In 2015, the Fiduciary Surcharge and Damages Sub-Committee distributed a twenty-six (26) question survey to ACTEC fellows regarding current case law, statutes and rules within each U.S. State on key issues relevant to financial remedies for trust and probate disputes. Separate topics related to damages and other remedies were presented to outline potential damage issues, followed by citations to language in Restatements, treatises, case law and other sources which may be followed by each State.

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## CONTENTS

1. Alternatives Remedies ........................................ 4
2. Election of Remedies ........................................ 22
3. Damages for Improper Sale Where Fiduciary Should Have Retained 35
4. Statutory Interest ........................................ 48
5. Discretion to Charge Full Statutory Interest ................. 58
6. Treasury Bill Interest ..................................... 73
7. Simple or Compound Interest ................................. 80
8. Specific Reparation if Reasonable Under the Circumstances 91
9. Equitable Lien ........................................... 102
10. Disgorge Profit ........................................... 111
11. What Would Have Been Earned But For the Breach .... 123
12. Failure to Invest ........................................... 135
13. Damages For Purchase of Imprudent Investment ........... 146
14. Failure to Sell or Diversify ................................ 156
15. Determination of Date of Sale—A Question of Fact .... 175
16. Calculation of Damages From Date Asset Should Have Been Sold 183
17. Benchmark ................................................... 198
18. Offsetting Losses With Gains ............................... 207
19. Estimation of Damages ..................................... 213
20. Failure to Purchase Assets ................................ 223
22. Failure to Maximize Income By Retaining Too Much Cash 245
23. Punitive Damages .......................................... 257
24. Double Damages ........................................... 269
25. Common Law As Default Or Supplement ................. 275
26. Uniformity in Applying and Construing Uniform Acts 283
I) **ALTERNATIVE REMEDIES.** “The law recognizes three alternative remedies available to beneficiaries when the trustee had breached the duty of loyalty to the trust. First, the trustee is obviously charged with any loss to the trust estate. Second, the trustee is liable for any profit made through the breach. Third, the beneficiary may recover from the trustee a profit that would have accrued to the trust if there had been no breach.” Restatement (Second) of Trusts § 205 (1959); see also Restatement (Third) of Trusts § 95 (2012); Scott and Ascher on Trusts § 24.3 (5th ed. 2007); Bogert, Trusts and Trustees § 861 (2d ed. rev. 1995); Loring and Rounds, A Trustee’s Handbook § 7.2.3.2 (2012); Unif. Trust Code § 1002; Unif. Trust Code Art. 10 gen. cmt.; Redke v. Silvertrust (1971) 6 Cal.3d 94, 107; Coster v. Crookham (Ia. 1991) 468 N.W.2d 802, 806.

**Alabama:** Accord: Damages for breach of trust. ALA. CODE § 19-3B-1002 (1975): (a) A trustee who commits a breach of trust is liable to the beneficiaries affected for: (1) The greater of: (i) The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or (ii) The profit the trustee made by reason of the breach; (2) Any measure of damage otherwise provided by law. (b) Except as otherwise provided in this subsection, if more than one trustee is liable to the beneficiaries for a breach of trust, a trustee is entitled to contribution from the other trustee or trustees. A trustee is not entitled to contribution if the trustee was substantially more at fault than another trustee or if the trustee committed the breach of trust in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries. A trustee who received a benefit from the breach of trust is not entitled to contribution from another trustee to the extent of the benefit received; Damages in absence of breach. ALA. CODE § 19-3B-1003 (1975): (a) A trustee is accountable to an affected beneficiary for any profit made by the trustee arising from the administration of the trust, even absent a breach of trust; (b) Absent a breach of trust, a trustee is not liable to a beneficiary for a loss or depreciation in the value of trust property or for not having made a profit.

**Alaska:** See Alaska Stat. Ann. § 13.36.080 (duty to inform and account to beneficiaries), Editors’ Notes citing Bogert Law of Trusts § 861 (remedies of the beneficiary against the trustee); Alaska Stat. Ann. § 34.20.070 (West) (including provisions for alternative remedies for improper sale of real property by trustee).

**Arizona:** “Except as provided in § 14-7404, a trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of either: 1. The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; 2. The profit the trustee made by reason of the breach.” Ariz. Rev. Stat. Ann. § 14-11002.
Arkansas: Arkansas has enacted section 1002 of the Uniform Trust Code. Ark. Code Ann. § 28-73-1002. No appellate decision has cited this section of the code. No appellate decisions cite either Restatement section.

California: “If the trustee commits a breach of trust, the trustee is chargeable with any of the following that is appropriate under the circumstances: (1) Any loss or depreciation in value of the trust estate resulting from the breach of trust, with interest; (2) Any profit made by the trustee through the breach of trust, with interest; (3) Any profit that would have accrued to the trust estate if the loss of profit is the result of the breach of trust.” Cal. Prob. C. § 16440(a); also see Uzyel v. Kadisha (2010) 188 Cal.App.4th 866, 906.

Colorado: “If a court, after a hearing, determines that a breach of fiduciary duty has occurred or an exercise of power by a fiduciary has been improper, the court may surcharge the fiduciary for any damage or loss to the estate, beneficiaries, or interested persons. Such damages may include compensatory damages, interest, and attorney fees and costs.” C.R.S. § 15-10-504; see also Foiles v. Foiles (In re Estate of Foiles), 2014 COA 104, P47 (Colo. Ct. App. 2014).


Delaware: Delaware law recognizes all three options as potential remedies. “A beneficiary may charge a trustee who commits a breach of trust with: (1) The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; (2) The profit that the trustee made by reason of the breach; or (3) Such other relief as may be fashioned by the court.” Del. Code Ann. tit. 12, § 3582; see also Del Code Ann. tit. 12, § 3581(b)(3) (“To remedy a breach of trust that has occurred or may occur, the court may order any equitable remedy, including… (3) Compelling the trustee to redress a breach of trust by paying money, restoring property, or other means.”); Mennen v. Wilmington Trust Co., No. CV 8432-ML, 2015 WL 1914599 (Del. Ch. Apr. 24, 2015) (The “appropriate remedy [of] a monetary judgment that includes the value of the lost principal associated with [the trustee’s] breaches and an additional amount to restore the value of the trust to what it would have been had the breach not occurred.”); McNeil v. McNeil, 798 A.2d 503, 509 (Del. 2002) (“With respect to the Court of Chancery’s application of remedies for breach of a trustee’s duties… [the] court, in exercise of its plenary equitable authority over the supervision of trusts is accorded broad discretion.”) (citing Hogg v. Walker, 622 A.2d 648, 654 (Del. 1993) (Court of Chancery has “broad latitude to exercise its equitable powers to craft a remedy”)).
Florida: A trustee who commits a breach of trust is liable for the greater of (a) the amount required to restore the value of the trust property and trust distributions to what they would have been if the breach had not occurred, including lost income, capital gain, or appreciation that would have resulted from proper administration; or (b) the profit the trustee made by reason of the breach. § 736.1002(1) Fla.Stat. The Florida statute is similar to Restatement (Third) of Trusts: Prudent Investor Rule § 205 (1992). The court may remedy a breach of trust that has occurred or may occur by compelling the trustee to perform his or her duties; enjoining the commission of the breach; compelling the trustee to redress the breach monetarily or by restoring property or by other means. See Fla. Stat. §736.1001(2). In the case where the personal representative (decedent’s widow) claimed the decedent’s business as her own, sold it, reacquired it on failure to pay the balance of the purchase price and resold it again, the beneficiary sued for breach of fiduciary duty and asked profits from the sale plus lost depreciation benefits, but also sued for conversion and also asked for damages for the conversion in the amount of the value of the business including the good will. The court held that she could certainly recover for the breach of fiduciary duty, or for the conversion, but not for both, terming the remedies as “redundant sanctions”. It appears that the conversion remedy was the one sought and the court remanded to determine the value of the business at the time and place of its conversion, plus interest up until the date of the final judgment. In re Estate of Corbin, 391 So.2d 731 (Fla. 3d DCA 1980).

Georgia: O.C.G.A. § 53-12-302 provides four remedies for breach of trust: (a) A trustee who commits a breach of trust shall be personally chargeable with any damages resulting from such breach of trust, including, but not limited to: (1) Any loss or depreciation in value of the trust property as a result of such breach of trust, with interest; (2) Any profit made by the trustee through such breach of trust, with interest; (3) Any amount that would reasonably have accrued to the trust or beneficiary if there had been no breach of trust, with interest; and (4) In the discretion of the court, expenses of litigation, including reasonable attorney’s fees incurred in bringing an action on such breach or threat to commit such breach; (b) If the trustee is liable for interest, then the amount of the liability for interest shall be the greater of: (1) The amount of interest that accrues at the legal rate on judgments; or (2) The amount of interest actually received.

Hawaii: In Matter of Estate of Dwight, 67 Haw. 139, 681 P.2d 563 (1984), a trustee purchased a building without adequate inspection. A tenant moved in, reported building code violations to the City and County, and refused to pay rent on account thereof. No rent was collected for 39 months. The Supreme Court determined that 8% would then have been a reasonable rate of return on the $235,000 purchase price and surcharged the trustee that amount. In Steiner v. Hawaiian Trust Co., 47 Haw. 548, 393 P.2d 96 (1964) a trustee sold stock in itself from a trust that it was administering to its President without the knowledge of
the settlor and beneficiaries. The trustee was liable for the appreciation that occurred between the date of the sale and the date that a successor trustee took over.

**Idaho:** In Idaho, “[t]he measure of damages in an action for breach of fiduciary duty is the same as the measure of damages in an action for breach of trust.” *Pickering v. El Jay Equipment Co., Inc.*, 108 Idaho 512, 517, 700 P.2d 134, 139 (Idaho App.1985); “A trustee who commits a breach of trust is chargeable with (a) the amount required to restore the values of the trust estate and trust distributions to what they would have been if the portion of the trust affected by the breach had been properly administered; or (b) the amount of any benefit to the trustee personally as a result of the breach.” *JustMed, Inc. v. Byrne* (D. Idaho, Nov. 7, 2012, 1:05-CV-00333-MHW) 2012 WL 5463897, at *6 aff’d, (9th Cir. 2014) 580 Fed.Appx. 566 (citing Restatement (Third) of Trusts §100).

**Illinois:** Yes. These three alternative remedies are available under Illinois law. “When a trustee breaches a trust agreement, whether willfully, negligently, or by oversight, he is liable for any loss to the estate resulting from the breach and must place the beneficiaries in the position they would have held had the breach not occurred. *Stuart v. Cont'l Illinois Nat. Bank & Trust Co. of Chicago*, 68 Ill. 2d 502, 526, 369 N.E.2d 1262 (1977); See also *Parish v. Parish* (1963), 29 Ill.2d 141, 149, 193 N.E.2d 761; *In re Guardianship of Connor*, 170 Ill.App.3d 759, 121 Ill. Dec. 408, 525 N.E.2d 214 (1988). Specifically, a trustee in violation of the trust is chargeable with (1) any loss or depreciation in value of the trust estate as a result of the breach; or (2) any profit made by him as a result of the breach; or (3) any profit which would have accrued to the trust estate had there been no breach of trust. (Parish, 29 Ill.2d at 149, 193 N.E.2d 761; Restatement (Second) of Trusts § 205 (1959).)” *Progressive Land Developers, Inc. v. Exchange National Bank of Chicago*, 266 Ill. App. 3d 934 (1st Dist. 1994). In *In re Estate of Halas*, 568 N.E.2d 170 (Ill. App. Ct. 1991), the court also cited the 2nd Restatement to support the same position.

