THE UNIFORM TRUST CODE AND THE COMMON LAW: AN ANALYSIS OF THREE SECTIONS OF THE CODE THAT DEVIATE FROM THE COMMON LAW AND WHY THE DRAFTERS CHANGED THE LAW

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INTRODUCTION

For hundreds of years, trust law in the United States has been a province of the common law, as expressed in the Restatements (Second) and (Third) of Trusts.[1] In 2000, the National Conference of Commissioners on Uniform State Laws (NCCUSL)[2] released the first draft of the Uniform Trust Code (UTC), which purports to codify the common law of trusts and create a set of easily accessible, uniform rules that could be adopted by the fifty states.[3] The UTC has since been amended several times.[4] The Commissioners of the NCCUSL have worked aggressively to have all fifty states adopt the UTC.[5] At the time of this writing, thirty-one states and the District of Columbia have adopted the UTC in some form.[6] States are beginning to see litigation over the meaning of particular UTC provisions—and already, one court

1 *See* RESTATEMENT (SECOND) OF TRUSTS (AM. LAW INST. 1959); RESTATEMENT (THIRD) OF TRUSTS (AM. LAW INST. 2003).

2 This group consisted of a drafting committee chaired by Maurice Hartnett, a justice of the Delaware Supreme Court, who had much experience with trust cases. *See* David M. English, *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 67 MO. L. REV. 143, 145 (2002). David M. English served as a Reporter who was responsible for carrying out the committee's day-to-day decisions and preparing the drafts. *Id.* The committee consisted of other scholars from prestigious institutions, including E. Edwin Eck, II, of the University of Montana, John H. Langbein of Yale Law School, and Richard V. Wellman of the University of Georgia, as well as advisors from the American Bar Association. UNIF. TRUST CODE intro. (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2010) (Drafting Committee to Amend Uniform Trust Code).

3 UNIF. TRUST CODE prefatory note; *see also* MARK W. WORTHINGTON, NAELA ADVANCED INST., IMPACT OF THE UNIFORM TRUST CODE ON THIRD-PARTY SNTS 2 (2006) ("[T]he rush to codify cannot be explained by any crisis in the common law . . . . Codification of common law is a risky undertaking, and ought be undertaken only with great deliberation, and not to pursue some other agenda.").

4 *Legislative Fact Sheet—Trust Code*, UNIFORM L. COMM'N (2016), http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Trust%20Code (mentioning that the UTC was completed in 2000 and amended in 2001, 2003, 2004, and 2005).

5 WORTHINGTON, *supra* note 3, at 1. However, the UTC has not been adopted in other leading trust jurisdictions, like Delaware and Nevada, and it has been considered and rejected in other states, such as Oklahoma and Colorado. *Id.* at 1–2.

6 *Legislative Fact Sheet—Trust Code*, *supra* note 4 (including Alabama, Arizona, Arkansas, District of Columbia, Florida, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming).

has applied the UTC, reaching an outcome that is contrary to the common law of trusts.[7]

Although the drafters of the UTC purported to follow the Restatements, there is evidence that instead, particular interest groups had major influence on the Code's development.[8] As a result, the UTC contains provisions that modify, abolish, or call into question various substantive common law rules.[9] The drafters have poorly explained the reasons for the changes in the official comments to the various UTC sections, if they have attempted to explain them at all.[10] This Note will focus on three particular UTC provisions: (1) section 1002, which governs whether disgorgement of profits may be awarded when a trustee breaches his duty of loyalty;[11] (2) sections 802(c) and (f), which demolish trust law's duty of loyalty as it applies to institutional trustees;[12] and (3) section 504, which governs creditors' rights to compel distributions of the assets of support trusts.[13] This Note explores the extent to which these sections depart from the common law, and analyzes the forces that may have prompted those changes. The Note then addresses whether the changes can be justified.

This Note proceeds in four Parts. Part I reviews early attempts to codify the common law of trusts, as well as the drafting and enacting of the UTC. Part II analyzes the first change to the common law as embedded in UTC section 1002, which concerns remedies that courts

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7 *See generally* Miller v. Bank of Am., N.A., 326 P.3d 20 (N.M. Ct. App. 2013) (holding that contrary to the common law—which states that a trustee cannot personally benefit from a breach of trust and, if he does, the appropriate remedy is disgorgement of profits—and based on the way section 1002 of the UTC was drafted, disgorgement was inappropriate because it allowed double recovery for the plaintiffs), *rev'd*, 352 P.3d 1162 (N.M. 2015).

8 *See* John H. Langbein, *Why Did Trust Law Become Statute Law in the United States?*, 58 ALA. L. REV. 1069, 1082 (2007) (noting that the trust banking industry has been very influential in promoting the UTC legislation); *see also* WORTHINGTON, *supra* note 3, at 1 ("[T]he UTC has been adopted . . . due to intense lobbying by NCCUSL and those it has recruited in the several states to promote the UTC . . . ."). See also *infra* Part III for a discussion of what interest groups are materially benefitted and harmed due to the changes that the UTC made to the common law.

9 *See* English, *supra* note 2, at 154–55. At least one author has noted that in the past, with the NCCUSL's other uniform bodies of law, while the Commissioners have "forg[ed] new ground," they have never before upset long standing common law rules. WORTHINGTON, *supra* note 3, at 1.

10 *See, e.g.*, UNIF. TRUST CODE § 405 cmt. (commenting that contrary to the Restatement (Second) of Trusts § 391 (AM. LAW INST. 1959), a settlor now has standing to maintain an action to enforce a charitable trust, but failing to explain why such a change to the common law was made).

11 *See infra* Section II.B.

12 *See infra* Section II.A–B.

13 *See infra* Part III.

may award when a trustee breaches his duty of loyalty.[14] At least one court has interpreted this section as limiting courts' ability to fashion equitable remedies.[15] Part II also looks at the UTC's treatment of the duty of loyalty, and explains how section 802(c) and (f) work together to dramatically diminish institutional trustees' duty. Part III discusses the second change regarding creditors' rights to attach trust assets, which occurs in section 504. This section materially undermines creditors' ability to attach the beneficiary's interest in support trusts.[16] Both Parts II and III additionally consider why the drafters might have made the respective changes. Finally, in Part IV, this Note analyzes whether the changes are well founded, and concludes by proposing modifications to those sections.

I. BACKGROUND

A. *Trust Law in the United States Before the Uniform Trust Code*

Trust law has been governed by the common law since the enforcement of trusts in the English Court of Chancery in the fourteenth century.[17] This common law tradition continued, was adopted in the United States, and was eventually laid out by the American Law Institute in various volumes of the Restatement of Trusts.[18] For over 200 years in the United States, the common law, as collected in the Restatements, governed how trusts were formed, managed, and enforced.[19]

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14 STEWART E. STERK ET AL., ESTATES AND TRUSTS 1041 (4th ed. 2011) ("The duty of loyalty requires the fiduciary to act only for the benefit of the trust beneficiaries. The fiduciary may not deal with the property so as to personally benefit directly or indirectly.").

15 *See infra* Section II.A–B.

16 UNIF. TRUST CODE § 504(b) (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2010).

17 Langbein, *supra* note 8, at 1071. There is some evidence that trust law enforcement might have been occurring even earlier in England under the direction of the English Church. *Id.*

18 RESTATEMENT (THIRD) OF TRUSTS (AM. LAW INST. 2003); RESTATEMENT (SECOND) OF TRUSTS (AM. LAW INST. 1959); RESTATEMENT (FIRST) OF TRUSTS (AM. LAW INST. 1935). *See generally* Meg Kribble, *Intro to Restatements*, HARV. L. SCH. LIBRARY, http://guides.library.harvard.edu/content.php?pid=103327&sid=1036651 (last updated Mar. 15, 2016, 12:44 PM) ("Restatements are highly regarded distillations of common law. They are prepared by the American Law Institute (ALI), a prestigious organization comprising judges, professors, and lawyers. The ALI's aim is to distill the 'black letter law' from cases to indicate trends in common law, and occasionally to recommend what a rule of law should be. In essence, they restate existing common law into a serious of principles or rules.").

19 Langbein, *supra* note 8, at 1081 ("The Restatement supplied a comprehensive and authoritative formulation of trust law doctrine, expressing the main ('black letter') provisions in statute-like voice.").

However, beginning in the twentieth century, some scholars, legislators, and attorneys, began to believe that certain aspects of trust law should be codified.[20] There were various reasons for this shift in paradigm. Today, it is believed that one reason for this desire to codify some aspects of trust law was that wealth held in trusts had changed dramatically from when trusts were originally established in the fourteenth century.[21] Instead of exclusively being used to transfer personal property to successive generations, trusts started to be used to transfer money and other securities.[22] This was due to the fact that there was a movement away from the ownership of familial real property as the predominant form of wealth, and towards holding wealth in the form of various financial assets.[23] Since trustees now had the responsibilities of managing more than just a stagnant piece of land, statutory laws of trust management needed to be expanded.[24]

Other reasons why practitioners early in the twentieth century favored statutory trust law are similar to reasons why statutory trust law is desirable today. First, with the greater use of trusts, statutory guides were thought to be necessary to help answer questions that frequently arise.[25] Practitioners wanted statutes that would conveniently deal with practical problems that surface in ordinary trust dealings, as opposed to theory-heavy, multi-volume treatises that did not provide much guidance.[26] Second, in many United States jurisdictions, the common law of trusts was, and today still is, sparse.[27] Therefore, having statutory law in these states would guide courts and practitioners who are unfamiliar with trust law—on all relevant issues where gaps in the law exist.[28]

In the twentieth century, many uniform statutes were created to deal with aspects of trust administration.[29] Some of these uniform acts

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20 *See id.* at 1071 (discussing the trend in the twentieth century to move trust law from a common law discipline to one governed by statutes).

21 *Id.* at 1072–73.

22 *Id.* at 1072 ("What is new is that the characteristic trust asset has ceased to be ancestral land and has become instead a portfolio of marketable securities.").

23 *Id.*

24 *Id.* at 1072–73.

