

USED NOT ONLY AS DIRECTED: MICHIGAN'S ADAPTATION OF THE UNIFORM DIRECTED TRUST ACT

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I. INTRODUCTION

On November 11, 2017, the Council of the Probate and Estate Planning Section of the State Bar of Michigan approved a legislative proposal developed by the Council's Divided and Directed Trusteeships *ad hoc* Committee.¹ The approved proposal introduces two innovations to the Michigan Trust Code (MTC): it imports the Uniform Directed Trust Act (UDTA),² and it provides a statutory template for a more radical scheme of fiduciary coordination that may be styled *divided*

1. As of this writing, the approved committee proposal is embodied in three Michigan House Bills. See H.B. 6129, 99th Leg. Reg. Sess. (Mich. 2018); H.B. 6130, 99th Leg. Reg. Sess. (Mich. 2018); H.B. 6131, 99th Leg. Reg. Sess. (Mich. 2018).

2. Mich. H.B. 6130 comprises the bulk of the UDTA in the form of new MTC section 7703a. The Appendix to this Article contains parallel tables mapping the UDTA onto the proposal's new section 7703a and *vice versa*. Because the proposal ensconces its version of the UDTA within the MTC, whereas the UDTA was promulgated by the ULC as a separate, stand-alone statute, see UNIF. DIRECTED TRUST ACT § 1 (UNIF. LAW COMM'N 2017) (short title), the proposal places some of the uniform act's structural provisions in natural places within the MTC that fall outside of the new section 7703a. Thus, for example, the UDTA provision that allows a settlor to extend the act's application to the relations of cotrustees is located, under the proposal, in the MTC provision on cotrusteeships. See Mich. H.B. 6131 § 7703(10) (UNIF. DIRECTED TRUST ACT § 12). That amendment of the cotrusteeships provision (*viz.*, MICH. COMP. LAWS ANN. § 700.7703 (West 2018)) is found in Mich. H.B. 6131 along with several other amendments to existing MTC provisions that facilitate the MTC's absorption of the UDTA.

trusteeship.³ The author has written elsewhere about divided trusteeships.⁴ The present Article focuses on the proposal's version of the UDTA, the *Michigan* UDTA (MUDTA):⁵ Part II of the Article describes how enactment of the MUDTA will affect the treatment of powers to direct trustees under the MTC; Part III describes how the MUDTA differs from the UDTA.

II. HOW THE PROPOSAL CHANGES MICHIGAN LAW

The proposal's importation of the UDTA into the MTC is effected primarily by the addition of a new section—section 7703a.⁶ Now, the MTC is a version of the Uniform Trust Code (UTC),⁷ and the effect of the UDTA in a state that has adopted the UTC is to displace subsections (b) through (d) of UTC section 808,⁸ which have their local installation in Michigan in MTC section 7809.⁹ So, under the proposal, the new section 7703a displaces MTC section 7809.¹⁰ The salient substantive results are (1) a change in the scope of the statutory imposition of duties to trust beneficiaries on persons having powers to direct the actions of trustees and (2) a change in the circumstances in which a trustee who is subject to direction can be liable for doing as the power holder directs or for doing nothing, if that is what the trust instrument that creates the power contemplates, when directions from the power holder are not forthcoming.

3. "While a separate trustees provision applies, the whole trusteeship of the aggregate trust is *divided*, under the terms of the separate trustees provision, into discrete sets of separately accepted fiduciary responsibilities." Mich. H.B. 6129 § 7703b(2) (emphasis added).

4. See James P. Spica, *Onus Fiducia Est Omnis Divisa in Partes Tres: A Statutory Proposal for Partitioning Trusteeship*, 49 REAL PROP. TR. & EST. L.J. 349 *passim* (2014). It should be noted that the statutory model that appears *id.* at 371–78 differs from the proposal's divided trusteeship provisions in some respects. For one thing, the proposal is more *laissez faire*, in the sense described *id.* at 378–79, than the 2014 article's model.

5. The MUDTA differs substantively from the UDTA in some respects. See *infra* Part III.

6. See *supra* note 2.

7. See, e.g., MICH. COMP. LAWS ANN. § 700.7809 (West 2018); cf. UNIF. TRUST CODE § 808(b)–(d) (UNIF. LAW COMM'N 2010).

8. See UNIF. DIRECTED TRUST ACT § 9 legislative note (UNIF. LAW COMM'N 2017).

9. See MICH. COMP. LAWS ANN. § 700.7809 (West 2018); cf. UNIF. TRUST CODE § 808(b)–(d) (UNIF. LAW COMM'N 2010).

10. See H.B. 6131, 99th Leg. Reg. Sess. (Mich. 2018) (enacting § 1 repealing MICH. COMP. LAWS § 700.7809).

A. Nomenclature

1. "Trust Protectors," "Trust Directors," and "Powers of Direction"

The proposal also involves a change of nomenclature: whereas MTC section 7809 describes the legal relations to beneficiaries and trustees borne by what the MTC currently calls "trust protectors,"¹¹ the new section 7703a describes the legal relations to beneficiaries and trustees borne by what the proposal, following the UDTA, calls "trust directors."¹² And the MUDTA defines "trust director"¹³ generally as someone having a "power of direction," which is defined generally as "a power over a trust granted by the terms of the trust."¹⁴ The latter definition is convenient in one way, because the idea of a *power over a trust* is broad enough to describe useful powers that sit awkwardly under the MTC's current description of a "power to direct certain actions with respect to the trust,"¹⁵ or UTC section 808's "power to direct certain actions of the trustee,"¹⁶ or the *Restatement (Third) of Trusts*' "power to direct or otherwise control certain conduct of the trustee."¹⁷ It is difficult to think of a power to release a trustee from liability, for example, as a power to direct administrative actions in the sense naturally evoked by each of the formulations just quoted.¹⁸

2. "Powers to Direct," and "Trustees Subject to Direction" as Opposed to "Powers of Direction" and "Directed Trustees"

But the MUDTA's terminology is an *expository* inconvenience in that it coopts for technical use terms that we should otherwise find it natural to use in nontechnical senses. We might well, for example, call

11. See MICH. COMP. LAWS ANN. §§ 700.7103(n), 700.7809 (West 2018); see also *id.* § 700.7105(2)(h) (stating minimum obligations imposed on trust protectors by section 7809 not liable to be subverted by terms of trust).

12. See H.B. 6130, 99th Leg. Reg. Sess. § 7703a(24)(f) (Mich. 2018) (UNIF. DIRECTED TRUST ACT § 2(9)); *id.* § 7703a(5) (UNIF. DIRECTED TRUST ACT § 8(a)).

13. Here we adopt the convenient, technical convention, common among logicians, of using single quotation marks "to construct a name for the [marked] expression." ALLAN GIBBARD, *WISE CHOICES, APT FEELINGS: A THEORY OF NORMATIVE JUDGMENT* 6 n.4 (1990). We shall use "[d]ouble quotes [sic] . . . in the many looser ways quotation marks can be used, often to mention a word and use it in the same breath." *Id.*

14. Mich. H.B. 6130 § 7703a(24)(e)–(f) (UNIF. DIRECTED TRUST ACT § 2(5), (9)).

15. MICH. COMP. LAWS ANN. § 700.7103(n).

16. UNIF. TRUST CODE § 808(b) (UNIF. LAW COMM'N 2010).

17. RESTATEMENT (THIRD) OF TRUSTS § 75 (AM. LAW INST. 2003).

18. See UNIF. DIRECTED TRUST ACT § 2 cmt. 5 (UNIF. LAW COMM'N 2017).

any power granted by the terms of a trust that allows the holder to direct a trustee or otherwise affect a trustee's tenure or administration a "power of direction" if it were not for the MUDTA's appropriation of that expression to indicate the proper subset of such powers to which the MUDTA selectively applies.¹⁹ As we shall see, the MUDTA does not apply, for example, to any power to remove a trustee or a "trust director," and such a power is, therefore, not a "power of direction" within the meaning of the MUDTA.²⁰ Likewise, it would seem natural to refer to a trustee who is expected, under the terms of a trust, to follow another's directions on some matter as a "directed trustee" if the MUDTA did not assign that term the special signification of "a trustee subject to a *power of direction*"²¹ thus causing the narrowness of the MUDTA's technical definition of 'power of direction' to push some trustees who are clearly expected under governing trust terms to follow the directions of others²² quite outside the extension of 'directed trustee' in the MUDTA's coinage.

We shall, therefore, be involved in some periphrases in what follows. In order to leave the term 'power of direction' to the MUDTA's technical appropriation, we shall refer generally to a power granted by the terms of a trust that allows the holder to direct a trustee or otherwise affect a trustee's tenure or administration—a power that may or may not be a "power of direction" within the meaning of the MUDTA—as a "*power to direct* [a trustee or other who can affect the administration of a trust]." And in order to grant the MUDTA its special, technical use of the term 'directed trustee,' we shall refer generally to a trustee who is expected, under the terms of the trust, to follow specified directions—a trustee who may or may not be a "directed trustee" within the meaning of the MUDTA—as a "*trustee* [who is] *subject to direction* [by the holder of a power to direct]."

19. See H.B. 6130, 99th Leg. Reg. Sess. § 7703a(24)(e)–(f) (Mich. 2018) (UNIF. DIRECTED TRUST ACT § 2(5), (9)) (providing technical definitions); *id.* § 7703a(1) (UNIF. DIRECTED TRUST ACT § 5(b)) (providing exclusions from the MUDTA's impositions of duties on power holders).

20. See *infra* notes 37, 49 and accompanying text.

21. H.B. 6130, 99th Leg. Reg. Sess. § 7703a(24)(b) (Mich. 2018) (UNIF. DIRECTED TRUST ACT § 2(3)) (emphasis added).

22. E.g., a trustee who is expected to yield custody of trust assets upon being removed as trustee by the holder of a power to direct: the power to remove is not a "power of direction" within the meaning of the MUDTA, and the trustee subject to the power is therefore not a "directed trustee" with respect to that power. See *infra* note 37 and accompanying text.

3. “Obligations to Trust Beneficiaries” as Opposed to “Fiduciary Obligations”

We shall have to put up with one other terminological inconvenience that is worth mentioning at the outset. It would be convenient to refer generally to the obligations to trust beneficiaries that MTC section 7809 imposes on “trust protectors” and those that proposed section 7703a imposes on “trust directors” as “fiduciary obligations,” but, as we shall see, MTC section 7809 seems, albeit pointlessly, to distinguish (1) the unspecified “fiduciary” duties that the section imposes on nonbeneficiary “trust protectors” *presumptively* with respect to all powers but *ineradicably* only with respect to powers *other than* administrative powers described in Internal Revenue Code (IRC) section 675(4) from (2) the obligation, which the section imposes *ineradicably* on nonbeneficiary “trust protectors” with respect to *all* powers, to “exercise or refrain from exercising any power, duty, or discretion in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.”²³

The possible coherence of such a distinction is briefly discussed below,²⁴ but the MUDTA (following the UDTA) simply assimilates “trust directors” to trustees for purposes of imposing duties and liabilities on “trust directors.”²⁵ The MUDTA is therefore indifferent to a possible distinction among a trustee’s duties *qua* trustee between those that may be, in some refined sense, strictly *fiduciary* duties and those that are not—if a trustee with a given power over the trust in question would have a given duty *qua* trustee in the exercise or nonexercise of the power, then the MUDTA imposes that same duty on a “trust director” who wields the power, *regardless* of the duty’s characterization as “fiduciary” or “nonfiduciary.”²⁶

For our purposes, then, nothing hangs on whether a given duty imposed on the holder of a power to direct by either MTC section 7809 or proposed section 7703a is properly a “fiduciary” duty according to our best interpretation or conception of uniquely fiduciary relations. We can harmlessly eschew that question—as we *will* do—by referring hereafter to the obligations to trust beneficiaries that are imposed on “trust protectors” by MTC section 7809 and the obligations to trust

23. MICH. COMP. LAWS ANN. § 700.7809(2) (West 2018); *see also id.* §§ 700.7809(1), 700.7105(2)(h) (stating minimum obligations imposed on trust protectors by section 7809 not liable to be subverted by terms of trust).

24. *See infra* Part II.B.1.f.

25. *See infra* note 51 and accompanying text.

26. *See* Mich. H.B. 6130 § 7703a(5) (UNIF. DIRECTED TRUST ACT § 8(a)).

beneficiaries that are imposed on "trust directors" by proposed section 7703a simply as "obligations to trust beneficiaries."

B. The Scope of Statutory Imposition of Obligations to Trust Beneficiaries on Holders of Powers to Direct (and herein of "Newly Excluded Powers," "Overlap Powers," and "Newly Included Powers")

By substituting its version of the UDTA for MTC section 7809, the proposal alters the scope of statutory imposition of obligations to trust beneficiaries on persons having powers to direct in two ways: (1) there are powers currently triggering obligations to trust beneficiaries, in some circumstances,²⁷ under MTC section 7809 that will *not* trigger such obligations, in those circumstances, under proposed section 7703a ("Newly Excluded Powers"), and (2) there are powers that will trigger obligations to trust beneficiaries, in some circumstances, under proposed section 7703a that do *not* now trigger such obligations, in those circumstances, under MTC section 7809 ("Newly Included Powers"). There are also, of course, powers currently triggering obligations to trust beneficiaries, in some circumstances, under MTC section 7809 that will also trigger such obligations, in those circumstances, under proposed section 7703a ("Overlap Powers").

So, if one likes the proposal as a change from the status quo in Michigan for the statutory imposition of obligations to trust beneficiaries as constraints on holders of powers to direct, it is because one prefers (1) that Newly Excluded Powers should *not* trigger statutory obligations to trust beneficiaries in the circumstances they currently do under the MTC and (2) that Newly Included Powers, which currently do not trigger statutory obligations to trust beneficiaries under the MTC, *should* trigger such obligations in the circumstances they *will* under proposed section 7703a.

1. Newly Excluded Powers

a. Certain Powers Held by Nonsettlor-Nonbeneficiaries

The powers currently triggering obligations to trust beneficiaries under MTC section 7809 do not include any power held by a settlor of the trust in question because section 7809 prescribes the duties, liabilities, and relations with trustees of "trust protectors," and, for

27. As we shall see, current imposition of obligations to trust beneficiaries under MTC section 7809 depends not only on the nature of the power in question, but also on the identity of the power holder. See *infra* notes 28–29 and accompanying text.

purposes of section 7809, the term ‘trust protector’ excludes “[t]he settlor of a trust”—meaning, presumably, the settlor of *the trust in question*.²⁸ The powers currently triggering obligations to trust beneficiaries under MTC section 7809 also do not include any power held by a *beneficiary* of the trust in question because MTC section 7809 imposes duties on “[a] trust protector[] *other than a trust protector who is a beneficiary of the trust*.”²⁹ Thus, every power that currently triggers obligations to trust beneficiaries under MTC section 7809 is a power held by someone who is neither a settlor nor a beneficiary of the trust in question.

b. Certain Powers to Remove a Trustee

The powers currently triggering obligations to trust beneficiaries under MTC section 7809 do not include any power that constitutes a power of appointment because for purposes of section 7809, the term ‘trust protector’ excludes “[t]he holder of a power of appointment.”³⁰ Now, neither the MTC nor the larger Estates and Protected Individuals Code (EPIC) of which the MTC is a part defines the term ‘power of appointment,’³¹ but the provisions of the Michigan Powers of Appointment Act of 1967 (MPAA) are no doubt *in pari materia* for purposes of interpreting the MTC.³² According to the MPAA, “‘power of appointment’ means a power . . . to designate . . . the transferees of property.”³³

Unlike the definitions of ‘power of appointment’ in the *Restatement (Second) of Property: Donative Transfers* and the *Restatement (Third) of Property: Wills and Other Donative Transfers*, the MPAA definition

28. See MICH. COMP. LAWS ANN. § 700.7103(n)(i) (West 2018) (excluding “the settlor of the trust” from the extension of the term ‘trust protector’); *id.* § 700.7809(1).

29. MICH. COMP. LAWS ANN. § 700.7809(1) (emphasis added).

30. MICH. COMP. LAWS ANN. § 700.7103(n)(ii). Even if the definition of ‘trust protector’ did not thus expressly exclude the holder of a power of appointment, MTC section 7809 would not impose obligations to trust beneficiaries on a nontrustee holder of such a power because, as noted above, section 7809 imposes duties on “[a] trust protector[] *other than a trust protector who is a beneficiary of the trust*,” *id.* § 700.7809(1) (emphasis added), and ‘trust beneficiary’ is defined to include a person who “holds a power of appointment over trust property in a capacity other than that of trustee.” *Id.* § 700.7103(l)(ii).

31. See MICH. COMP. LAWS ANN. § 700.7103 (providing MTC definitions); *id.* § 700.1106 (providing EPIC definitions).

32. See RUPERT CROSS, STATUTORY INTERPRETATION 150–51 (John Bell & George Engle eds., 3d ed. 2005); see also Robert S. Summers, *Statutory Interpretation in the United States*, in INTERPRETING STATUTES: A COMPARATIVE STUDY 407, 423 (D. Neil MacCormick & Robert S. Summers eds., 1991) (stating that courts are obliged to consider texts of closely related statutes).

33. MICH. COMP. LAWS ANN. § 556.112(c) (West 2018).

includes—by its broad reference to “transferees of *property*”—powers to designate the transferees of proprietary rights generally, not just rights of enjoyment or “beneficial interests.”³⁴ This broader contemplation of powers to designate the transferees of incidents of ownership that may or may not involve rights of enjoyment comports with a traditional conception of powers of appointment: “Dispositive powers are powers which authorize [a] person to create or dispose of beneficial interests *or proprietary rights* in property Powers of appointment are the most important and most common dispositive powers.”³⁵

The result is that if someone wielding a power to remove a trustee can also *replace* a trustee whom she has removed, the confluence of the removal and replacement powers constitutes a power of appointment within the meaning of the MPAA and, therefore, the MTC—because it enables the power holder to cause a transfer of the legal ownership of the *res* from one trustee to another.³⁶ Hence, to trigger obligations to trust beneficiaries under MTC section 7809, a nonsettlor-nonbeneficiary’s power to remove a trustee must be a power to remove a trustee *without* a concomitant power to fill any resulting vacancy or, indeed, to trigger the appointment of a known, predetermined successor. Otherwise, the MTC’s exclusion of holders of powers of appointment from the extension of the term ‘trust protector’ will take the case out of section 7809 altogether.

On the other hand, a power to remove a trustee is not included among the powers that will trigger obligations to trust beneficiaries under proposed section 7703a, *regardless* of whether the power is coupled with a power to fill a resulting vacancy: the MUDTA does impose duties on the holder of a power to remove or appoint a trustee.³⁷

This exclusion addresses the compelling suggestion to the [Uniform Law Commission (ULC)] drafting committee that

34. See *id.* § 556.112(c); cf. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 17.1 (AM. LAW INST. 2011) (defining ‘power of appointment’ as a power “to designate recipients of beneficial ownership interests in or powers of appointment over” property); RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 11.1 (AM. LAW INST. 1986) (indicating the same).

35. GERAINT THOMAS, THOMAS ON POWERS ¶¶ 1.14–1.15 (2d ed. 2012) (emphasis added); see also JOHN A. BORRON, JR. ET AL., THE LAW OF FUTURE INTERESTS § 871, at 414 (3d ed. 2004) (describing a power of appointment as “a capacity to change the ownership of interests in property”).

