

TRUSTS & ESTATES

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FEATURE:
FIDUCIARY PROFESSIONS

By **Todd A. Flubacher** & **Kenneth F. Hunt**

The Non-Judicial Settlement Agreement Wrapper

An alternative to directed trusts

The country's leading trust jurisdictions have been experiencing enormous growth in recent years from two sources: the creation of new trusts and the migration of existing trusts to take advantage of more favorable administrative laws. It's become commonplace to optimize planning through careful jurisdiction selection, migrating an existing trust to an advantageous jurisdiction and modifying the trust to capitalize on the new administrative laws, including converting it to a directed trust to accomplish specific objectives. The techniques available to migrate and modify a trust include decanting, trust merger and judicial or non-judicial modification.

However, an alternative structure to directed trusts exists. In jurisdictions that have adopted the Uniform Trust Code (UTC), and others that have adopted a stand-alone non-judicial settlement agreement (NJSA) statute, the concept of an "NJSA wrapper" is another tool for achieving client objectives, but one that requires a new way of thinking about trustee powers, duties and liabilities.

Directed Trusts

The reasons for creating a directed trust are numerous.¹ The beneficiaries may wish to use third-party investment managers or directly manage the trust investments, instead of using the trustee's investment capabilities. Alternatively, they may want the trustee to retain a concentrated position in a particular stock, real estate holding or closely held company. Trustees may be constrained from accommodating these wishes because

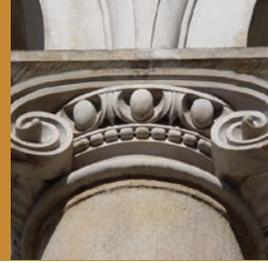
traditional fiduciary responsibilities impose an overriding duty to diversify or notify beneficiaries of potential harm, even in cases in which an investment objective is authorized by the governing instrument or approved by all of the beneficiaries.² Consequently, beneficiaries may wish to convert a trust to a directed trust and bifurcate the investment function from other traditional trustee functions, so that an individual investment advisor directs the trustee with respect to the exercise of investment powers, and the trustee is protected from liability for acting upon direction.

Although directed trusts work well in many cases, there are practical limitations to the structure. The need to modify an irrevocable governing document through a decanting, merger or other modification to create a directed trust often presents a roadblock. Also, in the ongoing administration of a directed trust, the trustee must exercise all investment powers only on the written direction of the investment advisor, which requires the trustee to remain in the middle of all investment activity. This requirement complicates execution of investment decisions, particularly if there's high transaction volume, and can give rise to potential liability if activities aren't clearly covered by the direction language or trustee powers or if there are infirmities in the direction letter.

By making a modification of the governing instrument to a directed trust the end goal in every situation, advisors may be seeking the wrong answer to the wrong question. The actual objective is to facilitate specific investment goals, and the impediments to achieving that objective are the limitations imposed by traditional trustee duties and the trustee's concern for its own liability when making discretionary decisions. The real issue advisors should be addressing to help clients achieve their goals is removing these impediments. Approaching every situation with the same solution—modifying the trust instrument to make it a



Todd A. Flubacher, far left, is a partner, and **Kenneth F. Hunt** is an associate, at Morris, Nichols, Arsht & Tunnell LLP in Wilmington, Del.



directed trust—is letting the tail wag the dog.

The NJSA Wrapper

An NJSA can be used to settle bona fide disputes or resolve construction issues with respect to a trust, but it may also be used to accomplish more strategic objectives. To understand the theory behind an NJSA wrapper, it's helpful to first look at the very nature of trusts and trustees. A trust is a fiduciary relationship that involves the transfer of legal title to property to a trustee that possesses powers and fiduciary duties and carries them out in accordance with a governing instrument in the best interest of the beneficiaries.³ The complete scope of powers that a trustee can possess consists of those granted under the governing instrument and applicable law.⁴ A trustee can't exercise any power beyond that scope, as such action would be ultra vires. Thus, the very nature of the trustee can be boiled down to powers, fiduciary duties and liabilities.

