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CONTEMPORARY FIDUCIARY INVESTMENTS: WHY MARYLAND NEEDS THE PRUDENT MAN RULE

David M. Tralins†

“And another came saying, ‘Lord, behold, here is thy pound which I have kept laid up in a napkin . . . [and He answered] wherefore thou gavest not thou money into the bank that at my coming I might have required my own with usury?’”‡

The problem of how to invest the funds of another is not new. While not intended as an investment guide, this article traces the development of the law in the area of fiduciary investment, analyzing the conflict inherent in balancing the considerations of safety, yield and liquidity with the needs of the beneficiaries. Concluding that most common law and statutory standards are unduly restrictive in light of modern investment practices, the author considers the Maryland experience and suggests that the Maryland legislature adopt a prudent man rule which would enable fiduciaries to effectively utilize contemporary investment vehicles.

I. INTRODUCTION

The investment powers of fiduciaries¹ are usually specified in the

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‡ *Luke* 19:20, 23. This quotation does not express the religious beliefs of the author nor the University of Baltimore, but is merely an example of the very early recognition of the issues embraced by the substance of this article. For a secular citation of this quotation see *In re Eddy's Estate*, 134 Misc. 112, 117, 235 N.Y.S. 455, 460 (1929).

1. The term fiduciary is derived from Roman law and describes “a person or institution who manages money or property for another and who must exercise a standard of care in such management activity imposed by law or contract.” BLACK’S LAW DICTIONARY 563 (rev. 5th ed. 1979). Maryland law provides that a personal representative of an estate is a fiduciary and may use the authority conferred on him by the estates of decedents law, by the terms of the will, by court orders, and

terms of the instruments providing for their appointment.² The testator may, however, have died intestate or the instrument granting fiduciary powers may be so inartfully drafted as to leave doubt about the type of investments authorized.³ In such situations statutory or common law standards are applied, traditionally requiring preservation of the fund's principal at the expense of income.⁴ These standards, however, have proven unduly restrictive in light of modern investment practices which emphasize productivity⁵ and do not provide fiduciaries with the flexibility needed to adapt investments to changing economic conditions.

Judicial and legislative attempts to define fiduciary investment powers have vacillated between imposing specific lists of sanctioned investments to applying prudent man negligence standards to those investing the funds of another. This article surveys the state of investment authority today and analyzes the legal list variations and the prudent man rule in terms of traditional investment considerations such as safety, productivity, liquidity and beneficiary needs. The article considers the interaction in Maryland between the common law prudent man rule espoused by the courts and the legal lists adopted by the legislature. The conclusion finds that legislative enactment of the prudent man rule in Maryland would provide the necessary balance between cautious, yet flexible, investment decisions.

by equitable principles applicable to fiduciaries. MD. EST. & TRUSTS CODE ANN. § 7-101(a) (1974); *accord* N.Y. EST. POWERS & TRUSTS § 11-2.2(b)(2) (McKinney 1967 & Supp. 1982). The term personal representative includes "executor." UNIF. PROBATE CODE § 1-201, 8 U.L.A. 309 (1972). An "executor" is a person appointed, either expressly or implicitly, by a testator to carry out directions concerning dispositions made in a will. BLACK'S LAW DICTIONARY 511 (rev. 5th ed. 1979). If a decedent dies testate, a personal representative may designate himself as an "executor" or if the decedent dies intestate as an "administrator." MD. EST. & TRUSTS CODE ANN. § 7-401(y) (1974).

The general rules applicable to the conduct of fiduciaries apply to personal representatives, trustees and executors. MD. EST. & TRUSTS CODE ANN. § 15-101(e) (1974). *But cf.* MD. EST. & TRUSTS CODE ANN. § 15-102 (1974 & Supp. 1982) (powers of fiduciaries to act without approval of the court in Maryland are not applicable to personal representatives or executors).

2. The investment rules discussed herein are applicable only when the instrument (*i.e.*, will, deed or trust) fails to adequately describe the particular types of investments the fiduciary is permitted to make. *See, e.g., In re Jannella's Will*, 33 Misc. 2d 64, 224 N.Y.S.2d 859 (1962).
3. *Cf. In re Nuese's Estate*, 25 N.J. Super. 406, 408, 411-12, 96 A.2d 298, 300-01 (1953)(trustee is under a duty to observe specific terms of a trust calling for a particular investment), *aff'd on other grounds*, 15 N.J. 149, 104 A.2d 281 (1954).
4. *See In re Brown's Estate*, 287 Pa. 499, 135 A. 112 (1926).
5. *See* G.C. BOGERT & G.T. BOGERT, TRUSTS AND TRUSTEES § 611 (rev. 2d ed. 1980) [hereinafter cited as BOGERT]; A.W. SCOTT, TRUSTS § 6 (3d ed. 1967) [hereinafter cited as SCOTT]; *Investments By Personal Representatives, Report of Committee on Investments by Fiduciaries*, 8 REAL PROP. PROB. & TR. J. 465 (1973) [hereinafter cited as 8 REAL PROP.].

II. HISTORY OF INVESTMENT AUTHORITY AND POWERS

A. *In General*

A fiduciary's power to make investments may flow from the instrument providing for his appointment,⁶ the common law,⁷ statute,⁸ or orders of the court.⁹ The primary source of the investment power is the instrument naming the fiduciary, for it is within that instrument that a testator may expand or limit the fiduciary's powers.¹⁰ There are numerous forms available to the draftsman providing language sufficient to give a fiduciary broad powers of investment.¹¹ Power clauses are usually broadly drafted because of the potential dangers of using restrictive language when granting investment powers. A narrowly drawn instrument limits the fiduciary's ability to minimize substantial losses due to changing economic conditions.¹² But it must be noted that while hardship on the beneficiary of an estate has been cited as a reason for adopting statutes authorizing broad powers, such powers may not be exercised contrary to express provisions in the instrument.¹³

If the language of an instrument does not provide a safe harbor for the fiduciary, *i.e.*, contains no express investment directives, the court examines other rules in order to determine whether the fiduciary's investment decisions were made within the limits of his powers. These rules take various forms and can best be understood by an examination of their historical development.

Fiduciaries have since their inception been subject to a rule of prudence, a fact recognized by English courts as early as 1820.¹⁴ English courts initially limited fiduciary investments to government or bank annuities.¹⁵ English statutory provisions subsequently enlarged approved

6. *See, e.g.*, MD. EST. & TRUSTS CODE ANN. § 7-101(a) (1974).

7. *Id.* A fiduciary "shall use the authority conferred upon him by the estates of decedents law . . . , and by the equitable principles generally applicable to fiduciaries. . . ." *Id.*; *see, e.g.*, Fox v. Harris, 141 Md. 495, 505-06, 119 A. 256, 259 (1922) (there being no direction from testator other than "good, safe" investments, trustee need only act as a prudent man investing his own money).

8. MD. EST. & TRUSTS CODE ANN. § 7-101(a) (1974).

9. *Id.*; *see also id.* § 7-402(a). The court's only discretion is, by the process of ratification, to approve or disapprove of a fiduciary's management decisions. Johnson v. Webster, 168 Md. 568, 578, 179 A. 831, 835 (1935) (trustee); Zimmerman v. Coblentz, 170 Md. 468, 474, 185 A. 342, 345 (1936) (executor).

10. *See, e.g.*, 7 W. BOWE & D. PARKER, PAGE ON THE LAW OF WILLS pt. 1, at 121-22 (1980-81) (forms § 62-218, § 62-219).

11. *See* 8 AM. JUR. LEG. FORMS 2d § 104:114-:115 (1972).

12. *See In re Nuese's Estate*, 25 N.J. Super. 406, 411-12, 96 A.2d 298, 300-01 (1953) (trustee held not accountable for loss when specific provision of will limited investments to those that in reasonable judgment of trustee would produce annual income between 5½% to 7%), *aff'd on other grounds*, 15 N.J. 149, 104 A.2d 281 (1954).

13. *See* Act of March 3, 1976, ch. 337, 1976 N.J. Laws 1342 (introductory statement).

14. *See Massey v. Banner*, 1 Jac. & Will. 241, 37 Eng. Rep. 367 (1820).

15. BOGERT, *supra* note 5, § 613.

investments to include real property securities¹⁶ and government consols.¹⁷

It appears that early authorities in the United States construed the English law as limiting fiduciary investments to government or real property securities,¹⁸ however, the early American courts had difficulty applying the English law due to the dearth of equivalent investment vehicles in the United States.¹⁹ The question necessarily arose as to whether more flexibility should be allowed American fiduciaries because of the lack of investment opportunities.

The judicial response came in *Harvard College v. Amory*,²⁰ decided in 1830. Proceeding on the assumption that the capital over which any fiduciary has control is always at risk,²¹ the Supreme Judicial Court of Massachusetts focused on the conduct of the fiduciary rather than on the performance of his investments.²² By defining what is known as the prudent man rule,²³ the court freed American fiduciaries from the strictures of English investment laws and provided them with greater flexibility in investment decisions. This liberal view was at first adopted by only a few jurisdictions.²⁴

In determining whether an American fiduciary has acted imprudently, courts invoking the prudent man rule have applied a negligence

16. *See id.*; *see also* King v. Talbot, 40 N.Y. 76, 83 (1869). A real property security is defined as "[t]he security of mortgages or other liens or encumbrances upon land." BLACK'S LAW DICTIONARY 1217 (rev. 5th ed. 1979).

