SPECIAL EDITION:
CHARITABLE GIVING

By **Conrad Teitell, Daniel G. Johnson** & **Katherine A. McAllister**

Diversifying Charitable Remainder Trust Investments

Who cares? Donors, advisors, trust drafters, trustees, beneficiaries and state attorneys general

Trustees have a duty to diversify charitable remainder trust (CRT) investments. Let's look at the diversification of investment rules applicable to all trusts and then home in on cases involving CRTs. (See "Glossary," p. 41, for the various types of CRTs.)

Spoiler alert. We'll also tell you about the danger of relying willy-nilly[1] on trust language authorizing the retention of concentrated investment positions and trust investment strategies favoring life income beneficiaries to the detriment of charitable remainder beneficiaries.

Importance of Diversification

To whet your appetite and demonstrate the importance of diversification, here's what happened in a case involving a charitable lead annuity trust (CLAT).[2]

Frances Rowe's will created a CLAT funded with 30,000 shares of IBM stock, with the remainder going to her nieces. IBM was trading for $113 a share when Frances died in April 1989 and for $117 a share when the trust was funded in September 1989. The market value of the trust assets subsequently dropped from $3.5 million to $1.9 million. Her nieces demanded an accounting in the New York Surrogate's Court, claiming that the bank trustee's failure to diversify the trust assets resulted in declining yield and forced sales of trust principal.

The Surrogate's Court removed the bank trustee and appointed successor co-trustees. It ordered the bank trustee to refund all its commissions to the trust and pay damages, plus interest to the trust. The bank trustee appealed.

The appellate court affirmed the lower court's ruling. Under New York's prudent investor rule, the bank trustee should have diversified the assets unless it reasonably determined that it was in the beneficiaries' interest not to do so. The court stated that "*neither adverse tax consequences nor any provision of the trust instrument restricted [the trustee's] freedom to sell the IBM stock and diversify the trust's investments.*"[3] Thus, the court agreed with the nieces that the bank "had acted imprudently in failing to diversify the trust's assets immediately upon receipt of the IBM stock, in furtherance of its initial goal of creating a diversified portfolio of fixed income oriented and equity or growth assets."[4]

Lesson to be learned: Diversify ASAP. But, what might be a reason not to diversify pronto? Placing a large block of stock on the market might drive the price down. Even so, the trustee had better be prepared to make a strong case for not diversifying or doing so in dribs and drabs.

General Principles

For nearly two centuries, U.S. courts grappled with the scope of trustees' investment duties. Beyond the governing instrument's terms, state laws impose duties on trustees that include loyalty, impartiality and prudence. Fundamentally, the law requires that a trustee exercise reasonable care in administering the trust, historically referred to as the prudent man standard, now expressed as the "prudent investor" principle.

Crimson letter law.[5] *Harvard College v. Amory*, an 1830 decision of the Massachusetts Supreme Judicial Court, is widely credited with articulating the prudent man standard. The testator established a $50,000 trust for his wife's lifetime benefit, with the remainder to be

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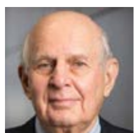

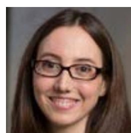

divided between Harvard College and Massachusetts General Hospital.[6] The remainder beneficiaries claimed the trustees, who were the surviving spouse's brother and cousin, abused their position by investing in manufacturing and insurance stocks rather than keeping the principal in safer, interest-producing assets.

The spouse as income beneficiary received high dividends but at greater risk to the trust principal destined for the remainder beneficiaries. In noting that the will specifically authorized the trustees to invest in stocks, the court declined to find malfeasance on the trustees' part. Instead, it observed:

> [a]ll 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.[7]

CRTs enable generous individuals to make gifts now that ordinarily would be made by a will.

A century and a half after *Amory*, the Uniform Prudent Investor Act (UPIA) codified the prudent investor principle, with some notable refinements. Section 2(a) provides:

> [a] trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.[8]

This principle emerged not only from the common law duty of reasonable conduct but also from the developing doctrine of modern portfolio theory.[9]

No litmus test. Departing from the classic common law duty, the UPIA expressly rejects any specific test for one particular investment; instead, it views a given investment in the context of the portfolio as a whole to consider whether it adequately balances risk and return.[10] Forty-three states and the District of Columbia have enacted the UPIA as of 2017, according to the National Conference of Commissioners on Uniform State Laws, which promulgated the UPIA in 1994.[11] The UPIA calls for trustees to "become devotees of 'modern portfolio theory' and to invest as a prudent investor would invest 'considering the purposes, terms, distribution requirements, and other circumstances of the trust' using 'reasonable care, skill, and caution.'"[12]

Do you know prudence when you see it? Absent extraordinary circumstances, prudence under the UPIA is presumed to require broad diversification of trust assets:

> [a] trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying.[13]

Translation: If the trustee wants to maintain a concentrated investment position, he must: (1) have a compelling rationale for doing so, which might include a clear prohibition in the governing instrument against diversification; and (2) be prepared to defend a concentrated position if a challenge should ultimately result in losses.