36. See *supra* notes 33–35 and accompanying text; see also MICH. COMP. LAWS ANN. § 556.115a(6) (characterizing a power to transfer trust property from one trustee to another as a power of appointment).

37. See H.B. 6130, 99th Leg. Reg. Sess. § 7703a(1)(c) (Mich. 2018) (UNIF. DIRECTED TRUST ACT § 5(b)(2)).

granting a person a power to appoint or remove a trustee is a common drafting practice that arose separately from the phenomenon of directed trusts. Under prevailing law, the only limit on the exercise of a power to appoint or remove a trustee is that it “must conform to any valid requirements or limitations imposed by the trust terms.”³⁸

So, a power in someone who is neither a settlor nor a beneficiary of the trust in question to remove a trustee is a Newly Excluded Power (i.e., a power that currently triggers obligations to trust beneficiaries under MTC section 7809 that will *not* trigger such obligations under proposed section 7703a) if exercise of the removal power will create either no vacancy or a vacancy that will have to be filled by the prospective action of someone other than the power holder.

c. Power to Remove a “Nontrustee Trust Actor” Who Wields a Nondispositive Power

It will be convenient for us to refer to a nontrustee who has a power to direct the trustee (or a power to direct someone else who has a power to direct the trustee) in the exercise of one or more of the trustee’s powers *qua* trustee as a “nontrustee trust actor.”³⁹ Now, a power to direct the exercise or nonexercise of a power of appointment is a power of appointment.⁴⁰ And a power to *confer* a power of appointment may also be a power of appointment.⁴¹ Thus, a power to remove *and replace* a nontrustee trust actor who can direct a trustee in the exercise of a

38. UNIF. DIRECTED TRUST ACT § 5 cmt. 2 (UNIF. LAW COMM’N 2017) (quoting RESTATEMENT (THIRD) OF TRUSTS § 37 cmt. c (AM. LAW INST. 2003)).

39. A “nontrustee trust actor” may or may not be either a “trust protector” within the meaning of the *current* MTC or a “trust director” within the meaning of the MUDTA. A nontrustee-nonbeneficiary holder, for example, of a power to direct the “decanting” of one trust into another under terms that expressly provide that the power is to be exercised in a nonfiduciary capacity would be neither a MTC “trust protector,” *see supra* notes 30, 36 and accompanying text, nor a MUDTA “trust director.” *See* Mich. H.B. 6130 § 7703a(1)(a) (UNIF. DIRECTED TRUST ACT § 5(a)–(b)(1)).

40. *See, e.g.*, MICH. COMP. LAWS ANN. § 556.112(c) (West 2018) (defining ‘power of appointment’ for purposes of MPAA); UNIF. POWERS OF APPOINTMENT ACT § 102 cmt. (UNIF. LAW COMM’N 2013).

41. *See, e.g.*, RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 19.14 (AM. LAW INST. 2011) (stating that unless instrument creating power manifests contrary intent, a special power of appointment may be exercised to create powers of appointment in permissible appointees); *see also id.* § 17.1 (defining ‘power of appointment’ circularly to include power to create “powers of appointment over the appointive property”); UNIF. POWERS OF APPOINTMENT ACT § 102(13) (defining ‘power of appointment’ circularly to include power to create “another power of appointment”).

fiduciary power of appointment may constitute a power to confer a power of appointment (on the removed nontrustee trust actor's successor), which is itself a power of appointment; and in that case, the holder of the removal-and-replacement power is not a "trust protector" within the meaning of MTC section 7809.⁴² Hence, in order to prevent the MTC's exclusion of holders of powers of appointment from the extension of the term 'trust protector' from taking the case out of section 7809 altogether, we may contemplate a power to remove and replace a nontrustee trust actor whose power (to direct the trustee) is a *nondispositive* power; that is, we may contemplate a power that does not amount to a power to confer a power of appointment because the trustee function that the nontrustee trust actor is empowered to direct is a nondispositive function.⁴³

In that case, the power to remove and replace the nontrustee trust actor will *not* constitute a power of appointment within the meaning of the MTC because (1) by hypothesis, the power is not a power to *confer* a power of appointment, and (2) a power of appointment is otherwise defined as a power "to designate the transferees of *property*,"⁴⁴ whereas the *nontrustee* trust actor, as such, will not hold property—legal title to the *res* is in the trustee(s), and "equitable title"⁴⁵ is in the trust beneficiaries other than those whose status as "beneficiaries" is predicated merely on their having powers of appointment.⁴⁶ Thus, if a

42. See *supra* notes 30, 36 and accompanying text.

43. Again, "[d]ispositive powers are powers which authorize [a] person to create or dispose of beneficial interests or proprietary rights in property.... Powers of appointment are the most important and most common dispositive powers." THOMAS, *supra* note 35, ¶¶ 1.14–1.15. In addition to powers of appointment, dispositive powers include certain powers of advancement and powers of maintenance. See *id.* ¶ 1.14.

44. MICH. COMP. LAWS ANN. § 556.112(c) (emphasis added); see *supra* text accompanying notes 31–33.

45. As to the peculiar nature of the "equitable property" constituting beneficial interests in trusts, see, e.g., F.W. MAITLAND, *EQUITY: A COURSE OF LECTURES* 17–18, 106–107 (A.H. Chaytor & W.J. Whittaker eds., rev. by John Brunyate, 2d ed. 1936); Robert Stevens, *When and Why Does Unjustified Enrichment Justify the Recognition of Proprietary Rights?* 92 B.U. L. REV. 919, 921–25 (2012).

46. See, e.g., MICH. COMP. LAWS ANN. § 700.2901(2)(j) (West 2018) (defining 'trust' in terms of the relation between legal and equitable *owners* of trust property). Although the MTC includes nontrustee holders of powers of appointment within the extension of the term 'trust beneficiary,' see *id.* § 700.7103(l)(ii), the existence of a valid power of appointment by which a vested equitable interest may be destroyed does *not* render that interest contingent. See, e.g., JOHN C. GRAY, *THE RULE AGAINST PERPETUITIES* § 112.1 (4th ed. 1942); BORRON, *supra* note 35, § 113. Thus, unless it is a presently exercisable general power, a power of appointment over trust assets does not itself yield the donee "equitable title." As to the exception for a presently exercisable general power, see, e.g., MICH. COMP. LAWS ANN. § 556.123 (stating that creditors of donee of presently exercisable general power of appointment can reach any interest subject to the power);

given nontrustee trust actor's power is a power to direct the trustee in the exercise of a nondispositive trustee function, the confluence of the powers to remove that nontrustee trust actor *and replace* her will *not* constitute a power of appointment, and the holder of the removal-and-replacement power (given that she is not a settlor of the trust in question)⁴⁷ is a "trust protector" within the meaning of MTC section 7809.⁴⁸

On the other hand, at least if the nontrustee trust actor is a "trust director" within the meaning of the MUDTA, a power to remove her is not included among the powers that will trigger obligations to trust beneficiaries under proposed section 7703a, *regardless* of whether the nontrustee trust actor's power is dispositive, because the MUDTA does not impose duties on the holder of a power to remove or appoint a trust director.⁴⁹ The rationale for this exclusion is the confluence of the "compelling suggestion to the [ULC] drafting committee" regarding powers to remove and appoint *trustees* mentioned above⁵⁰ and the MUDTA's overarching strategy of assimilating "trust directors" to trustees for purposes of imposing duties and liabilities.⁵¹ So, a power in someone who is neither a settlor nor a beneficiary of the trust in question to remove a nontrustee trust actor is a Newly Excluded Power (i.e., a power that currently triggers obligations to trust beneficiaries under MTC section 7809 that will *not* trigger such obligations under proposed section 7703a)—at least if the nontrustee trust actor is a "trust director"—if the nontrustee trust actor's power is nondispositive.

d. Certain Powers to Remove a Nontrustee Trust Actor Who Wields a Dispositive Power

In order to prevent the MTC's exclusion of holders of powers of appointment from the extension of the term 'trust protector' from taking the case out of section 7809 altogether, we may also contemplate a power to remove a nontrustee trust actor whose power (to direct the trustee) is a dispositive power (because the trustee function subject to the

Jesse Dukeminier, *Perpetuities: The Measuring Lives*, 85 COLUM. L. REV. 1648, 1669 (1985) ("[A] general power of appointment presently exercisable is, for perpetuities purposes, treated as absolute ownership in the donee").

47. See *supra* note 28 and accompanying text.

48. See MICH. COMP. LAWS ANN. § 700.7103(n).

49. See H.B. 6130, 99th Leg. Reg. Sess. § 7703a(1)(c) (Mich. 2018) (UNIF. DIRECTED TRUST ACT § 5(b)(2)).

50. See *supra* note 38 and accompanying text.

51. See, e.g., Mich. H.B. 6130 § 7703a(5) (UNIF. DIRECTED TRUST ACT § 8(a)); *id.* § 7703a(21) (UNIF. DIRECTED TRUST ACT § 16).

power is dispositive) if exercise of the removal power will create either no vacancy or a vacancy that will have to be filled by the prospective action of someone other than the holder of the removal power. In that case, the nontrustee trust actor's power *may* amount to a power of appointment,⁵² but the removal power does not,⁵³ and the holder of the removal power, therefore, may be a "trust protector."

Once again, though, at least if the nontrustee trust actor is a "trust director" within the meaning of the MUDTA, the power to remove her is not included among the powers that will trigger obligations to trust beneficiaries under proposed section 7703a because the MUDTA does not impose duties on the holder of a power to remove or appoint a trust director.⁵⁴ So, a power in someone who is neither a settlor nor a beneficiary of the trust in question to remove a nontrustee trust actor is a Newly Excluded Power (i.e., a power that currently triggers obligations to trust beneficiaries under MTC section 7809 that will *not* trigger such obligations under proposed section 7703a)—at least if the nontrustee trust actor is a "trust director"—even if the nontrustee trust actor's power is a power of appointment, provided exercise of the removal power will create either no vacancy or a vacancy that will have to be filled by the prospective action of someone other than the holder of the removal power.

e. Certain Powers to Ascertain the Happening of an Event That Affects Administration

A power decisively to ascertain the happening of an event that affects the administration of a trust may constitute a power of appointment. If, for example, a person *P* has the power, under the terms of a trust, to certify, at whatever time, if any, *P* thinks appropriate, that a certain beneficiary of the trust, *B*, has become "a contributing member of society," whereupon *B* will be entitled to regular trust distributions, *P* arguably has a power of appointment.⁵⁵ In that case, MTC section 7809

52. See, e.g., RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 19.14 (AM. LAW INST. 2011) (stating that unless instrument creating power manifests contrary intent, special power of appointment may be exercised to create powers of appointment in permissible appointees); see also *id.* § 17.1 (defining 'power of appointment' circularly to include power to create "powers of appointment over the appointive property"); UNIF. POWERS OF APPOINTMENT ACT § 102(13) (defining 'power of appointment' circularly to include power to create "another power of appointment").

53. See *supra* Part II.B.1.b.

54. See H.B. 6130, 99th Leg. Reg. Sess. § 7703a(1)(c) (Mich. 2018) (UNIF. DIRECTED TRUST ACT § 5(b)(2)); see also *supra* notes 50–51 and accompanying text.

55. See *supra* note 33 and accompanying text.

does not impose duties to trust beneficiaries in respect of *P*'s power.⁵⁶ Thus, in order to posit a power to ascertain the happening of an event affecting trust administration that currently triggers obligations to trust beneficiaries under MTC section 7809, we have specifically to contemplate a power that does *not* constitute a power of appointment.

Let us suppose, therefore, that the terms of a trust grant the settlor's friend, *F*, the power to certify that the trustee, *T*, has at some point, become "disabled," whereupon the then-current income beneficiaries of the trust will be entitled to elect *T*'s successor as trustee. Assuming *F* is not a beneficiary of the trust,⁵⁷ *F*'s power is a Newly Excluded Power (i.e., a power that currently triggers obligations to trust beneficiaries under MTC section 7809 that will *not* trigger such obligations under proposed section 7703a) as it is a power to remove a trustee *without* a concomitant power to fill the resulting vacancy (or to trigger the appointment of a known, predetermined successor).⁵⁸

But now let us suppose instead that *F*'s power is a power to certify that a certain beneficiary of the trust, *B*, has, at some point, become "so disabled as to be unsuited to living on her own" so that, among other things, certain residential property owned by the trustee and maintained for *B*'s use will more or less promptly be sold and the proceeds of sale held for *B*'s benefit. In that case, *F* is both a "trust protector" within the meaning of the current MTC and a "trust director" within the meaning of the MUDTA.⁵⁹ So, assuming again that *F* is not a beneficiary of the trust, *F*'s power triggers obligations to trust beneficiaries under MTC section 7809.⁶⁰ But *F*'s power will or will not trigger such obligations under proposed section 7703a depending on whether *F* is a health-care professional who acts in that capacity in ascertaining *B*'s disability because if *F* is a health-care professional acting in that capacity, then unless the terms of the trust provide otherwise, *F* has no duty under the MUDTA to any of the trust's beneficiaries.⁶¹

This [provision] addresses the concern that a health-care professional might refuse appointment as a trust director if such service would expose the professional to fiduciary duty under [the UDTA]. For example, the terms of a trust might call for a

56. See *supra* note 30 and accompanying text.

57. See *supra* note 29 and accompanying text.

58. See *supra* notes 36–38 and accompanying text.

59. See MICH. COMP. LAWS ANN. § 700.7103(n) (West 2018); H.B. 6130, 99th Leg. Reg. Sess. § 7703a(24)(f) (Mich. 2018) (UNIF. DIRECTED TRUST ACT § 2(9)).

60. See MICH. COMP. LAWS ANN. § 700.7809(1) (West 2018).

61. See Mich. H.B. 6130 § 7703a(6) (UNIF. DIRECTED TRUST ACT § 8(b)–(c)).

health-care professional to determine the capacity or sobriety of a beneficiary or the capacity of a settlor.⁶²

Thus, a power to ascertain the happening of an event that affects the administration of a trust is a Newly Excluded Power (i.e., a power that currently triggers obligations to trust beneficiaries under MTC section 7809 that will *not* trigger such obligations under proposed section 7703a) if (1) it does not amount to a power of appointment, (2) the power holder is neither a settlor nor a beneficiary of the trust in question but is a health-care professional who acts in that capacity in ascertaining the happening of the event in question, and (3) the terms of the trust do not expressly require that the power be exercised in a fiduciary capacity.

f. Certain Powers Described in Internal Revenue Code section 675(4)

If it is not held by a settlor or a beneficiary of the trust in question and does not constitute a power of appointment,⁶³ an administrative power that is described in IRC section 675(4)⁶⁴ is a power that currently triggers an ineradicable obligation under MTC section 7809 to exercise the power “in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries,”⁶⁵ although section 7802 also says that the terms of the trust may provide that an IRC section 675(4) power is to be exercised in a “nonfiduciary capacity.”⁶⁶ Now, it is arguable that not every duty a fiduciary owes someone with whom she stands in a fiduciary relation is a *fiduciary* duty. In a

62. UNIF. DIRECTED TRUST ACT § 8 cmt. b (UNIF. LAW COMM’N 2017).

63. See *supra* notes 28–30 and accompanying text.

64. I.R.C. § 675(4) (2018).

65. MICH. COMP. LAWS ANN. § 700.7809(1)(b) (stating that a trust protector must act “in accordance with . . . the interests of the trust beneficiaries”); *Id.* § 700.7809(2) (requiring the same even in exercise of IRC section 675(4) administrative power); *Id.* § 700.7105(2)(h) (stating that minimum obligations imposed on trust protectors by section 7809 not liable to be subverted by terms of trust).

66. “The terms of a trust may provide that a trust protector to whom powers of administration described in section 675(4) of the internal revenue code, 26 USC 675, have been granted *may exercise those powers in a nonfiduciary capacity. However, the terms of the trust shall not relieve the trust protector from the requirement under subsection (1)(b) that he or she exercise or refrain from exercising any power, duty, or discretion in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.*” MICH. COMP. LAWS ANN. § 700.7809(2) (West 2018) (emphasis added); see also *id.* § 700.7105(2)(h) (stating that the MTC prevails over terms of trust concerning minimum obligations imposed by section 7809).

contractual setting, for example, the duty of a fiduciary to use proper skill and care in the discharge of her functions, though obviously a duty of a fiduciary, viz., the fiduciary in question, is arguably *not* a duty of a fiduciary *qua* fiduciary and so, arguably, cannot accurately be described as one of the fiduciary's *fiduciary* duties.⁶⁷ And it has occasionally been argued that the duties to act in good faith in the interests of trust beneficiaries and to follow the terms and purposes of the trust are themselves distinguishable from distinctively *fiduciary* duties, which, according to this view, are just the duties of impartiality and undivided loyalty.⁶⁸

Assuming this conception of fiduciary relations is coherent,⁶⁹ it would allow us to suppose that a "trust protector" who has certain powers over a trust that trigger what are, according to this conception, strictly *fiduciary* duties under MTC section 7809 may have, in addition to *those* powers, whatever they happen to be, an IRC section 675(4) power that the trust instrument effectively authorizes the protector to exercise in a *nonfiduciary* capacity even though the IRC section 675(4) power must be exercised, according to the current MTC, in good faith in accordance with the terms and purposes of the trust and the interests of the beneficiaries.⁷⁰ On its face, that conception would also allow us to suppose that a "trust protector" whose *only* power over a given trust is an IRC section 675(4) power which the trust instrument authorizes the protector to exercise in a *nonfiduciary* capacity is simply *not a fiduciary*, though by virtue of the power, the protector acquires duties of good faith and faithfulness to the terms and purposes of the trust and the interests of the beneficiaries under MTC section 7809.

This last step may prove too much under the MTC given that the ineradicable, minimum obligations to trust beneficiaries currently

67. See J. E. PENNER, *THE LAW OF TRUSTS* ¶ 12.1 (8th ed. 2012) (discussing *Bristol & W. Bldg. Soc'y v. Mothew* [1998] AC 1 at 16 (Eng.)); R. P. Austin, *Moulding the Content of Fiduciary Duties*, in *TRENDS IN CONTEMPORARY TRUST LAW* 153, 155 (A. J. Oakley ed., 1996).

68. See Paul Finn, *Fiduciary Law and the Modern Commercial World*, in *COMMERCIAL ASPECTS OF TRUSTS AND FIDUCIARY OBLIGATIONS* 7, 9–10 (Ewan McKendrick ed., 1992).

69. "Finn J's thesis [i.e., the thesis argued in Finn, *supra* note 68] that the two rules [of impartiality and undivided loyalty] are an exhaustive account of fiduciary duties has not yet been accepted by the courts Some commentators, including Finn J, argue plausibly that [the] so-called "positive" fiduciary duty [to act in good faith for the benefit of the principal] is really a duty of good faith and is not strictly a fiduciary duty at all. Such a view would revolutionize the formulation of trustees' and company directors' duties and may in time lead to a more flexible evolution of the content of those duties." Austin, *supra* note 67, at 159.