17. *See* Fleming, *Prudent Investments: The Varying Standards of Prudence*, 12 REAL PROP. PROB. & TR. J. 243 (1977) [hereinafter cited as Fleming]. The term "consols" is an abbreviated form of the phrase "consolidated annuities" and represents "British government stock established in 1751 by consolidating various government securities and paying 2½% interest (originally 3%)." WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 314 (1960).

18. BOGERT, *supra* note 5, § 613.

19. Fleming, *supra* note 17, at 243.

20. 26 Mass. 446 (1830).

21. *Id.* at 461.

22. *Id.* *See* Fleming, *supra* note 17, at 244.

23. The rule as stated by the court is:

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

Harvard College v. Amory, 26 Mass. 446, 461 (1830). The prudent man rule is sometimes referred to as the Massachusetts rule.

24. Shattuck, *The Development of the Prudent Man Rule for Fiduciary Investment in the United States in the Twentieth Century*, 12 OHIO ST. L.J. 491, 496 (1950) [hereinafter cited as Shattuck]; *see, e.g.*, McCoy v. Horwitz, 62 Md. 183 (1884); Peckham v. Newton, 15 R.I. 321, 4 A. 758 (1886); Scoville v. Brock, 81 Vt. 405, 70 A. 1014 (1908). For another discussion of the developments of the rule from the point of view of durational requirements, *see* Friedman, *The Dynastic Trust*, 73 YALE L.J. 547, 550-51 (1964) [hereinafter cited as Friedman].

test.²⁵ This test presumes an obligation to obtain at least a minimal rate of return on the principal in the hands of the fiduciary.²⁶ In defining this obligation two factors are considered: (1) the length of time the funds are held by the fiduciary; and (2) the amount of the funds being held.²⁷ If the factors indicate that a deposit in an interest-bearing account should have been made and was not, a surcharge can be imposed against the fiduciary²⁸ in an amount equivalent to the interest currently offered by the savings institutions in the community.²⁹

Nearly forty years after *Harvard College*, the prudent man rule was reexamined by the New York Court of Appeals in *King v. Talbot*³⁰ and was found lacking. The New York court ruled that fiduciaries must place a greater emphasis on safety in selecting investments and, therefore, they should utilize government bonds and mortgages as investments rather than stocks.³¹ This decision, setting forth court-sanctioned investments, subsequently led a number of jurisdictions to pass legislation limiting investments to those appearing on legal lists.³²

The legal list legislation began in 1889³³ when the New York legis-

25. *E.g.*, *Ing v. Baltimore Ass'n*, 21 Md. 427 (1864); *Fitchard v. Hirschberg's Estate*, 128 Or. 317, 272 P. 906 (1928).

26. *See Ing v. Baltimore Ass'n*, 21 Md. 427 (1864); *In re Girard's Estate*, 152 N.Y.S.2d 981 (1956). One could reasonably argue that, today, a fiduciary must do more than obtain a minimal return to meet his obligation under the prudent man standard. New investment vehicles can safely provide more substantial returns, therefore a fiduciary must also consider the amount and regularity of income and weigh the potential income against safety when selecting investments. *See infra* note 120. *See generally* AM. JUR. 2D *Executors and Administrators* § 227 (1967); Annot., 117 A.L.R. 871 (1938). The minimal investment return requirement is also meaningless unless economic conditions existing at the time of the investment are considered. *See Young v. Phillips*, 170 Tenn. 169, 93 S.W.2d 634 (1936).

27. *See In re Girard's Estate*, 152 N.Y.S.2d 981, 982 (1956).

28. In addition, a surcharge can be imposed against a fiduciary when he is guilty of self-dealing, *Irwin v. Keokuk Sav. Bank & Trust Co.*, 218 Iowa 477, 255 N.W. 671 (1934), or when he has failed to comply with a court order, *In re Marker's Estate*, 137 Ohio 89, 27 N.E.2d 1019 (1940).

29. *See In re Girard's Estate*, 152 N.Y.S.2d 981 (1956). *See generally* 33 C.J.S. *Executors and Administrators* § 187 (1942 & Supp. 1982).

30. 40 N.Y. 76 (1869). *See also* Friedman, *supra* note 24, at 556 for a discussion of this case.

31. *King v. Talbot*, 40 N.Y. 76, 89-90 (1869). The theory has been advanced that the thinking of the Court of Appeals of New York was influenced by a post Civil War depression. *See generally* Barclay, *Why the Prudent Man Rule?* 99 TRUSTS AND ESTATES 127, 128 (1960).

32. Two states retain legal lists today. *See* ALA. CONST. art. IV, § 74; N.D. CENT. CODE §§ 60-05-10 (1975), 6-05-15 (Supp. 1982), 6-05-15.1, 6-11-08 (1975).

33. *See* Fleming, *supra* note 17, at 244. The banking industry appears to have played a significant role in the formulation of legislation affecting investments by fiduciaries. *See* Friedman, *supra* note 24, at 563. The legal lists were very similar to savings banks lists which existed in nearly every jurisdiction, including Massachusetts, except that legal lists were prepared by the legislature or by the executive branches of government. Shattuck, *supra* note 24, at 499. Savings banks maintained lists of appropriate investments, even in prudent man jurisdictions. *Id.* One could assume that such lists existed for the guidance of the industry and/or provided some measure of protection from criticism of the industry as a whole in

lature passed a statute authorizing fiduciaries to invest in bonds and mortgages, as the *King* court had suggested twenty years earlier.³⁴ During the next decade, a fiduciary in a legal list jurisdiction had become a conservator similar to the English fiduciary of the late eighteenth and early nineteenth centuries³⁵ whose duty was to protect the rights of the remainderman at the expense of life tenants.³⁶

The theory reflected in the legal list legislation was that beneficiaries were entitled to protection from the inexperienced or ignorant trustee.³⁷ To this end, government and municipal obligations and high quality bonds and notes appeared most frequently and consistently on the lists,³⁸ while equity participations³⁹ were almost universally excluded.⁴⁰ By 1900 those jurisdictions adhering to the Massachusetts prudent man rule were in the minority, with the majority following the New York legal list rule.⁴¹

In the late 1930's and early 1940's, a shift occurred in the economic standing of the population. The trust became the tool of the middle class as well as of the rich.⁴² From June 1926 through June 1938, the Comptroller of the Treasury reported a 921% increase in the assets of savings institutions and a 466% increase in the number of trusts in existence.⁴³ The use of life insurance trusts also became common.⁴⁴

While this period was marked by an increase in both the number of trusts and the size of their assets, the securities eligible for inclusion

making investments. The latter theory is supported by the MODEL PRUDENT MAN INVESTMENT ACT, written by the American Bankers Association in 1942, and adopted by the New York State Bankers Association in 1950. *See infra* note 51. The action of the banking industry in attempting to legislate investment standards indicates a desire to memorialize a presumption of correctness in investment decisions and to legitimize such decisions in the corporate fiduciary field.

34. Act of March 14, 1889, ch. 65, 1889 N.Y. Laws 63 (repealed 1897). In 1970, however, New York adopted a "prudent investor" rule for trustees, personal representatives and guardians. N.Y. EST. POWERS & TRUSTS LAW § 11-2.2 (McKinney Supp. 1982).
35. Shattuck, *supra* note 24, at 495.
36. *Id.* Of course, a remainderman would be more interested in the safety of the principal, whereas a life tenant would prefer increased production of income.
37. *Id.* at 499.
38. *Id.*
39. Equity participation is akin to having equity in real estate, *i.e.*, receiving or having a part or share of the value of a property above the total liens or charges against it. BLACK'S LAW DICTIONARY 484 (rev. 5th ed. 1979). The term is often used to refer to corporate stock.
40. Shattuck, *supra* note 24, at 499.
41. *Id.* The majority included the principal economic states of the country—California, Illinois, New York, Ohio, Pennsylvania, Texas and the entire block of Northwest Territory jurisdictions. *Id.* It is also noteworthy that, as the western states had not yet fully developed their economies, the early decisions predominately reflected the economic conditions prevalent in the eastern jurisdictions. *See* Friedman, *supra* note 24, at 562-63.
42. Shattuck, *supra* note 24, at 499.
43. *Id.* at 500.
44. *Id.*

on legal lists declined.⁴⁵ In addition, the income earning power of securities on the lists started to decline while overall prices began to rise.⁴⁶ These two factors, coupled with general economic conditions resulting from the stock market crash, placed the income of the life tenant of an estate in a most precarious position.⁴⁷

Investment conditions were not as difficult in the prudent man rule states as in the legal list jurisdictions since the flexibility afforded by the prudent man rule enabled fiduciaries to invest in equity participations and strengthen estate portfolios.⁴⁸ Indeed, while the rate of return on an investment in the legal list jurisdictions was approximately 2%, a 4% rate of return could be obtained in a prudent man rule jurisdiction with relative ease.⁴⁹

The economic facts of life quickly became apparent to corporate fiduciaries and state legislators, and the number of legal list jurisdictions began to decline.⁵⁰ In 1942 the American Bankers Association drafted the Model Prudent Man Investment Act, applicable to all fiduciaries.⁵¹ The Association concluded that the language of *Harvard College v. Amory*⁵² was appropriate and used its definition of the prudent man rule in drafting the Model Act.⁵³

In 1950 New York, responding to pressures from the New York State Bankers Association, adopted a partial prudent man rule.⁵⁴ This was a significant change for the leading legal list jurisdiction, but the departure was not total since under the new law the investment in

45. This was because the country had recently experienced the stock market crash of 1929. Fleming, *supra* note 17, at 245.