Prudent Investment in CRTs

CRTs must also invest prudently.

Why create CRTs? These planned gifts enable generous individuals to make gifts now that ordinarily would be made by a will. The donor keeps life income, gets income tax savings now and capital gains savings, plus has the pleasure of making a charitable gift. To date, nobody has reported back on the joys of making a charitable bequest.

CRTs are governed by Internal Revenue Code Section 664. Basically, they provide for an income

Glossary

High speed overview of charitable giving terms

Stan CRUT—standard (fixed percentage) charitable remainder unitrust. Pays the income beneficiary ("recipient" in the regulations) an amount determined by multiplying a fixed percentage of the net fair market value (FMV) of the trust assets, valued each year. On the death of the beneficiary or survivor beneficiary (or at the end of the trust term if the trust is measured by a term of years not to exceed 20 years), the charity gets the remainder. The fixed percentage can't be less than 5 percent nor more than 50 percent, and the remainder interest must be at least 10 percent of the initial net FMV of all property placed in the trust. (These percentage requirements apply to all types of CRUTs and charitable remainder annuity trusts (CRATs).)

NIMCRUT—net-income-with-makeup charitable remainder unitrust. Pays only the trust's income if the actual income is less than the stated percentage multiplied by the trust's FMV. Deficiencies in distributions (that is, when the unitrust income is less than the stated percentage) are made up in later years if the trust income exceeds the stated percentage.

NICRUT—net-income charitable remainder unitrust. Pays the fixed percentage multiplied by the trust's FMV or the actual income, whichever is lower. Deficiencies aren't made up.

Flip CRUT—a trust created as a NIMCRUT or NICRUT. On a qualified triggering event (for example, the sale of the unmarketable asset used to fund the trust or the happening of a specified event), it switches to a stan CRUT. The regulations sometimes refer to this trust as a "combination of methods unitrust." That's a trust that on a triggering event converts from the "initial method" (NIMCRUT or NICRUT) to a fixed percentage unitrust (stan CRUT).

Flex CRUT—Conrad Teitell's coinage for a flip CRUT drafted to give great flexibility in determining when—if ever—a NIMCRUT or NICRUT will flip to a stan CRUT.

Capital Gain NIMCRUT—post-transfer-to-the-trust capital gains (governing state law permitting) are treated as income for purposes of paying income to the income beneficiary. This provides a way of making up some or all of NIMCRUT deficits in payments from earlier years. And, that income can often be favorably taxed as capital gains (under the four categories) to the beneficiary.

Full Monty CRUT—Teitell's coinage for a flip CRUT that goes all the way—has flex CRUT and capital gain NIMCRUT provisions.

CRAT—pays the income beneficiary ("recipient" in the regulations) a fixed dollar amount (at least annually) specified in the trust instrument. On the death of the beneficiary or survivor beneficiary (or at the end of the trust term if the trust is measured by a term of years not to exceed 20 years), the charity gets the remainder. The fixed dollar amount must be at least 5 percent but not more than 50 percent of the initial net FMV of the transferred assets, and the remainder interest must be at least 10 percent of the initial net FMV of all property placed in the trust. **Caveat**. A CRAT must also meet the "5 percent probability test" of Revenue Ruling 77-374, which requires that there be a less than 5 percent chance that the annuity payments will fully deplete the trust's assets to qualify as a CRAT. 1977-2 CB 329; *but see Estate of Moor v. Commissioner*, 43 TCM 1530 (1982).

A "safe harbor" alternative to the 5 percent probability test. A CRAT containing the sample qualified contingency provision of Rev. Proc. 2016-42 won't be subject to Rev. Rul. 77-374's probability of exhaustion test.

The Internal Revenue Service's safe harbor qualified contingency provision can cause early termination of the CRAT, followed by an immediate distribution of the remaining trust assets to the charitable remainder organization.

