

Directed Trusts- Welcome to the "Situs Wars"

Take-Away: States now compete for 'trust business' by tweaking their versions of the Uniform Directed Trust Act. As such, the goal of establishing uniformity across all states regarding trusts and other common estate planning tools is anything but *uniform*.

Background: We live in an era of uniform laws. We have the Uniform Probate Code, the Uniform Trust Code, the Uniform Principal and Income Act, and the Uniform Trust Decanting Act. In 2017, the Uniform Law Commission gave us the Uniform Directed Trust Act. The intended purpose behind all of these uniform laws is to provide consistency and efficiency in the disposition of wealth in a highly mobile society. In addition, these Uniform Acts are intended to give more 'control' or flexibility to the trust settlor due to the dramatic increase in the use of irrevocable trusts to avoid probate and the modification (or elimination) of the venerable Rule Against Perpetuities. And as one commentator notes, another purpose of these uniform laws adopted by many states is to enhance the settlor's freedom of disposition in response to the increased use of "impersonal corporate trustees." [O'Brien, "Law Firms as Trust Directors," *ACTEC Law Journal*, Fall 2025.]

Situs Wars: While there is the obvious goal to provide uniformity in trust administration across the country when a uniform law is enacted and later adopted in several states, there is also the reality that these same laws are frequently modified at the state level, with the purpose to enable the adopting state to attract 'trust business,' with the choice-of-law situs for the trust. Departing from the goal of uniformity thus can lead to situs wars among the states in search of trust business. One example is the Uniform Directed Trust Act.

Delegate vs. Direct: It is first important to distinguish between a *trust director* with the power over some aspect of the trust to *direct* the trustee, and a trustee who *delegates* certain activities associated with the trust, e.g., the selection of an investment advisor, or agent. When a trustee *delegates* powers to another, that does not completely absolve the trustee from liability that arises from the exercise (or non-exercise) of the delegated power. The trustee retains the responsibility to make prudent choices in the selection of an agent and also to maintain prudent supervision of that agent to which it delegated responsibility. If that *delegation* is imprudent or the trustee fails to adequately monitor that agent, the trustee can be liable for any harm the agent causes. [UTC 807; Uniform Prudent Investor

Act, Section 9.] A *directed* trustee has far less exposure to liability under the Uniform Directed Trust Act (herein for ease of reference simply referred to as the Act.)

Michigan Uniform Directed Trust Act: Michigan adopted its version of the Uniform Directed Trust Act in 2019, making it a part of the Michigan Trust Code. [MCL 700.7703a] Like many uniform laws, this is a *default* statute that only applies to a question if the trust instrument is silent on that topic. There are only a couple of ‘non-modifiable’ provisions when the Act was adopted.

Power to Direct: In general, a *trust director* is given the power under the trust instrument to direct the trustee regarding an aspect of trust administration, such as the power to make distributions to trust beneficiaries, the power to invest or manage trust assets, e.g., closely held business interests or collectibles, the consent to dispose of trust assets e.g., the sale of real estate, the power/duty to administer, report or inform trust beneficiaries, and/or the power to deal with taxes.

Directed Trustee Liability: This is a binding direction the trustee must follow unless the trustee determines that the direction was outside the scope of the *trust director’s* power of direction under the trust instrument. Otherwise, the trustee is required to abide by that direction, and the trustee will have no liability for doing so in the absence of trustee fraud or collusion in a fraudulent activity.

Who Can be the Trust Director: The *trust director* can be a trust beneficiary or even the trust’s settlor, e.g., the power to direct investments. However, if the *trust director* is an organization, it must be an organization that is permitted by Michigan law to exercise trust powers in Michigan.

Further Reading: For more on Michigan Trust Directors just ‘Google’ ‘Michigan Trust Directors’ and you will find a couple of articles by me and a helpful *Perspectives* article written by Judy Grace on the statute.