46. Shattuck, *supra* note 24, at 500.

47. *Id.*

48. *Id.* at 501.

49. *Id.*

50. Fleming, *supra* note 17, at 491. See *supra* note 32 for the two legal list jurisdictions remaining.

51. The MODEL PRUDENT MAN INVESTMENT ACT provides in pertinent part:

In acquiring, investing, reinvesting, exchanging, retaining, selling and managing property for the benefit of another, a fiduciary shall exercise the judgment and care under the circumstances then prevailing, which men of prudence, discretion and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital.

Trust Div. Am. Bankers Ass'n, *Model Prudent Man Investment Act*, TRUST & EST. LEGIS. 7 (1961 & Supp. 1969) (out of print). It is curious to note that while the MODEL PRUDENT MAN INVESTMENT ACT is cited by numerous authorities, the text of the Act is no longer available in published form. See also BOGERT, *supra* note 5, § 612 n.18. For a discussion of the role of the banking industry in the area of fiduciary investment legislation, see *supra* note 33.

52. 26 Mass. 446 (1830)

53. BOGERT, *supra* note 5, § 612. Compare the language in *supra* note 23 with that in *supra* note 51.

54. Note, *Trust Fund Investment in New York: The Prudent Man Rule and Diversification of Investments*, 47 N.Y.U.L. REV. 527, 531 (1972) [hereinafter cited as *Trust Fund Investment*].

"nonlegals" could constitute only a percentage of the total assets of the portfolio.⁵⁵

B. Investment Authority Today

At present, investment rules for fiduciaries fall into four broad categories: (1) the prudent man rule initiated by judicial decisions;⁵⁶ (2) the prudent man rule adopted by statute;⁵⁷ (3) statutory legal lists, both mandatory⁵⁸ and permissive;⁵⁹ and (4) hybrid standards which limit particular types of investments to a percentage of the total assets of the fiduciary estate.⁶⁰ Maryland law clearly serves as an example that these categories are not mutually exclusive—the state has adopted the prudent man rule by judicial decision but also uses permissive and mandatory legal lists.⁶¹ In fact, it is quite difficult to categorize the kind of standard applicable in many jurisdictions due to the interplay between the common law and statutes which apply to different kinds of

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55. *Id.* In 1970, New York adopted a statutory prudent investor rule. N.Y. EST. POWERS & TRUST LAW § 11-2.2 (McKinney Supp. 1982). Most hybrid jurisdictions, *i.e.*, those jurisdictions authorizing a percentage of investments in "nonlegals," require that the "nonlegal" investment meet stringent standards such as high ratings by investment services, excellent earnings and dividend records, and ratings in particular stock exchanges. Today, codes of hybrid jurisdictions include: N.H. REV. STAT. ANN. §§ 564:18 (1974), 391:1a (1968); OHIO REV. CODE ANN. §§ 2109.37-.37.1 (Page 1976); W. VA. CODE §§ 44-6-1 to -5 (1982); WIS. STAT. ANN. § 881.01 (West 1982).
56. *See, e.g.*, *McCoy v. Horwitz*, 62 Md. 183 (1884); *Taft v. Smith*, 186 Mass. 31, 70 N.E. 1031 (1904); *Peckham v. Newton*, 15 R.I. 321, 4 A. 758 (1886).
57. *E.g.*, ARK. STAT. ANN. § 58-302 (1971); CAL. CIV. CODE § 2261 (West Supp. 1982); COLO. REV. STAT. § 15-1-304 (Supp. 1982); DEL. CODE ANN. tit. 12, § 3302 (1979); FLA. STAT. ANN. § 518.11 (West 1972); GA. CODE ANN. § 113-1531 (Supp. 1982); IDAHO CODE § 68-502 (1980); ILL. REV. STAT. ch. 148, § 5 (1972); IND. CODE ANN. § 30-4-3-3(c) (Burns Supp. 1982); IOWA CODE ANN. § 633.123 (West Supp. 1982); KAN. STAT. ANN. § 17-5004 (1981); LA. REV. STAT. ANN. § 9:21-27 (West 1964 & Supp. 1982); MISS. CODE ANN. § 91-13-3 (1972); NEB. REV. STAT. § 24-601 (1979); NEV. REV. STAT. § 164.050 (1979); N.M. STAT. ANN. § 33-1-16 (1978); N.Y. EST. POWERS & TRUSTS LAW § 11-2.2 (McKinney Supp. 1982); N.C. GEN. STAT. § 36 A-2 (Supp. 1982); OKLA. STAT. ANN. tit. 60, § 161 (West 1971); OR. REV. STAT. § 128.057 (1981); 20 PA. CONS. STAT. § 7302 (1975); S.C. CODE ANN. § 21-11-10 (Law. Co-op 1976); S.D. COMP. LAWS ANN. § 55-5-1 (1980); TEX. STAT. ANN. art. 7425b-46 (Vernon 1960 & Supp. 1982); UTAH CODE ANN. § 33-2-1 (1953 & Supp. 1982); WASH. REV. CODE ANN. § 30.24.020 (1961); WYO. STAT. § 2-3-301 (1980).
58. *E.g.*, ALA. CONST. art. IV, § 74 (investment in stocks and bonds of private corporations not permitted); N.D. CENT. CODE §§ 60-05-10 (1975), 6-05-15 (Supp. 1982), 6-05-15.1, 6-11-08 (1975) (permits limited discretionary investments by trust companies but restricts other fiduciaries to legal lists); N.H. REV. STAT. ANN. §§ 564:18 (1974), 391:1a (1968) (permits limited discretionary investments by trust companies but restricts other fiduciaries to legal lists).
59. OHIO REV. CODE ANN. §§ 2109.37-.37.1 (Page 1976); W. VA. CODE §§ 44-6-1 to -5 (1982).
60. WIS. STAT. ANN. § 881.01 (West 1982).
61. *See McCoy v. Horwitz*, 62 Md. 183 (1884); MD. EST. & TRUSTS CODE ANN. §§ 15-106, 13-805(b) (1974 & Supp. 1982).

fiduciaries.⁶²

1. Judicial Prudent Man Rule

The application of the prudent man rule by judicial decision has been carried forward to the present day. In *Chase v. Pevear*⁶³ the full range of considerations under the prudent man rule came into play and the case is illustrative of a modern court's analysis of fiduciary investment performance.

In *Chase* seven specific investments were challenged, four of which were in the housing industry and amounted to less than 4% of the trust assets.⁶⁴ The guardian *ad litem* argued that an investment in a real estate investment trust (REIT) was improper because it was "a new concept invited by an Internal Revenue Code provision⁶⁵ which had not survived adequate financial testing."⁶⁶ However, since the master found that the REIT was a large and strong fund widely held by institutional investors and common trust funds, the propriety of the investment was upheld.⁶⁷

In reviewing the investments made by the trustee, the court set forth the rationale for retaining the prudent man standard: "[it] avoids the inflexibility of definite classification of securities, it disregards the optimism of the promoter, and eschews the exuberance of the speculator. It holds fast to common sense and depends on practical experience."⁶⁸ Although the modern rule rejects categorization of improper investments,⁶⁹ the court noted that a disproportionate part of a trust fund should not be invested in a single kind of stock or bond.⁷⁰ The prudent man rule was also found to reject wasteful, hazardous or improperly speculative investments.⁷¹ Although the court would apply the standard to each separate investment in deciding if a trustee is chargeable with any loss, some consideration is given to the manage-

62. Shattuck, *supra* note 24, at 502. See generally BOGERT, *supra* note 5, at §§ 612, 616-67 (state by state discussion).

63. 419 N.E.2d 1358 (Mass. 1981)

64. *Id.* The estate of the testator consisted of "excessively diversified" common stocks and ten bond issues, debentures and notes. From January 7, 1971 to May 1974, the average annual rate of return on the securities in the trust was 3.5%. At the end of 1974, it was 5.1%. *Id.* at 1362.

65. REITs first came into being in 1961 as a result of a 1960 amendment to the Internal Revenue Code of 1954. I.R.C. §§ 856-58. The legislation attempted to create a vehicle that would allow small shareholders to invest in a diversified portfolio of real estate.

66. *Chase v. Pevear*, 419 N.E.2d 1358, 1366 (Mass. 1981). The reference to REITs as being a new concept refers to the lack of seasoning for this investment vehicle. *Cf.* Eby Estate, 6 Pa. D. & C.3d 371, 387 (Pa. 1977) (performance of REITs documented).

67. *Chase v. Pevear*, 419 N.E.2d 1358 (Mass. 1981).

68. *Id.* at 1365.

69. *Id.*

70. *Id.* at 1366.