The date of the contingent termination is the date immediately preceding the payment date of any annuity payment if, after making that payment, the value of the trust corpus, when multiplied by the specified discount factor, would be less than 10 percent of the value of the initial trust corpus.

Caution: A potential danger of early termination under the qualified contingency provision: The trust ends not when its value has declined to 10 percent of its original value, but when the remaining trust assets as discounted are less than 10 percent of the trust's original value.

Example. A CRAT can have 21 percent of its original value before the next payment and 16 percent of its original value after the next payment, but because the trust's remaining value is discounted, it falls to 9.3984 percent of the trust's original value. The trust is terminated with all assets going to the charitable remainder organization and no more payments to the beneficiary.

The downside of using the Rev. Proc. 2016-42 language: The beneficiary's payments may end unexpectedly because of a downturn in the market just when the beneficiary needs the income.

—Conrad Teitell

interest payable to one or more non-charitable beneficiaries for life (or a term of years not exceeding 20), with the remainder payable to qualified charitable organizations described in IRC Section 170, when the income interest terminates.[14] "Safe harbor" specimen documents published in revenue procedures[15] are extremely helpful in drafting charitable remainder unitrusts (CRUTs) and charitable remainder annuity trusts (CRATs). The annotations in the revenue procedures are a virtual primer on the rules governing CRTs. **Caution.** Under the *Atkinson*[16] case, a CRT late in making a required payment is void from its inception—resulting in loss of all charitable deductions and potential adverse capital gains taxation.

A prospective trustee should be cautious when a grantor expresses a wish to retain specific assets that will limit the trustee's ability and duty to diversify trust investments.

Caveat Trustees

A grantor (by any other name—a donor, trustor or settlor) often funds a CRT with low basis assets. Sometimes, donors have a personal connection to the funding asset—for example, an interest in a closely held business or the stock of a public company founded by a family member. The donor's personal connection to the trust assets may make him want to dictate the CRT's investment philosophy on retaining those assets in tension with the UPIA's default diversification requirements. A prospective trustee should be cautious when a grantor expresses a wish to retain specific assets that will limit the trustee's ability and duty to diversify trust investments.

A donor needn't rely on an independent trustee to carry out his investment directions. He can be his own trustee. **Caution.** In addition to diversification issues, special rules for the annual valuation of unitrusts apply when the donor is the trustee. And, if a CRUT or CRAT is a sprinkling trust, allowing the donor to act as the trustee will disqualify the trust at the outset.[17]

Fiduciary Duties

Some trustees misunderstand to whom they owe duties and whose interests should be considered when determining the risk profile of the trust and its investment strategy. Crucially, the trustee owes fiduciary duties not only to the income beneficiary—who's often the grantor, and who may well have selected the trustee in the first place—but also to the charitable remainder beneficiaries.[18]

Trustees of Trusts Involving Charities

The state attorney general's (AG) eyes are on these trustees. It's in the public interest to protect charities. State AGs are thus able to intervene when there's a breach of the trustee's duty to diversify and may be "necessary parties" in some charitable trust enforcement actions under state law.[19]

Retention-of-Assets Clauses

When is it A-OK[20] for trustees to rely on retention-of-assets clauses?

Although the prudent investor rule's requirement of diversification is broadly applicable, it can be waived if the governing instrument clearly provides that the grantor intends to do so. Section 1 of the UPIA specifically authorizes grantors to deviate from the prudent investor rule, noting that it, as "a default rule, may be expanded, restricted, eliminated, or otherwise altered by the provisions of a trust" and that a trustee isn't liable for failure to diversify "to the extent that the trustee acted in reasonable reliance on the provisions of the trust."

But, watch your step. Given the overwhelming preference in favor of diversification, courts closely scrutinize non-diversification clauses; they may give trustees less protection than trustees anticipate.

A Cautionary Tale

The decision by the Ohio Appellate Court in *Wood v. U.S. Bank, N.A.*[21] provides a cautionary tale[22] for prospective trustees. Boilerplate[23] clauses authorizing retention of stock aren't always sufficient to demonstrate a grantor's intention to override the duty to diversify. In

Wood, the bank trustee maintained a concentrated position in its own stock—at times approaching 90 percent of the corpus—and the income beneficiary ultimately sued. The bank trustee relied on a retention clause that authorized it "to retain any securities in the same form as when received, including shares of a corporate Trustee . . . even though all of such securities are not of the class of investments a trustee may be permitted by law to make and to hold cash uninvested as they deem advisable or proper."[24] The beneficiary argued that the language was intended to relax a different fiduciary duty, namely, the duty of loyalty, which would have otherwise

A well-drafted retention and exculpatory clause can be an effective shield for a CRT trustee who, in good faith, finds it impracticable to immediately diversify the trust's assets.

prohibited the corporate trustee from owning its own stock, and didn't alter the trustee's duty to diversify.