An NJSA offers a complete set of tools to effectively bifurcate specific areas of trust administration from traditional trustee functions. UTC Section 111 enables certain "interested persons" to enter into a binding NJSA with respect to "any matter" involving a trust, provided the NJSA doesn't violate a material purpose of the trust.⁵ Section 111 includes a non-exclusive list of six matters that an NJSA can address.⁶ From among those matters, subsections (d)(3), (4), and (6) make an NJSA wrapper possible. Those subsections permit parties to:

- grant a trustee power;
- restrict the exercise of a trustee power;
- limit trustee liability for an action relating to the trust; and
- appoint a trustee and designate compensation.

By using these four tools strategically, the parties to an NJSA have the power to control certain aspects of trust administration by granting trustee powers and instructing their exercise, restricting the future exercise of powers, limiting trustee liability and, in some cases, appointing a special purpose trustee. The convergence of these tools enables parties to place a contractual "wrapper" around specific areas of trust administration to accomplish desired objectives. Parties to an NJSA can control certain aspects of trust administration and eliminate the real impediment to achieving strategic objectives—the trustee's concern over liability when exercis-

ing discretion—without modifying the trust agreement.

The abilities to restrict the future exercise of trustee powers and completely limit trustee liability are critical to bifurcating trust responsibilities. Properly restricting the future exercise of trustee powers can effectively handcuff the trustee and put it in the same position as a directed trustee that lacks authority to act, unless it receives written direction. By completely limiting the trustee's liability with respect to those restricted powers, trust administration can be effectively bifurcated without monitoring or interference from the trustee.

To accomplish these goals, the NJSA should expressly reference each trustee power to be restricted, whether granted under the governing instrument

It's important to carefully draft the release of trustee liability so that it's tailored to trustee powers and duties that are granted and restricted in the NJSA.

or applicable law. A generic description of powers the trustee is prohibited from exercising may cause ambiguity as to the restricted powers and expose the trustee to residual duties and liability. In addition, it's important to carefully draft the release of trustee liability so that it's tailored to trustee powers and duties that are granted and restricted in the NJSA. A general release (that is, one purporting to release a trustee from all liability with respect to some matter) may not be totally effective because unexpected circumstances can arise in the future.⁷ However, a forward-looking release for specific approved conduct (as opposed to general future conduct) can be drafted in a manner that makes it effective.⁸

Types of NJSA Wrappers

One example of an NJSA wrapper is to appoint an "investment trustee," "distribution trustee" or other "special purpose trustee" (SPT) with certain exclusive powers, such as investment responsibility, and exclude and exculpate the general trustee from those areas of



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administration. The NJSA may specify the: (1) powers and duties of the SPT, (2) term of service of the SPT and right to remove and appoint an SPT, (3) compensation of the SPT, (4) standard of liability of the SPT, (5) restriction of the SPT's powers from being exercised by the general trustee, (6) exculpation of the general trustee for any act or omission of the SPT to the fullest extent permitted by applicable law, and (7) reduction of compensation of the general trustee to reflect its reduced role and responsibilities. Additionally, the NJSA should restrict the trustee's powers, duties and liabilities associated with any monitoring or review of areas within the authority of the SPT. **The NJSA should also limit the trustee's duties to inquire into, monitor or question the prudence of the SPT or inform any beneficiary regarding any matter under the authority of the SPT.** A similar

duties, like the duty to diversify. Without appointing an SPT, the NJSA could expressly authorize and direct the trustee to retain the asset. Simultaneously, the NJSA could completely restrict the trustee from exercising all powers relating to the disposition, exchange, change in character, lending, borrowing, pledging, mortgaging, leasing, granting of options with respect to, insuring, abandoning or in any other way relating to the investment or management of the asset for a period of time or until some triggering event. The NJSA may further specify that the trustee shall have no liability for any action or omission in connection with the asset to the fullest extent permitted under applicable law and, perhaps, reduce the compensation of the general trustee to reflect its reduced role and responsibilities.

