard applies.*
IN	Directed trustee *is not liable* except if directed trustee knows that direction violates the director's fiduciary duties. *If director not a fiduciary*, then directed trustee liable if direction violates the terms of the trust.	
IO (Iowa)	Directed trustee *is not liable* unless he/she knows that it violates the terms of the trust or knows that the director is not competent.	Trust director *is presumed to be a fiduciary for purposes of the trust and to beneficiaries*. Liable for breach of fiduciary duties.
KS	UTC §808(b) duty	UTC §808(b) duty
KY	UTC §808(b) duty, except breach does not have to be serious	UTC §808(b) duty
ME	UTC §808(b) duty	UTC §808(b) duty
MD	*Director trustee* not liable except in the case of willful misconduct by trustee. *May not follow director* if (a) manifestly contrary to trust or (b) trustee knows following direction would lead to ~~serious~~ breach of director's fiduciary duty.	Trust directors are *advisors and fiduciaries*. They are *required to act reasonably under the circumstances* with regard to the purposes of the trust and the interests of the beneficiaries.
MA	UTC §808(b) duty	UTC §808(b) duty
MI		*Trust protector is a fiduciary* and shall act in good faith.
MS	Directed trustee *is not liable*. (No standard provided.)	Trust director *is a fiduciary.*

Directed Trust and Trust Director Duties and Liabilities by State

States	Directed Trustee Duties	Trust Director Duties
MO	Directed trustee is not liable *except in bad faith* or *reckless indifference.*	Trust director has *fiduciary duties when carrying out trust protection duties.* Exonerated from all liabilities *unless established by preponderance of evidence of breach of duty, in bad faith or with reckless indifference.*
MT	UTC §808(b) duty	UTC §808(b) duty
NE	UTC §808(b) duty	UTC §808(b) duty
NV	Directed trustee is *not liable for following directions and for omission due to not getting timely direction.*	*Directors are fiduciaries* unless instrument says otherwise. *Not clear whether protectors are fiduciaries.*
NH	Directed trustee is *fiduciary when no trust advisor* except for first 60 days after finding out no trust advisor	Trust Advisor *is a fiduciary*
NM	UTC §808(b) duty	UTC §808(b) duty
NY	Proposed	Proposed
NC	Directed trustee *is not liable except for intentional trustee misconduct*	Trust Director *is a fiduciary and to act in good faith and for purpose of trust and interests of beneficiaries*. Not fiduciary for 1) removing/ appointing trustee or director, 2) power of appointment of trust beneficiary, 3) power that may only affect the director.
ND	UTC §808(b) duty	UTC §808(b) duty
OH	Directed trustee *is not liable.*	UTC §808(b) duty
OK	Directed trustee *not liable except if negligent in carrying out directed action.*	

Directed Trust and Trust Director Duties and Liabilities by State

States	Directed Trustee Duties	Trust Director Duties
	If trustee has custody of any asset, trustee is liable for due diligence in safekeeping.	
OR	Directed trustee *is not liable.*	Trust director *is rebuttably presumed to be a fiduciary* required to act in good faith towards the trust/beneficiaries. Liable for breach of fiduciary duty.
PA	UTC §808(b) duty	UTC §808(b) duty
SC	UTC §808(b) duty	UTC §808(b) duty
SD	Directed trustee is *not liable*, *unless if take role of a trust director*. Then *gross negligence or willful misconduct standard*	Trust protector *has no greater liability than that of a trustee*, unless the trust document says otherwise.
TN	Directed Trustee has *no liability.*	Trust Protector/Director *is a fiduciary required to act in good faith* towards the trust/ beneficiaries.
TX	UTC §808(b) duty	UTC §808(b) duty
UT	Directed Trustee is not liable except in *willful misconduct* or *gross negligence.*	Trust Protector is (i) *presumptively a fiduciary*; (ii) is required to act in good faith; and (iii) is liable for any loss that results from breach of the *fiduciary duty*
VT	UTC §808(b) duty	UTC §808(b) duty
WA		Trust director shall be *deemed to be a fiduciary* and *liable to beneficiaries/trustee just as trustee*
WV	UTC §808(b) duty	TC §808(b) duty
WI	Directed trustee *is not liable except for willful misconduct*	Trust director *is a fiduciary* and *must act in good faith with regards to trust/beneficiaries.*

Directed Trust and Trust Director Duties and Liabilities by State

States	Directed Trustee Duties	Trust Director Duties
WY	Directed Trustee is *not liable* unless trust says otherwise	Trust protectors *are fiduciaries* for their duties
VA	UTC §808(b) duty	UTC §808(b) duty

Appendix Table 1.1