70. See *supra* notes 65–66.

imposed by MTC section 7809 on the holder of an IRC section 675(4) power are the same ineradicable, minimum obligations imposed, under the MTC, on *trustees*.⁷¹ It would presumably be disconcerting to conclude that a settlor could validly create an express trust, subject to Michigan law, whose trustees were nowise fiduciaries. In any case, though, the conception of fiduciary relations that we have been considering here is utterly wasted on the Internal Revenue Service (Service) in respect of IRC section 675(4) because the Treasury regulations specify that the relevant inquiry *for federal tax purposes* is just whether the power is in fact “exercisable primarily in the interests of the beneficiaries.”⁷² The Service is unlikely to accept that a nominally “nonfiduciary” IRC section 675(4) power subject to current Michigan law is “exercisable in a nonfiduciary capacity” *within the meaning of IRC section 675(4)* given that (1) regardless of what the trust instrument says about the power’s being exercisable in a nonfiduciary capacity, such a power has to be exercised in accordance with the interests of the trust beneficiaries⁷³ and (2) as just noted, the ineradicable, minimum obligations thus imposed on a holder of an IRC section 675(4) power are the same ineradicable, minimum obligations imposed, under the MTC, on *trustees*.⁷⁴

A nonbeneficiary trust protector’s inability, under the current MTC, to exercise an IRC section 675(4) administrative power in a “nonfiduciary capacity” *within the meaning of IRC section 675(4)* may be without practical effect to the extent that a power to substitute assets, which is perhaps the most prevalent of the powers described in section 675(4), is given to or reserved by a settlor of the trust in question or constitutes a power of appointment—because, again, in those circumstances, the holder of the power is not a “trust protector” within the meaning of MTC section 7809.⁷⁵ But anyone who recognizes that a power to substitute assets will rarely constitute a power of appointment⁷⁶—or who doubts that a power to substitute assets is the only IRC section 675(4) power worth giving a nonsettlor-nonbeneficiary, nontrustee trust actor for tax-engineering purposes—will be glad of a proposal that excludes IRC section 675(4) powers from the scope of a nontrustee trust actor’s statutorily imposed obligations to trust beneficiaries.

71. See MICH. COMP. LAWS ANN. §§ 700.7105(2)(b), (k), 700.7801, 700.7908 (West 2018).

72. Treas. Reg. § 1.675-1(b)(4)(iii) (1960).

73. See *supra* notes 65–66.

74. See MICH. COMP. LAWS ANN. §§ 700.7105(2)(b), (k), 700.7801, 700.7908.

75. See *supra* notes 28, 30 and accompanying text.

76. See *infra* notes 79–88 and accompanying text.

The MUDTA does that: it excludes from the powers triggering obligations to trust beneficiaries an expressly nonfiduciary power that “must be held in a nonfiduciary capacity to achieve the settlor’s tax objectives under the [IRC].”⁷⁷ And by expressly referring to the IRC, the MUDTA makes what counts as being exercisable in a “nonfiduciary capacity” *within the meaning of IRC section 675(4)* the touchstone.

This exclusion is responsive to multiple suggestions to the [ULC] drafting committee that certain powers held by a person other than a trustee must be nonfiduciary to achieve the settlor’s federal tax objectives. For example, to ensure that a trust is a grantor trust for federal income tax purposes, a common practice is to include in the trust instrument a provision that allows the settlor or another person to substitute assets of the trust for assets of an equivalent value, exercisable in a nonfiduciary capacity. If the power to substitute assets is exercisable in a fiduciary capacity, the power will not cause the trust to be a grantor trust. *Without the exception of subsection (b)(5), therefore, this common drafting practice might no longer ensure grantor trust status in a state that enacts [the UDTA], and the tax status of existing trusts with such a provision would be thrown into disarray.*⁷⁸

Thus, a nominally “nonfiduciary” power that is described in IRC section 675(4) is a Newly Excluded Power (i.e., a power that currently triggers obligations to trust beneficiaries under MTC section 7809 that will *not* trigger such obligations under proposed section 7703a) if the power does not constitute a power of appointment and the power holder is neither a settlor nor a beneficiary of the trust in question.

2. Overlap Powers

a. Certain Powers Held by Nonsettlor-Nonbeneficiaries

In this section of the Article, we shall describe Overlap Powers—i.e., powers that currently trigger obligations to trust beneficiaries under MTC section 7809 that will also trigger such obligations under proposed section 7703a. We have to remember, therefore, that, for reasons already

77. H.B. 6130, 99th Leg. Reg. Sess. § 7703a(1)(f) (Mich. 2018) (UNIF. DIRECTED TRUST ACT § 5(b)(5)).

78. UNIF. DIRECTED TRUST ACT § 5 cmt. 5 (UNIF. LAW COMM’N 2017) (emphasis added).

given, each of the powers that currently triggers obligations to trust beneficiaries under MTC section 7809 is a power held by someone who is neither a settlor nor a beneficiary of the trust in question.⁷⁹ Because that is true of all powers that currently trigger obligations to trust beneficiaries under MTC section 7809, it is true of all Overlap Powers.

b. Power to Acquire, Dispose of, Exchange, or Retain Trust Investments If the Power Does Not Constitute a Power of Appointment

We draw a line between powers of appointment and other dispositive powers,⁸⁰ on the one hand, and powers of sale, like investment powers, on the other.⁸¹ The latter are classed as administrative or managerial powers, sometimes called "executive" powers.⁸² This distinction has sometimes been said to be an arbitrary one.⁸³ But the expectation that the designation of an ownership interest in trust property pursuant to a power of sale will be predicated on an *exchange for value* is a real difference that resonates in one of the most distinctive features of the law of trusts—the idea of the trust-fund whose constituents may change over time without disturbing the beneficiaries' "equitable title," which is generally "title" to *the fund* as opposed to any particular constituent thereof, or fiduciary and nonfiduciary dispositive powers, which generally range over *the fund*.⁸⁴ Thus, we can distinguish dispositive powers, exercises of which must be expected to diminish the trust fund, from powers of sale, exercises of which (*in principle*, ignoring transaction costs and market inefficiencies) are *not* expected to diminish that fund.

Of course, a nominal power of sale may constitute a power of appointment if, in particular circumstances, the expectation of an exchange for value is more apparent than real. And there may be hybrid powers, as when someone has a power to determine who shall have the

79. See *supra* notes 28–29 and accompanying text.

80. See *supra* note 43.

81. See MICH. COMP. LAWS ANN. § 556.112(c) (expressly excluding power of sale from MPAA definition of 'power of appointment').

82. See RONALD H. MAUDSLEY, *THE MODERN LAW OF PERPETUITIES* 58 (1979); THOMAS, *supra* note 35, ¶¶1.12–1.15.

83. "We must also more or less arbitrarily exclude from our definition the power of sale, a power of attorney, [etc.]" BORRON, *supra* note 35, § 871, at 414–15.

84. See, e.g., PENNER, *supra* note 67, ¶2.34. "The idea of a trust-fund which is dressed up (invested) now as land and now as current coin, now as shares and now as debentures seems to me one of the most remarkable ideas developed by modern English jurisprudence." F.W. MAITLAND, *The Unincorporate Body*, in *SELECTED ESSAYS* 128, 134 (H.D. Hazeltine et al. eds., 1936).

privilege of purchasing an appreciated trust asset for “book value.” But a pure power of sale is distinguished by the expectation of an exchange for value, and this can be deduced from principles that extend beyond the law of trusts. If, for example, a person, *P*, tells us that she has just exercised her presently exercisable special power to appoint a certain legal life estate, and we, without having any reason to think that *P*’s power may be a hybrid of the kind described above, say, “Well, what did you get for it?” we might be, wittingly or unwittingly, accusing *P* of committing what is known as “fraud on a power,” which applies to fiduciary and nonfiduciary powers of appointment alike⁸⁵ because inducement to exercise by bribe is a paradigm of such “fraud.”⁸⁶ And if instead *P* tells us that she has just exercised her authority as agent under a certain “Power of Attorney for the Sale of [asset] *X*,” and we say, “Well, what did you get for it?” whereupon *P* says, “Oh, nothing: I decided to make a gift of it,” we will be warranted in suspecting that *P* may thus have become liable to her principal for the value of *X*.⁸⁷

On this theory that a power of sale signally involves the expectation of an exchange for value, a power to substitute assets described in IRC section 675(4)⁸⁸ is ordinarily not a power of appointment⁸⁹ and is, therefore, a Newly Excluded Power (i.e., a power that currently triggers obligations to trust beneficiaries under MTC section 7809 though it will *not* trigger such obligations under proposed section 7703a) if (1) the power was intended by the settlor to attract “grantor trust” status, (2) the power does not constitute a power of appointment, and (3) the power holder is neither a settlor nor a beneficiary of the trust in question.⁹⁰ But that is because, unlike MTC section 7809, the MUDTA excludes from the powers triggering obligations to trust beneficiaries an expressly nonfiduciary power that must be held in a nonfiduciary capacity to

85. See THOMAS, *supra* note 35, ¶ 9.05.

86. See, e.g., BORRON, *supra* note 35, § 981, at 547; THOMAS, *supra* note 35, ¶ 9.04.

87. See RESTATEMENT (THIRD) OF AGENCY §§ 2.01 cmt. f, 8.09 cmt. b (AM. LAW INST. 2006); see also MICH. COMP. LAWS ANN. § 556.112(c) (West 2018) (expressly excluding power of attorney from MPAA definition of ‘power of appointment’). Whereas the principles of agency developed at common law, powers of appointment and the historically distinct dispositive powers of advancement and of maintenance were recognized only in equity before the statutory unification of law and equity in England by the Judicature Acts 1873–75. See HAROLD GREVILLE HANBURY & RONALD HARLING MAUDSLEY, MODERN EQUITY 48–49 (Jill E. Martin ed., 13th ed. 1989); THOMAS, *supra*, note 35, ¶ 1.14.

88. See I.R.C. § 675(4) (2018).

89. See MICH. COMP. LAWS ANN. § 556.112(c) (expressly excluding power of sale from MPAA definition of ‘power of appointment’); see also *supra* notes 31–32 and accompanying text.

90. See *supra* text accompanying notes 75–78.

achieve the settlor's federal tax objectives.⁹¹ Apart from that particular exclusion, a power of sale in someone who is neither a settlor nor a beneficiary of the trust in question will trigger obligations to trust beneficiaries under proposed section 7703a: indeed, a power of sale in the form of an ordinary investment power is a paradigm of the UDTA's "power of direction."⁹² Such a power is, therefore, an Overlap Power—i.e., a power that currently triggers obligations to trust beneficiaries under MTC section 7809 that will also trigger such obligations under proposed section 7703a.

c. Various Other Nondispositive Powers

Other powers that currently trigger obligations to trust beneficiaries under MTC section 7809—if they do not constitute powers of appointment and are held by persons who are neither settlors nor beneficiaries of the trusts in question—that will also trigger such obligations under proposed section 7703a include⁹³ the powers to (1) vote proxies for securities held in trust; (2) make or take loans; (3) adopt a particular valuation of trust property or determine the frequency or methodology of valuations; (4) manage, or select managers for, a trust-owned business; (5) select a custodian for trust assets; (6) direct the delegation of a trustee's or a nontrustee trust actor's powers to the extent the powers to be delegated are nondispositive;⁹⁴ (7) change the trust's principal place of administration or tax situs or the law governing the meaning and effect of the trust's terms; (8) ascertain the happening of an event that affects the administration of the trust if the power holder is not a health-care professional who acts in that capacity in ascertaining the happening of the event;⁹⁵ (9) determine the compensation to be paid to a trustee or a nontrustee trust actor; (10) prosecute, defend, or join an action, claim, or judicial proceeding relating to the trust; (11) veto a trustee's or a nontrustee trust actor's exercise of a given power if the given power is nondispositive;⁹⁶ and (12) release a trustee or nontrustee trust actor from liability for an action proposed or previously taken by the trustee or nontrustee trust actor.

91. See *supra* notes 77–78 and accompanying text.

92. See UNIF. DIRECTED TRUST ACT § 6 cmt. a (UNIF. LAW COMM'N 2017).

93. The numbered illustrations that follow in the text are all drawn from UNIF. DIRECTED TRUST ACT § 6 cmt. a.

94. As to the transitivity of the dispositive character of powers of appointment, see *supra* notes 40–43 and accompanying text.

95. See *supra* notes 61–62 and accompanying text.

96. See *supra* note 94.

3. Newly Included Powers

a. Certain Powers Held by Settlers

Unlike the MTC's "trust protector,"⁹⁷ the MUDTA's "trust director" may be a settlor of the trust in question.⁹⁸ But to be a "trust director," a person has to have a "power of direction,"⁹⁹ which is defined to *exclude* any power of a settlor over a trust to the extent the settlor can revoke that trust.¹⁰⁰ So, in order for a settlor of a given trust to be a "trust director" with respect to that trust as of a given time, she must *not* have a power to revoke the trust at that time. Thus, we can cause any of the Overlap Powers described in the preceding section of the Article to be reclassified as a Newly Included Power (i.e., a power that will trigger obligations to trust beneficiaries under proposed section 7703a though it does *not* trigger such obligations under MTC section 7809) by supposing that the power is held by a settlor of the trust in question and that, at the time in question, the settlor does not have a power to revoke the trust. It will be convenient for us to refer hereafter to a settlor of a trust who has, as of the time in question, a power to revoke the trust as an "uncommitted settlor" of the trust.

b. Certain Powers of Appointment Expressly Identified as Fiduciary Powers

Unlike MTC section 7809, which has nothing to say about the duties of *any* holder of a power of appointment,¹⁰¹ the MUDTA imposes obligations to trust beneficiaries on a nontrustee trust actor who is not an uncommitted settlor of the trust in question and who has a power of appointment that is described, in the trust instrument that grants the power, as a *fiduciary* power:¹⁰² with one exception,¹⁰³ such nontrustee

97. See *supra* note 28 and accompanying text.

98. See H.B. 6130, 99th Leg. Reg. Sess. § 7703a(24)(f)(ii) (Mich. 2018) (UNIF. DIRECTED TRUST ACT § 2(9)).

99. See *id.* § 7703a(24)(f)(ii) (UNIF. DIRECTED TRUST ACT § 2(9)).

100. See *id.* § 7703a(24)(e) (UNIF. DIRECTED TRUST ACT § 2(5)); *id.* § 7703a(1)(d) (UNIF. DIRECTED TRUST ACT § 5(b)(3)).

101. See *supra* note 30 and accompanying text.

102. See Mich. H.B. 6130 § 7703a(24)(e) (UNIF. DIRECTED TRUST ACT § 2(5)) (defining 'power of direction'); *id.* § 7703a(1)(a) (UNIF. DIRECTED TRUST ACT § 5(b)(1)) (excluding powers of appointment intended to be held by donee in nonfiduciary capacity from extension of term 'power of direction'); *id.* § 7703a(2)(b) (UNIF. DIRECTED TRUST ACT § 5(c)) (constructively presuming certain powers of appointment granted to a donee other than a trustee to be nonfiduciary powers).

103. For the exception, see *infra* text accompanying notes 105–06.

trust actors are “trust directors” within the meaning of the MUDTA.¹⁰⁴ Thus, with one exception, any power of appointment given to a nontrustee who is not an uncommitted settlor of the trust in question is a Newly Included Power (i.e., a power that will trigger obligations to trust beneficiaries under proposed section 7703a though it does not trigger such obligations under MTC section 7809) if the power is expressly described by the terms of the trust as a fiduciary power.

The exception is a power to remove a trustee or a “trust director” who has a power to direct a trustee in the exercise of a dispositive trustee function if that power is accompanied by a power to fill a resulting vacancy. We have already noted that such a power may constitute a power of appointment.¹⁰⁵ But we have also seen that the MUDTA does not impose duties on the holder of a power to remove or appoint a trustee or a “trust director.”¹⁰⁶ So, if a nontrustee trust actor is granted a power to remove and replace a trustee or to remove and replace a “trust director” who has a power to direct a trustee in the exercise of a dispositive trustee function, even if that power is expressly described by the terms of the trust as a *fiduciary* power, the MUDTA will not prescribe that nontrustee trust actor’s duties.

But, again, *with that exception*, a power of appointment given to a nontrustee who is not an uncommitted settlor of the trust in question is a Newly Included Power if the power is expressly described by the terms of the trust as a fiduciary power. The transitivity of the dispositive character of powers of appointment¹⁰⁷ amplifies the scope of this principle. Thus, as we have seen, a power to veto a trustee’s exercise of a dispositive power may constitute a power of appointment.¹⁰⁸ If it does, and the veto power is expressly described by the terms of the trust as a fiduciary power, the power will be a Newly Included Power (i.e., a power that will trigger obligations to trust beneficiaries under proposed section 7703a though it does not trigger such obligations under MTC section 7809) provided that the power holder is not an uncommitted settlor of the trust in question.

104. See H.B. 6130, 99th Leg. Reg. Sess. § 7703a(24)(e)–(f) (Mich. 2018) (UNIF. DIRECTED TRUST ACT § 2(5), (9)). As to the exception, again, see *infra* text accompanying notes 105–06.