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An NJSA wrapper could also be used to hold a portion of a trust fund in a limited liability company (LLC). For conflicts of laws, creditor protection and management or investment reasons, it's generally advisable to hold real estate in an LLC. Also, an actively managed portfolio of investments that requires frequent activity could be held in an LLC, rather than a trust. An NJSA can direct the trustee to create a single-member LLC and drop trust assets into the LLC to be managed by a separate manager. The LLC operating agreement could restrict the member from managing LLC assets or transferring its interest, and the NJSA could restrict the trustee from taking any further action as a member of the LLC, subject to further direction or another triggering event. When combined with a proper limitation of trustee liability, an NJSA can allow the manager of the LLC to manage and administer investments at the LLC level without interference from the trustee. Just as with an SPT, the trustee may need information pertaining to an LLC, including its value, so that the trustee has sufficient information about the trust assets for reporting purposes. Obligations to provide such information could be imposed on the manager within the LLC operating agreement and/or in the NJSA.

type of NJSA wrapper could be used to appoint an "administrative trustee" to perform an exclusive set of administrative duties in a desirable trust jurisdiction to create the necessary administrative nexus that satisfies conflicts-of-laws rules in that jurisdiction. When appointing an SPT or an administrative trustee, the general trustee must be cautious about how and when information is provided by the SPT, so that the general trustee has sufficient information for reporting to beneficiaries, taxing authorities and regulators. Obligations could be imposed on the SPT or administrative trustee within the NJSA to provide the general trustee with sufficient information.

An NJSA wrapper may be used when a trust holds a concentrated position in a single asset, such as stock, a family-owned business or real estate. Often, the beneficiaries collectively wish to retain these assets because of sentimental value or their own investment outlook, but a trustee may be hesitant to hold the assets because of traditional fiduciary duties and concerns about liability. **The objective is to enable the family to continue to hold that asset and eliminate the conflict with traditional**

Additionally, an NJSA wrapper could be used to direct the trustee to open and fund a discretionary investment management account with an investment manager (perhaps an affiliate of the trustee) and preclude the trustee from taking further actions over the account until some triggering event. An NJSA wrapper could cause the trustee to delegate any discretionary or ministerial functions to an agent. A delegation isn't effective to bifurcate trustee functions because a trustee



can be liable for a negligent selection of the agent and has ongoing vicarious liability for the actions of the agent and for any failure to properly monitor or fire the agent, as appropriate. However, a delegation pursuant to an NJSA could effectively resemble a directed trustee structure by restricting the trustee's power to revoke or alter the delegation and limiting the trustee's duties and liability for delegating and monitoring the actions of the agent. An NJSA could grant the trustee the power to invest in affiliated investments to overcome traditional common law proscriptions on self-dealing and avoid requirements to notify beneficiaries periodically about related compensation.⁹ An NJSA could also restrict a trustee's power to provide statements or information to certain beneficiaries for a period of time and limit the trustee's related liability to create a so-called "silent trust."

In many cases, an NJSA wrapper will be administratively preferable to decanting or trust merger because no new trust is created; therefore, the trustee doesn't create a new trust account or assign a new tax identification number. An NJSA wrapper may also eliminate some tax concerns associated with trust modification or the creation of a new trust. An NJSA is also, generally, faster, less expensive and more predictable than obtaining a judicial modification of a governing instrument. Additionally, an NJSA wrapper that doesn't appoint an SPT could avoid state tax issues associated with a directed trust that has an investment advisor or other fiduciary located in a state, such as New York or California, which taxes the trust based on the domicile of a fiduciary.

Where Allowed

Thirty-one states and the District of Columbia have adopted an NJSA statute.¹⁰ In 23 of those jurisdictions, an NJSA can address "any matter" involving a trust.¹¹ Four states¹² have adopted an NJSA statute with a limited list of matters that can be resolved, and of those states, North Carolina and South Carolina include the tools necessary for an NJSA wrapper. Additionally, several non-UTC states have enacted NJSA statutes that permit an NJSA wrapper, including Delaware, Illinois and Iowa.¹³ Idaho and Washington each have a "binding agreement" statute that may permit parties to create an NJSA wrapper.¹⁴ In total, at least 27 jurisdictions (29 including Idaho and Washington) appear to allow an NJSA wrapper. Of the five leading trust jurisdictions that tend to attract the migration of trusts from

other jurisdictions (Alaska, Delaware, Nevada, New Hampshire and South Dakota),¹⁵ only Delaware and New Hampshire have NJSA statutes.¹⁶