The Court of Appeals of Ohio, finding that the language of the retention clause "smacked of the standard boilerplate that was intended merely to circumvent the rule of undivided loyalty—no more, no less," agreed with the beneficiary that the trustee couldn't rely on the retention clause to evade its duty to diversify.[25] Instead, the court held:

> . . . that to abrogate the duty to diversify, the trust must contain specific language authorizing or directing the trustee to retain in a specific investment a larger percentage of the trust assets than would normally be prudent. The authorization to 'retain' here was not sufficient—it only authorized the trustee to retain its own stock—something it could not otherwise do.[26]

In *Fifth Third Bank*[27] *v. Firstar Bank, N.A.*,[28] decided by the same court the following year, the Court of Appeals of Ohio expressly applied its analysis in *Wood* to a CRUT's trustee. The court in *Fifth Third Bank* considered the duty to diversify in the context of a CRUT created by Elizabeth Gamble Reagan, a descendant of one of the founders of Procter & Gamble (P&G). Elizabeth funded the CRUT with $2 million of low basis P&G stock. The CRUT provided that Elizabeth would receive an 8 percent unitrust amount during her lifetime, with the remainder to three charities at her death. Elizabeth named U.S. Bank as the initial trustee and maintained that U.S. Bank understood that one of her objectives in establishing the CRUT was to diversify out of the P&G stock. U.S. Bank was slow to do so, however, and by the end of the CRUT's first year, its value had been reduced by half. Elizabeth removed U.S. Bank, appointed Fifth Third Bank as the successor trustee and sued U.S. Bank alleging breach of duty. Elizabeth and Fifth Third Bank—with the support of the AG[29]—prevailed following a jury trial.

On appeal, U.S. Bank contended that the CRUT's language exculpated it from any losses attributable to its failure to diversify out of P&G stock. U.S. Bank relied on this trust provision: "[t]he trustee shall have expressly the following powers * * * to retain, without liability for loss or depreciation resulting from such retention, original property, real or personal, received from Grantor or from any other source, although it may represent a disproportionate part of the trust." As in *Wood*, however, the court was unpersuaded that the language shielded the trustee, concluding the clause "did not clearly indicate the intention to abrogate the duty to diversify."[30]

Communication With Beneficiary

Here's what happened in *Museum Associates v. Schiff*.[31] The CRT's remainder beneficiary was the Los Angeles County Museum of Art (LACMA). Beginning in 2001, LACMA requested the trustee supply LACMA with information about the CRT's value and a present value calculation of the trust.

The trustee's 2002 response to the LACMA request explained that the trust had a significant investment in Fund Management International, LLC (FMI) and enclosed a short form investment management contract, explaining that FMI didn't issue periodic statements. The trustee's 2003 letter to LACMA made the same

representations but the 2004 letter from the trustee to LACMA explained that the FMI investment had been converted into a promissory note. The income beneficiary of the CRT renounced her interest in the CRT in 2006, accelerating LACMA's interest in the CRT. That led to LACMA's petition for surcharge against the trustee for the poorly performing promissory note.[32]

The unsuccessful Hail Mary statute of limitations defense. The trustee argued that his annual letters to LACMA effectively triggered the statute of limitations against LACMA by putting it on notice about the poorly performing CRT investments. The Court of Appeals for the Second District of California disagreed, concluding that the 2002 and 2003 letters from the trustee informed LACMA that the trust principal was "guaranteed and secured" and that LACMA had no reason to suspect mismanagement until receiving the trustee's 2004 letter.[33] In short, the court reasoned that the trustee's letters to LACMA didn't trigger the statute of limitations; the letters weren't sufficiently transparent to put LACMA on notice of a potential problem with the CRT.

Protection Pointers

To protect the trustee and the trust beneficiary:

- Planning during the drafting of the trust and monitoring during its administration can help a CRT trustee avoid the fate of the Fifth Third Bank or LACMA trustees, even when the grantor intends that the trustee follow an atypical investment strategy.
- The trustee may be able to rely on a carefully drafted retention clause or may consider whether the trustee should accept his appointment.[34]
- Once the trust is operating, the trustee may seek judicial relief from onerous restrictions on diversification if the trust's objectives are being imperiled by the grantor's restrictive investment strategy.
- In all cases, the trustee should frequently review trust investments, scrupulously document those reviews and communicate in writing with the beneficiaries.