**Indiana:** Burns Ind. Code Ann. § 30-4-3-11(b) (2016) ("If the trustee commits a breach of trust, the trustee is liable to the beneficiary for: (1) any loss or depreciation in the value of the trust property as a result of the breach; (2) any profit made by the trustee through the breach; (3) any reasonable profit which would have accrued on the trust property in the absence of the breach; and (4) reasonable attorney's fees incurred by the beneficiary in bringing an action on the breach."). Comments by Indiana's Trust Code Study Commission are statutorily designated to be used "by the courts to determine the reasons, purpose and policies of [the Indiana Trust Code provisions], and may be used as a guide to [their] construction and application." Burns Ind. Code Ann. § 30-4- 1-7 (2016). The Trust Code Study Commission comments to Ind. Code § 30-4-3-11(b) provide that: "This subsection adds reasonable
attorney's fees to the liabilities imposed by the Restatement on a trustee who commits a breach of trust. See Restatement (Second), Trusts § 205 (1959).

**Iowa:** “A beneficiary may charge a trustee who commits a breach of trust with the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred, or, if greater, the amount of profit lost by reason of the breach.” (Iowa Code Ann. § 633A.4503.) “The law recognizes three alternative remedies available to beneficiaries when the trustee has breached the duty of loyalty to the trust… In determining which remedy is most proper the beneficiary “can choose the remedy that seems most advantageous…” Fratcher § 205, at 242.” *Coster v. Crookham* (Iowa 1991) 468 N.W.2d 802, 806.

**Kansas:** KSA 58a-1002 sets damages for breach of trust at the greater of: (1) The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; (2) The profit the trustee made by reason of the breach; or (3) If the trustee embezzles or knowingly converts to the trustee's own use any of the personal property of the trust, the trustee shall be liable for double the value of the property so embezzled or converted.

**Kentucky:** KRS 386B.10-010; KRS 386B.10-020

**Louisiana:** Louisiana maintains the same rule as stated above, which is based upon Restatement (Second) of Trust 205. La. Rev. Stat. Ann. 9:2201. General Rule: If a trustee commits a breach of trust he shall be chargeable with: (1) A loss or depreciation in value of the trust estate resulting from a breach of trust; or (2) A profit made by him through breach of trust; or (3) A profit that would have accrued to the trust estate if there had been no breach of trust.

**Maine:** 18-B M.R.S.A. § 1002 (“A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of: (1) The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; (2) The profit the trustee made by reason of the breach”). *Est. of Wilde*, 708 A.2d 273, 275 (Me. 1998) (“When the trustee breaches his duties, he will be liable to the trust in damages”).

**Maryland:** Section 14.5-902 of the Maryland Trust Act (“MTA”) sets damages for breach of trust at “the greater of: (1) [t]he amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or (2) [t]he profit the trustee made by reason of the breach.” (MD Code, Estates and Trusts, § 14.5-902.) In the absence of a breach of trust or the applicable standard of care, “a trustee is not liable to
a beneficiary for a loss or depreciation in the value of trust property or for not having made a profit.” (MTA § 14.5-903.)

Massachusetts: Either loss from estate (make it whole) or recovery of profit (perhaps requires willful neglect or reckless indifference), whichever greater, unless it was elected by beneficiaries. The Woodward School For Girls, Inc. v. City Of Quincy (2014) 469 Mass. 151, 174-175; Berish v. Bornstein (2002) 437 Mass. 252, 270-271; Restatement (Third) of Trusts §100 (2012).

Michigan: Michigan Compiled Laws provides broad language with regards to remedies available to beneficiaries. MCL 700.7901 states, "(1) A violation by a trustee of a duty the trustee owes to a trust beneficiary is a breach of trust. (2) To remedy a breach of trust that has occurred or may occur, the court may do any of the following: (a) Compel the trustee to perform the trustee's duties. (b) Enjoin the trustee from committing a breach. (c) Compel the trustee to redress a breach of trust by paying money, restoring property, or other means. (d) Order a trustee to account. (e) Appoint a special fiduciary to take possession of the trust property and administer the trust. (f) Suspend the trustee. (g) Remove the trustee as provided in section 77061. (h) Reduce or deny compensation to the trustee. (i) Subject to section 79122, void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds. (j) Order any other appropriate relief." Additionally, MCL 700.7902 provides, "A trustee who commits a breach of trust is liable to the trust beneficiaries affected for whichever of the following is larger: (a) The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred. (b) The profit the trustee made by reason of breach." MCL 700.7706 states, “(1) The settlor, a cotrustee, or a qualified trust beneficiary may request the court to remove a trustee, or a trustee may be removed by the court on its own initiative. (2) The court may remove a trustee if 1 or more of the following occur: (a) The trustee commits a serious breach of trust. (b) Lack of cooperation among cotrustees substantially impairs the administration of the trust. (c) Because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the purposes of the trust. (d) There has been a substantial change of circumstances, the court finds that removal of the trustee best serves the interests of the trust beneficiaries and is not inconsistent with material purpose of the trust, and a suitable cotrustee, to the extent it is not inconsistent with material purpose of the trust, the court may order any appropriate relief under section 7901(2) that is necessary to protect the trust property of the interests of the trust beneficiaries.”
MCL 700.79.7912 states, “(1) A person other than a trust beneficiary who is good faith assists a trustee, or who in good faith and for value deals with a trustee, without knowledge that the trustee is exceeding or improperly exercising the trustee’s powers is protected from liability as if the trustee properly exercises the power. (2) A person other than a trust beneficiary who in good faith deals with a trustee is not required to inquire in to the extent of the trustee’s powers or the propriety of the exercise of the powers. (3) A person who in good faith delivers assets to a trustee need not ensure the proper application of the assets. (4) A person other than a trust beneficiary who in good faith assists a former trustee, or who in good faith and for value deals with a former trustee, without knowledge that the trusteeship has terminated is protected from liability as if the former trustee were still a trustee. (5) Comparable protective provisions of other laws relating to commercial transactions or transfer of securities by fiduciaries prevail over the protection provided by this section.

**Minnesota:** The Minnesota Uniform Trust Code (“Minnesota UTC”), Section 501C.1002, sets damages at the greater of: (1) the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or (2) the profit the trustee made by reason of the breach. Minnesota case law is consistent with Section 501C.1002. See e.g. *Sell v. Sell*, 2009 LEXIS 1145 (Minn. Ct. App. 2009) (“The measure of damages for breach of fiduciary duty by a trustee is the amount required to restore the values of the trust estate and trust distributions to what they would have been if the trust had been properly administered.”); *Schug v. Michael*, 245 N.W.2d 587 (Minn. 1976) (holding that the measure of damages is “the amount of defendant's profit”). Minnesota courts have broad discretion to order appropriate relief in matters involving trusts and are not limited to the statutory remedies. *In re RIJ Revocable Trust Agreement*, 2006, 2014 Minn. App. Unpub. LEXIS 139, *17 (Minn. Ct. App. Feb. 24, 2014).

**Mississippi:** *Wilburn v. Wilburn*, 106 So. 3d 360, 378 (Miss. Ct. App. 2012) (internal quotes omitted): "[A] trustee is entitled to receive compensation for such services and expenditures as are within the line of his duties. [B]ut [compensation] may be forfeited or reduced in the discretion of the court for bad faith, conversion, commingling of funds, or other improper conduct.... Each case must be determined largely on its own peculiar facts, due weight being given by the appellate court to the findings of the lower tribunal. The facts justifying forfeiture must be clearly shown; and in the absence of sufficient evidence thereof, the right to compensation is not forfeited." Miss. Code Ann §91-8-1002(a): "A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred, or the profit the trustee made by reason of the breach, and any measure of damages otherwise provided by law."
Missouri: RSMo.456.10-1002. "A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of: (I) the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or (2) the profit the trustee made by reason of the breach." Barnett v. Rogers, 400 S.W.3d 38, 4950 (Mo. App. S.D. 2013), citing Parker v. Pine 617 S.W.2d 536, 540, Mo. App. W.D. 1981). If breach of trust is established, the beneficiaries are entitled to recover the loss in value of the trust property attributable to the breach, or the loss of profit which otherwise would have accrued to the trust, but for the breach. Parker v. Pine, 617 S.W.2d 536, 540 (Mo. App, W.D.1981). If the trustee breaches his trust, the beneficiary is entitled to recover (a) loss in value of the trust property attributable to the breach, (b) profit inuring to the trustee from the breach, or (c) loss of profit to the trust which would otherwise have accrued but for the breach. Luyties' Estate v. Scudder, 432 S.W.2d 210 (Mo. 1968). If trustee commits breach of trust, he is chargeable with any loss or depreciation in value of trust estate resulting from breach of trust, or any profit made by him through breach of trust, or any profit which would have accrued to trust estate if there had been no breach of trust.

Montana: Mont. Code Ann. § 72-38-1002 ( “(1) A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of: (a) any loss or depreciation in value of the trust estate resulting from the breach of trust, with interest; (b) the profit the trustee made by reason of the breach of trust, with interest; or (c) any profit that would have accrued to the trust estate if the loss of profit is the result of the breach of trust.”)

Nebraska: Neb. Rev. St. § 30-3891 (UTC 1002) sets damages for breach of trust at the greater of:
(1) The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or
(2) The profit the trustee made by reason of the breach.

Neb. Rev. St. § 30-3892 (UTC 1003) further provides:
(a) A trustee is accountable to an affected beneficiary for any profit made by the trustee arising from the administration of the trust, even absent a breach of trust.
(b) Absent a breach of trust, a trustee is not liable to a beneficiary for a loss or depreciation in the value of trust property or for not having made a profit.

Nevada: “1. If a trustee commits or threatens to commit a breach of trust, a beneficiary or cotrustee of the trust may maintain a proceeding for any of the following purposes that is appropriate: (a) To compel the trustee to perform his or her duties; (b) To enjoin the trustee from committing the breach of trust; (c) To compel the trustee to redress the breach of trust by payment of money or otherwise; (d) To appoint a receiver or temporary trustee to take possession of the trust property and administer the trust; (e) To remove the trustee; (f) To set
aside acts of the trustee; (g) To reduce or deny compensation of the trustee; (h) To impose an equitable lien or a constructive trust on trust property; (i) To trace trust property that has been wrongfully disposed of and recover the property or its proceeds; 2. The provision of remedies in subsection 1 does not preclude resort to any other appropriate remedy provided by statute or common law.” Nev. Rev. Stat. Ann. § 163.115 (West)

**New Hampshire:** N.H. Rev. Stat. Ann. § 564-B: 1O-1002(A) ("A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of: (1) the amount required to restore the value of the trust property and trust distribution to what they would have been had the breach not occurred; or (2) the profit the trustee made by reason of the breach."). *Billewicz v. Ransmeier*, 13 A.3d 116 (N.H. 2010) (finding that plaintiffs had standing under § 564-B: 1O-1002 because they were beneficiaries of trusts). *In re Guardianship of Dorson*, 934 A.2d 545, 549 (N.H. 2007) (detailing the variety of remedies a court may impose for a trustee's breach of loyalty).


**New Mexico:** Beneficiaries can recover both loss to Beneficiaries, i.e. loss in value of the trust estate and disgorgement of gain made by trustee arising from the administration of the trust estate. *Miller v. Bank of America, N.A., as trustee*, 2015-NMSC-022 (New Mexico Supreme Court); New Mexico Uniform Trust Code 46A-10-1002-1003, NMSA. Recover loss of profit in self-dealing. *H.B. Cartwright & Bro. v. United States Bank & Trust*, 1917-NMSC-057, 23 N.M. 82 (p. 132), 167 Pac. 436.