105. See *supra* notes 36, 40–43 and accompanying text.

106. See *supra* notes 37, 49 and accompanying text.

107. See *supra* notes 40–43 and accompanying text.

108. See *supra* note 40 and accompanying text.

c. Certain Powers to Adjust between Principal and Income or Convert to a Unitrust If the Power Holder Is Not a Beneficiary and the Power Is Expressly a Fiduciary Power

If a trust has disparate income and remainder beneficiaries, a power over the trust to adjust between principal and income or convert to a unitrust is a power of appointment.¹⁰⁹ The MUDTA sets up a presumption that a power to adjust between principal and income or convert to a unitrust is intended to be held in a fiduciary capacity if the power is granted to someone who is not a beneficiary of the trust in question.¹¹⁰ Thus, because, with the exception noted above,¹¹¹ the MUDTA applies to a power of appointment that is intended to be held by the donee in a fiduciary capacity,¹¹² a power to adjust between principal and income or convert to a unitrust is a Newly Included Power (i.e., a power that will trigger obligations to trust beneficiaries under proposed section 7703a though it does not trigger such obligations under MTC section 7809) if (1) the trust has disparate income and remainder beneficiaries, (2) the donee of the power is neither an uncommitted settlor nor a beneficiary of the trust in question, and (3) the power is not expressly described by the terms of the trust as a *nonfiduciary* power.

d. Certain Powers to Adjust between Principal and Income or Convert to a Unitrust If the Power Holder Is a Beneficiary and the Power Is Expressly a Fiduciary Power

The MUDTA sets up a presumption that a power to adjust between principal and income or convert to a unitrust is intended to be held in a nonfiduciary capacity if the trust has disparate income and remainder beneficiaries and the power is granted to someone who is a beneficiary of the trust in question.¹¹³ Thus, a power to adjust between principal and income or convert to a unitrust is a Newly Included Power (i.e., a power that will trigger obligations to trust beneficiaries under proposed section 7703a though it does not trigger such obligations under MTC section 7809) if (1) the trust has disparate income and remainder beneficiaries, (2) the donee of the power is not an uncommitted settlor

109. See, e.g., MICH. COMP. LAWS ANN. § 556.112(c) (West 2018) (stating MPAA definition of ‘power of appointment’).

110. See H.B. 6130, 99th Leg. Reg. Sess. § 7703a(2)(c)(i) (Mich. 2018) (no UDTA counterpart).

111. See *supra* text accompanying notes 105–06.

112. See Mich. H.B. 6130 § 7703a(1)(a) (UNIF. DIRECTED TRUST ACT § 5(a)–(b)(1)).

113. See *id.* § 7703a(2)(b) (UNIF. DIRECTED TRUST ACT § 5(c) as modified by the proposal).

but *is* a beneficiary of the trust in question, and (3) the power is expressly described by the terms of the trust as a *fiduciary* power.

e. Certain Powers to Modify, Terminate, or Decant a Trust If the Power Holder Is Not a Beneficiary and the Power Is Not Expressly a Nonfiduciary Power

The MUDTA's presumptions about the fiduciary or nonfiduciary character of a power of appointment, including one in the form of a power to adjust between principal and income or convert to a unitrust,¹¹⁴ is extended also to powers to modify, terminate, or decant a trust because any of these may constitute a power of appointment. Of course, not *every* such power constitutes a power of appointment. Consider, for example, a power over a grantor retained annuity trust to amend the trust to the extent required solely for the purpose of ensuring that the "grantor's" interest in the trust is a "qualified interest" within the meaning of IRC section 2702.¹¹⁵ The tax-saving purpose of such a power entails that it is not a power to alter *interests* in the trust so as to bring that of the grantor into compliance with section 2702 but rather a power to alter the *trust instrument* so as accurately to reflect what the grantor actually intended to retain, on the one hand, and to give away, on the other. On that construction, this particular power to amend is an administrative power not a dispositive one and, therefore, not a power of appointment.¹¹⁶

We have to emphasize, therefore, that the MUDTA's presumptions about the fiduciary or nonfiduciary character of powers to modify, terminate, or decant a trust concern only powers to modify, terminate, or decant that constitute powers of appointment: a power to modify, terminate, or decant a trust is a Newly Included Power (i.e., a power that will trigger obligations to trust beneficiaries under proposed section 7703a though it does not trigger such obligations under MTC section 7809) if (1) the power amounts, in the circumstances, to a power of appointment, (2) the donee of the power is neither an uncommitted settlor nor a beneficiary of the trust in question, and (3) the power is not expressly described by the terms of the trust as a nonfiduciary power. This is because the MUDTA constructively presumes that a power to modify, reform, terminate, or decant a trust that is granted to someone

114. See *supra* notes 102, 110, 113.

115. See I.R.C. 2702(b) (2018).

116. See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 17.1 cmt. h (AM. LAW INST. 2011).

who otherwise has no beneficial interest in the trust is meant to be a fiduciary power.¹¹⁷

f. Certain Powers to Modify, Terminate, or Decant a Trust If the Power Holder Is a Beneficiary and the Power Is Expressly a Fiduciary Power

By the same principle—viz., that the MUDTA's presumptions about the fiduciary or nonfiduciary character of a power of appointment extend to powers of appointment in the forms of powers to modify, terminate, or decant a trust—¹¹⁸ a power to modify, terminate, or decant is a Newly Included Power (i.e., a power that will trigger obligations to trust beneficiaries under proposed section 7703a though it does not trigger such obligations under MTC section 7809) if (1) the power amounts, in the circumstances, to a power of appointment, (2) the donee of the power is not an uncommitted settlor but *is* a beneficiary of the trust in question, and (3) the power is expressly described by the terms of the trust as a *fiduciary* power. Express description of the power as a fiduciary one displaces the MUDTA's constructive presumption that a power to modify, reform, terminate, or decant a trust that is granted to someone who has a beneficial interest in the trust is meant to be a nonfiduciary power.¹¹⁹

C. The Circumstances in Which a Trustee Subject to Direction Can Be Liable for Doing as the Power Holder Directs

In addition to changing the scope of statutory imposition of duties and liabilities on persons having powers to direct, the proposal changes the circumstances in which a trustee who is subject to direction can be liable for doing as directed or for doing nothing, if that is what the trust instrument that creates the power contemplates, when directions from the power holder are not forthcoming. Whereas in its current form, Michigan law arguably will not allow the settlor to relieve a trustee subject to direction of “overall responsibility for seeing that the terms of the trust are honored,”¹²⁰ the default rules of the proposal essentially relieve a trustee subject to direction of any obligation to second guess the holder

117. See H.B. 6130, 99th Leg. Reg. Sess. § 7703a(2)(b)–(c) (Mich. 2018) (UNIF. DIRECTED TRUST ACT § 5(c) as modified by the proposal).

118. See *supra* text accompanying note 114.

119. See Mich. H.B. 6130 § 7703a(2)(b)–(c) (UNIF. DIRECTED TRUST ACT § 5(c) as modified by the proposal).

120. See *infra* note 146 and accompanying text.

of a power to direct when the holder is acting within her authority under the trust instrument.

So, if one likes the proposal as a change from the status quo in Michigan as to the potential liability of trustees subject to direction, it is because one prefers that would-be trust fiduciaries should be able to take the settlor's division of administrative labor as expressed in the terms of the trust seriously as an allocation of fiduciary risk. One practical motivation for such a preference is that professional trust-service providers are increasingly being asked by settlors to reduce their fees in light of allocations of administrative responsibilities to holders of powers to direct: the settlor reasons that the power holder will assume responsibility for the directed function and that, because an undertaking to follow directions is less onerous than exercising discretion, the directed professional trustee's standard fee should be adjusted.

But *is* following directions less onerous than exercising discretion? The professional trustee will evaluate whether to cut her standard fee in this situation by asking in what circumstances she can be liable for doing what the settlor would have her do, *viz.*, just follow directions. To the extent following a direction from a power holder when the power holder is acting within the power holder's authority under the trust instrument will effectively insulate the trustee from liability, the trustee can take the settlor's division of administrative labor seriously as a scheme of fiduciary-risk allocation. But to the extent the trustee can be liable to trust beneficiaries for doing exactly as directed when the holder of the power to direct is acting within her authority, the request that the trustee reduce her professional fee is a request that she forgo compensation for risk or, equivalently, for effort that she will have to mount—in the way of vigilance over the power holder—to avoid such risk.¹²¹

1. "*Doing as the Power Holder Directs*"

Doing as the holder of a power to direct *directs*, or following, "act[ing] in accordance with,"¹²² or "comply[ing] with,"¹²³ the power holder's *directions*, will amount to different things depending on the

121. See Spica, *supra* note 4, at 354–55.

122. "Except as otherwise provided in subsection (4), the trustee shall *act in accordance with* a trust protector's exercise of the trust protector's specified powers and is not liable for so acting." MICH. COMP. LAWS ANN. § 700.7809(3) (West 2018) (emphasis added).

123. "A directed trustee shall take action to *comply with* the exercise or nonexercise of a power of direction or further power of a trust director . . . [and] is not liable for taking [such] action." H.B. 6130, 99th Leg. Reg. Sess. § 7703a(7) (Mich. 2018) (UNIF. DIRECTED TRUST ACT § 9(a)) (emphasis added).

precise contours of the power to direct. Neither the existing MTC nor the MUDTA specifies a particular form that a power to direct must take.¹²⁴ a power to direct trust investments, for example, may be a plenary power to direct the investment of all the trust's assets or a power to veto the sale of a single "heirloom" investment,¹²⁵ and in either case, the power may cause the holder to be treated, to the extent of the power, as a "trust protector" under the MTC provisions that the MUDTA will displace¹²⁶ or a "trust director" under the MUDTA.¹²⁷ Thus, a given power to direct may or may not purport to shift the initiative from the trustee who is subject to direction to the power holder. A mere power to veto a trustee's articulated plan of action on some matter, for example, will leave the initiative with the trustee.

We can also imagine arrangements of shared responsibility under which independent initiatives by the trustee who is subject to direction, on the one hand, and the holder of the correlative power to direct, on the other, are merely additive—as when, for example, the terms of a trust grant a power holder, *D*, a power to direct a trustee, *T*, to make certain distributions to a trust beneficiary at the beneficiary's request but also provide *T* discretion to make the same distributions without giving *D* a veto over exercises of *T*'s discretion in the matter. In that case, the MTC provisions that the MUDTA will displace or the MUDTA may protect *T* if *D* directs a requested distribution, assuming *D* is acting within her authority under the trust instrument,¹²⁸ but if *D* demurs to a distribution request from the beneficiary, *T* is still liable, *regardless* of *D*'s power, to a claim by an affected trust beneficiary that *T* abused her discretion in deciding to make or not to make the requested distribution.¹²⁹

124. See *supra* notes 14–15 and accompanying text. "This subsection does not provide any powers to a trust director by default. Nor does it specify the scope of a power of direction. The existence and scope of a power of direction must instead be specified by the terms of a trust." UNIF. DIRECTED TRUST ACT § 6 cmt. (UNIF. LAW COMM'N 2017); see also MICH. COMP. LAWS ANN. § 700.7809(6) (indicating that terms of a trust may grant a power to direct modification or termination).

125. See, e.g., UNIF. DIRECTED TRUST ACT § 6 cmt. a.

126. See MICH. COMP. LAWS ANN. § 700.7103(n) (West 2018).

127. See Mich. H.B. 6130 § 7703a (24)(e)–(f) (UNIF. DIRECTED TRUST ACT § 2(5), (9)).

128. See *supra* notes 122–23.

129. Whatever *T* does in response to the beneficiary's request is subject to review by a court, at the instance of an interested person, as a possible abuse of discretion. See, e.g., MICH. COMP. LAWS ANN. § 700.7815(1) (West 2018) (defining trustee's abuse of discretion under discretionary trust provision); RESTATEMENT (THIRD) OF TRUSTS § 87 (AM. LAW INST. 2007). The same standard of judicial review is sometimes referred to as the "arbitrary-and-capricious standard": "abuse-of-discretion standard is simply the arbitrary-and-capricious standard by another name." John H. Langbein, *The Supreme Court Flunks Trusts*, 1990 SUP. CT. REV. 207, 218.

If *T* ordinarily charges a standard fee for acting as trustee and ordinarily performs the distribution function in that capacity, her motivation, if any, to reduce her standard fee in light of *D*'s power in the situation just described is obviously marginal. Still, *at the margin*, *T* is bound to ask under what circumstances she can be liable to trust beneficiaries for failing to second guess *D* in case *D* approves a request by the relevant beneficiary for a distribution. To the extent (1) *T* expects that *D* will exercise the power to direct and (2) following a direction from *D*, when *D* is acting within her authority under the trust instrument, will effectively insulate *T* from liability for the distribution(s) in question, *T* can take *D*'s power seriously as a factor that may, if only marginally, affect the pricing of risk or, equivalently, the exertions required of *T* to mitigate risk.

T's potential motivation to reduce her standard fee in light of *D*'s power is much greater if we suppose instead that *D*'s power is a plenary power to direct distributions and that the trust instrument says: "*T* has no duty to suggest possible distributions for *D*'s consideration, otherwise to prompt *D*, or to evaluate (let alone comment to anyone on) the advisability of any exercise or nonexercise of *D*'s power." In that case, *T* is bound to ask not only under what circumstances she can be liable for failing to second guess *D* when *D* directs a distribution, but also under what circumstances she (*T*) can be liable for doing nothing when *D* is quiescent. To the extent *D*'s having the plenary distribution power effectively insulates *T* from liability for both following *D*'s directions and for doing nothing when distribution directions are not forthcoming, *T* can take *D*'s power seriously as a reason for considering a reduction in her standard fee.

In both of the alternative hypotheticals above, *T* wants to know in what circumstances she can be liable for "following directions" as contemplated by the terms of the trust, but her questions are different in the two hypotheticals because the contours of the hypothesized powers to direct are different. Having noticed this point, we shall ignore it in what follows by stipulating here that, for our purposes, a trustee's "*doing as the holder of a power to direct directs*," "*doing as directed*," "*following directions*," "*act[ing] in accordance with directions*," "*comply[ing] with the exercise or nonexercise of a power of direction*," etc., all mean behaving in respect of the power to direct in any way that is required or permitted by the terms of the trust—whether that involves following a particular instruction, acting repeatedly under a standing order, giving way in response to a veto, prompting instructions, or doing absolutely nothing.

2. *The Duty of a Trustee Subject to Direction under Current Michigan Law to Second Guess “Trust Protectors”*

MTC section 7809(3)–(4) provides that “a trustee shall act in accordance with a trust protector’s exercise of the trust protector’s specified powers and is not liable for so acting,”¹³⁰ *except* that:

the trustee shall not act in accordance with the attempted exercise of the power unless the trustee receives prior direction from the court *[if] [t]he exercise is contrary to the terms of the trust [or] [t]he exercise would constitute a breach of any fiduciary duty that the trust protector owes to the beneficiaries of the trust.*¹³¹

The trustee may be liable for any loss that results from her compliance with a trust protector’s direction if the direction is contrary to the terms of the trust or constitutes a breach of a fiduciary duty that the trust protector owes to trust beneficiaries.¹³² Thus, if, without more, the terms of an irrevocable trust created by a settlor, *S*, grant a person, *D*, a power to direct the trustee, *T*, as to some nondispositive trustee function¹³³ such as investment,¹³⁴ then, provided *D* is not *S*,¹³⁵ *D* is a “trust protector” within the meaning of MTC section 7809,¹³⁶ and if a direction of *D*’s that *T* executes turns out to be prejudicially improvident, *T* is liable to a claim by a trust beneficiary that *T* knew¹³⁷ or had reason to know¹³⁸ that the

130. MICH. COMP. LAWS ANN. § 700.7809(3) (West 2018).

131. *Id.* § 700.7809(4) (emphasis added).

132. *See id.* § 700.7809(5)(a).

133. The point of stipulating that *D*’s power is a power over one of *T*’s nondispositive functions is only that, otherwise, we should have to determine that *D*’s power does not constitute a power of appointment in order to conclude that *D* is a “trust protector” within the meaning of MTC section 7809. *See supra* note 30 and accompanying text. As to the transitivity of the dispositive character of powers of appointment, *see supra* notes 40–43 and accompanying text.

134. For the classification of trustee investment powers as “nondispositive,” *see supra* notes 80–87 and accompanying text.

135. *See supra* note 28 and accompanying text.

136. *See* MICH. COMP. LAWS ANN. §§ 700.7103(n), 700.7809 (West 2018).

137. There is actually no express *scienter* requirement in the relevant provision of MTC section 7809. *See id.* § 700.7809(4). But the omission was probably inadvertent. There is an express *scienter* requirement in the UTC provision on which section 7809 is based, *viz.*, UTC section 808(b), and that requirement is remarked in the ULC Comment to the section: “A trustee may refuse the direction only if the attempted exercise would be manifestly contrary to the terms of the trust or the trustee *knows* the attempted exercise would constitute a breach of a fiduciary duty owed by the holder of the power.” UNIF. TRUST CODE § 808(b) cmt. (UNIF. LAW COMM’N 2010) (emphasis added). And in this, the

direction was contrary to the terms of the trust or constituted a breach of a fiduciary duty that *D* owed the beneficiary.¹³⁹

We may note that the case is unaltered if *D* in the hypothetical above is a beneficiary of the trust and the prejudicially improvident direction was contrary to the terms of the trust because, although MTC section 7809 does not impose obligations to trust beneficiaries on a “trust protector” who is a beneficiary of the trust in question,¹⁴⁰ such a beneficiary is nevertheless a “trust protector” for purposes of *T*’s duty under section 7809(3)–(4) “not [to] act in accordance with the attempted exercise of [a trust protector’s] power unless [T] receives prior direction from the court [if] [t]he exercise is contrary to the terms of the trust.”¹⁴¹ For the same reason, the case is also unaltered if *D* is a beneficiary of the trust and the prejudicially improvident direction constituted a breach of a fiduciary duty to beneficiaries that is imposed on *D* by virtue of something *outside of* section 7809,¹⁴² as when, for example, *the terms of the trust* require *D* to exercise the power in question in a fiduciary capacity.¹⁴³ In that case, it is possible for *T* to know not only whether a

UTC provision comports with the *Restatement (Third) of Trusts*: “Even though the person holding the power of control holds it as a fiduciary and in fact violates a fiduciary duty in exercising the power, the trustee is not liable for acting in accordance with the exercise of the power unless the trustee *knows or should have known* [] that the power holder acted in violation of the fiduciary duty.” RESTATEMENT (THIRD) OF TRUSTS § 75 cmt. e (AM. LAW INST. 2003) (emphasis added).

138. For purposes of the MTC, “a person has knowledge of a fact if . . . [f]rom all the facts and circumstances known to the person at the time in question, the person has reason to know it.” MICH. COMP. LAWS ANN. § 700.7104(1) (West 2018) (UNIF. TRUST CODE § 104).

139. See *supra* note 131 and accompanying text. The conclusion that *T* is thus liable to a claim *by a trust beneficiary* depends on our stipulation (in the text) that the trust in question is irrevocable, for “while a trust is revocable, rights of the trust beneficiaries are subject to the control of, and *the duties of the trustee are owed exclusively to, the settlor.*” MICH. COMP. LAWS ANN. § 700.7603(1) (West 2018) (UNIF. TRUST CODE § 603(b)) (emphasis added).

140. See *supra* note 29 and accompanying text.

141. MICH. COMP. LAWS ANN. § 700.7809(4) (West 2018); see also *id.* § 700.7103(n) (defining ‘trust protector’).

142. The relevant provision of MTC section 7809 says that the trustee shall not act in accordance with the attempted exercise of the power (unless the trustee receives prior direction from the court) if the exercise “would constitute a breach of *any fiduciary duty* that the trust protector owes to the beneficiaries of the trust.” MICH. COMP. LAWS ANN. § 700.7809(4) (emphasis added). It does *not* say, “. . . any fiduciary duty that the trust protector owes *under this section [7809]* to the beneficiaries of the trust.” See *id.*

143. So-called “powers in trust” or “powers in the nature of a trust,” i.e., trust powers granted by the terms of a trust *nominatim* to nontrustees, are commonly dispositive powers. See, e.g., PENNER, *supra* note 67, ¶¶ 3.15(ii), 7.10; BORRON, *supra* note 35, § 877. But they need not be: “administrative powers may also be given to individuals *nominatum* [sic].” PENNER, *supra* note 67, ¶ 3.20. Thus, the supposition that the terms of

given direction from *D* is contrary to the terms of the trust, but also whether it constitutes a breach of a fiduciary duty that *D* owes under the terms of the trust to a beneficiary.¹⁴⁴

But can the terms of the trust relieve *T* in the hypothetical above of the duty to second guess *D* in the circumstances described in MTC section 7809(3)–(4)?¹⁴⁵ Put another way: is MTC section 7809(3)–(4) to be understood as a constructive presumption—to the effect that “the trustee [has] overall responsibility for seeing that the terms of the trust are honored”—¹⁴⁶ that can be rebutted by the terms of the trust? The Comment to the UTC provision on which MTC section 7809(3)–(4) is based, UTC section 808(b), suggests that we *are* dealing here with a rule of construction or default rule and that the terms of the trust *can* relieve *T* of the duty to second guess *D*: “The provisions of [UTC section 808] may be altered in the terms of the trust A settlor can provide that the trustee must accept the decision of the power holder *without question*.”¹⁴⁷

The problem is that the ULC Comment does not explain how the latitude it posits in the settlor to require the trustee to accept the decision of the power holder *without question* squares with UTC sections 801 and 1008(a)(1) (MTC sections 7801 and 7908(1)(a)). The former of these mandates that “the trustee shall administer the trust in good faith, expeditiously, in accordance with its terms and purposes, for the benefit of the trust beneficiaries, and in accordance with this [act].”¹⁴⁸ The latter section denies a settlor the ability to “relieve[] the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the trust beneficiaries.”¹⁴⁹ Neither of these provisions is a mere rule of construction, a default rule—they both prevail over any term of a trust that might be inconsistent with them.¹⁵⁰

the trust require *D* to exercise her power in a fiduciary capacity does not contradict our conclusion that *D* is a “trust protector” within the meaning of MTC section 7809. See *supra* notes 133–36 and accompanying text.