Retention and Exculpatory Clauses

Before agreeing to implement a grantor's nontraditional investment strategy, the prospective trustee of a

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CRT funded with illiquid or concentrated assets should ensure that the trust contains properly drafted retention and exculpatory clauses to relieve the trustee of the duty to diversify trust assets and shield the trustee from potential liability that may result from carrying out the grantor's wishes. UPIA Section 1(b) expressly permits these clauses, but they must be carefully drafted to ensure that they don't "smack[] of standard boilerplate."[35]

A well-drafted retention and exculpatory clause can be an effective shield for a CRT trustee who, in good faith, finds it impracticable to immediately diversify the trust's assets. In *Americans for the Arts v. Ruth Lilly Charitable Remainder Annuity Trust No. 1*,[36] National City Bank of Indiana (National City) was named as the conservator of the estate of Ruth Lilly, the great-granddaughter of the founder of Eli Lilly & Co. (Lilly). National City, realizing that Ruth's existing estate plan was needlessly complex and would result in an excessive tax burden, petitioned the court for approval of an updated estate plan for Ruth. The interested parties were notified of this proposal and retained sophisticated counsel, all of whom spent more than 400 hours—at a cost of nearly $250,000, charged to Ruth's estate—to review the proposed estate plan and propose changes. The proposed plan involved the creation of two CRATs funded with Lilly stock, each of which named Americans for the Arts, The Poetry Foundation and the Lilly Endowment as remainder beneficiaries. Each CRAT contained this clause, which drew no objections from the seasoned attorneys who scrutinized the draft documents:

> 10. [National City, in its capacity as Trustee,] shall have the following powers and rights and all others granted by law . . . (b) To retain indefinitely any property received by the trustee and invest and reinvest the trust property in stocks, bonds, mortgages, notes, shares of stock of regulated investment companies or other property of any kind, real or personal, including interests in partnerships, limited liability companies, joint ventures, land trusts or other title-holding trusts, investment trusts or other business organizations as a limited or general partner, shareholder, creditor or otherwise, and any investment made or retained by the trustee in good faith shall be proper despite any resulting risk or lack of diversification or marketability and although not of a kind considered by law suitable for trust investments.

When National City sought judicial approval of its diversification of the CRATs, two of the remainder beneficiaries objected.

The probate court ultimately approved the proposed estate plan, and none of the interested parties appealed or otherwise objected to the retention and exculpation clause (Clause 10(b)). National City implemented the estate plan and funded the two CRATs with roughly $286 million of Lilly stock on Jan. 18, 2002. By July, the vast majority of the Lilly stock had been sold, and by October, the CRATs were fully diversified, but Lilly's stock price had declined significantly since the CRATs' inception.

When National City sought judicial approval of its diversification of the CRATs, two of the remainder beneficiaries objected. They alleged that National City had been too slow to reduce the concentration of Lilly stock, thereby breaching its duty to diversify the trust assets and thus should be surcharged. In response, National City cited Clause 10(b), which, it maintained, both authorized its retention of Lilly stock irrespective of diversification and exculpated it from any liability as a result of that retention.

The remainder beneficiaries challenged Clause 10(b) on several grounds. Citing *Wood*, they claimed that the retention clause was insufficient to override the Prudent Investor Act. In addition, they argued that National City's three hats—as conservator of Ruth's estate, drafter of the CRATs and trustee of the CRAT—constituted a conflict that should void the application of Clause 10(b). Moreover, they claimed National City should have brought the clause to their attention, and it should be invalidated because it had been kept hidden. The probate court found those claims unpersuasive, and

the remainder beneficiaries appealed to the Court of Appeals of Indiana.

On appeal, the appellate court distinguished *Wood*, determining that Clause 10(b) had none of the defects present in *Wood*, in which the clause merely addressed the duty of loyalty rather than the duty of diversification. The appellate court rejected the argument that the parties were entitled to any specific notice of the clause after their lawyers had an extensive opportunity to review the documents in advance of their signing and failed to object.

Trustees be cautious. Don't count on the Indiana appellate court's holding in cases in which the trustee drafts the trust instrument containing the exculpatory clause, and the documents aren't subjected to comparable scrutiny before their execution.