**New York:** New York courts have the ability to suspend or remove a trustee if he or she has violated or threatens to violate the trust, is insolvent, or unsuitable. N.Y. EST. POWERS & TRUSTS § 7-2.6. New York courts differ on whether they will award attorney’s fees in cases where a trustee acted negligently as opposed to acting in bad faith. In *In re Saxton*, 274 A.D.2d. 110, 121 (3rd Dep’t. 2000), a case involving a negligent trustee, the Appellate Division, Third Department found no support under New York law for awarding attorney’s fees absent bad faith or misdealing. *But see Williams v. J.P. Morgan & Co., Inc.*, 199 F.Supp.2d 189, 196 (S.D.N.Y. 2002) (stating that under New York law, a court has discretion to award attorney’s fees in cases where a trustee negligently failed to sell a depreciating asset). In New York, a court may set aside a sale of trust assets it believes to be imprudent. In *In re Gould’s Will*, 17 A.D.2d 401 (3rd Dep’t. 1962), a trustee agreed to sell and transfer to
the president of a closely held family corporation more than 50% of the outstanding stock of the company that was owned by the trust. The sale agreement provided that payment of a substantial portion of the purchase price was deferred for more than 8 years. In the meantime, the buyer had ownership rights of voting stock and received all dividends and could renounce the sale with only small monetary loss. The court held the trustee was prohibited from transferring the stock and completing the sale.

**North Carolina:** N.C.G.S.A. § 36C-10-1002 (“A trustee who commits a breach of trust is liable for the greater of: (1) The amount required to restore the value of the property and trust distributions to what they would have been had the breach not occurred; or (2) The profit the trustee made by reason of the breach”). Belk ex rel. Belk v. Belk, 728 S.E.2d 356, 358 (N.C. App. 2012) (finding that under § 36C-10-1002, a trustee should be liable for the interest that would have accrued on the amount of funds wrongfully distributed from the beneficiary’s Uniform Transfers to Minors Act accounts).

**North Dakota:** North Dakota Century Code § 59-18-02 (“A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred or the profit the trustee made by reason of the breach.”) North Dakota Century Code § 59-18-01 (“To remedy a breach of trust that has occurred or may occur, the court may compel the trustee to perform the trustee's duties; enjoin the trustee from committing a breach of trust; compel the trustee to redress a breach of trust by paying money, restoring property, or other means; order a trustee to account; appoint a special fiduciary to take possession of the trust property and administer the trust; suspend the trustee; remove the trustee as provided in section 59-15-06; reduce or deny compensation to the trustee; subject to section 59-18-12, void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds; or order any other appropriate relief.”) Kirsten Franzen & Bradley Myers, Improving the Law Through Codification: Adoption of the Uniform Trust Code in North Dakota, 86 N.D.L. Rev. 321 (2010) Broten v. Broten, 2015 ND 127, ¶ 21, 863 N.W.2d 902

**Ohio:** Ohio Rev. Code Ann. § 5810.02 (“A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of the following: (I) The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; (2) The profit the trustee made by reason of the breach”). May v. Copeland, 947 N.E.2d 1239, 1247 (Ohio Ct. App. 2010) (upholding trial court decision ordering trustee to pay back only half of the money the trustee inappropriately paid to herself as one of trust's co-beneficiaries had consented to the trustee's actions). Wills v. Kolis, No. 93900, 2010 Ohio App. LEXIS 3674, at *9 (Ohio Ct. App. Sept. 16, 2010)
(explaining that while a court can order a trustee to pay damages under § 5810.02, that provision only applies if the "trial court chooses to remedy a breach of trust by compelling the trustee to pay money" under § 5810.01(B)(3)).

**Oklahoma:** Oklahoma case law is not very well developed on issues of damages against a trustee. However, Oklahoma statutes have been brought in line with the Uniform Trust Code in certain narrow issues. In Oklahoma, “[a] beneficiary may charge a trustee who commits a breach of trust with the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred, or, if greater, the profit that the trustee made by reason of the breach.” 60 Okla. Stat. § 175.57(C). *See also In re Burford*, No. PT-2006-013, 2012 WL 6777389 (Tulsa County, Okla., Oct. 9, 2012). Oklahoma law also authorizes a number of other remedies, including without limitation voiding an act by a trustee and “any other appropriate remedy.” *Id.* § 175.57(B)(8), (9).

**Oregon:** ORS § 130.805 (trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of (a) The amount of damages caused by the breach; (b) The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or (c) The profit the trustee made by reason of the breach.) 46 Or. Op. Atty. Gen. 180 (1989) (“A breach of trust renders a trustee liable for the amount of the trust assets diverted, plus the actual earnings as a result of the breach and interest that the trust would have received had there been no breach of trust. Restatement (Second) of Trusts secs 205(c), 207(1) (1959).”)

**Pennsylvania:** 20 Pa. C.S. § 7782(a) (“A trustee who commits a breach of trust is liable to the beneficiaries affected.”), Unif. L. Cmt. (“If a trustee commits a breach of trust, the beneficiaries may either affirm the transaction or, if a loss has occurred, hold the trustee liable for the amount necessary to compensate fully for the consequences of the breach. This may include recovery of lost income, capital gain, or appreciation that would have resulted from proper administration. Even if a loss has not occurred, the trustee may not benefit from the improper action and is accountable for any profit the trustee made by reason of the breach.”). Pennsylvania modified UTC § 1002 and included the Uniform Law Comment that discusses various sections of the Restatement of Trusts regarding alternative remedies. In addition, Pennsylvania intermediate appellate courts frequently cite to and use Section 205 of the Second Restatement of Trusts. In *Dentler Family Trust*, 873 A.2d 738 (Pa. Super. 2005), the Superior Court cited Section 205 as authority to surcharge a trustee for his investment advisor fee (thus, his “profit”), instead of any quantifiable investment loss, because he had exposed the trust to unnecessary risk without proper justification. In *Estate of Scharlach*, 809 A.2d 376 (Pa. Super. 2002), the Superior Court examined Section 205 in surcharging a trustee for failing to implement the plan proposed by a paid investment advisor
where there was no actual loss to a special needs trust, but instead minimal gains over a ten-year period. The Superior Court held that the failure to implement the investment advisor’s plan constituted a breach of trust and that the trustee should be surcharged for the difference between the actual investment performance and the gains the trust would have realized had the trustee implemented the investment advisor’s plan. This ruling was sharply criticized “for the Court’s willingness to violate the long standing principle of ‘no loss-no surcharge.’” See “Surcharge – Paper Loss,” Fiduciary Review at 1 (S. Ober Hess, et al., eds., March 2003).


**South Carolina:** S.C. Code Ann. § 62-7-1002 (“A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of :(1) The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; (2) The profit the trustee made by reason of the breach”). *Eldridge v. Eldridge*, 728 S.E.2d 24, 27 (S.C. 2012) (holding that trustees of revocable trust lacked adequate remedy at law against grantor during grantor’s lifetime, warranting application of equitable principles of constructive or resulting trust in trustee’s action to recover assets alienated from trust).

**South Dakota:** “If the trustee commits a breach of trust, he is chargeable with any loss or depreciation in value of the trust estate resulting from the breach of trust. Restatement (Second) of Trusts § 205(a) (1959); 76 Am.Jur.2d Trusts § 367 (1992).” *In re Florence Y. Wallbaum Revocable Living Trust Agreement*, 2012 S.D. 18, ¶ 36. The remedies stated in § 205 of the Restatement (Second) are also applicable when the trustee violates his duty of loyalty. Restatement (Second) of Trusts § 206 (1959)(See comment “ If the trustee commits a breach of trust, the beneficiary may have the option of pursuing a remedy which will put him in the position in which he was before the trustee committed the breach of trust; or of pursuing a remedy which will give him any profit which the trustee has made by committing the breach of trust; or of pursuing a remedy which will put him in the position in which he would have been if the trustee had not committed the breach of trust.”) *Willers*, 510 N.W.2d at 680–81 SDCL § 55-2-2 (Trustee not to use property for his own benefit--Profit of trustee from use of property, extent of liability)(“ A trustee may not in any manner use or deal with the trust property for his own profit or for any other purpose unconnected with the trust. If he does so, he may, at the option of the beneficiary, be required to account for all profits thereby made or to pay the value of the use of the trust property, and if he has disposed thereof, to replace it with its fruits or to account for its proceeds with interest.”
Tennessee: See Tenn. Code Ann. 35-15-1001:
(a) A violation by a trustee of a duty the trustee owes to a beneficiary is a breach of trust.
(b) To remedy a breach of trust that has occurred or may occur, the court may:
   (1) Compel the trustee to perform the trustee's duties;
   (2) Enjoin the trustee from committing a breach of trust;
   (3) Compel the trustee to redress a breach of trust by paying money, restoring property, or other means;
   (4) Order a trustee to account;
   (5) Appoint a special fiduciary to take possession of the trust property and administer the trust;
   (6) Suspend the trustee;
   (7) Remove the trustee as provided in § 35-15-706;
   (8) Reduce or deny compensation to the trustee;
   (9) Subject to § 35-15-1012, void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds; or
   (10) Order any other appropriate relief whether provided elsewhere in this chapter, available at common law or under equity principles.”

Tenn. Code Ann. 35-15-1001 General and Section Comments which states the availability of remedy in particular circumstances will be determined not only by the Tenn. Uniform Trust Code, but also by common law of trusts and principles of equity to the extent provided in TCA 35-15-106.

(a) The common law of trusts and principles of equity supplement this chapter, except to the extent modified by this chapter or another statute of this state.
(b) Notwithstanding subsection (a):
   (1) No provision in a trust directing or authorizing accumulation of trust income shall be invalid; and
   (2) The traditional common law distinction between a discretionary trust and a support trust and the dual judicial review standards related to this distinction shall be maintained. Unless specifically provided otherwise in this chapter, courts shall not consult, rely on or give any persuasive value to the Restatement (Third) of Trusts §§ 50, 56, 58, 59 or 60, nor any of the comments under such sections or related thereto, none of which have any force or effect relative to trusts governed by the laws of this state.
Tenn. Code Ann. 35-15-1002: (a) Except as otherwise provided in § 35-3-117(a)-(d) with regard to investment of trust funds or elsewhere in this chapter, a trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of: (1) The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or (2) The profit the trustee made by reason of the breach. (b) Except as otherwise provided in this subsection (b), if more than one (1) trustee is liable to the beneficiaries for a breach of trust, a trustee is entitled to contribution from the other trustee or trustees. A trustee is not entitled to contribution if the trustee was substantially more at fault than another trustee or if the trustee committed the breach of trust in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries. A trustee who received a benefit from the breach of trust is not entitled to contribution from another trustee to the extent of the benefit received.

Tenn. Code Ann. 35-15-1002 Section Comment (2013): “Subsection (a) is based on Restatement (Third) of Trusts: Prudent Investor Rule § 205 (1992). Such subsection states the general rule that if a trustee commits a breach of trust, the beneficiaries may either affirm the transaction or, if a loss has occurred, hold the trustee liable for the amount necessary to compensate fully for the consequences of the breach. This may include recovery of lost income, capital gain, or appreciation that would have resulted from proper administration. Even if a loss has not occurred, the trustee may not benefit from the improper action and is accountable for any profit the trustee made by reason of the breach.”