144. See *supra* note 131 and accompanying text.

145. I.e., of the duty imposed on *T* by MICH. COMP. LAWS ANN. § 700.7809(4).

146. See UNIF. TRUST CODE § 808(b) cmt., 7C U.L.A. 605 (UNIF. LAW COMM’N 2010).

147. *Id.* (emphasis added).

148. MICH. COMP. LAWS ANN. § 700.7801 (West 2018) (UNIF. TRUST CODE § 801).

149. *Id.* § 700.7908(1)(a) (UNIF. TRUST CODE § 1008(a)(1)).

150. See *id.* § 700.7105(2)(b), (k) (UNIF. TRUST CODE § 105(b)(2), (10)). Presumably, these provisions are not contradicted by UTC section 1006 (MTC section 7906), according to which, “[a] trustee who acts in reasonable reliance on the terms of the trust as expressed in the trust instrument is not liable to a trust beneficiary for a breach of trust to the extent the breach resulted from the reliance.” *Id.* § 700.7906 (UNIF. TRUST CODE § 1006). The obvious reconciliation is that a trustee’s reliance on an express provision of the trust instrument that is trumped by mandatory (i.e., non-default) provisions of the

In one situation, the conflict between the latitude suggested in the Comment to section 808(b), on the one hand, and UTC sections 801 and 1008(a)(1) (MTC sections 7801 and 7908(1)(a)), on the other, is patent and irreconcilable: if *T* follows a direction from *D* that *T* knows or has reason to know¹⁵¹ is contrary to the terms of the trust,¹⁵² *T* must be in breach of the duty, described in UTC section 801 (MTC sections 7801), to administer the trust *in accordance with its terms*,¹⁵³ which, again, is a duty of which *T* cannot be relieved by the terms of the trust.¹⁵⁴ So, here we have a clear sense in which the terms of the trust cannot relieve *T* of the duty to second guess *D* in the circumstances described in MTC section 7809(3)–(4).¹⁵⁵ regardless of what the trust instrument says about *T*'s having to follow *D*'s directions without question, if a direction of *D*'s that *T* executes turns out to be prejudicially improvident, *T* is liable to a claim by a trust beneficiary that *T* knew or had reason to know that the direction was contrary to the terms of the trust. Even if the terms of the trust exculpate *T* to the fullest extent permitted by the MTC, *T* is liable to a claim that, in the circumstances, her compliance with *D*'s direction amounted to a breach of the duty to administer the trust in accordance with its terms that *T* committed with reckless indifference to the purposes of the trust or the interests of the trust beneficiaries.¹⁵⁶

But what of the case in which, without being contrary to the terms of the trust, a direction from *D* constitutes a breach of a fiduciary duty that *D* owes to the trust beneficiaries? What if, for example, *D*, who, let us suppose, is *not* a beneficiary of the trust in question, gives a direction that *T* knows or has reason to know violates the fiduciary duty of undivided loyalty that *D* owes, as a "trust protector," to the trust beneficiaries?¹⁵⁷ Under the existing UTC section 808(b)–(d) (MTC

trust code is never "reasonable reliance." "This section [UTC section 1006 (MTC section 7906)] protects a trustee only if the trustee's reliance is reasonable." UNIF. TRUST CODE § 1006 cmt. (UNIF. LAW COMM'N 2010). For the idea that internal contradiction is to be avoided in statutory interpretation, see, e.g., Cross, *supra* note 32, at 88–92.

151. See *supra* notes 137–38.

152. See *supra* note 131 and accompanying text.

153. See *supra* note 148 and accompanying text.

154. See MICH. COMP. LAWS ANN. § 700.7105(2)(b) (UNIF. TRUST CODE § 105(b)(2)); see also *supra* notes 148–50 and accompanying text.

155. See *supra* notes 130–31 and accompanying text.

156. See *supra* notes 148–50 and accompanying text.

157. The derivation of that particular duty is as follows. By hypothesis, *D* is a "trust protector." See *supra* note 135–36 and accompanying text. And we have further supposed in the text this note tags that *D* is not a beneficiary of the trust in question. Under MTC section 7809, "[a] trust protector other than a trust protector who is a beneficiary of the trust . . . is a fiduciary to the extent of the powers, duties, and discretions granted to him or her under the terms of the trust." MICH. COMP. LAWS ANN. § 700.7809(1)(a) (West 2018). And under EPIC section 1212: "A fiduciary shall observe the standard of care

section 7809) regime, can the terms of the trust relieve *T* of the duty to resist *D*'s direction¹⁵⁸ in those circumstances? That depends on whether UTC section 801 (MTC section 7801), which, again, is not a mere rule of construction or default rule, but prevails over the terms of the trust,¹⁵⁹ imposes on the trustee of an irrevocable trust a "positive" duty to pursue the purposes of the trust and the interests of the beneficiaries—¹⁶⁰a positive duty that is, in certain circumstances at least, independent of the duty to administer the trust "in accordance with its terms."¹⁶¹

If UTC section 801 (MTC section 7801) imposes such an independent, positive duty, it will be possible for the respective duties to conflict with one another; and if they do, and a direction of *D*'s that *T* executes turns out to be prejudicially improvident, *T* is liable to a claim by a trust beneficiary that (1) although the direction in question was not contrary to the terms of the trust, *T* knew or had reason to know that it constituted a breach of a fiduciary duty that *D* owes to the beneficiary, so that despite what the trust instrument says about *T*'s having to follow *D*'s directions "without question," compliance with the direction was a breach of *T*'s own positive duty to pursue the purposes of the trust and the interests of the beneficiaries;¹⁶² (2) given that in complying with the direction, *T* was adhering to the terms of the trust that require her to follow *D*'s directions without question, *T*'s breach of trust was necessarily committed with "reckless indifference to the purposes of the trust or the interests of the trust beneficiaries" within the meaning of UTC section 1008(a)(1) (MTC section 7908(1)(a)),¹⁶³ and, therefore,

described in [MTC] section 7803 [on trustee impartiality and prudence] and shall discharge all of the duties and obligations of a confidential and fiduciary relationship, including the duties of *undivided loyalty*; impartiality between heirs, devisees, and beneficiaries; care and prudence in actions; and segregation of assets held in the fiduciary capacity." *Id.* § 700.1212(1) (emphasis added).

158. I.e., of the duty imposed on *T* by MICH. COMP. LAWS ANN. § 700.7809(4).

159. See *supra* note 148–50 and accompanying text.

160. "[C]onflict and profit rules take no account of the positive side of fiduciary duties, usually expressed as the duty to act in good faith for the benefit of the principal." Austin, *supra* note 67, at 159. Our assumption that such a duty would be owed by *T* to the beneficiaries of the trust in question depends on our stipulation (in the text) that the trust is irrevocable, because, as already noted *supra* note 139, "while a trust is revocable, rights of the trust beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor." MICH. COMP. LAWS ANN. § 700.7603(1) (West 2018) (UNIF. TRUST CODE § 603(b)) (emphasis added).

161. See *supra* note 148 and accompanying text.

162. See *supra* text accompanying note 160.

163. See *supra* note 149 and accompanying text. "[A] trustee who relied on the presence of a trustee exemption [i.e., exculpatory] clause to justify what he proposed to do would thereby lose its protection: he would be acting recklessly in the proper sense of the term." *Armitage v. Nurse*, [1998] Ch. 241 at 253–54 (Eng.).

(3) *T* cannot be relieved of liability for loss resulting from her compliance with *D*'s direction¹⁶⁴ by the provision of the trust requiring *T* to follow *D*'s directions without question or any other term of the trust.¹⁶⁵

A counterargument would be that, properly understood, UTC section 801 (MTC section 7801) does *not* impose a duty to pursue the purposes of the trust and the interests of the beneficiaries that can be independent of, and therefore possibly conflict with, the trustee's duty to administer the trust in accordance with its terms. Though the section suffers, this counterargument runs, from an indiscriminately adverbial formulation, it can be understood according to traditional concepts as imposing (1) "a duty to administer the trust, diligently and in good faith, in accordance with the terms of the trust and applicable law"¹⁶⁶ and (2) a duty to administer the trust, if it has beneficiaries,¹⁶⁷ "solely in the interest of the beneficiaries."¹⁶⁸ The trust's purposes are mentioned, on this view, apropos of the first duty, and only because the terms of a trust have to be interpreted to be followed, and interpretation necessarily involves the ascription of coherent purposes to the settlor;¹⁶⁹ and the second duty, the traditional "duty of loyalty,"¹⁷⁰ is traditionally *subject* to the terms of the trust—it is not an instance of fiduciary disloyalty to remainder beneficiaries, for example, for a trustee to favor an income beneficiary when the terms of the trust require or permit the trustee to favor the income beneficiary.¹⁷¹ So, the counterargument concludes, if

164. See *supra* note 132 and accompanying text.

165. See *supra* note 150 and accompanying text.

166. RESTATEMENT (THIRD) OF TRUSTS § 76(1) (2003).

167. I.e., if the trust is neither a charitable trust nor a noncharitable "purpose trust," the latter being an express trust lacking definite or definitely ascertainable beneficiaries. See, e.g., MICH. COMP. LAWS ANN. § 700.2722(1) (West 2018). See generally PENNER, *supra* note 67, ¶¶ 9.1-9.30; Paul Matthews, *The New Trust: Obligations without Rights?*, in TRENDS IN CONTEMPORARY TRUST LAW, *supra* note 67, 1, *passim*. Purpose trusts are also sometimes called "trusts of imperfect obligation." See PENNER, *supra* note 67, ¶ 9.18; MAURIZIO LUPOI, TRUSTS: A COMPARATIVE STUDY 124 (Simon Dix trans., 2000).

168. RESTATEMENT (THIRD) OF TRUSTS § 78(1) (2003).

169. See, e.g., DONALD DAVIDSON, *Hume's Cognitive Theory of Pride*, in ESSAYS ON ACTIONS AND EVENTS, 277, 290 (1980) (discussing interpretation of "human thoughts, speech, intentions, motives, and actions"); GREGORY VLASTOS, SOCRATES, IRONIST AND MORAL PHILOSOPHER 236 (1991) (referring to interpretation of texts). For what seems to be a flatfooted misunderstanding of this fundamental point in the context of statutory interpretation, see Gerald C. MacCallum, Jr., *Legislative Intent*, in ESSAYS IN LEGAL PHILOSOPHY 237, 240-45 (Robert S. Summers ed., 1970); cf. CROSS, *supra* note 32, at 32-33, 57 (getting the fundamental point right apropos of statutory interpretation).

170. RESTATEMENT (THIRD) OF TRUSTS § 78 (2003).

171. "Except as otherwise provided in the terms of the trust, a trustee has a duty to administer the trust solely in the interest of the beneficiaries, or solely in furtherance of its charitable purpose." *Id.* § 78(1) (2003) (emphasis added).

the terms of the trust created by *S* are properly interpreted, in light of the trust's purposes, to require *T* to follow *D*'s directions on certain matters *without question*, then *T* cannot commit a breach of trust—she cannot violate any duty she owes, as trustee of the trust, to any trust beneficiary¹⁷²—by following any of *D*'s directions on those matters.¹⁷³

The first strike against this counterargument's reading of UTC section 801 (MTC section 7801) is the wording of the section itself. The counterargument recommends the subordination of the trustee's duty or duties to administer the trust in good faith, expeditiously, for the sole benefit of the trust beneficiaries, and in accordance with the trust code to the duty to administer the trust in accordance with its terms, but there is no indication in the section's wording of that subordination.¹⁷⁴ This is a problem for the counterargument that is presumably not to be dispatched by the tendentious characterization of the section's formulation as "indiscriminately adverbial."

Furthermore (strike two), the legislative history of UTC section 801 (MTC section 7801) is equivocal on the point—on the question, that is, whether the section imposes a duty to pursue the purposes of the trust and the interests of the beneficiaries that can be independent of, and therefore possibly conflict with, the trustee's duty to administer the trust in accordance with its terms. The Comment to the section says that the section "confirms that a primary duty of a trustee is to follow the terms and purposes of the trust and to do so in good faith,"¹⁷⁵ but having articulated 'primary duty' with the indefinite article, the Comment does not indicate whether section 801 (MTC section 7801) also confirms *any other* "primary duty" of the trustee. And the Comment goes on to suggest that "the purposes and particular terms of the trust *can on occasion conflict*"¹⁷⁶ without indicating whether such conflict is liable to be *normative*, in the sense of being a conflict between independent duties, rather than merely *interpretive*, as when what is expressly said in the trust instrument conflicts with what was or would likely have been intended given the trust's purposes. "If such a conflict occurs because of

172. See MICH. COMP. LAWS ANN. § 700.7901(1) (UNIF. TRUST CODE § 1001(a)) (defining 'breach of trust').

173. Thus, according to the counterargument described in the text, a clearer formulation of UTC section 801 (MTC section 7801) would be: *Upon acceptance of a trusteeship, the trustee shall administer the trust in accordance with its terms interpreted in light of the trust's purposes. The trustee shall perform that duty in good faith, expeditiously, for the sole benefit of the trust beneficiaries, and in accordance with this Act.*

174. See *supra* note 148 and accompanying text.

175. UNIF. TRUST CODE § 801 cmt., 7C U.L.A. 587 (2006) (emphasis added).

176. *Id.* (emphasis added).

circumstances not anticipated by the settlor, it may be appropriate for the trustee to petition under [UTC] Section 412 [(MTC section 7412)] to modify or terminate the trust.”¹⁷⁷

And (strike three) there is undoubtedly some support in case law and the academic literature for the idea that a trustee has an ineradicable, positive duty to pursue the interests of the beneficiaries. “The foundational positive duty is stipulated as a duty to seek the ‘best interests’ of the beneficiaries, which would seem to correlate with a right to have one’s interests served.”¹⁷⁸

While a temporary express ouster of almost all accountability can be stipulated for in special circumstances, an exemption [i.e., exculpatory] clause cannot oust the trustees’ duties to act in good faith. If the settlor’s fully informed consent be obtained a clause can exempt the trustees from liability for negligence, whether or not a great or marked departure from the normal standard of conduct, *but not from liability for dishonesty which is taken to include acting deliberately with reckless indifference to the interests of the beneficiaries.*¹⁷⁹

The upshot is that a court *could* endorse the argument we laid out above to the effect that if *T* adheres to the terms of the trust that require her to follow *D*’s directions without question when she knows or has reason to know that a direction of *D*’s that turns out to be prejudicially improvident constitutes a breach of a fiduciary duty that *D* owes to the trust beneficiaries, she (*T*) is necessarily acting with “reckless indifference to the purposes of the trust or the interests of the trust beneficiaries” within the meaning of UTC section 1008(a)(1) (MTC section 7908(1)(a)), and, therefore, cannot be relieved, by that particular term of the trust or any other, of liability for loss resulting from her compliance with *D*’s direction.¹⁸⁰ On that view, the terms of the trust cannot relieve *T* of the duty to second guess *D* in *either* of the circumstances described in MTC section 7809(3)–(4): before following a direction from *D*, *T* is bound to determine not only whether the direction is contrary to the terms of the trust, but also whether it constitutes a breach of any fiduciary duty that *D* owes to the beneficiaries. In its

177. *Id.*

178. Joshua Getzler, *Ascribing and Limiting Fiduciary Obligations: Understanding the Operation of Consent*, in *PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW* 39, 42 (Andrew S. Gold & Paul B. Miller eds., 2014).

179. David Hayton, *The Irreducible Core Content of Trusteeship*, in *TRENDS IN CONTEMPORARY TRUST LAW*, *supra* note 67, 47, 62.

180. See *supra* text accompanying notes 159–65.

current form, the UTC and, accordingly, the current MTC thus make *T D*'s ineluctable fiduciary keeper.

That is evidently what the ULC Drafting Committee that developed the UDTA concluded; for a Legislative Note to the section of the uniform act governing the duties and liabilities of "directed trustees" provides:

A state that has enacted the Uniform Trust Code . . . should . . . add "*subject to [insert cite to Uniform Directed Trust Act Sections 9, 11, and 12],*" to the beginning of subsection (b)(2) of Section 105 [(subsection (2)(b) of MTC section 7105)]. Section 105(b)(2) [(MTC section 7105(2)(b)))] prescribes the mandatory minimum fiduciary duty of a trustee, which is superseded with respect to a directed trustee by . . . this section.¹⁸¹

The MUDTA makes that change to the MTC.¹⁸²

3. The Duty of a Trustee Subject to Direction under Current Michigan Law to Second Guess Holders of Powers to Direct Who Are Not "Trust Protectors"

In its current form, the MTC says nothing directly about the duty of a trustee to second guess the holder of a power to direct when the holder is not a "trust protector" within the meaning of MTC section 7809;¹⁸³ the MTC's instruction in the form mandatory second-guessing requirements¹⁸⁴ pertains only to "trust protectors."¹⁸⁵ But we have seen that the MTC imposes an ineradicable duty on the trustee of an irrevocable trust¹⁸⁶ to administer the trust in accordance with the trust's

181. See UNIF. DIRECTED TRUST ACT § 9 legislative note (UNIF. LAW COMM'N 2017) (emphasis added).

182. See H.B. 6131, 99th Leg. Reg. Sess. § 7105(2)(b) (Mich. 2018); see also *infra* Part II.C.5.

183. I.e., because either the holder is a settlor of the trust in question or the power in question constitutes a power of appointment. See *supra* notes 28, 30 and accompanying text. It is important to remember here that although MTC section 7809 does not impose obligations to trust beneficiaries on a "trust protector" who is a beneficiary of the trust in question, such a beneficiary is nevertheless a "trust protector" for purposes of the mandatory second-guessing requirements of MTC section 7809(3)–(4). See *supra* notes 140–43 and accompanying text.

184. I.e., the duty imposed by MICH. COMP. LAWS ANN. § 700.7809(4) (West 2018) discussed *supra* Part II.C.2.

185. See *supra* notes 29, 140–44 and accompanying text.

186. See *supra* note 139.

terms.¹⁸⁷ And, of course, *that* duty is implicated whenever a power is granted by the terms of a trust, *regardless* of whether the power holder is or is not a “trust protector” within the meaning of current MTC section 7809, because the duty to administer the trust in accordance with its terms will require the trustee to object to any purported exercise of the power that is contrary to those terms.