It's worth noting that eight states have NJSA statutes that expressly authorize trust modification.¹⁷ Subject to certain applicable statutory limitations, a trust could be modified through an NJSA in those jurisdictions to make it a directed trust without having to create an entirely new trust. If modification to a directed trust turns out to be a more attractive alternative to an NJSA wrapper, and those states are not the most advantageous for administering a directed trust, the modification and change of situs could be accomplished under those NJSA statutes as part of the trust migration. (See "NJSA Laws in a Nutshell")

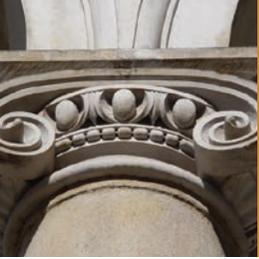
Change of Situs

If a trust is located in a jurisdiction that doesn't allow an NJSA wrapper or more desirable laws are available in another jurisdiction, it may be advantageous to change the trust's situs by appointing a trustee in another jurisdiction. Upon a change of situs, it's critical that the law governing administration of the trust changes to ensure that the transferee jurisdiction's NJSA statute will apply, as well as the laws governing other issues, such as release of trustee liability, virtual representation, the outer limits of exculpating trustees and the enforceability of the NJSA wrapper.

Different jurisdictions may have different rules for determining what jurisdiction's laws will apply if a trustee is appointed in a new jurisdiction. Recently, the Delaware Supreme Court clarified, in *Matter of Peierls Family Inter Vivos Trusts*, that Delaware law will govern the administration of any trust that allows for the appointment of a successor trustee without geographic limitation once a Delaware trustee is appointed and the trust is administered in Delaware, unless the choice-of-law provision expressly provides that another jurisdiction's laws shall always govern the administration, even if the place of administration or situs changes.¹⁸ This landmark case makes it clear when Delaware law applies to trust administration matters and may offer a new level of clarity to the conflicts-of-laws analysis in other jurisdictions as well.

Necessary Parties

It's also critical that all potentially interested parties are



bound by the NJSA, either directly or through virtual representation, so that no party can later challenge it. The required parties to an NJSA vary from jurisdiction to jurisdiction, but in most UTC jurisdictions, the consent of “interested persons” (defined as the parties whose consent would be required to enter into a binding court-approved settlement) is required.¹⁹ Based on this definition, “interested persons” may vary among the UTC jurisdictions, and it may not be entirely clear which consents are required.

A few states define the necessary parties to an NJSA more concretely. For example, Delaware defines “interested persons” by reference to the Court of Chancery consent petition rules. Those rules provide a specific, discrete list of necessary parties.²⁰ At least

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nine other jurisdictions clearly define who must sign an NJSA.²¹ Even among these jurisdictions, individuals with a minimal or tenuous connection to the trust may be required to consent, such as in Arizona, where a spouse of a beneficiary, a creditor of the trust or an individual holding no interest in a trust other than a power of appointment, may be required to consent to an NJSA.²²

Compliance with the relevant virtual representation statute may be necessary to bind minor, unborn, contingent and unascertainable beneficiaries. Most NJSA statutes expressly cross reference and invoke the jurisdiction’s virtual representation statute, however, some states, like Florida, have no explicit reference to a virtual representation statute to make it clear that virtual representation applies to an NJSA.²³

Trustee Releases

It’s also imperative that the jurisdiction has clear law (preferably by statute) validating the release of trustee liability. Most jurisdictions that have adopted the UTC have a statute expressly allowing beneficiaries to

release the trustee from liability for a breach of trust.²⁴ Many non-UTC jurisdictions, including Delaware, have adopted statutes validating trustee releases as well.²⁵ As mentioned previously, it’s important to consider any limitations on the ability to release a trustee for liability related to future conduct. It’s also important to consider whether there’s a requirement of consideration for the release of trustee liability.²⁶ Unlike other situations, such as those in which a trustee resigns or is terminated, in which forbearance of a judicial accounting for trustee services can serve as consideration, an NJSA isn’t theoretically entered into by the trustee in exchange for consideration. Courts in at least a handful of states have held that a beneficiary’s release of liability for a trustee is invalid on the basis that the release lacked consideration, and one state has a statute that implies consideration is required for a valid trustee release.²⁷ The Delaware Court of Chancery, in dicta, once suggested that an enforceable release of trustee liability probably requires consideration,²⁸ but Delaware has since adopted a release statute that expressly provides that a release is enforceable with or without consideration.²⁹