Tenn. Code Ann. 35-15-117: (a) Notwithstanding any other law, a bank or trust company, to the extent it acts at the direction of another person authorized to direct investment of funds held by the bank or trust company, or to the extent that it exercises investment discretion as a fiduciary, custodian, managing agent, or otherwise with respect to the investment and reinvestment of assets that it maintains in its trust department, may invest and reinvest the assets, subject to the standard contained in this section, in the securities of any open-end or closed-end management investment company or investment trust registered under the Investment Company Act of 1940 (15 U.S.C. §§ 80a-1 -- 80a-64). The fact that the bank or trust company, or any affiliate of the bank or trust company, is providing services to the investment company or trust as investment advisor, sponsor, distributor, custodian, transfer agent, registrar or otherwise, and receiving reasonable remuneration for the services, does not preclude the bank or trust company from investing in the securities of the investment company or trust.

(b) In the absence of express provisions to the contrary in the governing instrument, a fiduciary will not be liable to the beneficiaries or to the trust with respect to a decision regarding the allocation and nature of investments of trust assets unless the court determines that the decision was an abuse of the fiduciary's discretion. A court shall not determine that a
fiduciary abused its discretion merely because the court would not have exercised the discretion in the same manner.

(c) If a court determines that a fiduciary has abused its discretion regarding the allocation and nature of investments of trust assets, the remedy is to restore the income and remainder beneficiaries to the positions they would have occupied if the fiduciary had not abused its discretion, according to the following rules:

(1) To the extent that the abuse of discretion has resulted in no distribution to a beneficiary or a distribution that is too small, the court shall require a distribution from the trust to the beneficiary in an amount that the court determines will restore the beneficiary, in whole or in part, to the beneficiary's appropriate position, taking into account all prior distributions to the beneficiary.

(2) To the extent that the abuse of discretion has resulted in a distribution to a beneficiary that is too large, the court shall restore the beneficiaries, the trust, or both, in whole or in part, to their appropriate positions, taking into account all prior distributions, by requiring the fiduciary to withhold an amount from one (1) or more future distributions to the beneficiary who received the distribution that was too large or requiring that beneficiary to return some or all of the distribution to the trust.

(3) To the extent that the court is unable, after applying subdivisions (c)(1) and (c)(2), to restore the beneficiaries, the trust, or both, to the position they would have occupied if the fiduciary had not abused its discretion, the court may require the fiduciary to pay an appropriate amount from its own funds to one (1) or more of the beneficiaries or the trust or both.

(d) Upon a petition by the fiduciary, the court having jurisdiction over the trust or agency account shall determine whether a proposed plan of investment by the fiduciary will result in an abuse of the fiduciary's discretion. If the position describes the proposed plan of investment and contains sufficient information to inform the beneficiaries of the reasons for the proposal, the facts upon which the fiduciary relies, and an explanation of how the income and remainder beneficiaries will be affected by the proposed plan of investment, a beneficiary who challenges the proposed plan of investment has the burden of establishing that it will result in an abuse of discretion.

**Texas:** Texas Trust Code § 114.001 specifically recognizes all three of these alternative remedies. Texas Trust Code § 114.001 provides that:

“(a) The trustee is accountable to a beneficiary for the trust property and for any profit made by the trustee through or arising out of the administration of the trust, even though the profit does not result from a breach of trust; provided, however, that the trustee is not required to return to a beneficiary the trustee’s compensation as provided by this subtitle, by the terms of the trust instrument, or by a writing delivered to the trustee and signed by all beneficiaries of the trust who have full legal capacity.”
(b) The trustee is not liable to the beneficiary for a loss or depreciation in value of the trust property or for a failure to make a profit that does not result from a failure to perform the duties set forth in this subtitle, or any other breach of trust.

(c) A trustee who commits a breach of trust is chargeable with any damages resulting from such breach of trust, including, but not limited to:
  1) Any loss or depreciation in value of the trust estate as a result of the breach of trust;
  2) Any profit made by the trustee through the breach of trust;
  3) Any profit that would have accrued to the trust estate if there had been no breach of trust.

(d) The trustee is not liable to the beneficiary for a loss or depreciation in value of the trust property or for acting or failing to act under Section 113.025 [Powers of Trustee Regarding Environmental Laws] or under any other provision of this subtitle if the action or failure to act relates to compliance with an environmental law and if there is no gross negligence or bad faith on the part of the trustee. The provision of any instrument governing trustee liability does not increase the liability of the trustee a provided by this section unless the settlor expressly makes reference to this subsection.

(e) The trustee has the same protection from liability provided for a fiduciary under 42 U.S.C. Section 9607(n).”

**Utah:** “A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of: (a) the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or (b) the profit the trustee made by reason of the breach. Utah Code Ann. § 75-7-1002.

**Vermont:** 14A V.S.A. (Vermont Statutes Annotated) §§ 1001 (remedies for breach of trust), 1002 (damages for breach of trust). 14A V.S.A. §1002 allows to probate court to remedy breaches of trust as follows: (1) compel the trustee to perform the trustee's duties; (2) enjoin the trustee from committing a breach of trust; (3) compel the trustee to redress a breach of trust by paying money, restoring property, or other means; (4) order a trustee to account; (5) appoint a special fiduciary to take possession of the trust property and administer the trust; (6) suspend the trustee; (7) remove the trustee . . . (8) reduce or deny compensation to the trustee; (9) . . . void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds; or (10) order any other appropriate relief. -14A V.S.A. §1002 sets damages at the greater of: “(1) the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or (2) the profit the trustee made by reason of the breach.”

**Virginia:** “A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of:
1. The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or 2. The profit the trustee made by reason of the breach.” Va. Code § 64.2-793.A (2012).
“A trustee is accountable to an affected beneficiary for any profit made by the trustee arising from the administration of the trust, even absent a breach of trust.” Va. Code § 64.2-794(A) (2012).

Washington: Newly adopted RCW 11.98.085 governs a beneficiary’s available remedies in the event of a trustee’s breach. Accordingly:

(1) A trustee who commits a breach of trust is liable for the greater of:
   (a) The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or
   (b) The profit the trustee made by reason of the breach. (REV. CODE WASH. § 11.98.085 (2015)

However, there is no case law at present that cites to the statute in support of a claim for damages. In the past, courts in Washington have operated under the “make whole” theory of damages (see Gillespie v. Seattle-First National Bank, 855 P.2d 680, 693 (Wash. Ct. App. 1993)). Because claims for breach of trust are equitable, the court may grant whatever relief it deems is warranted, and place the trust in the same position as if the trustee had never breached its fiduciary duties (Id.).

In Gillespie v. Seattle-First National Bank, the court found a bank liable for breach of its fiduciary duty to a trust when its suggestion and management of an inappropriate real estate acquisition caused the trust to lose a significant portion of its assets (Id. at 696.). The court held the bank liable for the amount of trust funds used to make the purchase as well as interest. The remedy in that case, principal and interest, would fall under section 1(a) above. Additionally, In re Washington Builders Benefit Trust’s court found that trustees had breached their trust duties by commingling trust funds with their own, and by retaining approximately $400,000 interest earned on trust funds (In re Washington Builders Benefit Trust, 293 P.3d 1206, 1230 (Wash. Ct. App. 2013)). Because the court found that a “trustee can make no profit out of his trust,” the appropriate remedy was for the trustee to return the $400,000 profit in interest (Id. at 1231). This type of remedy is the one addressed in section 1(b) above. Finally, in a case where a trustee had appropriated the use of two trust property airplanes for his own personal use, the court determine the proper measure of damages was “any profit which would have accrued to the trust estate” if no breach had been committed (In the Matter of Guardianship of Eisenberg, 719 P.2d 187, 192 (Wash. Ct. App. 1986)).
The trustee was thus liable for damages consisting of the fair rental value of the planes, from the time of their purchase to the end of the trustee’s use (Id.).

Finally, while an award of attorney’s fees may be necessary in order to make the trust and its beneficiaries whole, these awards are made at a court’s discretion (Gillespie, 855 P.2d at 695).

**West Virginia:** W. Va. Code Ann. § 44D-10-1002 (West). “(a) A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of: (1) The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or (2) The profit the trustee made by reason of the breach.”

**Wisconsin:** Loss to trust estate: Wis. Stat. § 701.1001(2)(c)  
Trustee’s profit: Wis. Stat. § 701.1002(1)(b)  
Lost profit: Wis. Stat. §§ 701.1002(1)(a)  
Wis. Stat. § 701.1001(2) provides: “(2) To remedy a breach of trust that has occurred or may occur, a court may do any of the following: . . . (c) Compel the trustee to redress a breach of trust by paying money, restoring property, or other means.”  
Wis. Stat. § 701.1002(1) provides: "A trustee who commits a breach of trust is liable to an affected beneficiary for the greater of the following: (a) The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred. (b) The profit the trustee made by reason of the breach."

**Wyoming:** “A fiduciary who commits a breach of trust is liable to the beneficiaries affected for the greater of: (i) The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or (ii) The profit the fiduciary made by reason of the breach.”  
Wyo. Stat. § 4-10-1002.
2) ELECTION OF REMEDIES. “If the trustee purchases with trust funds property which it is her duty not to purchase, the beneficiary can at his election reject the purchase or affirm it.” Restatement (Second) of Trusts § 210, cmt. b (1959); see also Restatement (Third) of Trusts § 100 (2012); Restatement (Third) of Trusts: Prudent Investor Rule § 205 (1992); Scott and Ascher on Trusts § 24.9 (5th ed. 2007); Unif. Trust Code § 1002 cmt.; Bogert, Trusts and Trustees § 867 (2d ed. rev. 1995); Loring and Rounds, A Trustee’s Handbook §7.2.3.2 (2012); Uzyel v. Kadisha (2010) 188 Cal.App.4th 866, 893, 911; Keown v. W. Jersey Title & Guar. Co. (N.J. Super. Ct. App. Div. 1978) 161 N.J. Super. 19, 24. but see, Nickel v. Bank of Am. 290 F.3d 1134, 1139 (9th Cir. 2002).

**Alabama:** See: ALA. CODE § 19-3B-1001 (1975) (Remedies for breach of trust). (a) A violation by a trustee of a duty the trustee owes to a beneficiary is a breach of trust; (b) To remedy a breach of trust that has occurred or may occur, the court may: (1) Compel the trustee to perform the trustee's duties; (2) Enjoin the trustee from committing a breach of trust; (3) Compel the trustee to redress a breach of trust by paying money, restoring property, or other means; (4) Order a trustee to account; (5) Appoint a special fiduciary to take possession of the trust property and administer the trust; (6) Suspend the trustee; (7) Remove the trustee as provided in Section 19-3B-706; (8) Reduce or deny compensation to the trustee; (9) Subject to Section 19-3B-1012, void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds; or (10) Order any other appropriate relief. See also: ALA. CODE § 19-3B-1009 (1975) (Beneficiary's consent, release, or ratification). A trustee is not liable to a beneficiary for breach of trust if the beneficiary consented to the conduct constituting the breach, released the trustee from liability for the breach, or ratified the transaction constituting the breach, unless: (1) The consent, release, or ratification of the beneficiary was induced by improper conduct of the trustee; or (2) At the time of the consent, release, or ratification, the beneficiary did not know of the material facts relating to the alleged breach and the trustee had actual knowledge of the facts relating to the alleged breach.

**Alaska:** See Alaska Stat. Ann. § 13.36.080 (duty to inform and account to beneficiaries), Editors’ Notes citing Bogert Law of Trusts § 861 (remedies of the beneficiary against the trustee); Alaska Stat. Ann. § 34.20.070 (West) (including provisions for alternative remedies for improper sale of real property by trustee).

**Arizona:** “[A] sale, encumbrance or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account or that is otherwise affected by a conflict between the trustee's fiduciary and personal interests is voidable by a beneficiary affected by the transaction unless…” (Ariz. Rev. Stat.