Thus, for example, if the terms of an irrevocable trust created by a settlor, *S*, grant a person, *D*, a special power of appointment over trust assets, then regardless of whether *D* is *S*, *D* is not a “trust protector” within the meaning of MTC section 7809.¹⁸⁸ If *D* purports to exercise the power by directing the trustee, *T*, to distribute assets subject to the power to an appointee, *A*, who is not a permissible object of the power,¹⁸⁹ then if *T* follow’s *D*’s direction, she is presumably liable to a claim by beneficiaries of the trust who are takers in default that *T* knew or had reason to know that, because *A* is not a permissible object of *D*’s power, *D*’s purported exercise was ineffective according to the terms of the trust.¹⁹⁰ Even if the terms of the trust exculpate *T* to the fullest extent permitted by the MTC, *T* is liable to a claim that, in the circumstances, her compliance with *D*’s direction amounted not only to a breach of *T*’s duty to administer the trust in accordance with the trust’s terms, but a breach that *T* committed with reckless indifference to the purposes of the trust or the interests of the trust beneficiaries.¹⁹¹

But we have seen too that in its current form, the MTC arguably also imposes on the trustee of an irrevocable trust an independent, “positive,”¹⁹² and equally ineradicable duty to pursue the purposes of the trust and the interests of the beneficiaries.¹⁹³ Thus, *T* in our hypothetical above may have to second guess *D* on an exercise of *D*’s power even when the exercise is *not* facially contrary to the terms of the trust, as when, for example, *D* exercises her power in favor of a permissible object *O* pursuant to an agreement by *O* or someone else on *O*’s behalf to make a payment to *D*’s spouse who is not a permissible object of the special power. In that case, if *T* knows about *D*’s side agreement when she (*T*) transfers trust assets to *O* on *D*’s instruction, *T* may be liable to a

187. See *supra* notes 148, 150 and accompanying text.

188. See *supra* note 30.

189. The distinguishing characteristic of a “special” power of appointment is that the power is limited by its terms as to the objects on whom the donee of the power (*D* in our example) can confer beneficial interests by exercise. See, e.g., MICH. COMP. LAWS ANN. § 556.112(i) (West 2018); THOMAS, *supra* note 35, ¶ 1.17.

190. See *supra* notes 148, 150 and accompanying text.

191. See *supra* notes 148–50 and accompanying text.

192. See *supra* note 160 and accompanying text.

193. See *supra* Part II.C.2.

claim by beneficiaries of the trust who are takers in default that *T* knew or had reason to know that, because *D*'s purported exercise amounted to a "fraud on a power,"¹⁹⁴ the exercise was ineffective and that *T*'s compliance with *D*'s direction therefore constituted a breach of *T*'s duty to administer the trust for the trust's purposes and in the interests of the beneficiaries. And if the terms of the trust exculpate *T* to the fullest extent permitted by the MTC, the beneficiaries will, plausibly, add that the breach was committed with reckless indifference to the purposes of the trust or the interests of the trust beneficiaries.

T in our hypothetical above can certainly be required by the terms of the trust to second guess *D* on an exercise of *D*'s power even when the exercise is not facially contrary to the terms of the trust. The terms of the trust might provide, for example, that *D*'s special power is to be exercised in a fiduciary capacity¹⁹⁵ and that *T* shall act in accordance with *D*'s exercise of the power *unless* the exercise is contrary to the terms of the trust or would constitute a breach of *D*'s fiduciary duty to the beneficiaries. In other words, the terms of the trust can place *T* in the same position in respect of *D*'s power that the MTC currently places a trustee in respect of the power of a "trust protector."¹⁹⁶ As written, the current MTC section 7809 pertains only to "trust protectors," but there is nothing to prevent *S* from privately adopting the same or similar treatment for her nontrustee trust actors who are *not* "trust protectors."¹⁹⁷

In that case, *T* could certainly be liable for complying with an exercise of *D*'s special power when *T* knows or has reason to know that

194. See *supra* notes 85–86 and accompanying text. The doctrine of fraud on a power is not codified in the MPAA, let alone the MTC. (As to those statutes' being *in pari materia*, see *supra* note 32 and accompanying text.) But both statutes are "supplemented" by common law. See MICH. COMP. LAWS ANN. § 556.129 (West 2018) (specifying "common law" supplementation of MPAA); *id.* § 700.1203(1) (specifying "principles of law and equity" supplementation of EPIC, of which the MTC is a part). In this sense, 'common law' refers *not*, as it does, e.g., *supra* note 87, to the former separation of the jurisdictions of the King's or Queen's Bench, on the one hand, and the Court of Chancery, on the other (as to which, see, e.g., MAITLAND, *supra* note 45, at 15–20), but rather to judge-made rules and principles, legal *and* equitable, applicable in common-law jurisdictions since the statutory unification of law and equity in England by the Judicature Acts 1873–75: in this sense, 'common law' is "contrasted with statue law" so that "equity is just another form of common law." A.W.B. Simpson, *The Common Law and Legal Theory*, in OXFORD ESSAYS IN JURISPRUDENCE 77, 77 (A.W.B. Simpson ed., 2d series 1973).

195. As we have already noted, trust powers granted by the terms of a trust *nominatim* to nontrustees are commonly dispositive powers. See *supra* note 143.

196. See *supra* notes 130–31 and accompanying text.

197. See MICH. COMP. LAWS ANN. § 700.7105 (UNIF. TRUST CODE § 105) (specifying and limiting trust code's construction as set of default rules).

the exercise is in violation of a duty—the duty of impartiality,¹⁹⁸ for example—that *D* owes the beneficiaries as a fiduciary under the terms of the trust. But what if the terms of the trust merely raise a *question* as to whether *S* intended *D* to act in a fiduciary capacity? Suppose, for example, that (1) *D*'s special power of appointment is one that is commonly exercised by a trustee, such as a decanting power or a power to adjust between income and principal when the trust has disparate income and remainder beneficiaries,¹⁹⁹ (2) *D* has no interest in the trust as a “beneficiary” apart from the status conferred by the special power,²⁰⁰ and (3) the terms of the trust say nothing about *T*'s having an obligation to second guess *D*'s exercise of the power. Does the MTC currently infer such an obligation on these facts?

It might be argued that the opposite inference, *viz.*, that *T* has *no* obligation to second guess *D*'s exercise of the power, is currently *implied* by MTC section 7809 given that (1) the section is the only MTC section providing express second-guessing requirements of the kind in question,²⁰¹ (2) the section applies only with respect to “trust protectors,”²⁰² and (3) *D* is not a “trust protector.”²⁰³ Section 7809 is explicit on this point, the argument runs, with respect to trustees who are subject to direction by “trust protectors”; if the legislature had meant for a trustee to have a duty to second guess the holders of powers to direct who are *not* “trust protectors,” there would be a provision of comparable explicitness to that effect somewhere in the MTC. We may characterize this argument as a very general application of the canon of statutory construction referred to by the maxim *expressio unius est exclusio alterius*—roughly, *the mention of one thing is the exclusion of another*.²⁰⁴

That maxim has some plausibility as a rough guide “to the way in which people speak in certain contexts,”²⁰⁵ but it cannot supply the general premise that what is expressly provided as to one matter in a

198. See *id.* § 700.1212(1) (specifying a fiduciary's duty of impartiality under EPIC, of which the MTC is a part).

199. We have already seen that both of these hypothesized powers are powers of appointment within the meaning of the MTC. See *supra* notes 36, 109 and accompanying text.

200. As noted above, ‘trust beneficiary’ is defined in the MTC to include a person who “holds a power of appointment over trust property in a capacity other than that of trustee.” MICH. COMP. LAWS ANN. § 700.7103(l) (West 2018). For further discussion, see *supra* notes 30, 46.

201. I.e., the requirements imposed by MICH. COMP. LAWS ANN. § 700.7809(4). For further discussion, see *supra* Part II.C.2.

202. See *supra* notes 183–85 and accompanying text.

203. See *supra* notes 30, 188 and accompanying text.

204. See, e.g., CROSS, *supra* note 32, at 140.

205. *Id.* at 134.

given statute cannot be true of other matters subject to that statute unless it is also expressly provided as to them.

[I]t is doubtful whether the maxim [*expressio unius . . .*] does any more than draw attention to a fairly obvious linguistic point, *viz.*, that in many contexts the mention of some matters warrants an inference that other cognate matters were intentionally excluded. Allowance must always be made for the fact that the ‘*exclusio*’ may have been accidental, still more for the fact that there may have been good reason for it.²⁰⁶

In this particular application, to the extent *T*’s having an obligation to second guess *D*’s exercise of the power can be inferred from common-law principles, the presumption is arguably set against the maxim because “[u]nless displaced by the particular provisions of [EPIC, of which the MTC is a part], general principles of law and equity supplement [EPIC’s] provisions.”²⁰⁷

And without the unwarranted premise, the argument we are considering is fallacious: to argue (a) *T* has a duty to second guess *D* under the MTC if *D* is a “trust protector,” (b) *D* is not a “trust protector,” therefore (c) *T* has no duty to second guess *D* under the MTC is to exemplify the “fallacy of denying the antecedent.”²⁰⁸ One might as well deduce that *X* is not wearing a hat from the premises (a) if it is sunny, *X* wears a hat and (b) it is not sunny. In each of these arguments, the conclusion is invalid because the first premise, premise (a), says absolutely nothing about the situation described by the second premise, premise (b). It may be that *X* wears a hat when it is sunny and when it is overcast because *X* just always wears a hat! In neither argument does the first premise, premise (a), say, “if and only if . . .” MTC section 7809 does not say that a trustee who is subject to direction has to second guess the holder of the power to direct if and only if the holder is a “trust protector”; it says that such a trustee has to second guess the power holder if the power holder is a “trust protector.” That leaves open the possibility that, in some circumstances at least, such a trustee has a duty imposed from outside of section 7809 to second guess a holder of a power to direct who is not a “trust protector.”

So, the fact that MTC section 7809 pertains only to “trust protectors” cannot prevent a judge from reasoning as follows: Given that *D*’s special

206. *Id.* at 140.

207. MICH. COMP. LAWS ANN. § 700.1203(1) (West 2018).

208. *See, e.g.*, RICHARD JEFFREY, FORMAL LOGIC: ITS SCOPE AND LIMITS 65–66 (2d ed. 1981); WESLEY C. SALMON, LOGIC 29–30 (3d ed. 1984).

power of appointment is *administrative*, in the sense that it is commonly exercised by a trustee,²⁰⁹ and that, apart from the special power, *D* has no "beneficial" interest in the trust,²¹⁰ there is a strong presumption that *S* intended *D*'s power to be exercised in a fiduciary capacity;²¹¹ in that case, *D*'s fiduciary obligations are among the benefits that *S* intended to confer on her beneficiaries by means of the trust; for *T* to comply with an exercise of *D*'s special power that *T* knows or has reason to know violates one of *D*'s fiduciary duties to the beneficiaries is therefore for *T* to disregard the purposes of the trust and the interests of the beneficiaries, which is a breach of *T*'s own ineradicable duty to the beneficiaries under MTC section 7801 (UTC section 801).²¹²

Can *S*, our hypothetical settlor, effectively disclaim the intent that the preceding argument attributes to her and thereby protect *T* from the implications of the argument? Suppose the trust instrument says: "In the hope that by doing so, I can induce *D* to accept the special power of appointment conferred [in a prior provision of the trust instrument], I [*S*] warrant that *D* shall have no duty to any beneficiary of the trust either to exercise the power or, if it is exercised, to exercise it in any particular way; I hope *D* will consider exercising the power for the benefit of one or more of the trust beneficiaries, but I do not require her to do so; *D* may exercise the power (or decline to exercise it) capriciously, and in any case, *T* shall have no duty in respect of *D*'s power to do anything other than follow any instruction *D* might care to give that is within the terms of [the prior provision of the trust instrument conferring *D*'s special power]."

A court might say that such a provision rebuts any presumption of fiduciary responsibility on *D*'s part that might otherwise be raised by the typically administrative nature of *D*'s power²¹³ and compels the conclusion that *S* intended *D*'s power to be, in some inscrutable sense, *for the sole benefit of D*. In that case, the court could analogize a "bare" or "personal" power of appointment,²¹⁴ for there is no doubt that *S* could create a power solely for *D*'s benefit in the exercise of which *D* would have "no obligation to the objects to benefit, or even consider benefiting, them in any way."²¹⁵ Provided *D* complied with whatever limitations

209. As we assumed *supra* in the text accompanying note 199.

210. See *supra* note 200.

211. See PENNER, *supra* note 67, ¶ 3.20.

212. See *supra* notes 148–50 and accompanying text.

213. See *supra* note 211 and accompanying text.

214. I.e., a *nonfiduciary* power of appointment. See, e.g., HANBURY & MAUDSLEY, *supra* note 87, at 164–66; PENNER, *supra* note 67, ¶ 3.16(v).

215. PENNER, *supra* note 67, ¶ 3.16(v).

might be imposed on such a power by the terms of the trust,²¹⁶ there would be no question of *T*'s having to second guess *D*'s exercise of the power based on *T*'s duty to pursue the purposes of the trust and the interests of the beneficiaries.²¹⁷ "The primary duty of the trustee in regard to such a power is to ascertain whether an attempted exercise is within the terms of the power and to refuse to comply if it is not."²¹⁸ Otherwise, the trustee's duty is "to comply with any exercise of [the] power."²¹⁹

In some circumstances, perhaps, even a typically administrative power can plausibly be interpreted as having been conferred for the sole benefit of the donee of the power:

A power conferred on a parent of the income beneficiary of a trust to direct the trustee to pay that beneficiary additional amounts from trust principal ordinarily would be a power for the benefit of the income beneficiary. The parent would nevertheless hold the power in a fiduciary capacity, although presumptively with broad discretion It is possible, however, that the wording of the power and other admissible evidence of settlor intention (see § 4) might justify an interpretation that a power such as this is a [nonfiduciary] power of appointment, with the duty of the trustee then being to ascertain whether an attempted exercise is within the terms of the power.²²⁰

216. See, e.g., RESTATEMENT (THIRD) OF TRUSTS § 75 cmt. d (AM. LAW INST. 2003); HANBURY & MAUDSLEY, *supra* note 87, at 173.

217. See *supra* notes 160, 162, 193 and accompanying text.

218. RESTATEMENT (THIRD) OF TRUSTS § 75 cmt. d (2003). The quoted comment goes on to recognize that the trustee may also have a duty not to comply with an exercise that constitutes "an abuse" of the power (specifying a particular version of what we have referred to, *supra* in the text accompanying notes 85–86, 194, as "fraud on a power"):

So also, the power holder must not abuse the power by exercising it in a manner that is harmful or indifferent to the interests of the other beneficiaries when such exercise is not reasonably related to the benefit intended for the power holder. . . . If the trustee knows or has reason to believe that an attempted exercise exceeds the scope or would otherwise constitute an abuse of the power (*supra*), the trustee would have a duty not to comply with the direction given by the holder of the power.

RESTATEMENT (THIRD) OF TRUSTS § 75 cmt. d (2003). But in the situation we have hypothesized, a court prepared to treat *D*'s power as being for the sole benefit of *D* would likely say that *S* had effectively ruled out the possibility of *D*'s "abusing" the power (i.e., of committing a "fraud on [the] power") by expressly providing that *D* may exercise the power capriciously.

219. RESTATEMENT (THIRD) OF TRUSTS § 75.

220. *Id.* § 75 cmt. c(1).

On our hypothetical facts, though, the sense in which *D*'s power could be said to be for *D*'s benefit is obscure: we have assumed that apart from the power itself, *D* is a stranger to the trust and the trust beneficiaries.²²¹ The more plausible interpretation is that *S* has sought to insulate *D* from liability to the beneficiaries in order to ensure, or at least to remove an anticipated obstacle to, *D*'s participation in the trust's administrative scheme, but *S* has sought *D*'s participation in that scheme for the benefit of the beneficiaries.

We can leave aside the question of whether on this view of *S*'s motivation, *S* will have succeeded by the hypothesized provision in preventing *D* from acquiring duties to the beneficiaries. We know that, provided *D* is not *S*,²²² *S* could not currently achieve that end if *D*'s power were not a power of appointment because, in that case, *D* would be a "trust protector" within the meaning of MTC section 7809²²³ on whom section 7809 would impose minimum obligations to the beneficiaries²²⁴ that cannot be subverted by the terms of the trust;²²⁵ and we have also seen that we cannot deduce from MTC section 7809's application only to "trust protectors" that rules like those that section 7809 applies to "trust protectors" do not also apply, on other authority, to nontrustee trust actors who are *not* "trust protectors."²²⁶ But what we want to know is whether *S* will have succeeded by the hypothesized provision in preventing *T* from acquiring a duty to second guess *D*, regardless of whether *D* has any duty to second guess herself, if the court interprets the provision as an attempt by *S* to secure *D*'s participation in the trust's administration *for the benefit of the beneficiaries*.

On that interpretation, it would seem that the provision—according to which "*T* shall have no duty in respect of *D*'s power to do anything other than follow any instruction *D* might care to give that is within the terms of [the provision of the trust instrument conferring *D*'s special power]"—is liable to be viewed as an impermissible attempt by *S* to exculpate *T* for a breach of *T*'s ineradicable duty to pursue the purposes of the trust and the interests of the beneficiaries.²²⁷ By hypothesis, *T*'s duty to pursue the purposes of the trust and the interests of the beneficiaries is independent of, and therefore may conflict with, *T*'s duty

221. See *supra* text accompanying notes 200, 210.

222. See *supra* note 28 and accompanying text.

223. See MICH. COMP. LAWS ANN. § 700.7103(n) (West 2018).

224. See *id.* § 700.7809(1)–(2).

225. See *id.* § 700.7105(2)(h).

226. See *supra* text accompanying notes 202–08.

227. See *supra* notes 148–50 and accompanying text.

to administer the trust in accordance with its terms;²²⁸ on the view that *S* granted *D* the special power for the benefit of the beneficiaries, for *T* to comply with an exercise of the power that *T* knows or has reason to know is contrary to the interests of the beneficiaries is for *T* to disregard the purposes of the trust and the interests of the beneficiaries, which is a breach of *T*'s own ineradicable duty to the beneficiaries under MTC section 7801 (UTC section 801);²²⁹ for *T* to rely on the hypothesized provision in doing so is necessarily for *T* to commit that breach with "reckless indifference" within the meaning of MTC section 7908(1)(a) (UTC section 1008(a)(1));²³⁰ and, therefore, this line of reasoning goes, *T* cannot be relieved, by the hypothesized provision or any other term of the trust, of liability for loss resulting from her compliance with *D*'s direction.²³¹

By that reasoning, before following a direction from *D*, *T* is bound under the MTC in its current form to determine not only whether the direction is contrary to the terms of the trust, but also whether it comports with the purposes of the trust and the interests of the beneficiaries. And even if the terms of the trust exculpate *T* to the fullest extent permitted by the MTC, *T* is liable under the current MTC to a claim that, in the circumstances, her compliance with *D*'s direction amounted to a breach of trust committed with reckless indifference to the purposes of the trust or the interests of the trust beneficiaries.