25 UNIF. TRUST CODE prefatory note (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2010).

26 English, *supra* note 2, at 144.

27 John Spencer Treu, *The Mandatory Disclosure Provisions of the Uniform Trust Code: Still Boldly Going Where No Jurisdiction Will Follow—A Practical Tax-Based Solution*, 82 MISS. L.J. 597, 600 (2013).

28 *See id.* at 602.

29 *See, e.g.*, UNIF. PROB. CODE (UNIF. LAW COMM'N 2010); UNIF. TRUSTS ACT OF 1937 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2006); UNIF. PRINCIPAL & INCOME ACT (UNIF. LAW COMM'N 1997); UNIF. PRUDENT INV'R ACT (UNIF. LAW COMM'N 1994); UNIF. TESTAMENTARY ADDITIONS TO TR. ACT (UNIF. LAW COMM'N 1991); UNIF. STATUTORY RULE

have been very successful, as they have been adopted by many states and are still in use today.[30] However, others have been much less successful, and have faded into the background of trust law.[31]

While the drafting of the UTC has not affected most of the previous uniform trust laws, four acts have since been incorporated or superseded by the UTC.[32] These are: Article VII of the Uniform Probate Code, the Uniform Prudent Investor Act of 1994, the Uniform Trustee Powers Act of 1964, and the Uniform Trusts Act of 1937.[33] Accordingly, states that have enacted any of those four acts, and have now chosen to adopt the UTC, must repeal those previous statutes.[34]

The first uniform act that the UTC has incorporated, and thus superseded, is Article VII of the Uniform Probate Code.[35] The Uniform Probate Code, as a whole, was first approved in 1969 and has since been adopted by eighteen jurisdictions officially;[36] it is influential in all fifty states.[37] Article VII addresses a limited number of trust topics; the UTC drafters have incorporated most of these topics into UTC Article 2.[38] The second uniform act incorporated into the UTC is the Uniform Prudent Investor Act of 1994.[39] This Act has been uniformly enacted in

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AGAINST PERPETUITIES (UNIF. LAW COMM'N 1990); UNIF. CUSTODIAL TR. ACT (UNIF. LAW COMM'N 1987); UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT (UNIF. LAW COMM'N 1972); UNIF. COMMON TR. FUND ACT (1938) (UNIF. LAW COMM'N, amended 1952).

30 *See, e.g.*, UNIF. PRUDENT INV'R ACT (UNIF. LAW COMM'N 1994). This uniform law has been enacted in forty-three jurisdictions in the United States. *Legislative Fact Sheet—Prudent Investor Act*, UNIFORM L. COMM'N (2016), http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Prudent%20Investor%20Act (jurisdictions include Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, District of Columbia, Hawaii, Idaho, Indiana, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, U.S. Virgin Islands, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming).

31 *See, e.g.*, UNIF. TRUSTS ACT OF 1937 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2006). This uniform law has only been enacted in six states, and none within the last several decades. UNIF. TRUST CODE prefatory note (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2010).

32 *See* UNIF. TRUST CODE prefatory note.

33 *Id.*

34 *See id.*

35 *See id.*

36 *Legislative Fact Sheet—Probate Code*, UNIFORM L. COMM'N (2016), http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Probate%20Code (jurisdictions include Alaska, Arizona, Colorado, Hawaii, Idaho, Maine, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Jersey, New Mexico, North Dakota, South Carolina, South Dakota, U.S. Virgin Islands, and Utah).

37 *See* UNIF. TRUST CODE prefatory note.

38 *Id.* However, Article VII's provisions on trust registration have not been incorporated into the UTC. *Id.*

39 *Id.*

over forty-three jurisdictions,[40] and has been adopted in various nonuniform ways in almost all the other states.[41] It provides a default standard of care for trustees in their duties in investing and managing trust assets.[42] Article 9 in the UTC has replaced this Act, and the UTC drafters have asked that all adopting states recodify their existing laws.[43] The third uniform act superseded by the UTC is the Uniform Trustee Powers Act of 1964.[44] This Act has been enacted in sixteen states, and contains a list of powers trustees hold in their managerial capacity when dealing with parties other than the beneficiaries.[45] The powers listed in this Act have been incorporated into sections 815, 816, and 1012 of the UTC.[46] Finally, the fourth uniform act that the UTC has incorporated and superseded is the Uniform Trusts Act of 1937.[47] This Act was only adopted by a small number of states, and covers a limited number of topics, including the purchase and sale of securities for the trust, as well as trustees' potential liabilities to these third parties.[48] With enough success demonstrated by these trust statutes, some scholars believed the time was ripe to create a statute that encompassed all aspects of trust law.[49]

B. *The Uniform Trust Code*

The NCCUSL—also known as the Uniform Law Commission (ULC)—creates all the Uniform Acts, including the UTC.[50] This organization was established in 1892 and its purpose is to provide the states with model statutes in important areas of statutory law in order to maintain a degree of uniformity.[51] All the members of the NCCUSL are

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40 *See supra* note 30 and accompanying text.

41 English, *supra* note 2, at 145.

42 *See* UNIF. TRUST CODE prefatory note; *see also* Langbein, *supra* note 8, at 1070–71.

43 *See* UNIF. TRUST CODE prefatory note.

44 *Id.*

45 *Id.*; *see also* Langbein, *supra* note 8, at 1070 (explaining that these powers include "buying, selling, voting, and otherwise dealing with securities").

46 UNIF. TRUST CODE prefatory note.

47 *Id.*

48 Langbein, *supra* note 8, at 1070.

49 *See id.* at 1082 ("Legislation was essential, both to overcome the older regime of trust law that hampered trustees' ability to transact with trust property, and to set default standards of prudence in administering the management trust.").

50 *About the ULC*, UNIF. L. COMM'N, http://www.uniformlaws.org/Narrative.aspx?title=About%20the%20ULC (last visited Mar. 18, 2016).

51 *Id.*; *see also* WORTHINGTON, *supra* note 3, at 1 ("The [NCCUSL] . . . has had a long history of success in drafting proposed state laws that either make more uniform the various states' approaches, or forge new ground in an effort to liberalize commerce and promote the smooth administration of law."). Examples of these proposed state laws, which have been

lawyers with varying occupations, including practitioners, judges, and law professors.[52] The members are appointed to the NCCUSL by the state governments and the governments of the District of Columbia, Puerto Rico, and the U.S. Virgin Islands.[53] Some of the enumerated goals of the NCCUSL include providing rules that are consistent from state to state, keeping state laws current by addressing practical legal issues, as well as drafting these laws by utilizing the knowledge of the commissioners, outside legal experts, and interest groups.[54]

The NCCUSL published the first draft of the UTC in 2000; it was the product of a seven-year drafting process by the commissioners.[55] In February 2001, the American Bar Association's House of Delegates added additional comments, and the final edition was approved in 2001.[56] The NCCUSL stated that the goal of the Code was to provide states with a precise, uniform body of trust law that largely codified the common law, while also striving to advance United States trust law with innovative provisions.[57]

The initial drafting process began in 1993, when NCCUSL appointed a study committee chaired by Maurice Hartnett, a justice on the Delaware Supreme Court with a great deal of experience deciding trust cases.[58] The job of the committee was to decide whether a uniform code of trust law would be of value to the American states.[59] The study committee concluded that it would be of significant benefit; a drafting committee was then appointed, which was again chaired by Justice Hartnett.[60] The actual drafting of the UTC purposefully spanned a six-year period in order for the drafters to gain as much information as possible to compile this code.[61] Reputable legal groups—including the American Bar Association and its Section on Real Property, Probate, and Trust Law; the American College of Trust and Estate Counsel; the American Bankers Association; and the California and Colorado State

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successful and widely used, are the Uniform Commercial Code, the Uniform Transfers to Minors Act, and Uniform Acts regarding partnerships and limited liability companies. *Id.*

52 *About the ULC*, *supra* note 50.

53 *Id.* (explaining that the NCCUSL provides services for the states that could not afford or duplicate themselves).

54 *Id.*

55 Langbein, *supra* note 8, at 1069.

56 English, *supra* note 2, at 144.

57 UNIF. TRUST CODE prefatory note (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2010).

58 English, *supra* note 2, at 145.

59 *Id.*

60 *Id.*

61 *Id.*

Bars—were represented in the drafting process, as these groups twice sent advisors to annual drafting meetings.[62]

For a majority of the UTC, the drafters structured the Code as a series of default rules to be applied to a trust only in the absence of express language in the trust instrument itself about particular issues.[63] This is how the law of trusts in the United States has worked for many years: because modern trusts are based on contractual relationships, most of the rules for administering trusts are default rules that can be waived in the trust instrument through explicit wording to the contrary.[64] However, for the first time, the drafters of the UTC also laid down some specific rules that are mandatory for every trust in a section of the Code.[65]

C. *The Structure of the UTC*

As of 2016, the UTC has been enacted in thirty-one states and the District of Columbia, and it has received praise from many sources.[66] Some find it beneficial that the UTC has codified a very current version of trust law—unlike previous statutes—and that the commissioners will continue to update the Code throughout the years.[67] Others have praised the substantial comments provided for each section, which help to clarify the law for judges as well as practitioners who are unfamiliar with the complexities of trust law.[68]

However, there are also various criticisms of the UTC, especially for the innovative provisions it sets forth and the relatively poorly drafted comments explaining those changes.[69] Some of its harshest

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62 *Id.*

63 UNIF. TRUST CODE prefatory note (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2010).

64 *See, e.g.*, Henry Hansmann & Ugo Mattei, *Trust Law in the United States. A Basic Study of Its Special Contribution*, 46 AM. J. COMP. L. 133, 135 (1998); John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE. L.J. 625, 627 (1995) ("Either way, the deal between settlor and trustee is functionally indistinguishable from the modern third-party-beneficiary contract. Trusts are contracts.").

65 UNIF. TRUST CODE prefatory note; *id.* § 105(b).

66 *See supra* note 4 and accompanying text.

67 E. Edwin Eck, *BETTR Section Committee to Recommend Modified Version of Uniform Trust Code*, MONT. LAW., Nov. 2012, at 18 (noting that adopting a current, uniform body of law that is regularly updated means courts will be able to use case law from other jurisdictions that have also adopted the UTC). However, this is not necessarily accurate because not every state has adopted every provision of the UTC in full or at all. *See* WORTHINGTON, *supra* note 3, at 2 (indicating the different ways states have enacted sections 503 and 504, if state legislatures have chosen to enact those sections at all).