In another case, *Merrill Lynch Trust Co. v. Campbell*,[37] the CRT at issue didn't have an exculpatory provision, but had such an unusual and inadvisable structure that the court determined the trustee was left with no option but to pursue a highly risky investment strategy in an effort to realize the trust's objectives. The CRT called for the grantor to receive distributions of 10 percent each year, with the distributions to continue to her husband and children following her death, a period which was expected to last, on an actuarial basis, for approximately 50 years.[38] The corporate trustee initially pursued an investment strategy that anticipated 60 percent to 70 percent of the trust assets being invested in equities, a weighting that was eventually increased to 90 percent equities.

As the value of the CRT, initially funded with $840,000, decreased to $356,000, the grantor's frustration with the trustee grew as her payments from the CRT decreased. She refused to provide the trustee with a release related to the trust's administration and the investment of trust assets. The trustee sought judicial approval of its accounting, and the grantor counterclaimed seeking a refund of trustee commissions, advisory fees and legal fees and removal of the trustee.

The court found that the risky investment policy pursued by the trustee was dictated by the CRT's terms:

> Fiduciary duties, always contextual, might not allow for an investment strategy so heavily weighted in equities but for the unusual constraints embodied in the Trust Agreement. Because of these unique facts, the Court need not reach the question of whether, and under what circumstances, such a heavy equity mix would be, if ever, permissible. The Court need only find, and does so find, that, given the Trust Agreement and in light of the Court's having concluded that any claim challenging its formation is time-barred, no breach of the prudent investor standard may be found in MLTC's administration of the Trust.[39]

Under less egregious circumstances (the CRT at issue called for an annual distribution of 7.5 percent), the Court of Appeals of Georgia reached a similar conclusion.[40]

A more typical case involves the trustee of a CRT who's been specifically instructed and authorized to retain a particular concentrated investment. For those trustees, it's important that the CRT document contain both an explicit instruction to retain the concentrated investment and permission to avoid the diversification of investments recommended by the UPIA. This was the situation in *Smith v. First Community Bancshares, Inc.*,[41] in which the court determined that the trustee hadn't breached its fiduciary duty in retaining a concentrated stock position, even though the position represented an interest in the public company that owned the trustee. Professor Jeffrey A. Cooper of Quinnipiac University School of Law in North Haven, Conn. warns that trustees shouldn't rely solely on "standard" administrative provisions for this purpose and that, to overcome the judicial bias in favor of the UPIA, attorneys drafting estate-planning documents should use customized language to clearly communicate the grantor's interest.[42]

Even if the trustee who's administering a CRT with a concentrated investment position is satisfied that the CRT contains provisions adequate to grant the trustee discretion to retain the concentrated position and avoid diversification in spite of the UPIA, the trustee still should remain vigilant and monitor the performance of the trust assets. Section 66 of the *Restatement (Third) of Trusts (the Restatement)* provides:

> (1) The court may modify an administrative or distributive provision of a trust, or direct or permit

> the trust to deviate from an administrative or distributive provision, if because of circumstances not anticipated by the settlor the modification or deviation will further the purposes of the trust.

The Restatement forces a trustee of a CRT with a concentrated investment sheltered by an adequate retention position to consider, in the event the concentrated position is declining in value for reasons not anticipated by the grantor, that it might have a duty to petition the appropriate court to modify the retention provision or obtain a judicial blessing for deviating from its terms.[43] The trustee might take solace in the ancillary benefit that flows from this duty: if the trustee seeks a court's permission to modify or deviate from provisions instructing the retention of a concentrated investment and that petition is denied, the trustee has the court's blessing of the retained position as a protection against potential liability.

A flip charitable remainder unitrust (flip CRUT) to the rescue. Apart from concerns about diversification, a trust funded with an asset not capable of earning enough (or an asset that can't be sold easily) to make the required annual payments of standard (fixed percentage) charitable remainder unitrusts can be funded as a flip CRUT.

Parthian shot—potential plaintiffs are under every rock, so leave no stone unturned.