4. *Eliminable and Ineliminable Second Guessing*

Our conclusions in the preceding two sections of the Article²³² allow us to refine what we mean by a trustee's having to "second guess" the holder of a power to direct. We have so far used that expression to indicate any situation in which the trustee in question may have a duty to a trust beneficiary to do something other than simply comply with the exercise or nonexercise of a power holder's power. But we have seen that there is one sense in which the trustee always has to second guess the power holder: whether the power to direct is clearly a power granted to the holder for the benefit of the trust beneficiaries or is best interpreted as a purely personal power created for the sole benefit of the power holder, a trustee who is subject to the power has a duty not to comply with an exercise that violates the terms of the trust that create the

228. See *supra* Part II.C.2.

229. See *supra* notes 148–50 and accompanying text.

230. See *supra* notes 149, 163 and accompanying text.

231. See *supra* notes 149–50 and accompanying text.

232. See *supra* Part II.C.2–3.

power;²³³ the exercise of even a “bare” or “personal” power of appointment,²³⁴ has to comply with the conditions or limitation placed on the power by the instrument that creates it.²³⁵

The UDTA does not affect a trustee’s obligation to second guess the holder of a power to direct in *that* sense:

A directed trustee should not comply with a direction that is outside of the director’s power of direction To do so would violate the trustee’s . . . background duty to act in accordance with the terms of the trust. *See, e.g.*, Uniform Trust Code § 105(b)(2) (amended 2005) (making mandatory “the duty of a trustee to act . . . in accordance with the terms . . . of the trust”); Restatement (Third) of Trusts § 76 (2007) (“The trustee has a duty to administer the trust . . . in accordance with the terms of the trust.”).²³⁶

So, as far as a comparison between the status quo in Michigan and the MUDTA is concerned, a trustee’s duty to second guess the holder of a power to direct on the question whether a purported exercise of the holder’s power is or is not consistent with the terms of the trust that create the power is indifferent because *that* duty is ineliminable under both regimes.

But as we have seen, a trustee who is subject to direction under current Michigan law is bound to determine not only whether a given exercise or nonexercise of a power to direct is contrary to the terms of the trust, but also whether it constitutes a breach of any fiduciary duty that the power holder owes to the beneficiaries if the power holder is a “trust protector” within the meaning of MTC section 7809,²³⁷ and, arguably, even if the power holder is *not* a “trust protector,” whether the exercise or nonexercise comports with the purposes of the trust and the interests of the beneficiaries.²³⁸ The MUDTA, on the other hand, allows a settlor decisively to *waive* any duty on the part of a trustee who is subject

233. *See supra* notes 131, 216–18 and accompanying text.

234. *See supra* note 214 and accompanying text.

235. *See, e.g.*, MICH. COMP. LAWS ANN. § 556.112(c) (West 2018) (defining ‘power of appointment’ as “a power . . . that enables the donee of the power to designate, within any limits that may be prescribed, the transferees of the property [subject to the power]”); *id.* § 556.115(2) (requiring that an exercise comply “with the requirements, if any, of the creating instrument as to the manner, time, and conditions of the exercise of the power”); *Hannan v. Slush*, 5 F.2d 718, 722 (E.D. Mich. 1925) (requiring that power of appointment be exercised in the mode prescribed by donor).

236. UNIF. DIRECTED TRUST ACT § 9 cmt. a (UNIF. LAW COMM’N 2017).

237. *See supra* Part II.C.2.

238. *See supra* Part II.C.3.

to direction to question whether an exercise or nonexercise of a power to direct constitutes a breach of any fiduciary duty of the power holder or comports with the purposes of the trust and the interests of the beneficiaries: under the default rules of the MUDTA, *once a trustee who is subject to direction determines that the holder of a power to direct is acting within the power holder's authority under the terms of the trust with respect to a particular exercise or nonexercise of a power*, the trustee has no further duty to second guess the power holder regarding that exercise or nonexercise.²³⁹

5. A Trustee Subject to Direction Has No Default Duty under the MUDTA to Second Guess the Holder of a Power to Direct When the Power Holder Is Acting within Her Authority under the Terms of the Trust

a. No Default Duty to Second Guess a "Trust Director" When the Director Is Acting within Her Authority under the Terms of the Trust

Under the MUDTA, a settlor can require a "directed trustee" (i.e., a trustee subject to a "power of direction" as defined by the act)²⁴⁰ to second guess a "trust director" (i.e., someone who wields a "power of direction")²⁴¹ to whatever extent the settlor thinks helpful.²⁴² But under the default rules of the MUDTA:

A directed trustee shall take action to comply with the exercise or nonexercise of a power of direction A directed trustee is not liable for taking an action required under this subsection. However, a directed trustee shall not comply with the exercise or nonexercise of a power [of direction] if the exercise or nonexercise was obtained with *the directed trustee's collusion or*

239. See *infra* Part II.C.5.

240. See *supra* Part II.A.2.

241. See *supra* Part II.A.1.-2.

242. "The terms of a trust may impose a duty or liability on a directed trustee in addition to the duties and liabilities under [UDTA section 9]." UNIF. DIRECTED TRUST ACT § 9(e) (UNIF. LAW COMM'N 2017). Because the proposal ensconces the MUDTA within the MTC rather than adopting the UDTA as a separate, stand-alone statute, see *supra* note 2, the proposal relies for the flexibility described in the text on MICH. COMP. LAWS ANN. § 700.7105(1) (West 2018) (UNIF. TRUST CODE § 105(a)).

by the directed trustee's fraud and compliance would be in pursuance of that collusion or fraud.²⁴³

This provision displaces the trustee's obligation to second guess the holder of a power to direct in the sense currently required by MTC section 7809(3)–(4) with respect to “trust protectors,”²⁴⁴ and it trumps any “positive” duty to pursue the purposes of the trust and the interests of the beneficiaries²⁴⁵ that the trustee of an irrevocable trust might otherwise have under the MTC.²⁴⁶

Thus, unless the terms of the trust provide otherwise, a “directed trustee” subject to the MUDTA can only be liable for complying with an exercise or nonexercise of a “power of direction,”²⁴⁷ when the exercise or nonexercise is within the power holder's authority under the terms of the trust, if to do so is for the directed trustee to pursue the directed trustee's own affirmative misconduct *in obtaining* the exercise or nonexercise in question; the mere following of a formally authorized direction that was not wrongfully obtained by affirmative misconduct of the directed trustee will never in itself expose the directed trustee to liability for breach of trust.²⁴⁸

b. No Default Duty to Second Guess a Holder of a Power to Direct Who Is Not a “Trust Director” When the Power Holder Is Acting within Her Authority under the Terms of the Trust

But what if the holder of a power to direct is not a “trust director”—because her power to direct is expressly excluded from the MUDTA's imposition of duties on power holders?²⁴⁹ In that case too, there is

243. H.B. 6130, 99th Leg. Reg. Sess. § 7703a(7) (Mich. 2018) (emphasis added). For a discussion of the respects in which this provision of the MUDTA differs from its counterpart in the UDTA, see *infra* Part III.D.

244. See *supra* Part II.C.2.

245. See *supra* Part II.C.2.–3.

246. See H.B. 6131, 99th Leg. Reg. Sess. § 7105(2)(b) (Mich. 2018) (making the provisions of proposed section 7703a an exception to the trustee's otherwise ineradicable duty to administer the trust in accordance with MICH. COMP. LAWS § 700.7801 (UNIF. TRUST CODE § 801)); see also *supra* notes 181–82 and accompanying text.

247. It is important to remember that a “power of direction” within the meaning of the MUDTA is a power to direct *other than* one that is excluded from the MUDTA's imposition of duties on power holders by proposed section 7703a(1) (UNIF. DIRECTED TRUST ACT § 5(b)). See Mich. H.B. 6130 § 7703a(24)(e) (UNIF. DIRECTED TRUST ACT § 2(5)); see also *supra* Part II.C.2.–3. The proposed section 7703a(1) (UNIF. DIRECTED TRUST ACT § 5(b)) exclusions from the MUDTA's imposition of duties on power holders are discussed *supra* throughout Part II.B.

248. See *supra* note 243.

249. See *supra* note 247.

nothing to prevent the settlor's requiring a trustee subject to the power to second guess the power holder to whatever extent the settlor thinks helpful.²⁵⁰ But under the default rules of the MUDTA:

A power [expressly excluded from the MUDTA's imposition of duties on power holders] that is intended to be held in a nonfiduciary capacity is not subject to fiduciary constraint and may be exercised by the holder in any manner consistent with the scope of the power and any express requirements or limitation imposed by the terms of the trust. A trustee shall take action to comply with the exercise or nonexercise of a power [described in this provision]. A trustee is not liable for taking an action required under this [provision]. However, a directed trustee shall not comply with the exercise or nonexercise of [such] a power . . . if the exercise or nonexercise was obtained with the trustee's collusion or by the trustee's fraud and compliance would be in pursuance of that collusion or fraud.²⁵¹

As with the analogous MUDTA provision applicable to "directed trustees" with respect to "trust directors,"²⁵² this provision displaces the trustee's obligation to second guess the holder of a power to direct in the sense currently required by MTC section 7809(3)-(4) with respect to "trust protectors,"²⁵³ and it trumps any "positive" duty to pursue the purposes of the trust and the interests of the beneficiaries²⁵⁴ that the trustee of an irrevocable trust might otherwise have under the MTC.²⁵⁵

Thus, unless the terms of the trust provide otherwise, a trustee who is subject to the MUDTA can only be liable for complying with an exercise or nonexercise of a power to directed that is both (1) not a "power of direction,"²⁵⁶ and (2) intended to be held in a nonfiduciary capacity, when the exercise or nonexercise is within the power holder's authority under the terms of the trust, if to do so is for the trustee to pursue the trustee's own affirmative misconduct in obtaining the exercise or nonexercise in question; the mere following of a formally authorized direction that was

250. See *supra* note 197 and accompanying text.

251. Mich. H.B. 6130 § 7703a(2)(a). For a discussion of the respects in which this provision distinguishes the MUDTA from the UDTA, see *infra* Part III.E.

252. See *supra* Part II.C.5.a.

253. See *supra* Part II.C.2.

254. See *supra* Part II.C.2.-3.

255. See *supra* note 246.

256. See *supra* note 247.

not wrongfully obtained by the trustee's own affirmative misconduct will never in itself expose the trustee to liability for breach of trust.²⁵⁷

III. HOW THE MUDTA DIFFERS FROM THE UDTA

The MUDTA is based closely on the UDTA, but it differs substantively from the uniform act in several respects.

A. The UDTA's Definition of 'Trust Director' and State Regulation of Entity Trust Powers

Under Michigan law, the only persons other than natural persons permitted to exercise trust powers are corporations that are authorized to do so in one of several ways enumerated in the Michigan Banking Code.²⁵⁸ One of those ways, the catch-all, is for "[a] nonbanking corporation [to] be specifically authorized to act as fiduciary in [Michigan] by another statute of [Michigan]."²⁵⁹ Now, the UDTA, like the MUDTA, (1) permits a settlor to "grant a power of direction to a trust director,"²⁶⁰ (2) subjects "trust directors" to personal jurisdiction²⁶¹ and to "fiduciary dut[ies]" in respect of their "powers of direction,"²⁶² (3) defines 'trust director' as a "*person* granted a power of direction,"²⁶³ and (4) defines 'person' to include legal entities such as corporations.²⁶⁴ Wholesale adoption of the UDTA in Michigan could therefore be interpreted as the enactment of a Michigan statute authorizing nonbanking organizations to exercise trust powers pursuant to the terms of trusts granting "powers of direction."²⁶⁵

That interpretation would obviously have raised an important question of policy—*viz.*, whether enactment of the UDTA should make it possible for corporations or other organizations, which, but for that enactment, would *not* currently be permitted to exercise trust powers in Michigan, to exercise, and to be created *for the purpose of* exercising, any trust power implicit in a "power of direction." As a matter of policy, the latitude that the UDTA allows a settlor to waive a "directed trustee's"

257. See *supra* note 251.

258. See MICH. COMP. LAWS ANN. § 487.11105(2) (West 2018).

259. See *id.* § 487.11105(2)(e).

260. UNIF. DIRECTED TRUST ACT § 6(a) (UNIF. LAW COMM'N 2017) (H.B. 6130, 99th Leg. Reg. Sess. § 7703a(3) (Mich. 2018)).

261. See *id.* § 15 (Mich. H.B. 6130 § 7703a(20)).

262. See *id.* § 8(a) (Mich. H.B. 6130 § 7703a(5)).

263. See *id.* § 2(9) (Mich. H.B. 6130 § 7703a(24)(f)) (emphasis added).

264. See *id.* § 2(4) (MICH. COMP. LAWS ANN. § 700.1106(n) (West 2018)).

265. See MICH. COMP. LAWS ANN. § 487.11105(2).

obligation to supervise a “trust director” when the latter is acting within her authority under the terms of the trust²⁶⁶ is no doubt supported by the UDTA’s conservation of aggregate fiduciary responsibility to beneficiaries: by assimilating trust directors to trustees for purposes of imposing duties and liabilities on such directors,²⁶⁷ the UDTA ensures that the beneficiaries of a trust are always owed *at least* the fiduciary duties they would be owed if the trust in question made no provision for a trust director.²⁶⁸ But the practical value of that assurance must be depreciated to the extent the UDTA allows a thinly capitalized limited liability company, for example, to be created for the purpose of accepting a trust directorship in a state in which, but for enactment of the UDTA, such a company would not be permitted to exercise the “powers of direction” in question.

And in Michigan, an interpretation of the UDTA as a statute authorizing nonbanking organizations to exercise trust powers in the form of powers of direction could have affected the legislative process of enactment because the Michigan Constitution requires a supermajority in both houses of the State legislature for the enactment of any “general law providing for the incorporation of trust companies or corporations for banking purposes, or regulating the business thereof.”²⁶⁹ However, the proposal’s version of the UDTA avoids both the question of policy and the possible constitutional complication by expressly disavowing any intent to augment the class of legal persons currently permitted to exercise trust powers in the State: for purposes of the MUDTA, ‘trust director’ is defined as “an organization *permitted to exercise trust powers in this state as described in section 1105(2) of the Banking Code of 1999, 1999 PA 276*, or an individual, if that person is granted a power of direction.”²⁷⁰ Thus, the MUDTA limits the entities to which a settlor can grant “powers of direction” to those that are otherwise authorized by Michigan law to act as trustees.

266. See *supra* Part III.D; see also *supra* text accompanying notes 120–21 (locating a policy motivation for the latitude in question in certain market forces for price differentiation).

267. See *supra* note 51 and accompanying text.

268. “Compared with a non-directed trust in which a trustee holds all power over the trust, a directed trust subject to this act provides for more aggregate fiduciary duties owed to a beneficiary. All of the usual duties of trusteeship are preserved in the trust director, and in addition the directed trustee has a duty to avoid willful misconduct.” UNIF. DIRECTED TRUST ACT Prefatory Note (UNIF. LAW COMM’N 2017).

269. MICH. CONST. art. IV, § 43 (1963).

270. H.B. 6130, 99th Leg. Reg. Sess. § 7703a(24)(f) (Mich. 2018) (emphasis added); see also MICH. COMP. LAWS ANN. § 700.1106(n) (West 2018) (defining ‘person’).

B. The UDTA's Definition of 'Power of Appointment'

Section 5(a) of the uniform act defines 'power of appointment' so as to include the *definiendum* in the *definiens*: "power of appointment means a power that enables a person acting in a nonfiduciary capacity to designate a recipient of an ownership interest in *or another power of appointment over trust property*."²⁷¹ This lexical circularity, which is imported to the UDTA from the Uniform Powers of Appointment Act²⁷² and the *Restatement (Third) of Property: Wills and Other Donative Transfers*,²⁷³ is inelegant and intellectually disreputable: "Circularity is a disease of analysis . . . that consists in representing a thing as being a synthesis of elements one of which is itself."²⁷⁴ But such circularity is easily avoided. Thus, the MUDTA defines 'power of appointment' without using the term itself outside of quotation marks²⁷⁵ and simply refers, when necessary, to "a power . . . that enables the holder to create a power of appointment."²⁷⁶

C. Rules of Construction

1. Decision-Procedural Circularity

Section 5(c) of the uniform act presumes, as a rule of construction,²⁷⁷ that certain powers are powers to which the uniform act does not apply: UDTA section 5(a) defines 'power of appointment' as "a power that enables a person acting in a nonfiduciary capacity to designate a recipient of an ownership interest in *or another power of appointment over trust property*";²⁷⁸ UDTA section 5(b) excludes a "power of appointment" from the uniform act's application;²⁷⁹ and UDTA section 5(c) provides that:

271. UNIF. DIRECTED TRUST ACT § 5(a) (emphasis added).

272. See UNIF. POWERS OF APPOINTMENT ACT § 102(13) (UNIF. LAW COMM'N 2013).

273. See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 17.1 (AM. LAW INST. 2011) (defining 'power of appointment' as a power "to designate recipients of beneficial ownership interests in *or powers of appointment over the appointive property*") (emphasis added).

274. RICHARD ROBINSON, DEFINITION 145 (1972).

275. See Mich. H.B. 6130 § 7703a(24)(d) (adverting to MPAA definition); MICH. COMP. LAWS ANN. § 556.112(c) (West 2018) (stating MPAA definition).

276. See H.B. 6130, 99th Leg. Reg. Sess. § 7703a(1)(b) (Mich. 2018).

277. "Unless the terms of a trust provide otherwise . . ." UNIF. DIRECTED TRUST ACT § 5(c) (UNIF. LAW COMM'N 2017).

278. See *supra* note 271 and accompanying text.

279. See UNIF. DIRECTED TRUST ACT § 5(b)(1).

Unless the terms of a trust provide otherwise, a power granted to a person to designate a recipient of an ownership interest in or power of appointment over trust property which is exercisable while the person is not serving as a trustee is a power of appointment and not a power of direction.²⁸⁰

In other words, UDTA section 5(a)–(b) excludes nonfiduciary powers of appointment (and nonfiduciary powers to create powers of appointment) from the uniform act's application, and UDTA section 5(c) presumes, as a rule of construction, that any power of appointment that is granted to a nontrustee is a nonfiduciary power of appointment.

But the constructive presumption of UDTA section 5(c) evidently can never apply! If the presumption *were* to apply to any given power, it would follow that the uniform act does not apply to that power, but it would also follow that the *presumption of section 5(c)* does not apply to the power, for the presumption is part of the uniform act. Suppose, for example, that without saying whether the power is to be exercised in a fiduciary or a nonfiduciary capacity, the terms of the trust created by *S* in our previous hypothetical above²⁸¹ grant *D* a power to direct *T* to decant. We have already seen that a power to direct a decanting is a power of appointment.²⁸² We have also seen that a fiduciary power of appointment can be a "power of direction" within the meaning of the UDTA and, therefore, *subject* to the UDTA,²⁸³ but that a nonfiduciary power of appointment is excluded from the UDTA's application.²⁸⁴ Is *D*'s power to direct *T* to decant subject to the UDTA?

The answer to that question is unclear (under the UDTA), but whatever the answer is, the presumption of UDTA section 5(c) clearly has nothing to do with it. If it applied, section 5(c) would tell us that, since the trust instrument is silent on the point, *D*'s power is a nonfiduciary power to which the UDTA does not apply—i.e., that it is a "power of appointment" within the meaning of the UDTA, not a "power of direction," and is, therefore, not subject to the UDTA.²⁸⁵ But that

280. UNIF. DIRECTED TRUST ACT § 5(c). A power that is a "power of appointment" within the meaning of the UDTA, i.e., a nonfiduciary power of appointment, is not a "power of direction" because such "powers of appointment" are excluded from the application of the UDTA by section 5(b), *see supra* note 203, and the term 'power of direction' "excludes the powers described in Section 5(b)." UNIF. DIRECTED TRUST ACT § 2(5).

281. *See supra* notes 133–38 and accompanying text.

282. *See supra* notes 36, 40 and accompanying text.