68 *See* sources cited *supra* note 67 and accompanying text.

69 *See, e.g.*, UNIF. TRUST CODE § 405 cmt. (commenting that contrary to the Restatement (Second) of Trusts § 391 (AM. LAW INST. 1959), a settlor now has standing to maintain an

critics claim that the UTC is a radical departure from the common law; they go as far as to say that following the Code's provisions severely reduces asset protection.[70] Other critics have argued that it is not the innovative provisions that are problematic, but rather, the fact that some states themselves have changed or excluded UTC provisions that embedded firmly established common law tradition dating back hundreds of years, therefore making the Code not truly uniform.[71]

The remainder of this Note will discuss the changes that three sections of the UTC have made to the common law, why the UTC drafting committee decided to put these new provisions into the Code, and whether these changes improve trust law. Based on that discussion, this Note will conclude that at least one of the primary reasons for these changes was to benefit the powerful institutional trust industry.

II. UTC Sections 1002 and 802: Damages for Breach of Trust and the Duty of Loyalty

A. *Background on the Common Law and the Changes the UTC Has Made in Sections 802(c) and (f)*

The first substantive change to the common law made by the UTC drafters occurs in Article 8, section 802, which deals with the "no further inquiry" rule. The no further inquiry principle is a centuries-old common law duty that prohibits a trustee from breaching the duty of loyalty owed to the beneficiaries by engaging in any self-dealing activities—activities that create a conflict of interest between the trustee's fiduciary duties and his personal desires.[72] Under the no

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action to enforce a charitable trust, but failing to explain why such a change to the common law was made).

70 Mark Merric & Steven J. Oshins, *How Will Asset Protection of Spendthrift Trusts Be Affected by the UTC?*, 31 EST. PLAN. 478, 487 (2004) (noting that "[b]oth the UTC and the Restatement Third seem to have gone to great lengths to significantly reduce the asset protection provided" by the common law); *see also* Melanie B. Leslie, *In Defense of the No Further Inquiry Rule: A Response to Professor John Langbein*, 47 WM. & MARY L. REV. 541, 543–44 (2005) ("Two such provisions, taken together, effectively release institutional trustees from the constraints of the no further inquiry rule for many, if not most, of the conflicted transactions in which they might engage, and allow trustees to rebut a charge of self-dealing with proof that the transaction was fair to the trust. This is a radical change in trust law . . . ." (footnotes omitted)).

71 Kevin D. Millard, *The Trustee's Duty to Inform and Report Under the Uniform Trust Code*, 40 REAL PROP. PROB. & TR. J. 373, 401 (2005).

72 RESTATEMENT (THIRD) OF TRUSTS § 78 (AM. LAW INST. 2007). The only ways for a trustee to use the trust property to enter into transactions in which he has a conflict of interest are: by obtaining permission from a court, from all of the beneficiaries, or that the transaction is permitted expressly or impliedly by the terms of the trust. *See id.* § 78 general cmt. a.

further inquiry rule, when a trustee engages in self-dealing behavior, he immediately breaches his duty of loyalty, regardless of whether the self-dealing actions were fair to the beneficiaries or whether the trustee made a personal profit; he is per se liable for the breach.[73]

When a trustee engages in self-dealing actions, the beneficiaries have a variety of available remedies, including: a right to rescind the transaction; recovery of damages; various forms of equitable relief such as trustee removal; and finally, disgorgement of profits earned by the trustee.[74] One purpose of this "unusually generous selection of remedies" for a breach of the duty of loyalty is to "increase the likelihood . . . that the trustee will choose to advance the beneficiaries' best interests."[75]

For over 200 years under the common law, cases have allowed beneficiaries to acquire disgorgement of profits as at least one form of remedy for a trustee's breach of the duty of loyalty.[76] *In re Paxson Trust I*[77] is a recent case that shows this common law principle. In *Paxson Trust*, a husband and wife were trustees and life beneficiaries of a trust,[78] while their children were the remainder beneficiaries.[79] The husband and wife repeatedly breached their duty of loyalty to the beneficiary children, using the trust property as collateral for multiple loans and mortgages they individually obtained.[80] When the Paxson children sued their parents for breach of the duty of loyalty, the parent trustees claimed there was no liability, because they had not damaged the value of the trust estate.[81] However, the appellate court held that the trustees were still required to disgorge all profits to the beneficiaries that were accumulated in the resale of the properties which the trustees had taken

73 *Id.* § 78 cmt. b.; Leslie, *supra* note 70, at 545.

74 *See* John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 YALE L.J. 929, 932 (2005).

75 3 AUSTIN WAKEMAN SCOTT ET AL., SCOTT AND ASCHER ON TRUSTS § 17.2 (5th ed. 2007); *see also* RESTATEMENT (THIRD) OF TRUSTS § 100 cmt. c. (AM. LAW INST. 2012); AMY MORRIS HESS & GEORGE G. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 816 (rev. 2d and 3d ed. 2011).

76 *See generally* Uzyel v. Kadisha, 116 Cal. Rptr. 3d 244, 276–77 (Ct. App. 2010); Coster v. Crookham, 468 N.W.2d 802, 807 (Iowa 1991); Berish v. Bornstein, 770 N.E.2d 961, 978 (Mass. 2002); Davoue v. Fanning, 2 Johns. Ch. 252, 265 (N.Y. Ch. 1816).

77 893 A.2d 99 (Pa. Super. Ct. 2006).

78 *Life Beneficiary*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining a life beneficiary of a trust as "[s]omeone who receives payments or other benefits from a trust for life, but who does not own the trust property").

79 *Paxson Trust*, 893 A.2d at 104. *See generally* Philip J. Ruce, *The Trustee and the Remainderman: The Trustee's Duty to Inform*, 46 REAL PROP. TR. & EST. L.J. 173, 176 n.11 (2011) (defining a remainder beneficiary to include either a vested remainder beneficiary—someone who will receive a benefit from a trust in the future, or a contingent remainder beneficiary—someone who can receive a benefit but whose interest can be terminated).

80 *Paxson Trust*, 893 A.2d at 105–07.

81 *Id.* at 112, 126.

loans for, even though no injury to the actual trust property occurred.[82] Since self-dealing occurred here, there was per se liability—strict liability—for the trustees.[83]

Section 802 of the UTC largely exempts institutional trustees from the no further inquiry rule.[84] Section 802(c) basically eliminates the no further inquiry rule in many situations—by making it a voidable presumption that a conflict of interest exists between a trustee and a person, corporation, or enterprise in which the trustee has an interest that might affect the trustee's judgment—instead of strictly voiding the transaction as under the common law.[85] This presumption is rebuttable on a showing that the transaction was fair to the trust and otherwise complied with the Prudent Investor Rule.[86] Therefore, as long as a trustee *believes* a self-dealing transaction is fair to the trust, he can engage in that transaction without informing the beneficiary or getting court permission (unlike what he is required to do under the common law no further inquiry rule).[87] Accordingly, the beneficiary must first detect the self-dealing himself, and then decide whether the transaction was actually fair.[88]

Section 802(f) also completely removes the presumption of the no further inquiry rule if a trustee invests trust assets in an investment vehicle for which the trustee or its affiliate institution provides services or has an interest, so long as the trustee complies with the Prudent

82 *Id.* at 122 ("Paxson makes much of his claim that the Trust sustained no loss as a result of the trustees repeatedly using it as collateral for the loans in question. That the Paxson's actions did not result in a decrease in the Trust's value in the end, however, does not relieve the necessity of a surcharge. A loss can be other than a reduction in value.").

83 *Id.* at 120–21 ("It is clear from the record that the Paxsons, in their capacity as trustees, profited from their unauthorized use of trust property, all the while exposing the Trust to the possibility of foreclosure.").

84 Leslie, *supra* note 70, at 543, 569.

85 *Id.* at 579–80; *see also* UNIF. TRUST CODE § 802(c) (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2010) ("A sale, encumbrance, or other transaction involving the investment or management of trust property is *presumed* to be affected by a conflict between personal and fiduciary interests if it is entered into by the trustee with: (1) the trustee's spouse; (2) the trustee's descendants, siblings, parents, or their spouses; (3) an agent or attorney of the trustee; or (4) a corporation or other person or enterprise in which the trustee, or a person that owns a significant interest in the trustee, has an interest that might affect the trustee's best judgment." (emphasis added)); *id.* § 802 cmt. (explaining that the transaction is presumptively voidable instead of void).

86 Leslie, *supra* note 70, at 543. In trust law, the Prudent Investor Rule means "[t]he trustee has a duty to the beneficiaries to invest and manage the funds of the trust as a prudent investor would, in light of the purposes, terms, distribution requirements, and other circumstances of the trust." RESTATEMENT (THIRD) OF TRUSTS § 90 (AM. LAW INST. 2007).

87 *See supra* note 72 and accompanying text.

88 *See infra* notes 115–16 and accompanying text (explaining why beneficiaries are uniquely poor monitors of their trustees).

Investor Rule.[89] Although this section does not codify the common law, the UTC drafters did not create this discrepancy. The vast majority of state legislatures have passed laws, which provide that trustee investment in vehicles owned by the trustee's institution or a related company is not a breach of the duty of loyalty, even though the trustee's company collects commissions and fees in its capacity as an investment bank.[90]

B. *Background on the Common Law and the Changes the UTC Has Made in Section 1002*

The next related substantive change to the common law made by the UTC drafters occurs in Article 10, section 1002, and deals with the damages available to beneficiaries when a breach of trust—specifically a breach of the duty of loyalty—occurs.[91] Under the common law, a trustee who commits a breach of trust is liable for any profit accruing to the trust through a breach, or for the amount required to bring the trust back to its previous value before the trustee's mismanagement.[92] However, in addition to that remedy, the trustee is also liable for any remedy that would prevent him from personally benefitting from the breach of his duty.[93] Whenever a breach of the duty of loyalty occurs, this rule for liability is in effect, even if the profit the trustee has accrued did not come at the expense of the estate itself.[94]

The rules the UTC drafters laid out in sections 1002 and 802 have made courts and practitioners call into question these long-standing common law rules.[95] Section 1002 restates the common law: that any trustee committing a breach of trust is liable for either the amount required to restore the trust to the value it would have had the breach not occurred, or the profit made by the trustee from the breach.[96]

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89 UNIF. TRUST CODE § 802(f) ("An investment by a trustee in securities of an investment company or investment trust to which the trustee, or its affiliate, provides services in a capacity other than as trustee is not presumed to be affected by a conflict between personal and fiduciary interests if the investment otherwise complies with the prudent investor rule of [Article] 9." (alteration in original)); Leslie, *supra* note 70, at 543 n.5.