Arkansas: Arkansas has enacted section 1002 of the Uniform Trust Code. Ark Code Ann. § 28-73-1002. No appellate decision has cited this section of the code. "If a trustee purchases property that the trustee had no authority to purchase, a beneficiary may either charge the trustee for the amount of the purchase or force the trustee to account for the property." Rest. (2d) of Trusts § 210, Riegler v. Reigler, 262 Ark. 70, 553 S.W.2d 37 (1977). In this case, the trustee purchased property for his own medical clinic, an investment profitable only to him. The court decreed that the trustee should restore the full cost of the real estate to the trust with an interest rate of 6%, from the date of the decree.

California: “The availability of a particular remedy and its application in particular circumstances are governed by the common law. (Cal. Law Revision Com. com., reprinted at 54A West's Ann. Prob.Code (1991 ed.) foll. § 16420, pp. 154–155.) The basic remedies include monetary relief (§ 16420, subd. (a)(3)), an equitable lien or constructive trust (§16420, subd. (a)(8)), and recovery of a specific asset through tracing (§ 16420, subd. (a)(9)), among other remedies. A petitioner can seek the disgorgement of the trustee's profits (§16440, subd. (a)(2)) through a money judgment against the trustee (§ 16420, subd. (a)(3)) or seek to establish an equitable interest in specific assets through a judgment in rem (§ 16420, subd. (a)(8), (9)). These are separate remedies; one remedy does not limit the other.” Uzyel v. Kadisha (2010) 188 Cal.App.4th 866, 893 (emphasis added).

Colorado: Breach of fiduciary duty caused a transaction to be “merely voidable” by beneficiaries. Foiles v. Foiles (In re Estate of Foiles), 2014 COA 104, P26 (Colo. Ct. App. 2014); Bowman v. Melnick, 99 Colo. 311, 322-23 (1936) ("[A]n act or contract so declared void, which is neither wrong in itself nor against public policy, but which has been declared void for the protection or benefit of a certain party, or class of parties, is voidable only and is capable of ratification by the acts or silence of the beneficiary or beneficiaries." (internal quotation marks omitted.)) Where there is a breach of trust, the shape of a remedy is in the discretion of the court. Rippey v. Denver U.S. National Bank, 273 F. Supp. 718, 742 (D. Colo. 1967); Buder v. Sartore, 774 P.2d 1383, 1390 (Colo. 1989). (Where a trustee's breach has been the making of an investment that is unauthorized, in whole or in part, and a loss resulted from the breach, the trustee may be compelled to restore the amount paid for the investment even though the loss may not have been entirely due to the trustee's breach, for example in the case of general market decline. Id., 1390.) In selecting the appropriate remedy, the controlling consideration is the award of fair compensation and advancement of the best interests of all of the beneficiaries. Rippey, 742 (citing Restatement (Second) Trusts, 291 cmt. l.)
If there is uncertainty as to the extent of damage to the trust, but there is no doubt as to the fact of damage, "the Colorado decisions hold that damages are to be closely approximated by drawing reasonable and probable inferences from the facts proven." Rippey, 744; Heller v. First National Bank of Denver, 657 P.2d 992, 997 (Colo. App. 1982).

**Connecticut:** *State v. Washburgn* (1896) 67 Conn. 187, 34 Atl. 1034 (conservatorship).

**Delaware:** Yes. “To remedy a breach of trust that has occurred or may occur, the court may order any equitable remedy, including… (8) Subject to § 3590 of this title, voiding an act of the trustee, imposing a lien or a constructive trust on trust property or tracing trust property wrongfully disposed of and recover the property or its proceeds.” Del. Code Ann. tit. 12, § 3581(b)(8).

**Florida:** The actions of the trustee are *voidable* by any affected beneficiary under the trust. See Fla. Stat. §736.0802(2)(a)-(f). This may be precluded by consent, ratification, or release by the beneficiary. See Fla. Stat. §736.1012. It may also be barred if the beneficiary fails to commence judicial action within the time allowed; See comments regarding the statute of limitations under Prefacing Comments above. §736.1008(1).

**Georgia:** *Turner v. Trust Co. of Ga.*, 214 Ga. 339 (1958)

**Hawaii:**

**Idaho:** “Any sale or encumbrance to the personal representative, his spouse, agent or attorney, or any corporation or trust in which he has a substantial beneficial interest, or any transaction which is affected by a substantial conflict of interest on the part of the personal representative, is voidable by any person interested in the estate except…” Idaho Code Ann. § 15-3-713 (West); “[A] purchase by a trustee from his cestui que trust is not void, but is a voidable transaction subject to being set aside on behalf of the beneficiary, provided a want of equity and fair dealing appears and provided the beneficiary acts to avoid the transaction with reasonable promptness.” Gibbs v. McLaughlin (1957) 79 Idaho 410, 414; In re Estate of Blackinton (1916) 29 Idaho 310, 328.

**Illinois:** Yes. Illinois law implicitly recognizes that the beneficiary can elect to retain the asset by providing for two alternative damages when the beneficiary chooses not to retain the asset: 1) Unless the beneficiaries elect to retain the asset, the trustee must place the trust in the condition it would have been in had the trustee never purchased the asset; *Mueller v. PNC Bank*, N.E.2d (2012), unreported; 2) beneficiary may recover the benefit or profit obtained by trustee with such purchase; *In re Estate of Swieciicki*, 121 Ill.App.3d 705 (1984).
**Indiana:** Impliedly recognized, see Bums Ind. Code Ann. § 30-4-3-19(a)(3) (2016), which relieves the trustee from liability if the beneficiary "elects, under an option to affirm or reject a transaction entered into as a breach of trust, to affirm the transaction .... ". The Trust Code Study Commission comments to Ind. Code § 30-4-3-19(a)(3) states that this section follows Restatement (Second) of Trusts § 218 (1959), which references § 210.

**Iowa:** “Any transaction involving the trust which is affected by a material conflict between the trustee's fiduciary and personal interests is voidable by a beneficiary affected by the transaction unless…” (Iowa Code Ann. § 633A.4202 (West).); “The law recognizes three alternative remedies available to beneficiaries when the trustee has breached the duty of loyalty to the trust… In determining which remedy is most proper the beneficiary “can choose the remedy that seems most advantageous....” Fratcher § 205, at 242.” *Coster v. Crookham* (Iowa 1991) 468 N.W.2d 802, 806.

**Kansas:** Kansas allows beneficiaries to affirm actions taken by a trustee in the same fashion expressed by Restatement (Second) of Trusts § 210, cmt. b (1959), as expressed above. KSA 58a-1009 states: A trustee is not liable to a beneficiary for breach of trust if the beneficiary consented to the conduct constituting the breach, released the trustee from liability for the breach, or ratified the transaction constituting the breach, unless: (1) The consent, release, or ratification of the beneficiary was induced by improper conduct of the trustee; or (2) at the time of the consent, release, or ratification, the beneficiary did not know of the beneficiary's rights or of the material facts relating to the breach.

**Kentucky:** KRS 386B.10-090; KRS 386B.10-010

**Louisiana:** Louisiana does not explicitly provide for a beneficiary’s right to elect to affirm or reject the purchase. Rather, it provides more generally that the beneficiary maintains remedies against the trustee, including compelling him to perform his duties, enjoining him from breaches, compelling him to redress a breach, or removing the trustee. La. Rev. Stat. Ann. 9:2221. Nevertheless, Louisiana allows a beneficiary to sue to enforce a right of the trust, in order to protect his own interest, if the trustee improperly refuses to do so, neglects to do so, or is unable to do so. La. R.S. 9:2222. Although section 2222 of the Louisiana Trust Code may be read to limit this right against obligors who are obligating to perform under an existing obligation, at least one Louisiana court case has held that a beneficiary may have a remedy against a third party due to the trustee’s breach. *See, e.g., Trust for Schwegmann v. The Schwegmann Family Trust, 905 So.2d 1143 (La. Ct. App. 5th Cir. 2005).* This case, however, may be limited to its facts, which involved a claim for unjust enrichment by beneficiaries of a trust against the trustee and the beneficiaries of another trust created by the improper diversion of funds by the trustee from the first trustee to create the second one.
a trust may institute an action: (1) To compel a trustee to perform his duties as trustee; (2) To
enjoin a trustee from committing a breach of trust; (3) To compel a trustee to redress a breach
A trustee is the proper plaintiff to sue to enforce a right of the trust estate, except that a
beneficiary may sue to enforce such a right, in order to protect his own interest, in an action
against: (1) A trustee and an obligor, if the trustee improperly refuses, neglects, or is unable
for any reason, to bring an action against the obligor; or (2) An obligor, if there is no trustee
or the trustee cannot be subjected to the jurisdiction of the proper court. Trust for
Schwegmann v. The Schwegmann Family Trust, 905 So.2d 1143 (La. Ct. App. 5th Cir. 2005).

Maine: Miles v. Coombs, 115 A. 249, 250 (Me. 1921) (“A beneficiary may pursue and
recover trust property improperly diverted, regardless of change in its form, providing its
identity be established outside of the hands of the bona fide purchaser for valuable
consideration without notice”).

Maryland: The MTA allows beneficiaries to affirm actions taken by a Trustee in the same
fashion expressed above. Section 14.5-907 of the MTA states: A trustee is not liable to a
beneficiary for breach of trust if the beneficiary consented to the conduct constituting the
breach, released the trustee from liability for the breach, or ratified the transaction
constituting the breach, unless: (1) The consent, release, or ratification of the beneficiary was
induced by improper conduct of the trustee; or (2) At the time of the consent, release, or
ratification, the beneficiary did not know of the rights of the beneficiary or of the material
facts relating to the breach. Section 14.5-902 of the MTA substantially mirrors Restatement
(Third) of Trusts § 100 (2012) and Restatement (Third) of Trusts: Prudent Investor Rule §
205 (1992), which are both cited above as it sets damages for breach of trust at “the greater
of: (1) [t]he amount required to restore the value of the trust property and trust distributions
to what they would have been had the breach not occurred; or (2) [t]he profit the trustee
made by reason of the breach.” (MD Code, Estates and Trusts, § 14.5-902.)


Michigan: MCL 700.7802(2) provides "a sale" is voidable, stating, "a sale, encumbrance or
other transaction involving the investment or management of trust property entered into by
the trustee for the trustee's own personal account or which is otherwise affected by a
substantial conflict between the trustee's fiduciary and personal interests is voidable by a trust
beneficiary affected by the transaction..."
Exceptions to the rule are: a) the transaction was authorized by the terms of the trust; b) the transaction was approved by the court after notice to the interested persons; c) the trust beneficiary did not commence a judicial proceeding within the time allowed; d) the trust beneficiary consented, ratified the transaction or released the trustee; e) the transaction involves a contract entered into or claim acquired by the trustee before the person became or contemplated becoming trustee; or f) the transaction is otherwise permitted by statute.

In a case where trust funds were misappropriated and used to purchase farm property, the Michigan Supreme Court stated, "The reason for the rule is found in the fact that, when there has been a breach of trust by wrongful sale, the cestui has a choice of two remedies. He may hold the trustee personally accountable, or may pursue the funds in the hands of the purchaser. If with full knowledge of the facts he elects to sue the trustee, he thereby ratifies the sale and waives his right to pursue the purchaser." Bliss v. Collier et al., 232 Mich. 221, 225 (1925)

MCL 700.7802(3) states, a sale, encumbrance, or other transaction involving the investment or management of trust property is presumed to be affected by a conflict between personal and fiduciary interests if it is entered into by the trustee with any of the following: a) The trustee's spouse; b) The trustee's descendant, sibling, or parent or the spouse of descendant, sibling or parent; c) An agent or attorney of the trustee; d) A corporation or other person or enterprise in which the trustee, or a person that owns a significant interest in the trustee, has an interest that might affect the trustee's best judgment.