Trustee Liability

When choosing a jurisdiction for an NJSA wrapper, it’s important to consider the outer limit of exculpation of trustee liability. In jurisdictions that have adopted the UTC, the terms of a trust instrument can’t exculpate a trustee for bad faith or for reckless indifference with respect to the purposes of the trust or the interests of its beneficiaries.³⁰ Although there doesn’t appear to be a definition of “reckless indifference” in the UTC commentary or case law in the trust context, indifference implies that a fiduciary can be liable for breach of trust in the absence of taking an action or for an omission.³¹ Unlike the UTC, Delaware law provides that any provision in a trust instrument is enforceable, except to the extent that it exculpates a trustee of liability for its own willful misconduct, which is defined as “intentional wrongdoing” (that is, malicious conduct or conduct designed to defraud or seek an unconscionable advantage), rather than “mere negligence, gross negligence, or recklessness.”³² A truly bifurcated trust structure requires full exculpation up to the willful misconduct standard because, if the trustee is liable for negligence or gross negligence, or perhaps even reckless indifference, the trustee may still have an independent duty to monitor or second-guess decisions and trust activity.³³



Endnotes

1. See generally David A. Diamond and Todd A. Flubacher, "The Trustee's Role in Directed Trusts," *Trusts & Estates* (December 2010), at p. 24 (Diamond and Flubacher).
2. See *Rollins v. Branch Banking & Trust Company of Virginia*, 56 Va. Cir. 147 (2001) (holding that even though a Virginia directed trustee wasn't liable for alleged \$25 million loss that resulted from retention of a concentration of stock and failure to diversify pursuant to a valid direction, the trustee had an overriding duty to apprise beneficiaries of the declining value of the stock); *In re HSBC Bank USA, N.A.*, 98 A.D.3d 300 (4th Dept. 2012) (despite being authorized to hold concentrated position of stock, trustee was liable for failure to diversify after stock value declined and dividends were no longer being paid).
3. See *Restatement (Second) of Trusts (Restatement Second)*, Section 2.
4. *Ibid.* at Section 186.
5. The Uniform Trust Code (UTC) doesn't define what constitutes a "material purpose" of a trust, and advisors should carefully consider whether the terms of any non-judicial settlement agreement (NJSAs) might violate this requirement.
6. See UTC Section 111, Comment. Because it's a non-exclusive list, Section 111 is potentially a useful tool for addressing a wide variety of matters related to the administration of trusts well beyond the six listed matters.
7. *Williston on Contracts (4th) (Williston)*, Section 73:10.
8. *Ibid.*
9. In Delaware, 12 Del. Code Section 3312 authorizes "affiliated investments," and a trustee isn't required to provide annual notice of related compensation to current account recipients if affiliated investments are authorized by the governing instrument. The definition of "governing instrument" in 12 Del. Code Section 3301(e) was amended in 2013 to include any document that alters the duties and powers of a fiduciary, which would include an NJSAs.
10. See "NJSAs Laws in a Nutshell" ("Nutshell").
11. Those jurisdictions include: Alabama, Arizona, Arkansas, District of Columbia, Florida, Maine, Massachusetts, Michigan, Missouri, Montana, Nebraska, New Hampshire, New Mexico, North Dakota, Ohio (called a "private settlement agreement"), Oregon, Pennsylvania, Tennessee, Utah, Vermont, Virginia, West Virginia and Wyoming. Additionally, Florida and Michigan permit an NJSAs that doesn't result in an "impermissible modification of a trust." See "Nutshell".
12. Those states are: Kansas, Minnesota, North Carolina and South Carolina.
13. See 12 Del. Code Section 3338; 760 Ill. Comp. Stat. 5/16.1(d); Iowa Code Section 633A.4505.
14. See Idaho Code Section 15-8-302; Wash. Rev. Code Ann. Section 11.96A.220.
15. Daniel Worthington and Mark Merric, "Which Situs Is Best in 2012?" *Trusts & Estates* (January 2012), at p. 51.
16. Earlier this year, Delaware enacted an NJSAs statute that's substantially similar to the UTC version. See 12 Del. C. Section 3338. New Hampshire's NJSAs statute is N.H. Rev. Stat. Ann. Section 564-B:1-111.
17. See descriptions of Florida, Illinois, Missouri, New Hampshire, Ohio, Oregon, Pennsylvania and West Virginia in "Nutshell".
18. See *Matter of Peierls Family Inter Vivos Trusts*, No. 16812 (Del. Oct. 4, 2013). Also, 12 Del. Code Section 3332 provides that Delaware law governs the administration of a trust while the trust is administered in Delaware, unless the governing instrument or a court order provides otherwise.
19. UTC Section 111(a).
20. 12 Del. Code Section 3338(e); Delaware Court of Chancery Rule 101(a)(7).
21. Those states are: Arizona, Idaho, Minnesota, Ohio, Oregon, Pennsylvania, Tennessee, Washington and West Virginia. See "Nutshell".
22. See Ariz. Rev. Stat. Ann. Section 14-1201(28).
23. Fla. Stat. Ann. Section 736.011.
24. UTC Section 1009.
25. See, e.g., 12 Del. Code Section 3588.
26. George G. Bogert, *Trusts & Trustees*, Section 943 (2d. ed. Rev. 1992) ("In the case of releases, as in other instances of dealing between a fiduciary and a person for whom he is acting . . . there must be adequate consideration paid"); see also *Williston* Section 3.2.
27. See *First Nat. Bank of Princeton v. Northrup*, 90 A.2d 894 (N.J. Super. Ct. Ch. Div. 1952); *Donovan v. Security-First Nat. Bank of Los Angeles*, 155 P.2d 856 (Cal. Dist. Ct. App. 1945) (upholding a beneficiary's release of a trustee based on, inter alia, the release being based on consideration); *Nettles v. First Nat. Bank of Temple*, 168 S.W.2d 920 (Tex. Civ. App. 1943); see also S.D. Codified Laws Section 55-2-8 ("All transactions between a trustee and his beneficiary, during the existence of the trust or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration and under undue influence").
28. *R. Leigh Duemler v. Wilmington Trust Company*, C.A. 20033 (Del. Ch. Oct. 28, 2004). This opinion is an unpublished transcript of a bench ruling by the Court of Chancery.
29. 12 Del. Code Section 3588.
30. UTC Sections 105, 1008.
31. See *Restatement Second* Section 222, Comment (1) (a trustee "is liable ... if he acts or omits to act with reckless indifference as to the interest of the beneficiary").
32. 12 Del. Code Sections 3301(g); 3303(a).
33. See Diamond and Flubacher, *supra* note 1, for a more detailed discussion of the importance of the willful misconduct standard.