Adopting States: Currently there are 17 states that have adopted the Act, e.g., Michigan, Tennessee, and Florida. Another 19 states have adopted some version of the Act. States that have earned the reputation for being ‘trust havens’ have their own, albeit perceived to be stronger, or more flexible, non-uniform directed trust statutes, including Delaware, South Dakota, Nevada, and Alaska.

State Departures from Uniformity: Since not all powers and responsibilities assigned to a trust director by the Act are adopted by the states, it is possible to select a trust situs that exploits these variations from what the Act otherwise provides. The major ‘players’ with that seek to gain trust situs ‘business’ using their directed trust statutes include South Dakota, Nevada, Delaware, Alaska, and Tennessee.

Fiduciary Duties: Perhaps the most significant departure among states that have adopted the Act is with regard to fiduciary duties. While the Act itself states that a trust director is a fiduciary, it also provides that the terms of the trust may mitigate the fiduciary obligations. [UDTA Sections 7 and 8.] Thus, the trust’s terms can confer the level of fiduciary responsibilities assigned to the trust director. Michigan’s version of the Act requires that a *trust director* serve as a fiduciary to the trust beneficiaries- a statutory provision that cannot be eliminated in the trust instrument. [MCL 700.7703(5)(a); 700.7105(2)(i).] In contrast, Delaware’s version of the Act makes the allocation of fiduciary duties to a trust director within the discretion of the settlor. As such, it apparently is possible for there to be a directed trust under Delaware law where neither the trustee nor the trust director has fiduciary duties to the trust beneficiaries.

Trust Director Powers and Deemed Powers: The Act enumerates what powers and duties may apply to a trust director. However, powers as distinguished from inherent fiduciary responsibilities, do not derive from default rules; instead, each power must be specified by the terms of the trust instrument. [Uniform Act, section 6.] Michigan’s statute provides that a trust director may exercise any power appropriate to the exercise or nonexercise of the director’s power of direction. [MCL 700.7703a(3)(a).] Delaware’s trust director statute provides an extensive list of grants of authority to the trust director, but it requires that the trust director’s powers be solely determined by the trust’s terms, not by implication. [Delaware Code, title 122, section 3313.] South Dakota’s trust director statute complements any powers given under the terms of the trust instrument with only codified *default* powers. [South Dakota Codified Laws, section 55-1B-6.]

[Note, though, that with some powers there may be a common law duty placed on the trust director to inform beneficiaries as to the trust's administration. See *Rollins v Branch Banking and Trust Co. of Virginia*, 56 Va Cir. 147 (2001) finding that such a duty was breached.]

Trustee and Director's Liability: Michigan's version of the Act provides a narrow standard of liability for a directed trustee. It lowered the directed trustee's standard of liability from willful misconduct used in the Act to one where the directed trustee is liable only if the direction was not obtained by the directed trustee's collusion or fraud. [MCL 700.7703a(7.) Delaware's statute provides that a directed trustee may refuse to comply with a trust director's direction if by such action the trustee would engage in willful misconduct, which term is then defined in the Delaware Code as "intentional wrongdoing, and not mere negligence, gross negligence or recklessness." [Del.Code title 12, sections 3301(g) and 3301(h)(4).]

Who Can be a Trust Director: As previously noted, Michigan limits an entity that can serve as *trust director* to one that must have trust powers granted by the state. In contrast, New Hampshire, South Dakota, and Tennessee (all 'trust haven' jurisdictions) allow a corporation or LLC to act as a trust director (or trust protector.)

These are just some of the examples of where a uniform law has been altered by an adopting state with the goal to make a trust flexible and/or adaptable by a trust director/trust protector, to attract trust 'business.'

Conclusion: A state that adopts a 'uniform' law can be misleading. Assuming one state's 'uniform' law is the same as another adopting state's version can cause confusion and possibly lead to a breach of fiduciary duty claims. As states continue to fight to attract trust business by abandoning the Rule Against Perpetuities, or constantly 'tinkering' with their trust laws, including subtle modifications made to otherwise 'uniform' laws, expect more clients to become aware that the situs of their trust need not be in their 'home' state.

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