**Minnesota:** The Minnesota UTC allows beneficiaries to affirm actions taken by a Trustee in the same fashion expressed by Restatement (Second) of Trusts § 210, cmt. b (1959), as expressed above. Section 501C.1008 states: A beneficiary's consent to a trustee’s conduct, release of the trustee from liability for the trustee’s conduct, or ratification of the trustee’s conduct is binding unless: (1) the consent, release, or ratification of the beneficiary was induced by improper conduct of the trustee; or (2) at the time of the consent, release, or ratification, the beneficiary did not know of the beneficiary’s rights or of the material facts relating to the trustee’s conduct and the trustee did know of the material facts relating to the trustee's conduct. Minnesota courts have stated that principles of trust law recognize that after a breach of trust has occurred, a beneficiary may expressly or impliedly express satisfaction with the trustee’s action and thereby prevent himself from claiming thereafter that it was illegal. A beneficiary's ratification requires proof of express or implied consent to the trustee’s action and full knowledge of all material facts. Fallgren Family Trust v. Fallgren, 2014 Minn. App. Unpub. LEXIS 1268, *15 (Minn. Ct. App. Dec. 15, 2014). Section 501C.1002 of the Minnesota UTC substantially mirrors Restatement (Third) of Trusts § 100 (2012) and Restatement (Third) of Trusts: Prudent Investor Rule § 205 (1992),
which are both cited above. Section 501C.1002 , sets damages at the greater of: (1) the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or (2) the profit the trustee made by reason of the breach.

**Mississippi:** *Carlisle v. Love*, 155 So. 197, 202 (Miss. 1934): "And if such guardian, without such authority, purchases the stock for the ward, a court of equity, a succeeding guardian or the beneficiaries, on obtaining majority, may ratify in case the property increases in value, or remains of the same value or they may disaffirm the purchase in case the same depreciates or becomes worthless." Miss. Code Ann §91-8-1009: A trustee is not liable to a beneficiary for breach of trust if the beneficiary consented to the conduct constituting the breach, released the trustee from liability for the breach, or ratified the transaction constituting the breach .... 

**Missouri:** *Taylor-McDonald v. Taylor*, 245 S.W.3d 867 (Mo. App. S.D.,2008). In a suit to establish a constructive trust, the plaintiff is not required to prove the inadequacy of the remedy at law and is able to elect freely between the relief which the law can give him and the constructive trust remedy. RSMo.456.10-1002. RSMo.456.10-1001.2. "To remedy a breach of trust that has occurred or may occur, the court may: (1) compel the trustee to perform the trustee's duties; (2) enjoin the trustee from committing a breach of trust; (3) compel the trustee to redress a breach of trust by paying money, restoring property, or other means; (4) order a trustee to account; (5) appoint a special fiduciary to take possession of the trust property and administer the trust; (6) suspend the trustee; (7) remove the trustee as provided in section 456.7-706; (8) reduce or deny compensation to the trustee; (9) subject to section 456.10-1012, void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds; or (10) order any other appropriate relief."

**Montana:** Mont. Code Ann. § 72-38-802 ("(2) Subject to the rights of persons dealing with or assisting the trustee as provided in 72-38-1012, a sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account or that is otherwise affected by a conflict between the trustee's fiduciary and personal interests is voidable by a beneficiary affected by the transaction unless…”); *Iverson v. Rehal* (1957) 132 Mont. 295, 301 [317 P.2d 869, 873] ("We hold then that a sale or transfer of trust property to the trustee with full knowledge by the beneficiary at a fair price without influence is voidable only.")

**Nebraska:** Nebraska allows beneficiaries to affirm actions taken by a trustee in the same fashion expressed by Restatement (Second) of Trusts § 210, cmt. b (1959), as expressed above.
Neb. Rev. St. § 30-3898 (UTC 1009) states:
A trustee is not liable to a beneficiary for breach of trust if the beneficiary consented to
the conduct constituting the breach, released the trustee from liability for the breach, or
ratified the transaction constituting the breach, unless:

(1) The consent, release, or ratification of the beneficiary was induced by improper
conduct of the trustee; or

(2) At the time of the consent, release, or ratification, the beneficiary did not know of the
beneficiary's rights or of the material facts relating to the breach.

Nevada: “[A]n act declared to be void by statute which is malum in se or against public
policy is utterly void and incapable of ratification, but an act or contract so declared void,
which is neither wrong in itself nor against public policy, but which has been declared void
for the protection or benefit of a certain party, or class of parties, is voidable only and is
capable of ratification by the acts or silence of the beneficiary or beneficiaries.” Leech v.
Armstrong (1930) 52 Nev. 125 [283 P. 396, 398]; see also Nev. Rev. Stat. Ann. § 163.115,
sect. 2.

New Hampshire: Ricker v. Mathews, 53 A.2d 196, 199 (N.H. 1947) ("the formal doctrine of
election of remedies should be confined to cases where the plaintiff may be unjustly enriched
or the defendant has actually been misled by the plaintiff's conduct or the result is otherwise
inequitable or res judicata can be applied."). In re Guardianship of Dorson, 934 A.2d 545,
549 (N.H. 2007) (noting that there are several remedies a beneficiary may pursue).

New Jersey:

New Mexico: Beneficiary may claim to recover damages, 46A-10-1002, NMSA—or may
consent, release or ratify transaction, 46A-10-1009 (NM Uniform Trust Code).

New York:

North Carolina: In re Will of Shepherd, 761 S.E.2d 221, 225 (N.C. App. 2014) (explaining
that the election of remedies is to prevent more than one redress for a single wrong)

North Dakota: North Dakota Century Code § 59-18-09 (“A trustee is not liable to a
beneficiary for breach of trust if the beneficiary consented to the conduct constituting the
breach, released the trustee from liability for the breach, or ratified the transaction
constituting the breach, unless the consent, release, or ratification of the beneficiary was
induced by improper conduct of the trustee or at the time of the consent, release, or ratification, the beneficiary lacked capacity or did not know of the beneficiary's rights or of the material facts relating to the breach.

**Ohio:** *Frederickson v. Nye*, 144 N.E. 299, 301 (Ohio 1924) (explaining that election is a choice between two inconsistent methods of addressing the same wrong). Ohio Rev. Code Ann. § 5808.02(B) (noting if a trustee violates his or her duty of loyalty in the management of trust property, the transaction is generally voidable by the beneficiary of the trust). Ohio Rev. Code Ann. § 5810.01(B)(9) (noting "[t]o remedy a breach of trust ... the court may ... void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover property or its proceeds.

**Oklahoma:** The doctrine of election of remedies is recognized in Oklahoma and appears to be applicable here. “We recognize the doctrine of election precludes a plaintiff from maintaining an action for two inconsistent remedies. We further recognize this doctrine presupposes a right to elect, under such conditions of fact that will afford a party choice of remedies inconsistent in character. The doctrine applies where there are coexistent remedies available at time of election which are repugnant and inconsistent. The rule is based upon the theory pursuit one inconsistent remedy involves or implies negation of others. The rule does not apply where the remedies are merely concurrent or cumulative.” *Sisler v. Jackson*, 1969 OK 104, 460 P.2d 903, 909. In 1947, the Oklahoma Supreme Court suggested that election of remedies did not apply in a case where the plaintiff (first cattle rancher, who entrusted his cattle to the second cattle rancher) pursued an action for breach of trust against a trustee (second cattle rancher, who sold the entrusted cattle) and an action for constructive trust against a bank (which received proceeds of sale of cattle by second cattle rancher in satisfaction of his debts). *Fourth National Bank v. Eidson*, 236 P.2d 491, 495, 1947 OK 379. It was suggested that the second rancher lacked the funds to pay a judgment for the proceeds of sale. The *Eidson* case does not appear to involve election between remedies, but rather an effort to recover from either of two defendants based upon a remedy of constructive trust. It appears that Oklahoma courts will treat election of remedies as a doctrine of estoppel. In 1922, the Oklahoma Supreme Court held that a plaintiff had not elected his remedies in a manner that would preclude a subsequent action for damages, when the plaintiff previously brought an action for rescission but the rescission action was dismissed before judgment. “[T]he bringing of the prior action to rescind was not such an election of remedies that would prevent the maintaining of an action for damages unless it is pleaded that by so doing some advantage is gained or detriment has been caused to the defendants.” *Sauer v. Bradley*, 1922 OK 321, 210 P. 726, 727.
Oregon: O.R.S. § 130.840 (beneficiary may affirm the transaction constituting the breach) 
*Bettencourt v. Bettencourt, 70 Or 384, 397-98 (1914)* (“When a trustee has violated the trust by purchasing property with trust funds and taking the title in his own name, the [beneficiary] has the right to elect either to proceed to fasten the trust upon the purchased property, or to proceed against the trustee personally.”)

Pennsylvania: 20 Pa. C.S. § 7781(b)(3), (9) (remedies for breach of trust involving undoing improper transactions). *See also Yost Estate, 175 A. 383, 385 (Pa. 1934)* (where the trustee invested trust funds in a mortgage loan and then mismanaged the loan, resulting in a default by the borrower, the beneficiary was “entitled to the option of affirming the transaction or of making the [trustee] restore the funds expended, with interest.”)

Rhode Island: *Point Trap Co. v. Manchester, 199 A.2d 592, 596 (R.I. 1964)*

South Carolina: No authority found.

South Dakota: South Dakota Codified laws § 55-2-2 (“A trustee may not in any manner use or deal with the trust property for his own profit or for any other purpose unconnected with the trust. “If he does so, he may, at the option of the beneficiary, be required to account for all profits thereby made or to pay the value of the use of the trust property, and if he has disposed thereof, to replace it with its fruits or to account for its proceeds with interest.”) 
SDCL § 55-4-31 (beneficiary may affirm the transaction constituting the breach) 
*In re Estate of Stevenson, 2000 S.D. 24, ¶ 19.* (“[T]he beneficiary [has] the capacity to contract and, with a full knowledge of the motives of the trustee and of all other facts concerning the transaction which might affect his own decision and without the use of any influence on the part of the trustee, permits the trustee to do so....”)


Texas: Not aware of any precept of Texas Trust Law that allows a BENEFICIARY to unilaterally reject an action by his or her trustee.

Texas Trust Code § 114.008 lists the remedies that a COURT may impose for breach of trust. This section provides that:
(a) To remedy a breach of trust that has occurred or might occur, the court may:
(1) compel the trustee to perform the trustee’s duty or duties;
(2) enjoin the trustee from committing a breach of trust;
(3) compel the trustee to redress a breach of trust, including compelling the trustee to pay money or restore property;
(4) order a trustee to account;
(5) appoint a receiver to take possession of the trust property and administer the trust;
(6) suspend the trustee;
(7) remove the trustee as provided under Section 113.082;
(8) reduce or deny compensation to the trustee;
(9) subject to Subsection (b), void an act of the trustee, impose a lien or constructive trust on trust property, or trace trust property of which the trustee wrongfully disposed and recover the property or the proceeds from the property; or
(10) any other appropriate relief.

(b) Notwithstanding Subsection (a) (9), a person other than a beneficiary who, without knowledge that a trustee is exceeding or improperly exercising the trustee’s powers, in good faith assists a trustee or in good faith and for value deals with a trustee is protected from liability as if the trustee had or properly exercised the power exercised by the trustee.”