71. *Id.*

ment of the fund as a whole since individual investment decisions may be affected by performance considerations of the aggregate fund. The focus should remain, however, on the individual security.⁷²

The *Chase* court went on to rule that the purchase of common stock in a business primarily engaged in insuring lenders against losses in residential mortgage loans was proper despite the stock's subsequent decline.⁷³ However, the fiduciary was surcharged for failure to sell the declining stock at an earlier date in light of "disquieting" information.⁷⁴ As to other challenges, the court found in each case that the investments were widely employed in the investment community and reflected certain favorable investment factors. These factors included ratings, dividend performance and price performance.⁷⁵

2. Statutory Prudent Man Rule

The vitality of the prudent man standard has been exhibited by its legislative enactment, almost verbatim, nearly a century and a quarter after its promulgation.⁷⁶ Indeed, most state adoptions of the prudent man rule have been by statutory enactment rather than by judicial decisions.⁷⁷ These statutes take several forms but frequently parrot the language of the court opinions.⁷⁸

Some uniform acts or federal statutes, however, are deviations from the broad standards of the state prudent man judicial decisions which mandate that a fiduciary act as though he were dealing with his own property.⁷⁹ The provisions of the Uniform Probate Code (UPC),⁸⁰

72. *Id.*

73. *Id.* at 1368.

74. *Id.*

75. *Id.* at 1368-69.

76. Such an example is the language of Utah's statutory provision. UTAH CODE ANN. § 33-2-1 (1953 & Supp. 1982). The law applies to executors, administrators, guardians, trustees and other fiduciaries. Law of 1977, ch. 194, § 70, 1977 Laws of Utah.

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

78. Compare *Harvard College v. Amory*, 26 Mass. 446, 461 (1830) (a fiduciary is to "observe how men of prudence, discretion, and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be 'invested'") with CAL. CIV. CODE § 2261 (West Supp. 1982) (trustee should "exercise the judgment and care, . . . which men of prudence, discretion and intelligence exercise in the management of their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of their capital"); see also UTAH CODE ANN. § 33-2-1 (1953 & Supp. 1982).

79. *Harvard College v. Amory*, 26 Mass. 446, 461 (1830).

80. UNIF. PROBATE CODE, 8 U.L.A. 281-592 (1972 & Supp. 1982). The UPC has been adopted in its entirety by 14 states: ALASKA STAT. § 13.06.005.100 (1972 & Supp. 1982); ARIZ. REV. STAT. ANN. §§ 14-1101 to -7307 (Supp. 1982); COLO. REV. STAT. § 15-10-101 to -17-101 (1973 & Supp. 1982); FLA. STAT. ANN. §§ 731.005 to 735.302 (West 1976 & Supp. 1982); HAWAII REV. STAT. §§ 560:1-101 to :8-102 (1976 & Supp. 1982); IDAHO CODE §§ 15-1-101 to -7-307 (1979 & Supp. 1982);

for example, invoke an external standard and require the fiduciary to act as though he were dealing with the property of another.⁸¹ To some, the distinction between the UPC and the judicially created prudent man standard may mean that a fiduciary under the UPC is permitted broader latitude in investment decisions because the property under his control is not his own. Perhaps a more intellectually honest interpretation, however, is that greater care is to be taken when dealing with another's property and, consequently, the fiduciary's options are actually more limited.

The UPC distinguishes between the investment powers of a personal representative⁸² and those of a trustee,⁸³ and even a brief comparison reveals radically different approaches to investment authority between these two types of fiduciaries. The UPC sets forth a legal list for personal representatives but also grants them power to invest in those instruments which are "prudent" and "reasonable for use by trustees generally."⁸⁴ Trustees, on the other hand, are authorized to invest in those vehicles which "a prudent man dealing with the property of another" would choose.⁸⁵

ME. REV. STAT. ANN. tit. 18A, §§ 1-101 to 8-401 (1964); MICH. COMP. LAWS ANN. § 700.1-993 (1980 & Supp. 1982); MINN. STAT. ANN. §§ 524.1-101 to 8-103 (West 1975 & Supp. 1982); MONT. CODE ANN. §§ 72-1-101 to 5-502 (1982); NEB. REV. STAT. §§ 30-2201 to -2902 (1979 & Supp. 1982); N.M. STAT. ANN. §§ 45-1-101 to 7-401 (1978 & Supp. 1982); N.D. CENT. CODE §§ 30.1-01-01 to -35-01 (1976 & Supp. 1982); UTAH CODE ANN. §§ 75-1-101 to 80-101 (Supp. 1982). The UPC applies to affairs of decedents, missing, protected, and incapacitated persons and minors. UNIF. PROBATE CODE § 1-201(b), 8 U.L.A. 302 (1972).

81. UNIF. PROBATE CODE § 7-302, 8 U.L.A. 584 (1972).

82. Compare MD. EST. & TRUSTS CODE ANN. § 7-401(c) (1974) (personal representative is authorized to "deposit funds for the account of the estate, including money received from the sale of assets, in checking accounts, in insured interest-bearing accounts, and in short-term loan arrangements which may be reasonable for use by a trustee") with UNIF. PROBATE CODE § 3-715(5), 8 U.L.A. 448 (1972) (personal representative is authorized to "invest in federally insured interest bearing accounts, readily marketable secured loan arrangements or other prudent investments which would be reasonable for use by trustees generally").

83. "Except as otherwise provided by the terms of the trust, the trustee shall observe the standards in dealing with . . . the property of another, and if the trustee has special skills or is named trustee on the basis of representations of special skills or expertise, he is under a duty to use those skills." UNIF. PROBATE CODE § 7-302, 8 U.L.A. 584 (1972).

84. UNIF. PROBATE CODE § 3-715(5), 8 U.L.A. 448 (1972).

85. *Id.* § 7-302, 8 U.L.A. at 584. The deviation of the UPC from the judicially created prudent man standard has not escaped comment. There appears to be little rationale behind the approach of the UPC in combining both a legal list and a prudent man rule in its standards for personal representatives yet allowing trustees to only be governed by a prudent man rule. One might speculate that, having made the dichotomy, the draftsmen of the UPC were attempting to render the standards for both offices harmonious. See generally Fleming, *supra* note 17, at 246.

The argument could easily be made that there is no greater protection afforded than the protection given to one's own assets. There is a point, however, when even the most prudent man will decide that, while his assets are not abso-

The Employee Retirement Income Security Act of 1974 (ERISA)⁸⁶ codifies a standard for judging the investment performance of a fiduciary that is a further deviation from the judicially created "prudent man" standard. An ERISA fiduciary must exercise the judgment which a prudent man "acting in a like capacity . . . would use in the conduct of an enterprise of a like character and with like aims. . . ."⁸⁷ However, ERISA mandates that the fiduciary discharge his obligations "in accordance with documents and instruments governing the plan [only] insofar as such documents and instruments are consistent with [other ERISA] provisions."⁸⁸

3. Legal Lists

The jurisdictions which have adopted the legal list approach may be classified as either mandatory or permissive.⁸⁹ A traditional mandatory legal list exists under New Hampshire law which states that "unless it is otherwise provided by the instrument creating the trust, [a fiduciary] shall invest the assets of the trust in the following described classes of property only. . . ."⁹⁰ Alabama's constitution prohibits investment by fiduciaries in bonds or stocks of any private corporation, and further prohibits the legislature from enacting statutes authorizing such investments.⁹¹ This particular provision has been described as a "reverse legal list" specifying a "no" rather than a "yes."⁹² It is important to bear in mind that even the use of the mandatory list presupposes the exercise of prudence.⁹³

Alabama supplements its constitutional "reverse legal list" with a permissive range of categories, raising a presumption that such investments will be approved by reviewing courts.⁹⁴ The permissive lists allow fiduciaries to purchase other nonlist investments if ordinary skill and prudence is used, an action precluded by the language of

lutely safe, they are sufficiently safe to permit some risk in order to yield a higher return.

86. 29 U.S.C. § 1104 (1976 & Supp. IV 1980, Supp. V 1981) (duties of fiduciaries to assets of employee benefit plan held in trust); *see also* MINN. STAT. ANN. § 501.125 (West 1946).

87. 29 U.S.C. § 1104(a)(1)(B) (1976).

88. *Id.* (D).

89. *See* 8 REAL PROP., *supra* note 5, at 466; *see also* Friedman, *supra* note 24, at 567.

90. N.H. REV. STAT. ANN. § 564:18 (1974).

91. ALA. CONST. art. IV, § 74. *Contra* WYO. CONST. art. III, § 38 (grants legislature the power to authorize investments in bonds, stocks or securities). Although Wyoming originally followed the lead of Alabama, those constitutional enactments have been attributed to "herd" instincts on the part of Wyoming's legislature. Friedman, *supra* note 24, at 563.

92. Friedman, *supra* note 24, at 563.

93. BOGERT, *supra* note 5, § 614.

94. Alabama authorizes investment in certain classes of securities which are federally or state insured or secured by promissory notes or mortgages. Life, endowment or annuity contracts are also acceptable. ALA. CODE tit. 19, §§ 3-120, 3-125 (1977).

mandatory lists.⁹⁵

4. Hybrid Standards

The difficulty in categorizing the investment standards applicable in many jurisdictions is most pronounced in states which maintain permissive legal lists or have enacted a statutory rule of prudence but continue to exert authority over the amount of funds to be placed "at risk."

For example, Ohio and West Virginia retain statutory legal lists which are permissive but limit the percentage of investments sanctioned in certain categories.⁹⁶ The ultimate hybrid jurisdiction is Wisconsin which enacted the prudent man standard but limited investment in common stocks to 50% of the total market value of the fund.⁹⁷ The Wisconsin provision does, however, allow proceeds from the sale of the excess stock to be reinvested in new common stocks.

III. TRADITIONAL INVESTMENT CONSIDERATIONS

Along with the common law duty to make a safe yet productive investment, the modern fiduciary must also juggle changing market conditions and the estate's need for readily available funds. As such, the currently used investment standards must be examined to determine if, and to what extent, they satisfy these traditional investment considerations.