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NJSA Laws in a Nutshell

An overview of jurisdictions with non-judicial settlement agreement statutes

Jurisdictions With NJSA Statute	Allows Wrapper Trust	Express Power To Modify	Required Parties	Statutory Limit on Trustee Exculpation	Statute Validating Trustee Release
Alabama (UTC) ¹	Yes [ALA. CODE §19-3B-111]	No	Interested persons (UTC definition) [§19-3B-111(a)]	Bad faith and reckless indifference [§19-3B-1008]	Yes (silent on consideration) [§19-3B-1009]
Arizona (UTC)	Yes [ARIZ. REV. STAT. ANN. §14-1011]	No	Interested persons (provides a list) [§14-1201(28)]	Bad faith and reckless indifference (applies only to irrevocable trusts created on or after Jan. 1, 2009) [§14-11008]	Yes (silent on consideration) [§14-11009]
Arkansas (UTC)	Yes [ARK. CODE ANN. §28-73-111]	No	Interested persons (UTC definition) [§28-73-111(a)]	Bad faith and reckless indifference [§28-73-1008]	Yes (silent on consideration) [§28-73-1009]
Delaware	Yes [12 DEL. CODE §3338]	No	Interested persons (references court rules that provides list of parties) [§3338(a)]	Willful misconduct [§§ 3301(g); 3303(b)]	Yes (valid without consideration) [§3588]
District of Columbia (UTC)	Yes [D.C. CODE ANN. §19.1301.11]	No	Interested persons (UTC definition) [§19.1301.11(a)]	Bad faith and reckless indifference [§ 19.1310.18]	Yes (silent on consideration) [§19.1310.19]
Florida (UTC)	Yes [FLA. STAT. ANN. §736.0111]	Yes (but can't be used to modify in an "impermissible manner") [§736.0111(3)]	Interested persons ("persons whose interest would be affected") [§736.0111(a)]	Bad faith and reckless indifference (but only for trusts created on or after July 1, 2007) [§736.1011]	Yes (silent on consideration) [§736.1012]
Idaho (called a "binding agreement")	Maybe [IDAHO CODE §15-8-302; 15-8-103(1)]	No	"Parties" (lists necessary parties) [§15-8-103(3)]	No apparent limitation [§15-7-301; 302]	No
Illinois	Yes [760 ILL. COMP. STAT. §5/16.1(d)]	Yes (any term pertaining to administration of a trust) [§5/16.1(d)(4)(L)]	Interested persons (UTC-style definition) ² [§5/16.1(d)(1)]	No	No