90 Leslie, *supra* note 70, at 576.

91 UNIF. TRUST CODE § 1002(a).

92 RESTATEMENT (THIRD) OF TRUSTS: PRUDENT INVESTOR RULE app. § 205 (AM. LAW INST. 1992).

93 *Id.*

94 4 SCOTT ET AL., *supra* note 75, § 24.9.

95 Miller v. Bank of Am., N.A., 326 P.3d 20 (N.M. Ct. App. 2013), *rev'd*, 352 P.3d 1162 (N.M. 2015). *See generally* UNIF. TRUST CODE §§ 802, 1002.

96 UNIF. TRUST CODE § 1002(a).

However, unlike the common law as structured in section 205[97] of the Restatement (Third) of Trusts, the UTC contains no language to suggest that regardless of the remedies chosen, the trustee is prohibited from benefitting personally from the breach.[98] The UTC was drafted in close conjuncture with the most recent version of the Restatement (Third) of Trusts,[99] which also leaves out any language that would suggest this common law principle.[100] This version of the Restatement (Third) of Trusts seems to explicitly reject the idea that a beneficiary can recover both the damages to restore the trust to its value had the breach not occurred, as well as the profits accumulated by the trustee as a result of the breach.[101] The comment to section 1002 in the UTC creates ambiguity as to whether the drafters meant to follow the Restatement (Third) of Trusts section 100 or section 205.[102]

The confusing nature of sections 802(c), 802(f), 1002, and their comments led the Court of Appeals of New Mexico, a jurisdiction where the UTC has been adopted, to rule that disgorgement of the profits made by the trustee from a breach of the duty of loyalty was not an appropriate remedy.[103] In *Miller v. Bank of America, N.A.*, the bank trustee breached both its duty of care and its duty of loyalty in the management of the Miller Trusts.[104] The appellate court approved an

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97 RESTATEMENT (THIRD) OF TRUSTS: PRUDENT INVESTOR RULE app. § 205 ("A trustee who commits a breach of trust is (a) accountable for any profit accruing to the trust through the breach of trust; or (b) chargeable with the amount required to restore the values of the trust estate and trust distributions to what they would have been if the trust had been properly administered. In addition, the trustee is subject to such liability as necessary to prevent the trustee from benefiting personally from the breach of trust.").

98 UNIF. TRUST CODE § 1002(a) ("A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of: (1) the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or (2) the profit the trustee made by reason of the breach.").

99 English, *supra* note 2, at 147–48.

100 RESTATEMENT (THIRD) OF TRUSTS § 100 (AM. LAW INST. 2012) ("A trustee who commits a breach of trust is chargeable with (a) the amount required to restore the values of the trust estate and trust distributions to what they would have been if the portion of the trust affected by the breach had been properly administered; or (b) the amount of any benefit to the trustee personally as a result of the breach.").

101 *Id.* cmt. c ("Unless . . . they achieve a greater recovery [by restoring the trust to what it would have been had the breach not occurred], the trustee's improper benefit is eliminated . . . .").

102 Although the drafters used the language of Restatement (Third) of Trusts section 100 in the actual text of UTC section 1002, the comment nonetheless states "[s]ubsection (a) is based on [the] Restatement (Third) of Trusts: Prudent Investor Rule § 205 (1992)." UNIF. TRUST CODE § 1002 cmt.

103 Miller v. Bank of Am., N.A., 326 P.3d 20, 32 (N.M. Ct. App. 2013), *rev'd*, 352 P.3d 1162 (N.M. 2015).

104 The trustee breached his duty of care by mismanaging the trust property "by (1) investing in unproductive property, (2) failing to administer the trust prudently, (3) failing to

award of compensatory damages for both breaches, totaling $894,000, in order to restore the value of the trusts to what they would have been worth had the breaches and mismanagement not occurred.[105] However, the court would not approve an additional award of $540,000 as a disgorgement of profits for the trustee's self-dealing behavior.[106] The court found that disgorgement was not the proper remedy here; it would amount to a double recovery, since section 1002 states that an award should be the greater of *either* the amount needed to restore the value of the trust property to what it had been before the breach, *or* the disgorgement of profits.[107] While this decision appears to be in line with the text of section 1002, it is not consistent with the common law, as the bank here is allowed to profit from its self-dealing transaction.[108]

On June 15, 2015, the Supreme Court of New Mexico delivered a ruling on the issue of whether disgorgement of profits is an appropriate remedy under the New Mexico version of the UTC.[109] The New Mexico Supreme Court reversed the Court of Appeals, stating that both compensatory damages and disgorgement of a trustee's profits can be awarded to beneficiaries—to fully compensate them and to remove all profits from the self-dealing.[110] However, the court also stated the trustee only has to disgorge profits and interest gained in the self-dealing that were not included in the original compensatory damages

preserve principal, and (4) failing to produce income." *Id.* at 24. The trustee then breached his duty of loyalty by taking out loans for the trust assets from an affiliate entity. *See id.* at 23.

105 *Id.* at 32.

106 *Id.*

107 *Id.*

> Plaintiffs are entitled to be fully compensated, but there can only be one recovery. The district court's initial award set forth in the decision letter, as now reinstated by this Court, made Beneficiaries whole and effectively included the $540,000 Beneficiaries also claimed for disgorgement damages. Equity will not allow an award beyond the amount required to make Beneficiaries whole.

Id. at 33.

108 Brief for Trust Law Professors as Amici Curiae Supporting Petitioners at 22, *Miller*, 352 P.3d 1162 (No. 34,554) (on file with author) (explaining that the bank was allowed to profit here, because if the bank trustee had not breached the duty of loyalty and had taken a loan from a nonaffiliated bank, it would have lost more money on the transaction than it did in this case where it obtained the loan from an affiliated entity). The amici curiae also advance the theory that the beneficiaries should be able to recover, because there were two separate breaches. *See id.* When a breach of the duty of loyalty occurs, the no further inquiry rule comes into effect. *Id.* at 9. Disgorgement of profits is appropriate and in line with the no further inquiry rule, as it provides the highest level of deterrence against self-dealing trustees. *Id.* at 13, 24.

109 *Miller*, 352 P.3d at 1164.

110 *Id.* at 1168–69 ("Loss to Beneficiaries and profit by the Bank are distinct harms that traditionally give rise to different types of damages: restoration and disgorgement. Each has its own remedial purpose, and both may be awarded if necessary to satisfy each purpose fully by compensating the trust and removing all profit from the Bank's self-dealing.").

amount.[111] This disregards profits that were made by the trustee for breaching both the duty of loyalty and the duty of care, instead of just the duty of care, and thus does not effectuate the common law goal of the no further inquiry rule.[112] The rulings by these two different courts in the state of New Mexico serve as examples of potential conclusions that courts in other states that have adopted the UTC may reach, which would deviate from the former common law.

C. *An Analysis of How the Change Benefits Institutional Trustees at the Expense of Public Policy*

One possible way to attempt to deduce the motivations of the drafters in departing from the common law is to analyze what groups are benefitted or harmed by each provision. With regards to section 1002, taking away potential remedies in the event of a breach of trust materially hurts both settlors[113] and beneficiaries. The common law rules—one, making sure that regardless of the remedy chosen, the trustee is not allowed to profit from a breach, and two, the no further inquiry rule itself—both serve very important purposes in trust relationships for settlors and their beneficiaries. By requiring disgorgement of profits, regardless of the remedy chosen by the beneficiaries, trustees are aware that self-dealing behavior will never be profitable. This strongly deters trustees from engaging in self-dealing behavior that could hurt the beneficiary's interests.[114] It is important to have this strong deterrent against self-dealing behavior inherently in effect in the common law, because beneficiaries are often ineffective at, or incapable of, monitoring the trustee for this type of self-dealing behavior themselves.[115] Even if a beneficiary could detect self-dealing,

111 *Id.* at 1170.

112 *See supra* note 108 and accompanying text; *see also infra* notes 114–15 and accompanying text.

113 *See Settlor*, LEGAL INFO. INST., http://www.law.cornell.edu/wex/settlor (last visited Feb. 19, 2016) ("The settlor is the party that creates a trust . . . . The settlor transfers legal title in some asset to the trustee. The settlor then provides in the trust instrument how that trust property is to be used for the beneficiaries.").

114 *See* RESTATEMENT (THIRD) OF TRUSTS § 78 cmt. b (AM. LAW INST. 2007) ("[T]he policy of the trust law is to prefer (as a matter of default law) to remove altogether the occasions of temptation rather than to monitor fiduciary behavior and attempt to uncover and punish abuses when a trustee has actually succumbed to temptation.").

115 Melanie B. Leslie, *Trusting Trustees: Fiduciary Duties and the Limits of Default Rules*, 94 GEO. L.J. 67, 82–83 (2005) (explaining that there are no information markets where beneficiaries and future settlors can inquire into whether trustees engage in opportunistic behavior, or to communicate with other clients regarding whether self-dealing has happened); Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 680 (2004) ("[B]eneficiaries are often unsuited to monitor the trustee, perhaps because they are unborn,

the beneficiary may have trouble determining whether the transaction advances his best interests.[116] Courts may even have a difficult time, after the self-dealing has occurred, assessing whether the beneficiary's interests were harmed.[117] Therefore, by removing these remedies, beneficiaries and the settlors who wish to provide for the beneficiaries are left with less effective mechanisms to ensure that the trustees behave as they should, and more of a probability that they will not be fairly compensated in the event of a breach.