Endnotes

1. Meaning in a careless or haphazard way. A Google search tells us the first citation for "willy-nilly" is in a 1608 *Oxford English Dictionary.* The Banhart concise *Dictionary of Etymology* says it's a contraction of "will I, nil I." Whatever the derivation, watch your step when not diversifying investments.
2. *Estate of Rowe*, 274 A.D.2d 87 (N.Y. 3d Dept. 2000), *motion for leave to appeal denied,* 96 N.Y.2d 707 (2001).
3. *Ibid.* (emphasis supplied).
4. *Ibid.,* at p. 91.
5. Since it's Harvard, we've used the color crimson instead of the customary color black. The phrase "black letter law" is used to describe basic principles of law that are accepted by most judges in most states. Publishers of legal treatises highlighted legal principles by printing them in boldface type; that's the accepted derivation for "black letter" law.
6. *Harvard College v. Amory*, 26 Mass. 446, 461 (1830).
7. *Ibid.*
8. Uniform Prudent Investor Act (UPIA) Section 2, Standard of Care; Portfolio Strategy; Risk and Return Objectives. *See* Comment, noting that Section 2 is "the heart of the Act" and Subsection (a) "carries forward the relational and objective standard made familiar in the *Amory* case."
9. *See* Comment, UPIA Section 2.
10. UPIA Section 2.
11. These jurisdictions include: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, District of Columbia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, U.S. Virgin Islands, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming. *See* National Conference of Commissioners on Uniform State Laws, Legislative Fact Sheet—Prudent Investor Act, Uniform Law Commission (ULC), at *www.uniformlaws.org/LegislativeFactSheet.aspx?title=prudent%20Investor%20Act.*
12. *See* National Conference of Commissioners on Uniform State Laws, Prudent Investor Act Summary, ULC, at *www.uniformlaws.org/ActSummary.aspx?title=Prudent%20Investor%20Act.*
13. UPIA Section 3.
14. *See* Conrad Teitell, *Deferred Giving,* "Requirements to Qualify as a Charitable Remainder Unitrust," para. 1.02.
15. For inter vivos charitable remainder unitrust (CRUT) specimen documents, *see* Revenue Procedure 2005-52 (inter vivos CRUT for one measuring life); Rev. Proc. 2005-53 (inter vivos CRUT for a term of years); Rev. Proc. 2005-54 (inter vivos CRUT for two measuring lives, payable consecutively); Rev. Proc. 2005-55 (inter vivos CRUT for two measuring lives, jointly and then all to the survivor).

    For inter vivos charitable remainder annuity trust (CRAT) specimen documents, *see* Rev. Proc. 2003-53 (inter vivos CRAT for one measuring life); Rev. Proc. 2003-54 (inter vivos CRAT for a term of years); Rev. Proc. 2003-55 (inter vivos CRAT providing for annuity payments payable consecutively for two measuring lives); Rev. Proc. 2003-56 (inter vivos CRAT providing for annuity payments payable concurrently and consecutively for two measuring lives).

    For both CRATs and CRUTs, keep in mind the following cautionary note: "A specimen—no matter how good—is lousy if it doesn't cover or isn't amended to cover the client's situation." Teitell, *supra* note 14, para. 1.02[1].
16. *Estate of Atkinson v. Commissioner*, 115 T.C. 26, 32 (2000), *aff'd*, 309 F.3d 1290 (11th Cir. 2002).
17. Teitell, *supra* note 14, "Sprinkling Charitable Remainder Trust," para. 2.22.
18. *See, e.g., Museum Associates v. Schiff*, 2011 Cal. App. Unpub. LEXIS 1752 (March 10, 2011); *In re Rosenfeld Found. Tr.*, No. 1664IV2002, 2006 WL 3040020, at *2 (Pa. Com. Pl. July 31, 2006) (surcharging foundation trustees who, as members of the founder's family, refused to diversify out of the Pep Boys stock used to found the trust and demonstrated a failure to appreciate the nature of their duties owed to the charitable beneficiaries.)
19. *See Fifth Third Bank v. Firstar Bank, N.A.*, Court App. Oh., 2006-Ohio-4506, para. 2 (2006 WL 25203292006), *1-*2; *see generally Bogert's Trusts & Trustees*

Section 411. (The attorney general as the protector, supervisor and enforcer of charitable trusts.)