A. Safety

Probably the greatest dilemma facing fiduciaries in their investment decisions is the conflict between safety of investments and the rate of return they generate. By the nature of the office, a fiduciary may not make an investment which is unsafe.⁹⁸ He is also, however, charged with a duty to make the funds entrusted to him productive.⁹⁹ Because he would be liable for any losses incurred as a result of the investment, a fiduciary often looks first to its safety¹⁰⁰ with only secondary consideration going to the rate of return and the duration of the commitment.¹⁰¹ The duty to make funds productive, therefore, often conflicts with the fiduciary's self-protective instincts.

For many years, the investment opportunities available to fidu-

95. BOGERT, *supra* note 5, § 614.

96. OHIO REV. CODE ANN. §§ 2109.37 - .37.1 (Page 1976); W. VA. CODE §§ 44-6-1 to -5 (1982).

97. WIS. STAT. ANN. § 881.01(2) (West 1982).

98. BOGERT, *supra* note 5, § 614.

99. 8 REAL PROP., *supra* note 5, at 465. *See generally* 3 C.J.S. *Executors & Administrators* § 187 (1942 & Supp. 1982).

100. *See, e.g.,* King v. Talbot, 40 N.Y. 76 (1869); *In re* Brown's Estate, 287 Pa. 499, 135 A. 112 (1926).

101. *See, e.g.,* Ing v. Baltimore Ass'n, 21 Md. 427 (1864); *In re* Girard's Estate, 152 N.Y.S.2d 981 (1956).

ciaries were limited to bank or savings and loan deposits because of the traditional view that this was the safest way to make funds productive. This was unfortunate for the estate since interest paid on such deposits was usually very low, and higher rates of return could have been obtained without sacrificing the safety of the principal.¹⁰²

Bank and savings and loan deposits insured by one or more quasi-governmental agencies¹⁰³ have recently been criticized, however, for their alleged lack of safety. In recent months, the safety and security of approximately one-third of the savings and loan associations across the nation¹⁰⁴ have been threatened by high interest rates.¹⁰⁵ The assets involved amount to approximately two hundred billion dollars.¹⁰⁶ For

102. Today, for example, the maximum rate of interest banks can pay on unrestricted deposits is limited by law to 5¼% on savings deposits in commercial banks and 5½% on deposits in mutual savings banks. 12 C.F.R. § 1204.112 (1982). Maximum interest on time deposits ranges from 5¼% on funds committed for 14 days to 7¼% on funds committed for eight years or more. 12 C.F.R. § 217.7(b) (1982). In comparison, as of June 27, 1982, Donoghue's Money Fund seven-day average was paying 13% interest. N.Y. Times, June 27, 1982, at 14, col. 3. Rates on money funds have declined significantly since that time.

Congress has enacted a provision to phase out the maximum rate of interest and dividends on deposits and accounts as quickly as economic conditions warrant and to provide depositors with a market rate of return on savings with due regard to the safety and soundness of depository institutions. 12 U.S.C. §§ 3501, 3503(a)-(b) (Supp. IV 1980).

Recently enacted legislation would allow savings and loans to create optional accounts patterned after the money market account discussed *infra* in notes 132-39 and accompanying text. Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469, 1501. There are arguments both for and against the proposition that the legislation will enable the savings and loan industry to perform competitively with the money funds. Although these optional accounts have an advantage over money funds in that they are insured by the FDIC, see *infra* note 103 and accompanying text, institutions often require large minimum deposits and impose limitations on check writing. Savings and loans paying a higher rate of interest on money-market type accounts will have to generate these additional funds, most likely by raising the interest rates charged on consumer, commercial and residential loans. If savings institutions receive a large influx of depositors opting for this new account, they run the risk of being unable to meet their obligations should interest rates return to their previously high levels. For a critique of these new accounts see Rankin, *Bank Money Funds—Still A Good Idea?*, N.Y. Times, Apr. 17, 1983, at F11, col. 1.

103. *E.g.*, Federal Savings and Loan Insurance Corp. (FSLIC), 12 U.S.C. 1725 (1976); Federal Deposit Insurance Corp. (FDIC), 12 U.S.C. 1811 (1976); Maryland Savings Share Insurance Corp. (MSSIC), MD. FIN. INST. CODE ANN. § 10-105 (1980). Quasi-governmental agency obligations are backed by their own revenues.

104. Wall. St. J., May 27, 1982, at 10, col. 2.

105. Evening Sun, July 15, 1981, at B4, col. 2.

106. *Id.* If interest rates had continued at their recently high levels, it is estimated that savings and loan institutions would have been reduced to zero net worth at the rate of one per day, with potential losses of 45 billion dollars. *See id.* During the period between February 1981 and July 15, 1981, the list maintained by the Federal Home Loan Bank Board of savings and loan institutions with substantial financial difficulties rose dramatically. The number of troubled institutions on the roster had risen to 404 before the Board abolished the list, rather than release such information to the inquiring press. The Maryland Savings Share Insurance Cor-

example, in March 1982, savings industry leaders requested a form of federal subsidy that would cost the government seven and one-half billion dollars in the first year alone.¹⁰⁷ While the Federal Savings and Loan Insurance Company (FSLIC), which assists troubled financial institutions by providing capital infusions,¹⁰⁸ has assured depositors that assets appear to be more than sufficient to cover any potential loss,¹⁰⁹ financial analysts and commentators report that investors have become increasingly wary of the safety factor in insured accounts.¹¹⁰

The crux of the problem involves the amount of capital held in reserve out of which depositors are paid for losses by the insurers.¹¹¹ Although the United States Senate and House of Representatives have resolved that the full faith and credit of the federal government extends to insure all deposits up to the prescribed limits,¹¹² no public law has been signed by the President to this effect. Moreover, the federal government has not been put to the test in light of the Congressional resolution. Some analysts have also criticized the federal insurance funds for taking on assets of questionable quality in distress merger situations, thereby making the integrity of the reserve fund even more dubious.¹¹³

poration (MSSIC) has taken the same position. Evening Sun, Nov. 21, 1981 at 67, col. 2. The FDIC "problem list" numbers 425 banks. Wall St. J., Mar. 28, 1983, at 2, col. 2.

107. *How Safe Are Your Savings?*, NEWSWEEK, Mar. 15, 1982, at 50, 54. Total assets involved in federal savings and loan bailouts have risen from slightly more than half a billion in 1979 to 11.6 billion in 1981. "Dr. Doom" Calling, NEWSWEEK, Mar. 15, 1982, at 55.
108. 12 U.S.C. §§ 1725-26 (1976). Although the FSLIC is prepared to insure depositors from loss within its authorized limits of \$100,000 per account, it has more often chosen to find merger partners to take over the ailing institutions. In 1981, these mergers totaled 294, with 23 of the mergers requiring cash from the FSLIC. *How Safe Are Your Savings?*, NEWSWEEK, Mar. 15, 1982, at 50, 52.
109. *How Safe Are Your Savings?*, NEWSWEEK, Mar. 15, 1982, at 50.
110. See Scheibler, *Call in the Reserves?*, BARRONS, Mar. 8, 1982, at 48; see also *Money and Credit*, BUSINESS WEEK, Nov. 23, 1982, at 44.
111. Financial analysts estimated that the FDIC had roughly a 12 billion dollar reserve at the end of 1981, equivalent to only 1.19% of the bank deposits it insures. Scheibler, *Call in the Reserves?*, BARRONS, Mar. 8, 1982, at 48. The FSLIC reserve is approximately six and one-half billion dollars. *Money and Credit*, BUSINESS WEEK, Nov. 23, 1982, at 44, 45.
112. H.R.J. Res. 290, 97th Cong., 2d Sess., 128 CONG. REC. H957-58 (daily ed. Mar. 18, 1982), S2617-18 (daily ed. Mar. 23, 1982). The Resolution has not received widespread attention perhaps, incredibly, due to the argument that too much reinsurance may be a dangerous thing. This implies that depositors do, indeed, have cause for concern over the sanctity of the insurance reserves. Underlying this theory is the presumption by depositors that the insurance extended beyond the prescribed limits. This was clearly rebutted by federal regulators' actions in the takeover of Penn Square Bank of Oklahoma City in the summer of 1982. *The Runaway Action in Deposit Insurance*, BUSINESS WEEK, Feb. 14, 1983, at 113.
113. Scheibler, *Call in the Reserves?*, BARRONS, Mar. 8, 1982 at 48. This article provides an amusing insight into some of the assets obtained.

B. Productivity

The rate of return on an investment goes to the heart of the duty to make the funds in the hands of a fiduciary productive. This duty has been underscored in recent years by the presence of high inflation and high interest rates which tend to diminish the value of assets due to the weakened purchasing power of the dollar. Further, it has never been clear precisely how productive such funds must be, or what standards are used to gauge a fair investment return.¹¹⁴

While the fiduciary's duty to invest funds in order to make them productive is deeply rooted in the common law,¹¹⁵ it is not absolute. There may be compelling circumstances, such as a mortgage foreclosure or a medical emergency, which require the administrator to keep the funds uninvested and available in order to meet the immediate financial needs of a fiduciary estate.¹¹⁶ Courts have noted that "an executor may be responsible for interest on money kept in his possession . . . when there is no *apparent reason* or *necessity* for his doing so,"¹¹⁷ and likened such inaction on the part of the executor to "negligence and a breach of trust."¹¹⁸ This negligence-type theory has been embraced by a number of jurisdictions either by common law or by statute.¹¹⁹ Experience has shown that the most common means for a fiduciary to avoid liability for failure to generate income has been to deposit¹²⁰ the funds into a governmentally-insured account yielding a

114. For example, the court in *Chase v. Pevear*, 419 N.E.2d 1358 (Mass. 1981), noted that a "fair" return during 1968 through 1974 would have been 3% to 6% with a higher percentage towards the end of the period. *Id.* at 1366.