In contrast, it is clear that trustees, particularly institutional trustees, greatly benefit from this change in the law.[118] As currently written, the statute states that trustees who are found liable for a breach of trust only have to pay either the amount required to restore the value of the trust property to that prior to the breach, or profits that the trustee made—regardless of whether all damages or profits are recouped for the beneficiary this way.[119] This also effectively eliminates the no further inquiry rule when there are allegations of a breach of the duty of care and a breach of the duty of loyalty, like in *Miller*.[120] Some scholars have argued that the no further inquiry rule should be abandoned and replaced with a "best interest" rule when considering the duty of loyalty.[121] However, even scholars who advocated for the "best interest" rule still believe normal damages previously allowed under the common

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incapacitated, or simply irresponsible."). This is a particular problem in trust arrangements, because trustees operate in relative privacy, unlike corporate fiduciaries, and therefore may be tempted to engage in self-dealing transactions. *See* Leslie, *supra* note 70, at 561.

116 *See* RESTATEMENT (THIRD) OF TRUSTS § 78 cmt. b.

117 HESS & BOGERT, *supra* note 75, § 543.

118 Institutional trustees are referenced in particular here because there has been a "trend across the twentieth century to locate trusteeship services within large organizations that provide a variety of other financial services, such as banking, brokerage, investment advising, and the sponsoring or servicing of mutual funds." Langbein, *supra* note 74, at 968. "Integration and consolidation of such services for trust accounts can result in economies of scale and other synergies . . . but there is also a dimension of self-interest on the part of the providers of these financial services." *Id.*

119 UNIF. TRUST CODE § 1002(a) (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2010); *see also* Miller v. Bank of Am., N.A., 326 P.3d 20, 33 (N.M. Ct. App. 2013) (holding that because the $849,000 award for compensatory damages was greater than the $540,000 disgorgement of profits damages, the beneficiaries were only entitled to the $849,000 award), *rev'd*, 352 P.3d 1162 (N.M. 2015).

120 *See supra* notes 103–08.

121 Langbein, *supra* note 74, at 988 (stating that there should be a "best interest" rule, where a trustee should be able to defend a particular conflict of interest if it were "prudently undertaken in the best interest of the beneficiaries"). The "best interest" rule conflicts with the traditional "sole interest" rule in trust law, often regarded as the "most fundamental duty of a trustee," which states that a trustee must act in the sole interest of the beneficiary without regard for the trustee's own interest or those of third parties. *See* HESS & BOGERT, *supra* note 75, § 543. The "best interest" rule is what seems to be required in certain circumstances, for example, under UTC section 802(c)(4) and UTC section 802(f). *See supra* notes 72, 84–89, 115–16 and accompanying text.

law should be available when a breach of the duty of loyalty does actually occur.[122]

Despite arguments favoring a "best interest" rule, promulgated by UTC sections 802(c) and (f), as most ideal for both institutional trustees and beneficiaries,[123] it is clear the only group benefitting from this change is institutional trustees.[124] The provisions in sections 802(c) and (f) weaken the duty of loyalty and hurt settlors by forcing them to bargain for the protections of the no further inquiry rule, which the common law had previously included with the creation of a trust. Many settlors may be unaware of these protections that might be in their best interests.[125] Also, as previously mentioned, eliminating the no further inquiry rule in certain situations can negatively impact beneficiaries.[126] In contrast, institutional trustees will consistently benefit from this change: by profiting under section 802(c)[127] from a variety of transactions that are not allowed under the common law, and earning double commissions under section 802(f).[128]

There are also policy reasons that both support and oppose the change to the common law. One argument in support of this change is that allowing beneficiaries to get multiple types of remedies would amount to an impermissible double recovery, thereby exceeding what is

122 *See* Langbein, *supra* note 74, at 988 ("The question raised in this Article is not whether to retain the duty of loyalty but how best to formulate it.").

123 *See id.*, at 982 ("By comparison with the sole interest rule, a best interest rule would more accurately identify the policy that the sole interest rule has been meant to serve. The better focused a rule is on its true purpose, the greater the likelihood that those who work with the rule [i.e., trustees] . . . will apply the rule in a fashion that carries out the purpose.").

124 Leslie, *supra* note 115, at 118 ("If adopted, this change [i.e., UTC section 802(c)(4)] will free institutional trustees from the constraints of the no-further-inquiry rule and allow them to profit from a wide variety of formerly prohibited transactions as long as trustees can argue that 'the transaction was not affected by a conflict between personal and fiduciary interests.'" (quoting UNIF. TRUST CODE § 802 cmt.)).

125 *Id.*; *see also supra* notes 115–17 and accompanying text (explaining why settlors, like beneficiaries, might be unaware that requesting the no further inquiry rule could be in their best interest).

126 *See supra* notes 115–17 and accompanying text.

127 *See supra* note 124.

128 Leslie, *supra* note 70, at 569 ("These statutes enable institutional trustees to earn additional fees, and create an incentive for trustees to invest in assets that earn them an additional [income]."). Double recovery is due to the fact that the trustee is earning commissions from his management of the trust, while also earning commissions from gaining an investor for the investment vehicle of the institution that he also works for. *See also id.* at 577–78 ("Although the statute requires the trustee to issue an annual report that includes 'the rate and method by which . . . compensation was determined,' many beneficiaries will be unable to understand whether the trustee's proprietary funds are the best choice. Institutional trustees will have free rein to engage in self-interested investing." (alteration in original) (footnote omitted) (quoting UNIF. TRUST CODE § 802 (UNIF. LAW COMM'N 2000))).

needed to make the beneficiaries whole.[129] However, in cases such as *Miller*—where distinct breaches of the duty of care and the duty of loyalty occurred, and where the bank trustee has retained some profits from its self-dealing behavior even after awarding the compensatory damages for the duty of care breach—giving the beneficiaries disgorgement damages is not double recovery; rather, it is a separate recovery for the duty of loyalty breach.[130] In addition, even in cases without two distinct breaches, under the common law, there are instances where awarding damages in trust law have historically gone beyond making the beneficiaries whole.[131] Finally, courts have broad powers to fashion equitable remedies to promote the best interest of trust law, and to ensure that the trustee is not being unjustly enriched.[132]

The language of the UTC leaves a reader confused as to what the drafters meant to do: Did the drafters intend for the result of *Miller* to occur because they now see getting both forms of damages as an unjustified form of double recovery, or did the drafters just not realize that *Miller* would be the unintended result of omitting the last sentence from Restatement (Third) section 205? Even though the Comment to UTC section 1002 refers to Restatement (Third) section 205, section 1002 contains the exact language of Restatement (Third) section 100, which seems to suggest that multiple forms of recovery are not available.[133] Section 1003 also appears to support the idea that the result in *Miller* was unintended by the drafters, because it retains the no

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129 *See* Miller v. Bank of Am., N.A., 326 P.3d 20, 33 (N.M. Ct. App. 2013) ("Because the disgorgement damages of $540,000 were less than the $849,000 in compensatory damages awarded by this Court to make Beneficiaries whole, any additional recovery for disgorgement would amount to a double recovery and improperly impose a penalty on the Bank."), *rev'd*, 352 P.3d 1162 (N.M. 2015); *see also* Sheldon v. Metro-Goldwyn Pictures Corp., 309 U.S. 390, 399 (1940) (holding that the remedy of receiving disgorgement of profits is only meant to prevent the unjust enrichment of the injurers as well as to give the injured what is theirs, and nothing more).

130 Brief for Trust Law Professors as Amici Curiae Supporting Petitioners, *supra* note 108, at 21–22.

131 This is one of the core principles of the no further inquiry rule. Beneficiaries can get profits that the trustee made from self-dealing, even if the trust is not harmed; this goes beyond making the beneficiaries whole. *See* RESTATEMENT (THIRD) OF TRUSTS § 78 cmt. b (AM. LAW INST. 2007).

132 RESTATEMENT (THIRD) OF TRUSTS § 95 cmt. a (AM. LAW INST. 2012) (noting that a beneficiary can affirm a breach and receive the profits from the trustee that resulted from the transaction, but that does not prevent the beneficiary from receiving other remedies for fiduciary misconduct).

133 RESTATEMENT (THIRD) OF TRUSTS: PRUDENT INVESTOR RULE app. § 205 (AM. LAW INST. 1992); RESTATEMENT (THIRD) OF TRUSTS § 100 (AM. LAW INST. 2012). However, section 100 was not written until 2012—two years after the most recent version of the UTC was published in 2010. Therefore, it is unlikely that the American Law Institute had much influence on the drafting of this section of the UTC, and more likely that they interpreted the UTC to say multiple forms of recovery are not available.

further inquiry rule award of damages when there is a breach of the duty of loyalty.[134] However, as mentioned above, other sections of the UTC make the no further inquiry rule a rebuttable presumption in many situations; this only adds to the confusion of trying to deduce the drafters' intent.[135]

III. UTC SECTION 504: CREDITORS' RIGHTS WITH SUPPORT TRUSTS

A. *Background on the Common Law and the Changes Made by the UTC*

The second substantive change made to the common law by the UTC drafters occurs in Article 5, section 504, which deals with who is entitled to compel a distribution from discretionary and support trusts.[136] Under the common law, if the terms of the trust document allow for a beneficiary to receive distributions from the trust at certain times or under a specific standard, the beneficiary's creditor is entitled to attach any distributions that the trustee is required to make under the standard, as well to compel the distribution to satisfy a debt owed to it from a judgment against the beneficiary.[137] However, because of the nature of discretionary trusts, this ability to attach and compel a distribution usually can only occur with support trusts or other trusts with set standards for distribution.[138] With purely discretionary trusts, the trustee is permitted, but not compelled, to make distributions to the beneficiary from the trust income or principal.[139] Therefore, when a creditor brings a claim to attach a distribution, the trustee of a purely discretionary trust agreement has the option to refuse to authorize the

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134 UNIF. TRUST CODE § 1003(a) (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2010) ("A trustee is accountable to an affected beneficiary for any profit made by the trustee arising from the administration of the trust, even absent a breach of trust.").