20. "A-OK" is even better than "OK." US Air Force Lt. Col. John "Shorty" Powers popularized the expression when he was NASA's public affairs officer for Project Mercury. Tom Wolfe, in *The Right Stuff,* wrote that Powers borrowed the term from NASA engineers. They used it during radio transmissions because "the sharper sound of "A" cut through the static better than "O." A discussion of the expression, "I'm like ok" is for another time and another endnote.
21. *Wood v. U.S. Bank*, 828 N.E.2d 1072, 1077–78 (2005).
22. A cautionary tale is one told in folklore to warn of danger. Its three parts: First, an act or location is said to be dangerous and should be avoided; then someone disregards the warning and performs the dangerous act; and finally, the terrible fate of the person who disregarded the warning is revealed.
23. Why is language that's "standard" in legal documents called "boilerplate"? One theory is that pre-formed slabs of text sent to newspapers reminded printers of the standard-sized metal plates supplied by iron foundries for constructing steam boilers. *See* Michael Quinion, "Boilerplate," World Wide Words, *www.worldwidewords.org/qa/qa-boi1.htm.* A boilerplate contract is sometimes called a "contract of adhesion." And, a contract of adhesion (one party sticks it to the other) is also called a "leonine contract"—suggestive of a lion as in being powerful.
24. *Wood, supra* note 21.
25. *Ibid.*
26. *Ibid.*, at p. 1078.
27. Fifth Third's unusual name stems from the 1908 merger of Third National Bank and Fifth National Bank to become the Fifth-Third National Bank of Cincinnati (later dropping the hyphen and National of Cincinnati).
28. *Fifth Third Bank v. Firstar Bank, N.A.*, Court App. Oh., 2006-Ohio-4506, para. 2 (2006 WL 25203292006), at *1.
29. The attorney general's (AG) participation in the suit was also challenged in the context of U.S. Bank's appeal. U.S. Bank claimed that a CRUT wasn't a "charitable trust" as it's defined under Ohio law, and the AG was therefore improperly treated as a necessary party. The appellate court disagreed, holding that a CRUT was a charitable trust, and therefore, the AG was a necessary party under Ohio law. *Ibid.*, at *1-*2.
30. *Supra* note 28, para. 23, at *4.
31. *Museum Associates v. Schiff*, 2011 Cal. App. Unpub. LEXIS 1752 (March 10, 2011).
32. The Los Angeles County Museum of Art ultimately received interest payments totaling $39,000 against a note having a face value of $650,000.
33. *Museum Associates, supra* note 31, at *5.
34. If the trustee is the drafting attorney, however, such clauses alone may be insufficient to protect the unlucky trustee. *See* Uniform Trust Code (UTC) Section 1008 (b) ("An exculpatory term drafted or caused to be drafted by the trustee is invalid as an abuse of a fiduciary or confidential relationship unless the trustee proves that the exculpatory term is fair under the circumstances and that its existence and contents were adequately communicated to the settlor.") *Bogert's Trusts & Trustees* Section 542. As the comment to UTC Section 1008(b) observes, however:

    The requirements of subsection (b) are satisfied if the settlor was represented by independent counsel. If the settlor was represented by independent counsel, the settlor's attorney is considered the drafter of the instrument even if the attorney used the trustee's form. Because the settlor's attorney is an agent of the settlor, disclosure of an exculpatory term to the settlor's attorney is disclosure to the settlor. Cmt to UTC Section 1008. Exculpation of Trustee.

35. *Wood, supra* note 21.
36. *Americans for the Arts v. Ruth Lilly Charitable Remainder Annuity Tr. No. 1 U/A Jan. 18, 2002*, 855 N.E.2d 592, 594 (Ind. Ct. App. 2006).
37. *Merrill Lynch Tr. Co., FSB v. Campbell*, No. CIV.A. 1803-VCN, 2009 WL 2913893 (Del. Ch. Sept. 2, 2009).
38. The court was clearly incredulous at the terms of the charitable remainder trust: "The Trust Agreement set a nearly unreachable standard." *Ibid.*, at p. 11.
39. *Ibid.*
40. *Wells Fargo Bank N.A. v. Cook*, 332 Ga. App. 834 (2015).
41. *Smith v. First Cmty. Bancshares, Inc.*, 212 W. Va. 809, 819 (2002).
42. Jeffrey A. Cooper, "Speak Clearly and Listen Well: Negating the Duty to Diversify Trust Investments," 33 *Ohio N.U. L. Rev.* 903 (2007).
43. Trent S. Kiziah, "The Trustee's Duty to Diversify: An Examination of Developing Case Law," 36 *ACTEC L.J.* 357 (2010).

SPOT LIGHT

Moving Mountains

Sermons in Stone by William Wendt sold for $60,000 at Bonhams' California and Western Paintings and Sculpture auction in Los Angeles on Aug. 1, 2017. Wendt was a founding member of the California Art Club. Established in 1909, it's one of the oldest, largest and most active art organizations in the United States.