Texas Courts routinely rely on the Restatements of Trusts and legal treatises such as *Scott and Ascher on Trusts* and *Bogert, Trusts and Trustees* as legal authority for their decisions if the provisions of these sources do not conflict with statutory trust law or specific Texas case law.

**Utah:** “[A] sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee’s own personal account or which is otherwise affected by a conflict between the trustee’s fiduciary and personal interests is voidable by a beneficiary affected by the transaction unless . . .” Utah Code Ann. § 75-7-802; see also *Ockey v. Lehmer*, 2008 UT 37, P26 (2008) (a trustee's violation of fiduciary duty is voidable only, and capable of ratification); *Wheeler By & Through Wheeler v. Mann*, 763 P.2d 758, 760 (Utah 1988) (“Absent authorization from a court with jurisdiction over the administration of the trust or consent of the beneficiaries, any transaction involving self-dealing by a trustee is . . . voidable by the beneficiaries, regardless of any loss suffered by the trust estate, the payment of valuable consideration, or the existence of good faith.”); Utah Code Ann. § 75-7-1009.

**Vermont:** 14A V.S.A. §1009 allows beneficiaries to affirm actions taken by a Trustee in the same fashion expressed by Restatement (Second) of Trusts § 210, cmt. b (1959), as expressed above. Section 1009 states:
A trustee is not liable to a beneficiary for breach of trust if the beneficiary consented to the conduct constituting the breach, released the trustee from liability for the breach, or ratified the transaction constituting the breach, unless: (1) the consent, release, or ratification of the beneficiary was induced by improper conduct of the trustee; or (2) at the time of the consent, release, or ratification, the beneficiary did not know of the beneficiary's rights or of the material facts relating to the breach.

**Virginia:** “A trustee has no right to purchase the property he is selling since he cannot occupy the position of seller and buyer at the same time. Such sale, even though the price be fair and adequate and the trustee's motive pure, will be set aside upon the application of the proper party. *Harrison v. Manson*, 95 Va. 593, 29 S.E. 420; *Smith v. Miller*, 98 Va. 541, 37 S.E. 10. No person can be permitted to purchase an interest where he has a duty to perform which is inconsistent with the character of purchaser. A trustee cannot purchase the whole of the trust subject from the beneficiary. The transaction in such cases is not void but voidable, and voidable only at the election of the *cestui que* trust, who alone has the privilege of annulling the transaction, since he alone was injured, if there was a breach of trust. *Bresee v. Bradfield*, 99 Va. 340-341, 38 S.E. 196.” *Bowles v. Bowles*, 141 Va. 35, 39, 126 S.E. 49, 50 (1925).

“A beneficiary may void a transaction that violates the trustee's duty of loyalty unless ‘[t]he transaction was authorized by the terms of the trust.’” *W.A.K. ex rel. Karo v. Wachovia Bank, N.A.*, 712 F. Supp. 2d 476, 486 (E.D. Va. 2010).

“[U]nder well-settled rules of equity the beneficiaries … have the option to hold the trustee or his estate liable for the money with interest, or the property in which it was invested, with all actual profits, where the rights of no third person intervenes. That is to say, equity, in such case, at the option of the beneficiaries, will impress upon such investment the same trust as originally adhered to the money which was used to make the investment.” *Russell's Ex'r s v. Passmore*, 127 Va. 475, 103 S.E. 652, 662 (1920).

“It is a well settled doctrine that where a trustee or other person standing in a fiduciary character, makes a profit out of any transactions within the scope of his agency, that profit will belong to the *cestui que trust*. And if a trustee should lay out money in land when not so authorized by the terms of the trust, the *cestui que trust* has an option either to take the property or to claim the money.” *Miller v. Holcombe's Ex'r*, 50 Va. 665, 677 (1853).

**Washington:** There is no Washington case law that cites Restatement § 210 for this proposition or refers to the comment regarding ratification of an unauthorized purchase. In *Rohne v. Horton*, however, the court found that a beneficiary who had petitioned the court for
her share of stock of a corporation created by the trustees was estopped from arguing the organization of the corporation was invalid (*Rohne v. Horton*, 180 Wash. 428, 434 (Wash. 1935) (finding that beneficiary had full knowledge of the facts to be able to accept or reject the stock in the corporation)). While not a purchase per se, the trustees decision to create a corporation to hold separate piece of reality was ratified when the beneficiary sought stock in the corporation.

**West Virginia:** W. Va. Code Ann. § 44D-8-802 (West) “(b) Subject to the rights of persons dealing with or assisting the trustee as provided in section one thousand twelve, article ten of this chapter, a sale, encumbrance or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account or which is otherwise affected by a conflict between the trustee's fiduciary and personal interests is voidable by a beneficiary affected by the transaction unless…”

**Wisconsin:** Under Wis. Stat. § 701.0802(2), where a trustee enters into a transaction which breaches his or her duty of loyalty, the "sale, encumbrance, or other transaction . . . is voidable by a beneficiary affected by the transaction unless any of the following applies: . . . (d) The beneficiary consented to the trustee's conduct, ratified the transaction, or released the trustee in compliance with s. 701.1009." In In re Mendel’s Will, 164 Wis. 136, 159 N.W. 806 (1916), the quoted with approval the rule enunciated in Story's Equity Jurisprudence (13th Ed.) as follows: “'The cestui que trust has an option to insist upon taking the property, or he may disclaim any title thereto, and proceed upon any other remedy to which he is entitled, either in rem or in personam. But he cannot insist upon opposite and repugnant rights.'” 159 N.W. at 809 (quoting Story's Equity Jurisprudence (13th Ed.) at 1262). Additionally, Wisconsin courts historically have looked to the Restatement (Second) of Trusts as a guide to the common law. See e.g. *Matter of Estate of Kugler*, 117 Wis. 2d 314, 344 N.W.2d 160, 166 (1984); *Dick & Reuteman Co. v. Doherty Realty Co.*, 16 Wis. 2d 342, 114 N.W.2d 475, 478 (1962). Accordingly, comment b to § 210 of the Restatement (Second) of Trusts likely would be influential in Wisconsin courts.

**Wyoming:** "Principles of trust law recognize that '[a]fter a breach of trust has occurred, a beneficiary may expressly or impliedly express satisfaction with the trustee's action and thereby prevent himself from claiming thereafter that it was illegal." *Schmidt v. Killmer*, 2009 WY 23, P11 (2009) (internal citation omitted); see also *International Trust Co. v. Preston*, 156 P. 1128 (Wyo. 1916).
3) **DAMAGES FOR IMPROPER SALE WHERE FIDUCIARY SHOULD HAVE RETAINED.**

“If the trustee sells property that the trustee has a duty to retain in the trust, unless the beneficiaries elect to affirm the sale, they may charge the trustee with the value of the property at the time of the decree, plus the value of the income that would have accrued to the trust if the property had been retained; or they may require the trustee to make specific reparation to the extent it is reasonable under the circumstances.” Restatement (Third) of Trusts: Prudent Investor Rule § 208 (1992); see also Restatement (Second) of Trusts § 208 (1959); Restatement (Third) of Trusts § 100, cmt. b(1) (2012); Scott and Ascher on Trusts § 24.16.1 (5th ed. 2007); Bogert, Trusts and Trustees §§ 747, 862 (2d ed. rev. 1995); Loring and Rounds, A Trustee’s Handbook §7.2.3.2 (2012); Jarrett v. U.S. Nat. Bank of Oregon (1986); 81 Or. App. 242, 247-48; Lincoln Nat. Bank & Trust Co. v. Shriners Hospital for Crippled Children (Ind. Ct. App. 1992) 588 N.E.2d 597, 600; InterFirst Bank Dallas, N.A. v. Risser (Tex.App. 1987) 739 S.W.2d 882, 905; Matter of Green Charitable Trust (1988) 172 Mich. App. 298, 330-31(sale at too low a price).

**Alabama:** See: ALA. CODE § 19-3B-804 (1975): Prudent administration. A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution. See also: ALA. CODE § 19-3B-816(a)(2)(1975)("A trustee may acquire or sell property, for cash or on credit, at public or private sale) and Comment thereto ("Power to sell trust property. . *. *. * In arranging a sale, a trustee must comply with the duty to act prudently as provided in Section 804"); ALA. CODE § 19-3B-I00l(b)(3); Ala. Code § 19-3B- 1002(a)(1)(i); ALA. CODE § 19-3B-1009.

**Alaska:** “In requiring that the trust be reimbursed for any loss caused by plaintiff's improper action, the court was doing no more than providing a procedure for enforcement of its original decree. It will be necessary for the trial court to determine what loss, if any, was caused by the improper transfer-that is the amount if any by which the net fair market value of the property at the time of the transfer exceeded the balance due on the purchase agreement. The amount would bear interest from the date of the transfer. It is only to this extent that the amounts otherwise due plaintiff are to be utilized for reimbursement to the trust res.” Johnson v. Johnson (Alaska 1975) 544 P.2d 65, 73.

**Arizona:** “[A] trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of either: 1. The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; 2. The profit the trustee made by reason of the breach.” Ariz. Rev. Stat. Ann. § 14-11002; “A trustee is not liable to a beneficiary for breach of trust if the beneficiary consented to the conduct...
constituting the breach, released the trustee from liability for the breach or ratified the transaction constituting the breach[.]

Arkansas: Where trustee sons sold corporate stocks without the power to do so and did not inform their mother, the beneficiary, but simply paid her "dividends" from time to time, "appellant is entitled to a decree against appellees for the value of the stocks at the time they were converted by appellees, with interest at the legal rate from date of the conversion."

_Meyers v. Meyers_, 210 Ark. 714,724, 197 S.W.2d 477, 482 (1946). Where a brother-in-law trustee sold trust property to his wife and charged her 9% interest, and the court found that the sale did not prejudice the trust, and the beneficiaries argued that the interest rate was "unreasonably low," "[t]he chancellor considered this argument and the evidence presented, found benefit on both sides of the transaction, found the 9% rate of interest not unreasonable, and found no prejudice to the trust arising out of the sale. We cannot say that this finding was clearly erroneous." The court refused to impose a higher rate of interest on the sale.

_W_itehead v. King_, No. CIV. A. 96-570, 1997 WL 327233, at *4 (Ark. Ct. App. June 11, 1997) (unpublished decision). This is not really a "sale" - but, where a couple was purchasing property under a land installment contract, and the sellers required them to purchase a $10,000 certificate of deposit and place it into a trust with a bank serving as a trustee, and the trust agreement provided that if the purchasers defaulted on the sale contract, the trustee should pay over the $10,000 to the purchasers, but instead the trustee allowed the purchasers to cash in the $10,000, and thereafter purchasers defaulted, then the bank was required to pay the purchasers $10,000 plus 6% interest. _Farmers & Merch.'s Bank v. Deason_, 25 Ark. App, 152,153,752 S.W.2d 777, 778 (1988).

California: Taylor v. Crocker Nat. Bank (1988) 205 Cal.App.3d 459 (damages were appropriate when stocks were sold in violation of a bank trustee’s duties, even though the trustee did not act in bad faith or to personally benefit itself).

Colorado: Martin v. Barth, 4 Colo. App. 346, 349 (1894) (trustee’s sale may be set aside on account of inadequate price but only if “the difference between the value of the property and the price that it brought is such as to shock the judgment and conscience of the chancellor”); see also Washburn v. Williams, 10 Colo. App. 153 (1897); Fladung v. Fladung, 162 Colo. 381 (1967). Citing Restatement (Second) Trusts, 5198, the Colorado Supreme Court held that where a former trustee misappropriated trust funds (improper loans to friends, failure to account) and was under a duty to pay money immediately and unconditionally to the successor trustee, the action is legal in nature and exemplary damages can properly be awarded. _Peterson v. McMahon_, 99P.3d 594, 598-600 (Colo.2004).
Connecticut: *Appeal of Gardner* (1908) 81 Conn. 171, 70 A. 653, 656 (Beneficiary not allowed to complain because of acquiescence in sales).