135 *See id.* §§ 802(c)(4), (f).

136 *Id.* § 504(b).

137 RESTATEMENT (THIRD) OF TRUSTS § 60 (AM. LAW INST. 2003). This provision is subject to the rules that govern spendthrift provisions in trust documents. *Id.* If the trust document contains a valid spendthrift provision, creditors do not have the right to attach distributions to satisfy a judgment against the beneficiary. *Id.* § 58. However, under the common law, even if there is a spendthrift provision, the interest of the beneficiary can be reached in satisfaction for a claim of child support, spousal support, or for services provided for necessities. *Id.* § 59. The amounts a creditor can reach can vary based on different factors, including: being limited to only cover the beneficiary's needs, increased where the beneficiary is the settlor, and increased if the beneficiary is the trustee or holds any discretionary power to determine or compel distributions. *Id.* § 60.

138 STERK ET AL., *supra* note 14, at 601–02.

139 *Id.* at 550. Therefore, the beneficiary does not have any enforceable interest in the trust. Goforth v. Gee, 975 S.W.2d 448, 450 (Ky. 1998).

distribution.[140] Yet, in support trusts and other trust agreements with set standards or times for distribution, the trustee is obligated to pay the beneficiary the amounts necessary for support or to comply with that standard.[141] Therefore, with a support trust, under the common law, a creditor of specific necessaries can attach and compel the distribution that the trustee is obligated to make for the support or maintenance of the beneficiary, if the creditor has received a judgment against the beneficiary for that good or service.[142] If the trustee refuses to make this distribution, the creditor has the same rights as the beneficiary, and can argue that failure to pay the debt is a breach of fiduciary duty.[143]

For over 150 years under the common law, courts have allowed creditors of necessaries and other set standards to attach and compel distributions from trustees of support trusts to satisfy beneficiaries' debts.[144] *Goforth v. Gee* demonstrates this common law principle.[145] In this case, a testamentary trust was established for the benefit of Gee with a bank serving as the trustee.[146] The court found that the established trust was a support trust, and the relevant language required the trustee "to pay such amount of the interest quarterly to my said daughter [Gee] so that she may be maintained and cared for in accordance with her station in life."[147] When Gee's creditor, Goforth, obtained a $25,000 judgment against Gee, the creditor moved for a court order to compel the trustee to pay this judgment.[148] The court held that even though the standard by which to measure the amount Gee should receive was vague, it required the trustee to pay the income for the support and

140 STERK ET AL., *supra* note 14, at 601. However, "[i]f the trustee has been served with process in a proceeding by a creditor to reach the beneficiary's interest, the trustee is *personally liable* to the creditor for any amount paid to or applied for the benefit of the beneficiary in disregard of the rights of the creditor." RESTATEMENT (THIRD) OF TRUSTS § 60 cmt. c (emphasis added).

141 STERK ET AL., *supra* note 14, at 550. The language of support in the trust will explain when the trustee is obligated to make distributions to the beneficiary. *Id.* This language will typically call for distributions for things like "support," "maintenance," and often, "education." *Id.*

142 *Id.* at 602.

143 *Id.*

144 *See generally* Murphy v. Scott, 281 N.W.2d 447 (Iowa 1979); *Goforth*, 975 S.W.2d 448; Cecil's Tr. v. Robertson & Bro., 105 S.W. 926 (Ky. 1907); Pole v. Pietsch, 61 Md. 570 (1884); State v. Rubion, 308 S.W.2d 4 (Tex. 1957); Cochran v. Paris, 52 Va. (11 Gratt.) 348 (1854).

145 975 S.W.2d 448.

146 *Id.* at 448. The trust was deemed not to be a spendthrift trust. *Id.* A spendthrift trust is "[a] trust that prohibits the beneficiary's interest from being assigned and also prevents a creditor from attaching that interest; a trust by the terms of which a valid restraint is imposed on the voluntary or involuntary transfer of the beneficiary's interest." *Trust*, BLACK'S LAW DICTIONARY (10th ed. 2014).

147 *Goforth*, 975 S.W.2d at 448 (quoting the settlor's will).

148 *Id.* at 448–49. The bank admitted that it was acting as Gee's trustee, but denied that it had any fund, property, or wages that were due to Gee. *Id.* at 449.

maintenance of Gee.[149] Therefore, because Gee could demand payment from the trust to satisfy this particular debt, so could Goforth, her creditor.[150]

The principle as set out in section 504(b) materially changes this common law practice.[151] Section 504 states that, regardless of the type of trust in question and regardless of the kind of debt owed, a creditor of a beneficiary can never bring a claim to compel a distribution from the trustee to settle the debt, even if the trustee has abused his discretion.[152] Under the UTC, the only types of creditors who can attach and compel a distribution from the trustee for debts of the beneficiary are those seeking to satisfy a judgment for child support or alimony.[153] In the comment following section 504, the UTC drafters claim to have support for this change to the common law from both the American Law Institute and the most recent Restatement.[154] However, this support comes only in the form of a Reporter's Note to the comments; there is no language in the actual Restatement section or in any of the subsequent comments to suggest that creditors no longer have the right to compel a distribution.[155] In addition, section 60 of the Restatement (Third) actually stands for the opposite proposition, as the purpose of this section is to discuss when a creditor can attach an interest.[156]

149 *Id.* at 450 (explaining this result because the trustee was given no discretion in the trust instrument to decide if and when Gee should receive money).

150 *Id.* (explaining that as her creditor, Goforth had the right to "stand in her shoes"). The court also held that even though Goforth could demand payment of the debt from the trust income, she could not demand payment from the trust corpus because that was not contemplated in the trust document itself. *Id.*

151 UNIF. TRUST CODE § 504(b) (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2010).

152 *Id.* Unlike with the common law, this is true regardless of whether the trust contains a spendthrift provision. *Id.*

153 *Id.* § 504(c); *see also* Robert T. Danforth, *Article Five of the UTC and the Future of Creditors' Rights in Trusts*, 27 CARDOZO L. REV. 2551, 2576 n.109 (2006) (commenting that the general rule of not allowing creditors to attach a beneficiary's interest is subject to the important exception in UTC section 504(c), and that exception only applies to claims by children, spouses, or former spouses).

154 UNIF. TRUST CODE § 504 cmt. ("This section, similar to the Restatement, eliminates the distinction between discretionary and support trusts, unifying the rules for all trusts fitting within either of the former categories. By eliminating this distinction, the rights of a creditor are the same whether the distribution standard is discretionary, subject to a standard, or both." (citation omitted)).

155 RESTATEMENT (THIRD) OF TRUSTS § 60 cmt. a (AM. LAW INST. 2003) (Reporter's Note). In fact, this Reporter's Note only specifically discusses that the bright-line distinction between discretionary and support trusts is no longer in effect. *Id.* It contains language to suggest that creditors of support trusts may not be able to compel distributions if the settlor's intentions were so personal, such that only the beneficiary could receive the trust assets, but only in that circumstance. *Id.*

156 *Id.* § 60.

Numerous scholars agree that this change by the UTC drafters represents a dramatic change from the Restatement approach.[157]

B. *An Analysis of How the Change Benefits Institutional Trustees at the Expense of Public Policy*

Various groups of trust law participants were affected by the UTC's change to the common law. First, institutional trustees and the trust banking industry itself benefitted from this change. By preventing any creditors, besides those collecting child support or alimony, from reaching trust assets, trusts become much more marketable entities. This extra creditor protection influences more people to place their funds in trusts; in the United States, this usually means a trust with a bank officer serving as a trustee, which clearly benefits the industry.[158]

Trust settlors belong to a second designated group that undoubtedly gains from this change to the common law. When a settlor places his assets in a trust for a beneficiary, he typically wants the beneficiary himself to receive the assets, not judgment creditors of that beneficiary.[159] This is particularly true if the settlor has both lifetime beneficiaries and remainder beneficiaries to a trust device. If a settlor desires that there is some principal left for the remainder beneficiaries to receive at the death of the lifetime beneficiary, the settlor might prefer that not all creditors of necessaries be paid for services they provide if that results in a depletion the trust assets.[160] In cases where the lifetime beneficiary does not have many other assets besides the trust distributions, and the settlor desires residual assets for remainder beneficiaries, he may prefer for the government to pay most of the costs of necessaries, through various Medicaid programs, and for the trust assets to be used only as a supplement.[161] Therefore, most settlors would

157 STERK ET AL., *supra* note 14, at 602; Danforth, *supra* note 153, at 2576 n.109.

158 Langbein, *supra* note 8, at 1079 (noting that unlike England, where usually lawyers serve as trustees, in the United States, the typical professional fiduciary is a bank trust department).

159 Alan Newman, *The Rights of Creditors of Beneficiaries Under the Uniform Trust Code: An Examination of the Compromise*, 69 TENN. L. REV. 771, 772 (2002). However, it is unclear whether beneficiaries can continue to receive payments from a support trust if the trustee refuses to pay a creditor of necessaries, and whether the creditor can then reach it if a payment is made to the beneficiary. Therefore, if the trust can sufficiently cover the debt, some settlors may prefer for the necessary to be paid for, so that the beneficiary could continue to receive payments from the trust.

160 However, if the settlor cares more that the lifetime beneficiary is provided for completely, he might prefer that the creditor of the necessary have his debt paid, so the lifetime beneficiary could continue to receive payments.

161 Situations like this—where the beneficiaries' only assets come from the trust, and that they otherwise qualify for Medicaid without distributions—are not all that common, and probably are not what the UTC drafters were planning for.

be in favor of this new rule that prevents even creditors of necessaries from reaching assets.