283. *See supra* note 102 and accompanying text.

284. *See supra* notes 277–80 and accompanying text.

285. *See supra* note 280 and accompanying text.

presumption is *in* section 5(c) of the UDTA, which (statute), the presumption would tell us, *does not apply* to D's power. In fact, the presumption of UDTA section 5(c) cannot apply to *any* power because if it did, the uniform act of which the presumption is a part, and, therefore, the presumption itself, would not apply to that power—*reductio ad absurdum*. So, unlike the UDTA, the MUDTA makes it clear that rules of construction that may affect the application of *certain other parts* of the proposal's version of the UDTA remain applicable *regardless* of the application of those other parts: "*Excepting the rules of construction in subsection (2), this [proposed section 7703a] does not apply to . . .*"²⁸⁶

2. Substance

The MUDTA modifies the substance of the UDTA section 5(c) presumption by distinguishing between (1) nontrustee power holders who are and such power holders who are not beneficiaries of the trust in question and (2) administrative and non-administrative powers of appointment. Whereas UDTA section 5(c) presumes, as a rule of construction, that a power of appointment is a nonfiduciary power and, therefore, not a "power of direction,"²⁸⁷ the MUDTA makes the same presumption²⁸⁸ when the power of appointment in question is a power to adjust between principal and income, to convert to or from a unitrust, to modify or terminate the trust, or to distribute trust assets in further trust *only if* the nontrustee to whom the power is granted is a beneficiary of the trust in question.²⁸⁹ Thus, for example, if a trust instrument grants a nonbeneficiary nontrustee a decanting power that is not expressly described as either a fiduciary or nonfiduciary power by the terms of the trust, the power, as it is a power of appointment,²⁹⁰ is presumed under the UDTA to be a nonfiduciary power²⁹¹ and, therefore, not a "power of direction,"²⁹² whereas the power opposite is presumed under the MUDTA.²⁹³

286. H.B. 6130, 99th Leg. Reg. Sess. § 7703a(1) (Mich. 2018) (emphasis added); *see also id.* § 7703a(2) (providing MUDTA's rules of construction).

287. *See supra* Part III.C.1.

288. *See* Mich. H.B. 6130 § 7703a(1)(a)–(b) (excluding nonfiduciary powers of appointment from the act's imposition of duties on power holders); *id.* § 7703a(24)(e) (excluding powers described in section 7703a(1) from the extension of 'power of direction').

289. *See id.* § 7703a(2)(b)–(c).

290. *See supra* note 36 and accompanying text.

291. *See* UNIF. DIRECTED TRUST ACT § 5(a), (c) (UNIF. LAW COMM'N 2017).

292. *See supra* Part III.C.1.

293. *See* H.B. 6130, 99th Leg. Reg. Sess. § 7703a(2)(b)–(c) (Mich. 2018).

D. A "Directed Trustee's" Duty, under the UDTA, to Second Guess a "Trust Director" When the Director Is Acting within Her Authority under the Terms of the Trust

As we have seen, under the default rules of the MUDTA, a "directed trustee" can only be liable for complying with an exercise or nonexercise of a "power of direction," when the exercise or nonexercise is within the power holder's authority under the terms of the trust, "if the exercise or nonexercise was obtained with the directed trustee's collusion or by the directed trustee's fraud and compliance would be in pursuance of that collusion or fraud."²⁹⁴ But under the UTDA the standard is evidently different:

[A] directed trustee shall take reasonable action to comply with a trust director's exercise or nonexercise of a power of direction . . . and the trustee is not liable for the action [provided, however, that] [a] directed trustee must not comply with a trust director's exercise or nonexercise of a power of direction . . . to the extent that *by complying the trustee would engage in willful misconduct.*²⁹⁵

The ULC Comment to the provision just quoted makes it clear that conduct sufficient to trigger directed-trustee liability under the UDTA's willful-misconduct standard may consist entirely in complying with an egregious exercise or nonexercise of a "power of direction":

[B]ecause a trustee stands at the center of a trust, the trustee must bear at least some duty even if the trustee is acting under the direction of a director. Although the settlor could have made the trust director the sole trustee, the settlor did not actually do so—and under traditional understandings of trust law, *a trustee must always be accountable to a beneficiary in some way.*²⁹⁶

The UDTA's willful-misconduct standard thus makes a stark contrast to the MUDTA's collusion-or-fraud-in-obtaining-the-exercise-or-nonexercise-in-question standard. Under the uniform act, the quality of a particular exercise or nonexercise of a power of direction can determine whether a directed trustee may be liable to trust beneficiaries for complying with that exercise or nonexercise; whereas under the

294. See *supra* note 243 and accompanying text.

295. See UNIF. DIRECTED TRUST ACT § 9(a)–(b).

296. See *id.* § 9(a)–(b) cmt. b (emphasis added).

MUDTA, following a direction that was not procured by the directed trustee's own affirmative misconduct will never in itself expose a directed trustee to liability for breach of trust.²⁹⁷ Under both the UDTA and the MUDTA, a directed trustee is free to question (and convey her reservations regarding) the appropriateness of a particular exercise or nonexercise of a power to direct,²⁹⁸ and she can seek a court order directing her to comply, temporize, or resist.²⁹⁹ The difference is that under the UDTA, but *not* the MUDTA, a trustee may be liable for *failing* to do one or more of those things based on a claim that the exercise or nonexercise in question is such that merely by complying the trustee would engaged in willful misconduct.³⁰⁰

But when is the exercise or nonexercise of a "power of direction" such that compliance will involve a directed trustee in willful misconduct? We learn from a ULC Comment that a trust director's unreasonableness in the exercise or nonexercise of a power is not in itself sufficient to condemn compliance:

The duty to take reasonable action [to comply with the exercise or nonexercise of a "power of direction"] does not, however, impose a duty to ensure that the substance of the direction is reasonable. To the contrary, subject to [the UDTA's willful-misconduct standard], a trustee that takes reasonable action to comply with a power of direction is not liable for so acting even if the substance of the direction is unreasonable.³⁰¹

There are presumably circumstances, then, in which a "directed trustee" can comply with an unreasonable exercise or nonexercise of a "power of direction" under the UDTA without thereby committing willful misconduct. So, we have to ask what it is in addition to or, perhaps, *apart from* unreasonableness that will so mar a trust director's exercise or nonexercise of a power of direction as to proclaim a responsive trustee's obedience "willful misconduct." Alas, one searches the UDTA and the ULC Comments in vain for an answer.

That lack of guidance is bound to weigh on the deliberations of a professional trust-service provider who is being asked to reduce her standard fee in light the settlor's allocation of administrative

297. See *supra* Part II.C.5.a.

298. See UNIF. DIRECTED TRUST ACT § 11(a)(2) (UNIF. LAW COMM'N 2017); Mich. H.B. 6130 § 7703a(11)–(12).

299. See UNIF. DIRECTED TRUST ACT § 9(d); MICH. COMP. LAWS ANN. §§ 700.1302(b)(vi), .7203(1) (West 2018).

300. See *supra* note 295 and accompanying text.

301. UNIF. DIRECTED TRUST ACT § 9 cmt. a.

responsibilities to “trust directors.” To that extent, the MUDTA compares favorably with the uniform act as an inducement for the professional trustee to take the settlor’s division of administrative labor seriously as a scheme of fiduciary-risk allocation: compared with the MUDTA, the UDTA is vague as to the circumstances in which a directed trustee can be liable to trust beneficiaries for doing exactly as directed by a trust director when the director is acting within her authority under the terms of the trust.

E. The Duty of a Trustee Subject to Direction in a UDTA State to Second Guess a Holder of a Power to Direct Who Is Not a “Trust Director” When the Power Holder Is Acting within Her Authority under the Terms of the Trust

We have seen that, under the default rules of the MUDTA, if power to direct is (1) not a “power of direction”³⁰² and (2) intended to be held in a nonfiduciary capacity, a trustee can only be liable for complying with an exercise or nonexercise of the power when the exercise or nonexercise is within the power holder’s authority under the terms of the trust “if the exercise or nonexercise was obtained with the trustee’s collusion or by the trustee’s fraud and compliance would be in pursuance of that collusion or fraud.”³⁰³ But there is no counterpart to this provision in the UDTA: as noted above, apropos UDTA section 5(c),³⁰⁴ the UDTA purports simply not to apply to the powers it excludes from the extension of the term ‘power of direction,’ which means that the uniform act has nothing to say about such excluded powers. The ULC Comment emphasizes this point:

[UDTA section 5(b)] excludes five categories of powers that the drafting committee concluded should not be covered by this act for reasons of policy, coverage by other law, or both. Questions regarding a power that falls within one of these exclusions, such as the duty of the holder of the power and the duty of a trustee or other person subject to the power, *are governed by law other than this act.*³⁰⁵

302. Again, a “power of direction” is a power to direct that is not excluded from the MUDTA’s imposition of duties on power holders by proposed section 7703a(1) (UNIF. DIRECTED TRUST ACT § 5(b)). See *supra* note 247.

303. See *supra* note 251 and accompanying text.

304. See *supra* Part III.C.1.

305. See UNIF. DIRECTED TRUST ACT § 5 cmt (UNIF. LAW COMM’N 2017).

There may or may not be any “law other than this act” directly applicable in the adopting jurisdiction to a given excluded power to direct—directly applicable, that is, to a given power to direct that does not constitute a “power of direction.”³⁰⁶ Judicial decisions interpreting statutory provisions, like MTC section 7809, that are based on UTC section 808(b)–(d)³⁰⁷ will be displaced, along with those statutory provisions, by the enactment of the UDTA.³⁰⁸ But we have seen that a judge could reason from common-law principles to the conclusion that a trustee who is subject, for example, to a nominally nonfiduciary decanting power held by a nonbeneficiary nontrustee may have a duty to question a particular exercise or nonexercise of the power even when the power holder is acting within her authority under the terms of the trust.³⁰⁹ The authority of a judicial decision to that effect that was binding as precedent on judges in the adopting jurisdiction would be undiminished by adoption of the UDTA: because the decanting power is (1) a power of appointment³¹⁰ and (2) expressly nonfiduciary, it is excluded from the UDTA’s application by UDTA section 5(b)³¹¹ so that “[q]uestions regarding [the] power . . . such as the duty . . . of a trustee . . . subject to the power, are governed by law other than [the UDTA]”³¹² such as the judicial precedent that we have imagined here.

The situation is different, however, under the default rules of the proposal’s version of the UDTA. The hypothesized decanting power is not a “power of direction” within the meaning of the MUDTA,³¹³ yet, unless the terms of the trust provide otherwise, the trustee can be liable for complying with an exercise or nonexercise of the power when the exercise or nonexercise is within the power holder’s authority under the terms of the trust only if the exercise or nonexercise was procured with the trustee’s collusion or by the trustee’s fraud and compliance would be in pursuance of that collusion or fraud.³¹⁴ To that extent, the authority of the judicial precedent we hypothesized above, which would be

306. See *supra* note 302.

307. See MICH. COMP. LAWS ANN. § 700.7809 (West 2018); *cf.* UNIF. TRUST CODE § 808(b)–(d) (UNIF. LAW COMM’N 2010).

308. See UNIF. DIRECTED TRUST ACT § 9 legislative note (UNIF. LAW COMM’N 2017); H.B. 6131, 99th Leg. Reg. Sess. (Mich. 2018) (enacting § 1 repealing MICH. COMP. LAWS § 700.7809).

309. See *supra* notes 209–231 and accompanying text.

310. See *supra* notes 36, 40 and accompanying text.

311. See UNIF. DIRECTED TRUST ACT § 5(a)–(b)(1) (H.B. 6130, 99th Leg. Reg. Sess. § 7703a(1)(a)–(b) (Mich. 2018)).

312. See *supra* note 305 and accompanying text.

313. See Mich. H.B. 6130 § 7703a(1)(a)–(b), (24)(e) (UNIF. DIRECTED TRUST ACT §§ 5(a)–(b) (1), 2(5)).

314. See *supra* note 251 and accompanying text.

undiminished by adoption of the UDTA,³¹⁵ would be displaced by adoption of the MUDTA.³¹⁶ It may be that the *holder* of the power can be subject to liability to trust beneficiaries under the hypothesized precedent,³¹⁷ and, in any case, the trustee is free to question the appropriateness of a particular exercise or nonexercise of the power on the beneficiaries' behalf and to seek instructions regarding it;³¹⁸ but, unless the terms of the trust provide otherwise, compliance with an exercise or nonexercise of the power will not expose the trustee to liability for breach of trust provided the power holder is acting within her authority under the terms of the trust and the exercise or nonexercise was not wrongfully obtained by affirmative misconduct of the trustee.³¹⁹

In this respect too, then, the MUDTA compares favorably with the UDTA as an inducement for professional trust-service providers to take the settlor's division of administrative labor seriously as a scheme of fiduciary-risk allocation: because it has nothing to say about powers to direct that fall outside its own definition of 'power of direction,' the uniform act adds no clarity as to the circumstances in which a trustee who is subject to direction can be liable to trust beneficiaries for doing exactly as directed by a power holder who is not a "trust director" when the power holder is acting within her authority under the terms of the trust. The MUDTA, on the other hand, extends the same protection that it offers "directed trustees" in respect of "powers of direction" to trustees who are subject to direction under *other* powers to direct.

IV. CONCLUSION

We need not minimize the importance of those refinements of the UDTA described in the preceding section of the Article that are purely formal:³²⁰ at the very least, formal incoherence is ugly, and there is no reason, other things being equal, why a statute should be ugly. But the MUDTA's substantive refinements of the uniform act are more important: they ensure the practical significance of the statute's conservation of aggregate fiduciary responsibility to trust beneficiaries,³²¹ they calibrate the effects of the statute's rules of construction in light of the MPPA's (and the UDTA's) broad, traditional

315. See *supra* notes 310–12 and accompanying text.

316. For the proposition that precedent is subordinate to legislation as a source of law, see, e.g., RUPERT CROSS, *PRECEDENT IN ENGLISH LAW* 1, 165 (3rd ed. 1977).

317. See *supra* text accompanying notes 221–26.

318. See MICH. COMP. LAWS ANN. §§ 700.1302(b)(vi), 700.7203(1) (West 2018).

319. See Mich. H.B. 6130 § 7703a(2)(a) (no UDTA counterpart).

320. See *supra* Part III.B–C.1.

321. See *supra* Part III.A.

conception of powers of appointment,³²² and they enhance the statute as an inducement for professional trust-service providers to credit a settlor's division of administrative labor between trustees and nontrustee trust actors as an effective scheme of fiduciary-risk allocation.³²³

By requiring trustees who are subject to direction to second guess the holders of powers to direct, *regardless* of what the terms of the trust may say about the absence of a duty to second guess,³²⁴ the MTC currently forces professional trustees to discount settlors' divisions of administrative labor as schemes of fiduciary-risk allocation and thereby frustrates real market incentives for price differentiation.³²⁵ The MUDTA will allow those incentives to operate by allowing a settlor to waive a trustee's obligation to second guess the holder of a power to direct when the power holder is acting within her authority under the terms of the trust.³²⁶ At the same time, the MUDTA will rationalize the scope of the MTC's imposition of duties to trust beneficiaries on holders of powers to direct so as to enable common estate planning techniques that the MTC currently either rules out or makes unnecessarily risky or laborious.³²⁷

322. See *supra* Part III.C.2; see also *supra* text accompanying notes 34–35.

323. See *supra* Part III.D.–E.

324. See *supra* Part II.C.2.–3.

325. See *supra* text accompanying notes 120–21.

326. See *supra* Part II.C.5.

327. See *supra* Part II.B.

V. APPENDIX

UDTA / Proposed § 7703a Parallel Tables

UDTA to Proposed § 7703a [or other]		Proposed § 7703a to UDTA	
UDTA §	Proposed § 7703a [or other]	Proposed § 7703a	UDTA §
1	omitted ³²⁸	7703a(1)(a)-(b)	5(b)(1)
		7703a(1)(c)	5(b)(2)
2(1)	7703a(24)(a)	7703a(1)(d)	5(b)(3)
2(2)	omitted	7703a(1)(e)	5(b)(4)
2(3)	7703a(24)(b)	7703a(1)(f)	5(b)(5)
2(4)	omitted ³²⁹		
2(5)	7703a(24)(e)	7703a(2)(b) ³³⁰	5(c)
2(6)	omitted ³³¹		
2(7)	omitted ³³²	7703a(3)	6(a)
2(8)	omitted ³³³	7703a(4)(a)-(b)	6(b)
2(9)	7703a(24)(f)		
2(10)	omitted ³³⁴	7703a(4)	7
3(a)	7703a(22)	7703a(5)	8(a)
3(b)	[7108(1)(b)]		
		7703a(6)	8(b)
4	omitted ³³⁵		
		7703a(7)	9(a)-(b)
5(a)	7703a(24)(d)		
5(b)(1)	7703a(1)(a)-(b)	7703a(8)	9(c)
5(b)(2)	7703a(1)(c)		
5(b)(3)	7703a(1)(d)	7703a(9)-(10)	10(a)-(b)
5(b)(4)	7703a(1)(e)		
5(b)(5)	7703a(1)(f)	7703a(11)-(14)	11
5(c)	7703a(2)(b)		
		7703a(15)-(16)	10(c)-(d)
6(a)	7703a(3)		

328. Counterpart at MICH. COMP. LAWS ANN. § 700.7101.

329. Counterpart at MICH. COMP. LAWS ANN. § 700.1106(n).

330. Proposed sections 7703a(2)(a) and 7703a(2)(c) do not have counterparts in the UDTA.

331. Counterpart at MICH. COMP. LAWS ANN. § 700.7103(i).

332. Counterpart at MICH. COMP. LAWS ANN. § 700.1107(f).

333. Counterpart at MICH. COMP. LAWS ANN. § 700.1107(k).

334. Counterpart at MICH. COMP. LAWS ANN. § 700.1107(o).

335. Counterpart at MICH. COMP. LAWS ANN. § 700.1203(1).

UDTA to Proposed § 7703a [or other]			Proposed § 7703a to UDTA	
UDTA §	Proposed § 7703a [or other]		Proposed § 7703a	UDTA §
6(b)	7703a(3)(a)-(b)		7703a(17)	13(a)
7	7703a(4)		7703a(18)	13(b)
8(a)	7703a(5)		7703a(19)	14
8(b)	7703a(6)			
8(c)	omitted ³³⁶		7703a(20)	15
9(a)-(b)	7703a(7)		7703a(21)	16
9(c)	7703a(8)			
9(d)	omitted		7703a(22)	3(a)
9(e)	omitted ³³⁷			
			7703a(23)	17
10(a)-(b)	7703a(9)-(10)			
10(c)-(d)	7703a(15)-(16)		7703a(24)(a)	2(1)
			7703a(24)(b)	2(3)
11	7703a(11)-(14)		7703a(24)(d)	5(a)
			7703a(24)(e)	2(5)
12	[7703(10)]		7703a(24)(f)	2(9)
13(a)	7703a(17)			
13(b)	7703a(18)			
14	7703a(19)			
15	7703a(20)			
16	7703a(21)			
17	7703a(23)			
18	[8202]			

336. Counterpart at MICH. COMP. LAWS ANN. § 700.7105(1).

337. Counterpart at MICH. COMP. LAWS ANN. § 700.7105(1).