115. *See* *Ing v. Baltimore Ass'n*, 21 Md. 427 (1864).

116. *Mickle v. Cross*, 10 Md. 352, 362-63 (1856). The court refers to unutilized funds as laying "dead" in the hands of the administrator. *Id.*

117. *Id.* at 363 (emphasis in original).

118. *Id.*; *see also* *Cooper v. Jones*, 78 A.D.2d 423, 435 N.Y.S.2d 830 (1981).

119. *E.g.*, *Douglas v. Westfall*, 113 Cal. 2d 107, 248 P.2d 68 (1952); *Crowell v. Styler*, 315 Mass. 122, 49 N.E.2d 599 (1943); *In re Baldwin's Estate*, 311 Mich. 288, 18 N.W.2d (1945); *In re Estate of Lare*, 436 Pa. 1, 257 A.2d 556 (1969); ILL. ANN. STAT. ch. 3, § 462 (Smith-Hurd 1980); OHIO REV. CODE ANN. § 2109 (Page 1976).

120. The distinction between a deposit and an investment is not always clear. The principal feature of a deposit is the bank's obligation to repay the amount deposited on demand. However, when a deposit is made in a bank, a strong presumption arises that the funds will be made productive because interest will be earned. *In re Kruger's Estate*, 139 Misc. 907, 911-15, 249 N.Y.S. 772, 776-80 (1931) (citing *Van Wagoner v. Buckley*, 148 A.D. 808, 811, 133 N.Y.S. 599, 601 (1912)). Thus a deposit may also fall within the classic definition of an investment—using capital to secure income. BLACK'S LAW DICTIONARY 741 (rev. 5th ed. 1979).

The case of *In re Gershow*, 261 N.W.2d 335 (Minn. 1977), demonstrates the possible danger in obtaining a minimal rate of return. A remainderman of a testamentary trust sought the removal and surcharge of a trustee for holding the funds in her hands in savings accounts at a rate of return approximating 5%. The remainderman felt that public utility bonds yielding a rate of return of 8% to 10% were a better selection. In rejecting the attempted removal and surcharge, the Supreme Court of Minnesota held the investments were proper. However, the court's analysis in supporting the trustee was based on a number of factors unrelated to prudent investment analysis, such as the trustee's lack of compensation,

relatively low interest rate.

Today, however, certain new investment vehicles¹²¹ can provide both substantial return and considerable safety. These new investment vehicles were created as a response to rapidly increasing inflation and higher interest rates, the combined effect of which make low yielding investment vehicles less attractive. The practice of placing funds in an insured, interest-bearing account with a national bank or savings and loan association without examining the use of new investment vehicles has long since been abandoned by the average investor.¹²²

C. Duration

The durational commitment of any particular investment is also an important consideration for the fiduciary in making investments.¹²³ The fiduciary must consider the cash needs of the estate and the marketability or liquidity of the investment vehicle.¹²⁴ Long term investments may provide a higher degree of safety or rate of return than investments which may be short term and highly volatile. A fiduciary may, however, be forced to meet a cash requirement which would necessitate liquidation of long term investments at a depressed value. Finally, a fiduciary should be able to respond to shifts in the bond market due to economic pressures such as increases in the prime lending rate and, more recently, actions of the Federal Reserve Board in driving interest rates down. These changes make higher-yielding, long-term debt instruments more attractive and valuable.

Depositors in banks or savings and loans elect safety at the expense of income, although funds in these institutions are readily available for withdrawal should a cash need arise. The fiduciary might obtain more substantial return on insured deposits and still maintain the flexibility required by diversifying purchases in United States Treasury bills or other short term bank paper.¹²⁵

her relationship to the testator who was her sister, and the fact that only one of three remaindermen objected. *Id.* at 339. The case is significant not for the fact that the trustee was allowed to remain in office unscathed, but rather for the proposition that while investments in certificates of deposit are not per se improper trust investments, a court will seriously entertain an argument that they may be under certain circumstances. It is submitted that absent the personal factors involved the court's decision may have been different. See *supra* notes 26 and 102.

121. See *infra* notes 132-46 and accompanying text.

122. See *Exploring the Money-Fund Option*, NEWSWEEK, Mar. 15, 1982, at 52.

123. *In re Girard's Estate*, 152 N.Y.S.2d 981 (1956); see Friedman, *supra* note 24.

124. See generally 8 REAL PROP., *supra* note 5, at 472.

125. The Secretary of the Treasury is authorized to determine the maturity of bonds, not to exceed 20 years, and certificates, not to exceed 10 years from the date of issue. 31 U.S.C. § 757b (1976 & Supp. IV 1980). Treasury bills have maturities of less than one year and usually mature in 90 to 180 days. Treasury notes mature within one to seven years. Treasury bonds have a maturity of seven years or more. *Investing in Government Securities*, BUSINESS WEEK, Aug. 17, 1974, at 83, 84-85.

D. The Beneficiary

A final investment consideration, although implicit in all other factors, concerns the needs and desires of the people for whom the fiduciary estate is maintained. Although the intent of the creator of the fiduciary estate defines the parameters of safety, yield and duration, these three factors are not absolutes and must be balanced with the needs of the beneficiaries in determining the ideal blend of investments to be maintained. Obviously, the investment intended to provide a stable source of monthly income will not provide the nest egg needed for a college education. The investment standards adopted by a particular jurisdiction have a pronounced effect on the fiduciary's ability to promote each of the factors with which he must be concerned. These differing standards will be analyzed to determine which is best suited to achieve the ideal.

IV. ANALYSIS OF INVESTMENT STANDARDS IN LIGHT OF TRADITIONAL CONSIDERATIONS

A. Legal Lists

A mandatory legal list, whether stated in the positive or negative, has its highest and best use in protecting the fiduciary estate from the inexperienced investor. Emphasis is placed on safety as exemplified by the use of such vehicles as insured, interest-bearing accounts. While the argument advanced for maintaining legal lists is that the principal will be there when needed, the theory is myopic at best for the public has outgrown the need for restrictive legal standards designed to protect beneficiaries from ignorant or inexperienced fiduciaries. In fact, it is the investing public's demands which caused the professionalization of certified financial planners, investment advisors, and money managers.

The mandatory legal list approach usually results in a lower rate of return than other investment standards. It may force a fiduciary to make investments of extremely long duration in order to increase the rate of return on the funds in his hands. As such, changes in the economic climate cannot elicit quick response, nor can the needs of the beneficiaries be accommodated promptly without risking loss to the value of the funds. In addition, the whim of the legislature determines what is a "legal" investment at any given time. Mandatory lists are so restrictive that institutional investors, who normally favor strict standards, are often unable to prevent a diminution of the funds in their hands.

The mandatory legal list is, fortunately, fading from the landscape of fiduciary investment.¹²⁶ In its place one now finds a permissive legal list which sets forth sanctioned categories of investment and allows, by

126. *See supra* note 32.

implication, other "prudent" investments.¹²⁷

A superficial analysis would lead one to believe that the permissive list is the best of all possibilities. After all the fiduciary benefits from greater latitude in investment decisions and from the presumption that investments in certain categories will be upheld by a court if challenged. The analysis breaks down, however, when one considers that the legal list does not preclude a "prudence" analysis. In essence, all types of legal lists, whether mandatory or permissive, become overlays to a rule of prudence. It is also regrettable that permissive lists are often treated as mandatory¹²⁸ and that fiduciaries such as financial institutions perceive adherence to the categories as insulation from liability in making investments. A permissive list may add a presumption of correctness or a legitimacy to an investment decision but it begs the underlying question of whether or not, under all the circumstances, the investment is a wise one.

B. *The Prudent Man Rule*

Under the prudent man rule a fiduciary may be completely flexible in terms of duration, safety, and yield, tailoring investments to suit varying needs in varying degrees. This has led to the development of an "efficient portfolio" theory¹²⁹ in which the risk levels of investments are balanced to provide a fair rate of return, utilizing investment vehicles of recent vintage such as money market funds, repurchase agreements and covered options trading. The chief criticism of the prudent man rule is that this flexibility makes the rule too hard to administer.¹³⁰ It is difficult to evaluate the risks in using unseasoned investment vehicles which may, for example, expose the fiduciary estate to the uninsured collapse of a large equity issue. While this may be true, it must be noted that a similar analysis would also have to be made in a mandatory or permissive legal list jurisdiction to evaluate the prudence of the risk-income ratio.¹³¹ Although new investment alternatives are constantly being promoted, and while many of them may indeed be too untested to evaluate, the more seasoned vehicles mentioned previously have proven to be sound.