However, despite the apparent benefits to settlors, it does not mean that this change to the common law is without its faults. For instance, there are various important public policy reasons behind trust and estate planning laws that counter a settlor's intent. The first and most common example of this is elective share statutes, which are in place in the majority of states.[162] Elective share statues permit a surviving spouse to take a percentage of the decedent spouse's estate, even if the decedent's will limits or eliminates the surviving spouse's share.[163] The policy reason behind having these statutes is that marriage is a partnership; since both spouses contribute to the partnership, the spouse with the couple's assets in his name should not be able to keep them from the surviving spouse upon his death.[164] This would lead one to believe that if there were important policy reasons for allowing creditors of support trusts to compel the beneficiary's trust distribution this should be allowed.[165] In addition, if a settlor really did not want a creditor of necessaries to be able to reach the trust assets, that settlor could make the trust truly discretionary so that the trustee is under no obligation to make a distribution.[166]

Another group to be considered is trust beneficiaries. Whether this change benefited or harmed beneficiaries is difficult to determine, since it involves a few factors. From one perspective, beneficiaries might be in favor of this change to the common law, because creditors of necessaries can no longer reach assets: under Medicaid and other public benefits programs, the government will pay for the necessaries if the

162 *See* Daniel B. Kelly, *Restricting Testamentary Freedom: Ex Ante Versus Ex Post Justifications*, 82 FORDHAM L. REV. 1125, 1129 n.9, 1162 (2013). In the United States, forty-one common law, non–community property states have enacted elective share laws. *See* Ira Mark Bloom, *The Treatment of Trust and Other Partial Interests of the Surviving Spouse Under the Redesigned Elective-Share System: Some Concerns and Suggestions*, 55 ALB. L. REV. 941, 944–45 (1992).

163 STERK ET AL., *supra* note 14, at 169.

164 Laura A. Rosenbury, *Two Ways to End a Marriage: Divorce or Death*, 2005 UTAH L. REV. 1227, 1283 ("[T]he underlying premise of the partnership theory is that intangible contributions to a marriage, such as child care, housework and other care work, should be valued on par with tangible financial contributions, thus leading to an equal or equitable division of tangible assets."). The premise behind elective share statutes used to be that the surviving spouse needed a share for her support after the decedent spouse's death. *See* Alan Newman, *Incorporating the Partnership Theory of Marriage into Elective-Share Law: The Approximation System of the Uniform Probate Code and the Deferred-Community-Property Alternative*, 49 EMORY L.J. 487, 493 n.29 (2000).

165 Some of these important policy reasons include securing payments for creditors who provided these essential services, and also ensuring that the government does not have to pay for these services for people who actually have assets available.

166 *See supra* notes 138–40.

beneficiaries cannot, thereby maintaining the assets in trust.[167] Nevertheless, if the trust contains standards of support so the beneficiary can compel a distribution from the trustee, government administrative agencies could argue that the assets are available to the beneficiary, and therefore disqualify him from public benefits; this would harm a beneficiary who possesses no other assets.[168] A beneficiary might also dislike this change, because if he does not qualify for public assistance—and if the creditor has a judgment against the beneficiary that cannot be satisfied—the trustee would not make any more payments to the beneficiary, as he knows the payments will be taken by the creditor, or the trustee himself would be held personally liable.[169]

Finally, creditors of necessaries are materially injured by this change to the common law. There are now fewer options for the repayment of their services if a beneficiary cannot pay for the services himself.[170] Creditors of necessaries are typically reputable organizations—such as hospitals and nursing homes—that provide valuable services to society and are generally deserving of having their debts satisfied. If creditors cannot sue a trustee for failing to make a distribution from a support trust to satisfy a debt for a necessity, and the beneficiary for whatever reason does not qualify for public assistance,[171] the creditor risks never having that debt fully repaid.

There are, however, policy reasons embodied in the UTC that support the change from the common law. Trustees of all support trusts have at least some discretion, depending on the language used.[172] On one end of the spectrum, the trust language can contain very little discretion, such as in a nondiscretionary support trust.[173] Somewhere in

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167 Newman, *supra* note 159, at 809 (noting that the UTC does not address this issue, but hypothesizing that if the trust were a strict supplemental needs trust as opposed to a support trust, courts would most likely hold that trust assets were not available for the purposes of determining public benefits eligibility). However, if the beneficiary of a support trust has assets of his own, he most likely would not be in favor of having to pay for his necessaries himself, when there are trust assets available for that purpose.

168 *Id.* at 809–10 (mentioning that some courts have said that the assets are considered available even though a support trust contains discretionary language).

169 *See supra* note 140.

170 Danforth, *supra* note 153, at 2576 ("First, even a supplier of necessaries cannot compel distributions from a support trust. Second, the statute eliminates any argument that a support interest should be treated as mandatory and thus subject to compelled distributions to certain creditors, who would stand in the beneficiary's shoes.").

171 A beneficiary could not qualify for Medicaid for various reasons, such as because the trust assets are not available to him, or that the beneficiary's own assets are above the eligibility mark. *See* Newman, *supra* note 159, at 809–10.

172 Kevin D. Millard, *Rights of a Trust Beneficiary's Creditors Under the Uniform Trust Code*, 34 ACTEC J. 58, 69 (2008).

173 *Id.* (noting that this type of support trust contains language like: "the trustee shall distribute to the beneficiary as much of the net income and principal of the trust as is necessary

between, the language could contain some discretion that is subject to a support standard.[174] Or, on the other end, the trust can contain language of "extended discretion."[175] Some courts have held these trusts with some language of discretion to be discretionary, while others have held them to be support trusts, thus drawing an arbitrary and ambiguous line for whether creditors of necessaries should be paid. This frequently leads to litigation, where seemingly similar language in different trust documents is held to be discretionary trusts in some cases but support trusts in others.[176] Courts have distinguished between these types of trusts and whether a creditor can compel distributions of necessaries under certain circumstances; but even with those tests, it remains difficult to predict how a court will interpret language before it actually does so.[177]

Many states that have adopted the UTC have either rejected the abolition of the discretionary versus support trust distinction, or have adopted the Code without section 504 entirely.[178] However, most states and scholars have lamented this section of the UTC for other reasons besides the fact that settlors of necessaries can no longer compel distributions from support trusts.[179]

for the beneficiary's support"). This language is still considered somewhat discretionary, because the trustee has discretion to determine what goods or services constitute support. *Id.*

174 *Id.* (noting that this type of support trust contains language similar to this: "the trustee may distribute to the beneficiary as much of the net income and principal of the trust as the trustee, in its discretion, determines advisable for the beneficiary's health, education, maintenance, and support").

175 *Id.* (noting that this type of support trust contains language such as: "the trustee may distribute to the beneficiary as much of the net income and principal of the trust as the trustee determines advisable, in the trustee's *sole and absolute discretion*, for the beneficiary's health, education, maintenance, and support").

176 RESTATEMENT (THIRD) OF TRUSTS § 60 cmt. a (AM. LAW INST. 2003) (Reporter's Note) ("Attempting [to maintain a bright-line distinction] tends to produce dubious categorizations and almost inevitably different results . . . from case to case for beneficiaries who appear, realistically, to be similarly situated as objects of similar settlor intentions."). The different results that occur in litigation are important for determining whether a trust is a support trust, and whether a creditor of necessaries can compel a distribution, as well as whether a beneficiary can compel a distribution, thereby making the assets available to them when assessing the beneficiary's eligibility for public assistance. *See* Newman, *supra* note 159, at 809–10.

177 *See* Millard, *supra* note 172, at 69 (remarking that if a trust contains language of discretion with a support standard, most courts will not compel the trustee to make distributions to the beneficiary if his discretion were reasonable). However, if the trust contains a support standard with language of extended discretion, courts tend to take very different approaches as to whether a creditor of necessaries can compel a distribution. *Id.* at 69–70. Some say extended discretion relieves a trustee of the need to act reasonably, whereas others say a trustee still has to act in good faith. *Id.* at 70.

178 *See* WORTHINGTON, *supra* note 3 (states include North Carolina, South Carolina, Maine, Kansas, and Massachusetts).

179 *See, e.g.*, *id.* (discussing how abandoning the support and discretionary trust distinction might affect a beneficiary's rights under supplemental needs trusts); *see also* Danforth, *supra* note 153, at 2578 ("Section 504(c) arguably weakens creditor protection—at least in some

IV. PROPOSAL FOR CHANGES TO THE UTC SECTIONS

A. *UTC Section 1002: Damages for Breach of Trust*

As previously discussed, it is difficult to determine whether the UTC drafters meant to change the common law and intended for the damages awarded in *Miller*.[180] However, weighing both the policy reasons and other factors related to the drafting, this result certainly seems to be unintentional and not an improvement to trust law.[181] The only group to substantially benefit from this change is bank trustees,[182] while both settlors and beneficiaries are significantly harmed.[183] Also, though one could argue that the common law provides a double recovery for beneficiaries, this is often not the reality. In many cases where this issue arises, such as in *Miller*, there will be both a breach of care and a breach of the duty of loyalty; in addition, trust law does not strictly oppose remedies that go beyond making the beneficiary whole.[184] Finally, UTC section 1003 retains the damages award for the no further inquiry rule: UTC drafters refer to Restatement (Third) of Trusts section 205; meanwhile, the comment to UTC section 1002 does not contain any language to suggest a change from this rule.[185] Therefore, a change must be made to the UTC to improve trust law and to bring back the common law standards.

The proposal for improving future revisions to the UTC section 1002 is twofold. First, drafters should add the missing language from Restatement (Third) of Trusts section 205—that regardless of the remedy chosen, the trustee cannot profit from his breach—to section 1002.[186] Second, drafters should add a sentence to the section 1002

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jurisdictions—by expressly providing that children, spouses, and former spouses with support claims can compel distributions from discretionary trusts under some circumstances. . . . [T]here is only modest support [in the common law] for the proposition that such a claimant can compel distributions from a wholly discretionary trust."); Valerie J. Vollmar, Introduction, *The Oregon Uniform Trust Code and Comments*, 42 WILLAMETTE L. REV. 187, 288 (2006) (commenting that the reason section 504 of the UTC was not adopted in Oregon was because a policy decision could not be reached regarding whether the rights of children and ex-spouses should be expanded so they could seek review of discretionary decisions of the trustee).

180 *See supra* notes 105–06 and accompanying text.

181 *See supra* Section II.C.

182 *See supra* notes 118–22 and accompanying text.

183 *See supra* Section II.C.

184 *See supra* notes 129–32 and accompanying text.

185 *See supra* notes 133–34 and accompanying text.