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States With NJSA Statute	Allows Wrapper Trust	Express Power To Modify	Required Parties	Statutory Limit on Trustee Exculpation	Statute Validating Trustee Release
Iowa	Yes [IOWA CODE §633A.6308]	No (expressly prohibits modification) [§633A.6308.3]	Interested persons (UTC-style definition) [§633A.6308.1]	Intentional breach, gross negligence, bad faith, reckless indifference and profit derived from a breach [§633A.4505]	Yes (silent on consideration) [§633A.4505]
Kansas (UTC)	No [KAN. STAT. ANN. §58a-111]	No	Interested persons (UTC definition) [§58a-111(a)]	Bad faith and reckless indifference [§58a-1008]	Yes (silent on consideration) [§58a-1009]
Maine (UTC)	Yes [ME. REV. STAT. ANN. tit 18-B, §111]	No	Interested persons (UTC definition) [§111(a)]	Bad faith and reckless indifference [§1008]	Yes (silent on consideration) [§1009]
Massachusetts (UTC)	Yes [MASS. GEN. LAWS ch. 203E §111]	No	Interested persons (UTC definition) [§111(a)]	Bad faith and reckless indifference [§1008]	Yes (silent on consideration) [§1009]
Michigan (UTC)	Yes [MICH. COMP. LAWS §700.7111]	No (expressly prohibits modification) [§700.7111(2)]	Interested persons (UTC definition) [§700.7111(5)]	Bad faith and reckless indifference [§700.7908]	Yes (silent on consideration) [§700.7909]
Minnesota	No [MINN. STAT. §501B.154]	No	Trustee and all beneficiaries [§501B.151(a)]	No	No
Missouri (UTC)	Yes [MO. REV. STAT. §456.1-111]	Yes (if a court could modify the trust) [§456.1-411.6]	Interested persons (UTC definition) [§456.1-111.1]	Bad faith and reckless indifference [§456.10-1008]	Yes (silent on consideration) [§456.10-1009]
Montana (UTC)	Yes [MONT. CODE ANN §72-33-11]	No	Interested persons (UTC definition) [§72-33-11(1)]	Bad faith and reckless indifference [§72-33-125]	Yes (silent on consideration) [§72-33-126]
Nebraska (UTC)	Yes [NEB. REV. STAT. §30-3811]	No	Interested persons (UTC definition) [§30-3811(a)]	Bad faith and reckless indifference [§30-3897]	Yes (silent on consideration) [§30-3898]
New Hampshire (UTC)	Yes [N.H. REV. STAT. ANN. §564-B:1-111]	Yes [§564-B:1-111(d)(7)]	Interested persons (UTC definition, but expressly excludes the settlor) [§564-B:1-111(a)]	Bad faith and reckless indifference [§564-B:10-1008]	Yes (silent on consideration) [§564-B:10-1009]