127. BOGERT, *supra* note 5, § 613.

128. See Friedman, *supra* note 24, at 569.

129. An efficient portfolio "is one that contains a mixture of holdings such that it provides the largest expected return for a given level of risk." M.J. WHITEMAN & M. SHUBIK, *THE AGGRESSIVE CONSERVATOR INVESTOR* 49-50 (1979). Due to the increased institutionalization of the stock market over the past 20 years, securities are driven to their fair market values, and thus investors cannot make above-average profits unless they take above-average risks. For a criticism of the efficient portfolio theory, see Goodman & Peavy, *Responsible Investing: Optimizing the Return/Risk Tradeoff*, 21 *TR. & EST. L.J.* 12 (1982).

130. See Friedman, *supra* note 24, at 569.

131. BOGERT, *supra* note 5, § 614.

1. Money Market Mutual Funds

The high inflation rates of the 1970's-80's, coupled with the restrictions on interest rates payable by traditional depository associations, have resulted in a dramatic growth of money market mutual funds (MMMFs) which provide investors with market yield rates and high liquidity.¹³² Generally, these funds are organized as corporations or business trusts by brokerage firms. "Shares" are sold to the public, representing equity ownership of the funds. The proceeds are then invested in high-yield, short-term money market instruments. The returns on these investments, less management expenses, are distributed to shareholders as dividends.¹³³ A unique feature of MMMFs is the constant net asset value per share. If there is a decrease in the value of the investment, it is reflected in a decrease in the number of shares in the holder's account.¹³⁴ The value of the investor's interest in MMMFs, therefore, fluctuates as the fund's portfolio rises or falls.

The higher potential returns of MMMFs are a function of the risks involved. Unlike deposits at federally insured institutions, MMMFs guarantee neither return of principal nor a fixed yield. As "open ended investment companies," MMMFs are subject to the legal requirements of the Investment Company Act of 1940,¹³⁵ which requires disclosure of pertinent information to potential investors by means of a prospectus. However, fiduciaries and investors need to be aware that MMMFs are not part of the highly regulated banking system and that the only insurance generally carried by these business trusts is insurance against embezzlement of principal.¹³⁶ The principal of a money fund may otherwise be at risk when a loan is made by the fund to a company that subsequently defaults or when the fund has selected instruments with long maturities in a market with falling interest rates.¹³⁷ This latter scenario may generate a "run" on the assets of the fund when investors

132. The first money fund or money market fund was the Reserve Fund, which opened in 1973. *Investing for Income*, MONEY, Oct. 1974, at 55, 62. These funds have been widely heralded as providing opportunities to small investors which previously were unavailable to them.

133. See generally Adams, *Money Market Mutual Funds: Has Glass-Steagall Been Cracked?*, 99 BANK L.J. 4 (1982).

134. *Id.* at 7, 14.

135. 15 U.S.C. § 80a(1) to (64) (1976 & Supp. IV 1980). The reference to "open ended investment companies" appears at 15 U.S.C. § 80a-5(a)(1) (1976).

136. Quinn, *Is Your Money Safe?*, NEWSWEEK, June 22, 1981, at 74.

137. *Id.* On August 25, 1981, the Honorable Harry J. McGuirk, Chairman of the Maryland Senate's Economic Affairs Committee, held hearings on a bill that would have required mutual funds receiving money from Maryland investors to insure the funds' principal. In his remarks, the Chairman indicated that he thought many individuals were unaware of the funds' lack of insurance. Representatives of the money funds testified that they would be unable to issue shares in Maryland if such legislation were passed due to the necessity of treating investors from all states equally. *Hearings on S. 1121 Before the Senate Economic Affairs Comm.*, 1981 Md. Gen. Ass. (written testimony from 20 participants available from the Committee's file).

begin to liquidate their holdings in favor of other investments. The fund would be unable to meet the demand for withdrawals without liquidating assets at less than their value at maturity.¹³⁸ While these safety considerations merit attention, it should be noted that from 1972 to 1982 there have been no losses to investors as a result of a money market fund investment.¹³⁹ This record compares favorably to that of insured savings and loan associations and banks in recent years.

2. Repurchase Agreements

Another uninsured, yet generally safe, investment vehicle is the bank repurchase agreement, available to individual as well as institutional investors, and sometimes referred to as "repos." These agreements allow the investor to purchase securities from a member of the Federal Reserve System or from a well established securities dealer, with an agreement by the seller to later repurchase the securities at the same price, plus interest at a specified rate.¹⁴⁰ The repurchase agreement represents a contractual arrangement between the bank or securities dealer and the investor and is not a deposit; consequently the principal amount involved is not insured.¹⁴¹ If the seller fails to repurchase, the investor may be paid the value of the underlying securities, which could be below market, or be treated as an unsecured creditor in subsequent bankruptcy proceedings.¹⁴²

These repurchase agreements allow investors to earn substantial interest on a very short term basis, since maturities usually run for a period of less than seven days. These agreements represent a high degree of safety if the seller is a reputable institution and the maturities are kept to a short period.¹⁴³

3. Covered Option Trading

Perhaps the optimal low risk method for a fiduciary to generate income is to sell options on the stock held in the estate's portfolio. In order to do so, the stock must be optionable, that is, of a kind traded regularly on a national options exchange.¹⁴⁴ The fiduciary can then instruct his broker to sell what is known as a "call," granting the buyer an irrevocable right to purchase the security at a fixed price within a stated period of time, as selected by the fiduciary.¹⁴⁵ Covered option

138. *Exploring the Money-Fund Option*, NEWSWEEK, Mar. 15, 1982, at 52; Wall St. J., Nov. 5, 1981, at 12, col. 2.

139. Evening Sun, Aug. 26, 1982, at C11, col. 1.

140. Quinn, *Is Your Money Safe?*, NEWSWEEK, June 22, 1981, at 74.

141. See *supra* note 120 and accompanying text.

142. Quinn, *Is Your Money Safe?*, NEWSWEEK, June 22, 1981 at 74.

143. *Id.*

144. Most stock brokerage firms provide literature to investors desiring to engage in options trading. A particularly helpful publication is the brochure *Understanding the Risks and Uses of Listed Options* (American Stock Exchange, Oct. 1982).

145. S. GAYLORD, *SENSIBLE SPECULATING WITH PUT AND CALL OPTIONS* 24, 25

trading can be used as a hedge against the decline in value of securities since a premium has been paid for the option even if it is not exercised. The very low risk associated with covered options trading makes it a sensible choice for the cautious fiduciary.¹⁴⁶

As these examples indicate, jurisdictions adhering to the prudent man standard seem best suited to promoting traditional investment considerations. Admittedly, judicial administration becomes more subjective without statutory guidelines, but perhaps no more so than in a jurisdiction which fails to adopt a consistent investment standard. An examination of the Maryland experience clearly shows that statutory enactment of the prudent man rule is the best approach to fiduciary investments.

V. THE MARYLAND EXPERIENCE

A. *The Common Law*

In 1884, Maryland chose to follow the Massachusetts prudent man rule,¹⁴⁷ and in 1897 a judicious investment was defined by the Court of Appeals of Maryland as one "a prudent man would [have made] in the management of his own affairs."¹⁴⁸ In 1922, the standard was again emphasized in *Fox v. Harris*,¹⁴⁹ exonerating testamentary trustees from a charge of recklessly and improvidently investing the assets of an estate resulting in a heavy loss.¹⁵⁰ The court of appeals indicated that the test of proper fiduciary investing in Maryland was whether the trustees acted as ordinary prudent men would act in investing their own funds. In holding that the trustees had met the test then existing in Maryland, the court looked to factors such as the quality of the outside advice they had used in making their investment decisions, whether the trustees had invested their personal funds in the same securities, and whether they had made any personal profit out of these transactions.¹⁵¹ By 1936, Maryland case law had consistently confirmed the earlier adoption of the prudent man rule.¹⁵²

(1976). Of course, if the fiduciary determines that the stock should remain in the portfolio the option should be repurchased. *Id.*

146. *See id.* at 96; *see also* Foulke & Tollefsen, *Running a Pilot Program for Options*, 115 TR. & EST. 30 (1976); Levy, *Weighing the Options*, 114 TR. & EST. 806 (1975).

147. *See McCoy v. Horwitz*, 62 Md. 183 (1884).

148. *Gilbert v. Kolb*, 85 Md. 627, 634, 37 A. 423, 424 (1897).

149. 141 Md. 495, 119 A. 256 (1922).

150. *Id.* at 506, 119 A. at 260.

151. *Id.* at 504, 119 A. at 259.

152. *Shipley v. Crouse*, 279 Md. 613, 621-22 (1977); *Goldsborough v. Dewitt*, 171 Md. 225, 258 (1936). Note, however, that at the same time the Maryland courts were establishing the prudent man rule, the legislature pursued a different course. For example, in 1831 the General Assembly empowered the Orphans' Court to order the guardian of a minor's estate to invest funds received by him, and further empowered the court to direct the manner and form in which funds were deposited. Act of March 14, 1832, ch. 315, § 5, 1831 Md. Laws. Without authorization of the Orphans' Court a deposit made by a guardian established him, in effect, a guaran-

B. *The Statutory Law*

In contrast to the constancy of the courts, Maryland statutes impose a crazy-quilt pattern of standards for investment by fiduciaries. While Maryland common law generally favors the prudent man rule,¹⁵³ a permissive legal list of investments lawful for "any person" appears in the Maryland code.¹⁵⁴ Separate standards, some of them mandatory, exist for personal representatives,¹⁵⁵ guardians,¹⁵⁶ custodians,¹⁵⁷ and trustees.¹⁵⁸ Numerous other provisions exist throughout the code authorizing investments by the Workmen's Compensation Fund,¹⁵⁹ by savings banks,¹⁶⁰ and by savings and loan associations.¹⁶¹

tor of the deposit. *Fay v. Fay*, 172 Md. 570, 580, 193 A. 674, 681 (1937) (Parke, J., dissenting); see also Friedman, *supra* note 24, at 559. In *Fay*, it was recognized that a court may ratify a deposit by a guardian if the court knew the deposit was made but had not ordered the funds into court. Clearly, then, guardians were not governed by the prudent man rule since the court could approve the guardian's actions only under the rationale of ratification. In response to judicial unease with this state of the law, in 1969 the Maryland legislature eliminated the role of the Orphans' Court with respect to funds of an estate. MD. EST. & TRUSTS CODE ANN. § 7-401 (1974).