186 RESTATEMENT (THIRD) OF TRUSTS: PRUDENT INVESTOR RULE app. § 205 (AM. LAW INST. 1992) ("In addition, the trustee is subject to such liability as necessary to prevent the trustee from benefiting personally from the breach of trust." (citation omitted)).

Comment, to state that if the trustee commits both a breach of the duty of care and a breach of the duty of loyalty, the beneficiary can receive compensatory damages for the duty of care breach, separate from disgorgement damages for the duty of loyalty breach. These additions will clarify the law for future practitioners and judges. The proposed language will also give beneficiaries a high level of protection from duty of loyalty breaches by deterring trustees from engaging in self-dealing behavior;[187] it will be clear that, going forward, trustees will potentially have to provide beneficiaries with both forms of damages. Finally, the additional language will delineate that the remedies available under the no further inquiry rule still exist when there is an actual breach of the duty of loyalty—even if drafters decide that policy reasons instead require a "best interest" rule[188] or a voidable presumption of invalidity.[189]

B. *UTC Sections 802(c) and (f): The Duty of Loyalty*

The changes to the common law made by UTC sections 802(c) and (f) are immense.[190] Furthermore, only institutional trustees are benefiting from the UTC's changes in the trust relationship, whereas both settlors and beneficiaries are materially harmed.[191] Therefore a change should be made to improve the law as codified by the UTC.

How section 802 of the UTC should be changed in the future to provide settlors and beneficiaries with the optimal amount of protection is a difficult question to answer. A simple solution is for UTC section 802(c) to remove any indications of a "best interest" rule. Language suggesting that any transaction where the trustee has a conflict of interest is only presumed void should be eliminated and changed, so that the transaction is wholly void in accordance with the common law.[192] This same language should also be removed from the comment

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187 *See supra* note 115 and accompanying text.

188 *See generally* Langbein, *supra* note 74.

189 *See* UNIF. TRUST CODE §§ 802(c), (f) (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2010).

190 *See supra* notes 103–11, 114–15 and accompanying text.

191 *See supra* notes 123–28 and accompanying text.

192 Incorporating the proposed changes to section 802(c), the word "presumed" would be removed. Therefore, the new UTC section 802(c) would read:

> A sale, encumbrance, or other transaction involving the investment or management of trust property is affected by a conflict between personal and fiduciary interests if it is entered into by the trustee with: (1) the trustee's spouse; (2) the trustee's descendants, siblings, parents, or their spouses; (3) an agent or attorney of the trustee; or (4) a corporation or other person or enterprise in which the trustee, or a

following the rule. This will return the no further inquiry rule to the UTC, and will provide the desired amount of protection to beneficiaries and settlors in trust relationships.

For section 802(f), the simplest solution would be either (1) to remove this section from the UTC altogether, or (2) to add a sentence stating that if an institutional trustee invests trust property in an investment vehicle owned by his institution, he is not allowed to receive double commissions from that investment.[193]

For the first approach, some opponents may argue that removing section 802(f) entirely prevents institutional trustees from investing in mutual funds, which would ultimately harm beneficiaries.[194] However, this is not the case. Under the common law, institutional trustees could still invest for beneficiaries in mutual funds in which the trustee's institution does not have a financial interest, as well as in mutual funds in which the institution does have a financial interest if the institutional trustees received permission from the beneficiaries.[195] Removing this provision entirely from the UTC is unlikely to actually occur, since many states had previously enacted similar laws before the UTC was promulgated.[196] Therefore, the best approach—and one most likely to have a chance of adoption—is the second proposed solution. Keeping a trustee from making double commissions will at least remove some of the temptation to self-deal through investing money in mutual funds owned by the affiliated institution, as the trustee will not profit off of this investment.[197]

C. *UTC Section 504: Creditors' Rights with Support Trusts*

It is clear that the drafters of the UTC intended to make this change to the common law. However, there are also policy

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person that owns a significant interest in the trustee, has an interest that might affect the trustee's best judgment.

193 The New York statute dealing with the issue of double commission is an example of the second approach mentioned above. N.Y. EST. POWERS & TRUSTS LAW § 11-2.2 (McKinney 2008); *see also* OKLA. STAT. tit. 60, § 175.55 (2011); Leslie, *supra* note 70, at 578–79.

194 Leslie, *supra* note 70, at 578.

195 *Id.* at 578 ("The promulgators [of the current section 802(f)] offer no justification for failing to follow those state statutes that support the [common law] loyalty norm by requiring beneficiary consent or prohibiting trustees from making a commission on both activities.").

196 *Id.* at 571–78 (explaining how a majority of states adopted legislation with language similar to that in the UTC and why that is untenable).

197 *Id.* at 578–79. However, under this approach, an institutional trustee may still be enticed to self-deal and make investments not necessarily in the best interest of the beneficiaries. This is because even if he personally does not earn double commissions, his superiors in the institution may theoretically tempt him with other incentives, such as job security.

considerations, which both support and disagree with the change.[198] Important groups—such as settlors and creditors of necessaries—are materially harmed or benefitted, respectively,[199] while there are open issues around how beneficiaries are affected by the change.[200] Therefore, it is difficult to say what should be done to improve trust law. It is also difficult to conclude what should be done about this section because scholars and state legislatures have found other drafting issues besides those regarding creditors' rights discussed in this Note.[201]

Nevertheless, even though the change to the common law has improved certain aspects of trust law—such as by ending some of the litigation that has occurred over whether to characterize trust assets as discretionary or support—the reduction in the rights of creditors of necessaries cannot be justified by that improvement.[202] To keep the amount of litigation over this issue low, which seems to be one of the intents of the statute, while also maintaining necessary creditors' rights, this Note proposes that the language of section 504 be changed in a future revision of the UTC. The language should be amended to state that a creditor of necessaries could compel a distribution from a trustee, if the trust is a nondiscretionary support trust. This language will ensure that creditors of necessaries can obtain payments for their services when the trust is truly a support trust. It will further ensure that litigation over whether a trust is discretionary or support in nature, and thus whether a creditor can compel a distribution, is kept to a low level, because when a trust contains any language of discretion, the creditor will know it cannot reach those assets.[203] In addition, this Note proposes removing section 504(c), so that child support and spousal creditors can only compel a distribution of trust assets if the trust is a nondiscretionary support trust, as some states have debated this issue when deciding whether to adopt section 504.[204] Because of the problems that these states have found in section 504(c), applying this change to child support and spousal creditors, as well as to creditors of necessaries, will encourage those states previously rejecting this section of the Code to adopt it, as it will now be more consistent with the common law.

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198 *See supra* notes 171, 176–77 and accompanying text.

199 *See supra* notes 159–65, 170–71 and accompanying text.

200 *See supra* notes 167–69 and accompanying text.

201 *See supra* note 179 and accompanying text.

202 *But see* Danforth, *supra* note 153, at 2596 (contending that distinguishing between support and discretionary trusts is unnecessary, because the UTC seems to have abolished the preferred status of the suppliers of necessaries by leaving them out of the list of exceptions under which creditors can compel a distribution). However, this Note is arguing that is a mistake, since making sure these creditors are paid is important to society.

203 *See generally supra* notes 172–77 and accompanying text.

204 *See supra* note 179 and accompanying text.

CONCLUSION

The changes that the UTC made to the common law discussed in this Note possess one common feature: the institutional trust industry benefits from all of them.[205] The institutional trust industry has also been one of the most influential groups in promoting the adoption of the UTC in the states.[206] Given that these changes were not beneficial for all groups involved in the trust relationship, the issue arises as to whether the institutional trust industry has had too much influence over the drafting of the UTC.

In contrast to other countries, the typical trustee for most trusts in the United States is a bank's trust department.[207] While other countries, such as England, do not have countrywide practice of having banks or other institutional organizations serve as trustees, there are practical and important reasons for the development of this practice in the United States. First, employees serving as trustees for these institutions are experts at managing and investing assets.[208] Second, having an institution serve as a trustee means there is a smaller risk that a beneficiary will not have a remedy if the trustee breaches his duties, as these companies have "deep pockets."[209] Finally, having a corporate fiduciary means a settlor has a trustee with longevity, where the settlor does not have to worry about appointing an alternative trustee should the original trustee die.[210]

Even though the institutional trust industry is clearly an important player, that does not automatically mean that trust law should only be influenced by these institutions' lobbying efforts at the expense of other participants in the industry, such as settlors, beneficiaries, and creditors. However, even though the institutional trust industry benefits from the changes to section 1002, 802, and 504, settlors also benefit from the

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205 *See supra* Sections II.C, III.B.

206 Langbein, *supra* note 8, at 1069, 1079, 1082. The bank industry has had experience for years, lobbying for changes to allowable investment practices. *See* Leslie, *supra* note 70, at 574 ("With the slow erosion of Glass-Steagall, it appears that the banking industry's calls for an exemption from prohibition on self-interested investing grew more insistent.").

207 *See* Langbein, *supra* note 8, at 1079; *see also supra* note 158 and accompanying text.

208 *See* Langbein, *supra* note 64, at 638 ("These entities thrive on their expertise in investment management, trust accounting, taxation, regulation, and fiduciary administration.").

209 *Id.* at 639 ("This exposure of the trustee's capital informs the modern trust deal, effectively insuring the beneficiary against many potential harms and forming part of what the settlor buys when selecting a corporate fiduciary.").

210 *Id.* ("Corporate fiduciaries are institutions of perpetual succession. . . . [W]hen I have cut my trust deal with Northern Trust and the account officer on the trust dies or leaves, Northern Trust simply shifts the account to another desk.").

changes to section 504.[211] Whether the institutional trust industry has been given too much power in the drafting of the UTC, or whether these benefits given to that industry are simply due to its prominence in United States trust law, are questions beyond the scope of this Note.

Regardless, three sections of the UTC have materially changed the common law of trusts in ways that negatively affect essential individuals in a trust relationship—settlors, beneficiaries, and with section 504, creditors of necessaries. Drafters of future UTC revisions, along with states that have enacted or will enact the UTC, should consider how these sections impact these important groups, and should consider adopting the changes proposed in this Note in order to make the law of trusts as beneficial and effective as possible.

211 *See supra* notes 159–61 and accompanying text.