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States With NJSA Statute	Allows Wrapper Trust	Express Power To Modify	Required Parties	Statutory Limit on Trustee Exculpation	Statute Validating Trustee Release
New Mexico (UTC)	Yes [N.M. STAT. ANN. §46A-1-111]	No	Interested persons (UTC definition) [§46A-1-111(a)]	Bad faith and reckless indifference [§46A-1-1008]	Yes (silent on consideration) [§46A-1-1009]
North Carolina (UTC)	Yes [N.C. GEN. STAT. §46A-1-111]	No	Interested persons (UTC definition) [§46A-1-111(a)]	Bad faith and reckless indifference [§36C-1-1008]	Yes (silent on consideration) [§36C-1-1009]
North Dakota (UTC)	Yes [N.D. CENT. CODE. §59-09-11]	No	Interested persons (UTC definition) [§59-09-11.1]	Bad faith and reckless indifference [§59-18-08]	Yes (silent on consideration) [§59-18-09]
Ohio (UTC) (called a “private settlement agreement”)	Yes [OHIO REV. CODE ANN. §5801.10]	Yes (if it doesn’t violate a material purpose) [§5801.10(C)(4)]	Interested persons (may include the settlor, qualified beneficiaries, trustee and Attorney General) [§130.045(1)]	Bad faith and reckless indifference [§130.835]	Yes (silent on consideration) [§5810.09]
Oregon (UTC)	Yes [OR. REV. STAT. ANN. §5801.10]	Yes [§130.045(5)(i)]	Parties (may include the settlor, beneficiaries, trustee, creditors, and Attorney General) [§5801.10(B)]	Bad faith and reckless indifference [§5810.08]	Yes (silent on consideration) [§130.840]
Pennsylvania (UTC)	Yes [20 PA. CONS. STAT. §7710.1]	Yes [§7710.1(d)(11)]	All beneficiaries and trustees [§7710.1(b)]	Bad faith and reckless indifference [§7788]	Yes (silent on consideration) [§7789]
South Carolina (UTC)	Yes [S.C. CODE ANN. §62-7-111]	No	Interested persons (UTC definition) §62-7-111(a)]	Bad faith and reckless indifference [§62-7-1008]	Yes (silent on consideration) [§62-7-1009]
Tennessee (UTC)	Yes [TENN. CODE ANN. §35-15-111]	No	Qualified beneficiaries [§35-15-111; 35-15-103(a)(13); 35-15-110]	Bad faith and reckless indifference [§35-15-1008]	Yes (silent on consideration) [§35-15-1009]
Utah (UTC)	Yes [UTAH CODE ANN §75-7-110]	No	Interested persons (UTC definition) [§75-7-110(1)]	Bad faith and reckless indifference [§75-7-1008]	Yes (silent on consideration) [§75-7-1009]

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States With NJSA Statute	Allows Wrapper Trust	Express Power To Modify	Required Parties	Statutory Limit on Trustee Exculpation	Statute Validating Trustee Release
Vermont (UTC)	Yes [VT. STAT. ANN. tit. 14A, §111]	No	Interested persons (UTC definition) [§111(a)]	Bad faith and reckless indifference [§1008]	Yes (silent on consideration) [§1009]
Virginia (UTC)	Yes [VA. CODE ANN. §64.2-709]	No	Interested persons (UTC definition) [§64.2-709.A]	Bad faith and reckless indifference [§64.2-799]	Yes (silent on consideration) [§64.2-800]
Washington	Maybe [WASH. REV. CODE ANN. §11.96A.220; 11.96A.030(2)]	No	Parties (list of defined parties) [§11.96A.030(5)]	Result of an abuse of a fiduciary relationship between trustor and trustee [§11.98.107]	Yes (silent on consideration) [§11.98.108]
West Virginia (UTC)	Yes [W. VA. CODE §44D-1-111]	Yes [§44D-1-111(b)(12)]	Interested persons (UTC definition) [§44D-1-111(a)]	Bad faith and reckless indifference [§44D-10-1008]	Yes (silent on consideration) [§44D-10-1009]
Wyoming (UTC)	Yes [WYO. STAT. ANN. §4-10-111]	No	Interested persons (defined to include noncharitable current beneficiaries, settlor, trustee and trust protector) [§44D-10-111(a)]	Bad faith and reckless indifference [§4-10-1008]	Yes (silent on consideration) [§4-10-1009]

Endnotes

1. A reference to "UTC" means the jurisdiction has adopted the Uniform Trust Code.
2. A reference to a "UTC-style definition" means that, in the opinion of the authors, the state defines the necessary parties to a non-judicial settlement agreement (NJSA) in a similar way to the UTC.

— Todd A. Flubacher & Kenneth F. Hunt