153. See, e.g., *Fox v. Harris*, 141 Md. 495, 119 A. 256 (1922); *Gilbert v. Kolb*, 85 Md. 627, 634, 37 A. 423, 424 (1897); *McCoy v. Horwitz*, 62 Md. 183 (1884). See generally BOGERT, *supra* note 5, § 636; Shattuck, *supra* note 24, at 502.
154. The Maryland legislature has specified that the following investments are lawful for any person to make: (1) debentures issued by federal intermediate credit banks or by banks for cooperatives; (2) bonds issued by federal land banks, or by the Federal Home Loan Bank Board; (3) mortgages, bonds or notes secured by a mortgage deed of trust or debentures issued by the Federal Housing Administration; (4) obligations of National Mortgage Associations; (5) shares, free-share accounts, certificates of deposit, or investment certificates of any insured financial institution; (6) bonds or other obligations issued by a public housing authority; and (7) obligations issued or guaranteed by the international banks for reconstruction and development. MD. EST. & TRUSTS CODE ANN. § 15-106 (1974 & Supp. 1982).
155. MD. EST. & TRUSTS CODE ANN. § 7-401(e),(n),(s) (1974) (personal representatives may invest in insured, interest-bearing accounts or short-term loan arrangements (which may be reasonable for use by a trustee), sell, purchase or otherwise deal with property, and continue business ventures in which the decedent was engaged at the time of his death).
156. MD. EST. & TRUSTS CODE ANN. § 13-213 (1974) (powers of fiduciaries applicable to guardians); cf. MD. EST. & TRUSTS CODE ANN. § 13-805(b) (1974 & Supp. 1982) (guardian of veteran may invest, without a court order, only in interest-bearing obligations of the State or United States or in savings and loan accounts or other obligations guaranteed by the federal government).
157. MD. EST. & TRUSTS CODE ANN. § 13-304(e) (1974) ("the custodian, notwithstanding statutes restricting investments by fiduciaries, shall invest and reinvest the custodial property as would a prudent man of discretion and intelligence who is seeking a reasonable income and the preservation of his capital . . .").
158. MD. EST. & TRUSTS CODE ANN. § 15-102(j) (1974) (trustee may invest in insured, interest-bearing accounts or in short-term loan arrangements).
159. MD. ANN. CODE art. 101, § 80(a), (b) (1979) (treasurer of State Accident Fund may invest in funds legal for investment by fire, casualty and miscellaneous insurance companies, subject to all provisions of law respecting the deposit of other state funds).
160. MD. FIN. INST. CODE ANN. § 4-206(3)(i), (6) (1980) (savings bank may invest deposits "on good security" and may invest in real property).
161. MD. FIN. INST. CODE ANN. § 9-419 (1980) (savings and loans may invest, for

Investments of public funds also receive individual treatment in the Maryland code.¹⁶² The code provisions not only fail to provide consistent standards for fiduciaries, but also fail to fit any of the model statutory schemes.¹⁶³

The discrepancy between the common law in Maryland and the legislative enactments argues strongly for statutory adoption of the prudent man rule. The Maryland legislature has interposed what can be characterized as a permissive legal list for most fiduciaries; it has acknowledged, however, that the prudent man rule underlies all fiduciary investment decisions.¹⁶⁴ One is then left to wonder why Maryland's legal lists are necessary. Perhaps the mandatory list serves some function in that it cuts off any further inquiry into whether an investment not appearing on the list has been prudent. However, those investments enumerated on the list are still subject to analysis under the prudent man standard. The only advantage of the mandatory list is that it serves to narrow the inquiry and thereby promotes judicial efficiency by creating a presumption of correctness in an investment selection.

The permissive list analysis flows along the same lines in that the investments enumerated are still subject to an examination of prudence. However, because permissive lists allow broader latitude in decision making they lose whatever advantage they may have in promoting judicial efficiency. Permissive lists possess a certain cynical quality about them, *i.e.*, they come to be viewed as mandatory or they promote in the fiduciary a false sense of security about his investment

example, in specified mortgages, loans, ground rents, real property and securities).

162. *E.g.*, MD. ANN CODE art. 31, § 6 (1976) (financial officer of political subdivision may invest sinking funds in specified bonds); MD. ANN. CODE art. 31, § 24(b) (Supp. 1982) (municipal corporations may invest proceeds of refunding bonds in obligations guaranteed by the federal government); MD. ANN. CODE art. 95, §§ 22, 22A-E (1979 & Supp. 1982) (county finance directors and treasurer of state may invest in obligations guaranteed by the federal government or in local government investment pool).
163. For example, *compare* MD. EST. & TRUSTS CODE ANN. § 7-401(e) (1974) (personal representative may deposit funds in interest-bearing accounts or in short-term loan arrangements "which may be reasonable for use by a trustee") with Trust Div. Am. Bankers Ass'n, *Model Prudent Man Investment Act*, TRUST & EST. LEGIS 7 (1961 & Supp. 1969) (out of print) (fiduciary shall exercise the judgment and care under the circumstances then prevailing which men of prudence, discretion and intelligence exercise in the management of their own affairs). *But compare* MD. EST. & TRUSTS CODE ANN. § 14-202(a)(3) (1974) (trustee to administer funds in manner which men of ordinary prudence would manage their own affairs) with RESTATEMENT (SECOND) OF TRUSTS § 227 (1959) (trustee's investments governed by the terms of the trust, otherwise limited to such investments as a prudent man would make with his own property, subject to statutes governing investments by trustees). One might speculate that the legislature, in enacting the various Code provisions, merely chose to deal with defining the investment powers of fiduciaries on a piecemeal basis without being aware of the judicial decisions in the areas of fiduciary conduct.
164. MD. EST. & TRUSTS CODE ANN. § 15-106(c) (1974).

decision. Moreover, the list, by its nature, tends to stagnate so that it does not keep pace with a changing investment scenario. By way of example, one can compare New York's provision for use of money market fund investments¹⁶⁵ with the Maryland statutes, which are completely silent as to their use. It is unclear whether this is to be taken to mean that the Maryland legislature views money fund investments as improper. However, in light of their widespread use such a conclusion is doubtful.

In essence, Maryland's statutory provisions on investments by fiduciaries generate much heat but little light. The fiduciary is on his own in making decisions, frequently operating under the belief that the law protects him when, in fact, it only creates a presumption in favor of his decisions if he complies with the statutory recommendations.

It would seem the better course to allow fiduciaries complete latitude in the selection of their investments, without statutes which serve as a constraint on their decision making. However, such an approach is not without risks. Failing to guide an inexperienced fiduciary, or eliminating the presumption of correctness which attaches to legal lists, may increase the use of judicial resources to settle claims of imprudent investments.

It is submitted that this drawback does not outweigh a full embrace of the prudent man rule. The advantages are many. Inexperienced fiduciaries who do not seek advice in the conduct of their office are declining in number, while experienced fiduciaries would better their performance if not constrained by legal lists. Fiduciaries serving under inartfully drawn instruments or intestate appointment will be placed on an equal footing with those who are granted broad powers under properly drawn documents. Institutions may be made more responsive to the beneficiaries they serve, and in turn may be able to generate greater revenue through their fiduciary services. Since the underlying question, even where legal lists exist, is always the prudence of a particular investment, it is doubtful if adoption of the rule would foster a serious increase in litigation concerning the propriety of an investment.

VI. CONCLUSION

Although the prudent man rule has been a part of the history of fiduciary investment for many years, to a large extent legislatures have blurred its primacy by imposing mandatory or permissive lists of proper investments. The investing public has become more sophisticated, thus outgrowing the original need for paternal legislative protection. Accordingly, over the years legislative pronouncements on proper fiduciary investments have been relaxed, perhaps tacitly acknowledging the legislature's inability to impose standards in a vacuum when

165. N.Y. EST. POWERS & TRUSTS LAW § 11-2.2(b) 1, 2 (McKinney 1967).

the ultimate question remains the prudence of a particular investment. Even the most knowledgeable legislators are unable to respond quickly enough to the everchanging shifts in the investment atmosphere, or to predict the performance of as yet unproven investment vehicles. Clearly then, there is nothing to be gained from imposing investment standards on the fiduciary decision making process, and much to be lost in terms of the traditional considerations of safety, yield, liquidity and beneficiary needs.

Maryland's crazy-quilt pattern of legal lists is clearly inconsistent with the common law rule of prudence espoused by the Maryland courts. Maryland should return to its judicial roots and adopt the prudent man standard by legislative enactment. Since the Maryland fiduciary is in reality given no legislative guidance in his difficult task of juggling conflicting considerations, a statutory prudent man rule would, at the very least, allow the fiduciary to utilize modern investment vehicles.