Delaware: Yes. “To remedy a breach of trust that has occurred or may occur, the court may order any equitable remedy, including… (3) Compelling the trustee to redress a breach of trust by paying money, restoring property, or other means; (4) Ordering the trustee to account… or (9) Granting any other appropriate relief.” Del. Code Ann. tit. 12, § 3581(b)(3), (4), (9); see also Del. Code Ann. tit. 12, § 3582 (“A beneficiary may charge a trustee who commits a breach of trust with: (1) The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; (2) The profit that the trustee made by reason of the breach; or (3) Such other relief as may be fashioned by the court.”); *McNeil v. McNeil*, 798 A.2d 503, 509 (Del. 2002) (“With respect to the Court of Chancery’s application of remedies for breach of a trustee’s duties… [the] court, in exercise of its plenary equitable authority over the supervision of trusts is accorded broad discretion.”) *(citing Hogg v. Walker*, 622 A.2d 648, 654 (Del. 1993) (Court of Chancery has “broad latitude to exercise its equitable powers to craft a remedy”)); *Mennen v. Wilmington Trust Co.*, No. CV 8432-ML, 2015 WL 1914599, at *35 (Del. Ch. Apr. 24, 2015) (Noting the “appropriate remedy [of] a monetary judgment that includes the value of the lost principal associated with [the trustee’s] breaches and an additional amount to restore the value of the trust to what it would have been had the breach not occurred.”).

Florida: §736.0809 Fla. Stat. codifies a trustee’s duty to take reasonable steps to control and protect trust property. A trustee may be liable for losses sustained by the trust. If liability is found, “[b]y applying the fair market value of the retained and lost property at the time of trial . . . the trial judge awarded damages to the beneficial interest holders which placed them in a position very similar to that which they would have been in had the promoters not fraudulently retained the property.” *Flagship Bank of Orlando v. Reinman, Harrell, Silberhorn, Moule & Graham, P.A.*, 503 So.2d 913, 916 (Fla. 5th D.C.A 1987). See also Fla. Stat. §736.1001 (2)(i) & (j) where the court may remedy breach of a trust by, “voiding the act, imposing a lien or constructive trust on trust property, or trace property wrongly disposed of and recover the property or its proceeds; or order any other appropriate relief.”


Hawaii:

Idaho: “Where the trustee in breach of trust transfers trust property to a person who takes with notice of the breach of trust, the transferee can be compelled, (a) if he has not disposed of the property, to restore it to the trust, together with the income which he has received from
the property; or (b) if he has disposed of the property, to pay the proceeds of the sale with the income received from the property and from the proceeds, or the amount of the proceeds with interest thereon and with any income which he received from the property before he sold it, or to pay the value of the property at the time of the decree with the income received from the property; or (c) if he received the property with knowledge of the breach of trust, to pay its value at the time when he received it with interest thereon…” Taylor v. Maile (2005) 142 Idaho 253, 261; Fenton v. King Hill Irr. Dist. (1947) 67 Idaho 456, 466-67 (citing Restatement (2d) of Trusts, § 291.)

**Illinois:** Yes. Illinois law provides for compensatory damages for improper sale of property where fiduciary duty requires retaining certain property. First, as a threshold matter, Illinois law allows the beneficiary to choose whether to affirm the sale. The beneficiary of a trust is entitled, as a matter of course, at his election to have the sale affirmed or set aside. Borders v. Murphy, 125 Ill. 577, 18 N. E. 739 (1888); see also Bennett v. Weber, 323 Ill. 283 (1926). Moreover, in the event the sale is affirmed, the trustee will have to pay the beneficiaries the difference between the fair value at the time of the sale and the amount for which the property was actually sold. McSweeney v. Buti, 263 Ill.App.3d 955 (1994). If the trustee chooses not to affirm the sale, Illinois law awards the damage described by the Restatement (Third): “where a trustee makes a negligent transfer of trust property, the beneficiary may elect to collect the present value of the property plus any income he could have received from the property after the breach.” Progressive Land Developers, Inc. v. Exchange National Bank of Chicago, 266 Ill. App. 3d 934, 942 (1st Dist. 1994).

**Indiana:** Burns Ind. Code Ann. § 30-4-3-ll(b) (2016), provides that if a trustee commits a breach of trust, the trustee is liable to the beneficiaries for: "(1) any loss or depreciation in the value of the trust property as a result of the breach; (2) any profit made by the trustee through the breach; (3) any reasonable profit which would have accrued on the trust property in the absence of a breach; and (4) reasonable attorney's fees incurred by the beneficiary in bringing the action of the breach." The Trust Code Study Commission comments to Ind. Code § 30-4-3-ll(b) provide that: "This subsection adds reasonable attorney's fees to the liabilities imposed by the Restatement on a trustee who commits a breach of trust. See Restatement (Second), Trusts § 205 (1959)." Lincoln Nat. Bank & Trust Co. v. Shriners Hospital for Crippled Children (Ind. Ct. App. 1992) 588 N.E.2d 597 (trustee improperly sold real property and was held liable to the beneficiaries for the loss incurred from such improper sale, interest on that amount accruing from the date of sale, attorney's fees, and was also denied a trustee fee). Eiteljorg v. Eiteljorg (Ind. Ct. App. 2011) 951 N.E.2d 565,572 (a trustee is liable for lost profits stemming from the "trustee's misuse of or failure to acquire trust property.")
**Iowa:** “The law recognizes three alternative remedies available to beneficiaries when the trustee has breached the duty of loyalty to the trust. First, the trustee is obviously charged with any loss to the trust estate. Second, the trustee is liable for any profit made through the breach. Third, the beneficiary may recover from the trustee a profit that would have accrued to the trust if there had been no breach.” Coster v. Crookham (Iowa 1991) 468 N.W.2d 802, 806 (citing Restatement (2d) of Trusts, §205); Williams v. Security Nat. Bank of Sioux City, Iowa (N.D. Iowa 2005) 358 F.Supp.2d 782, 799.

**Kansas:** There does not appear to be any Kansas law regarding the proper measure of damages for improper sale of trust assets by a trustee. However, as noted above, if a beneficiary ratifies or consents to such action, the trustee cannot be held liable. (KSA 58a-1009.)

**Kentucky:** No direct authority, however, could be possible under KRS 386B.10-010

**Louisiana:** See response to Question 2.

**Maine:** 18-A M.R.S.A. §3-712 (“If the exercise of power concerning the estate is improper, the personal representative is liable to interested persons for damage or loss resulting from breach of his fiduciary duty to the same extent as a trustee of an express trust. The rights of purchasers and others dealing with a personal representative shall be determined as provided in sections 3-713 and 3-714”).

**Maryland:** Section 14.5-902 of the MTA sets damages for breach of trust at “the greater of: (1) [t]he amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or (2) [t]he profit the trustee made by reason of the breach.” (MD Code, Estates and Trusts, §14.5-902.) Though not exactly mirroring the above principle, this code section indicates that a similar approach to calculating damages would likely be taken. There is no Maryland case law discussing damages specifically for a fiduciary’s failure to retain assets.

**Massachusetts:** Yes, Restatement (Third) of Trusts (2012) §100, cmt. (b)(1).

**Michigan:** MCL 700.7909 provides, "A trustee is not liable to a trust beneficiary for breach of trust if the trust beneficiary consented to the conduct constituting the breach, released the trustee from liability for the breach, or ratified the transaction constituting the breach, unless either of the following applies: (a) The consent, release, or ratification of the trust beneficiary was induced by improper conduct of the trustee. (b) At the time of the consent, release, or ratification, the trust beneficiary did not know of 1 or more of the material facts relating to the breach." See, Bliss v. Collier et al., 232 Mich. 221, 225 (1925), above, for the proposition
that a beneficiary can affirm a trustee's actions, even if those actions are improper. In the Matter of Green Charitable Trust (1988) 172 Mich. App. 298, the Michigan Court of Appeals upheld the lower court's ruling that an appraisal taking into account the development potential was proper to determine an accurate worth of property sold. Id. at 323. As a catchall, per MCL 700.7901 (2)(j), the court has the authority to grant any other appropriate relief. Further, under Michigan law, an improper sale of trust property is covered under MCL 700.7902, which provides that a trustee who commits a breach of trust, such as the improper sale of trust property, the trustee is liable to the trust beneficiaries affected for the larger of:

a) The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred;
b) The profit the trustee made by reason of the breach.

Minnesoata: In Schug v. Michael, 245 N.W.2d 587 (Minn. 1976), the trustee sold 1,000 shares of stock he was obligated to retain for the benefit of the beneficiary. The measure of damages was found to be “the so-called New York rule under which the proper measure of damages for the conversion of stock is the highest value which the stock reaches within a reasonable time after the owner has knowledge of the conversion.” Id. at 592.

Mississippi: Miss. Code Ann § 91-8-1002: "A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred, or the profit the trustee made by reason of the breach, and any measure of damages otherwise provided by law."

Missouri: RSMo.456.10-1001.2. "To remedy a breach of trust that has occurred or may occur, the court may: (1) compel the trustee to perform the trustee's duties; (2) enjoin the trustee from committing a breach of trust; (3) compel the trustee to redress a breach of trust by paying money, restoring property, or other means; (4) order a trustee to account; (5) appoint a special fiduciary to take possession of the trust property and administer the trust; (6) suspend the trustee; (7) remove the trustee as provided in section 456.7-706; (8) reduce or deny compensation to the trustee; (9) subject to section 456.10-1012, void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds; or (10) order any other appropriate relief."

Montana: Word v. Union Bank & Trust Co. (1940) 111 Mont. 279 ("[A] trustee is personally liable for a loss occasioned by his improperly disposing of the trust property, or wrongfully distributing or misappropriating the trust funds, or investing the trust fund as the individual property of the trustee, or by the negligent conduct of litigation. The claim against the trustee for the breach of trust is in the nature of a general demand for damages; and an action cannot
be maintained unless the cestui que trust can show that he has been deprived of a benefit or sustained an injury in consequence thereof. The measure of the trustee's liability in such cases ordinarily is, at the option of the cestui que trust, the amount actually lost by the breach or the amount which the trustee has gained thereby; and under some statutes the trustee may even be held liable for exemplary damages. If the violation of trust is in the use of the trust property by the trustee, the measure of damages is the profits realized from its use while it was held by him.)

**Nebraska:** There does not appear to be any Nebraska law regarding the proper measure of damages for improper sale of trust assets by a trustee. However, as noted above, if a beneficiary ratifies or consents to such action, the trustee cannot be held liable. (Neb. Rev. St. § 30-3898.)

**Nevada:** “1. If a trustee commits or threatens to commit a breach of trust, a beneficiary or cotrustee of the trust may maintain a proceeding for any of the following purposes that is appropriate: (a) To compel the trustee to perform his or her duties; (b) To enjoin the trustee from committing the breach of trust; (c) To compel the trustee to redress the breach of trust by payment of money or otherwise; (d) To appoint a receiver or temporary trustee to take possession of the trust property and administer the trust; (e) To remove the trustee; (f) To set aside acts of the trustee; (g) To reduce or deny compensation of the trustee; (h) To impose an equitable lien or a constructive trust on trust property; (i) To trace trust property that has been wrongfully disposed of and recover the property or its proceeds; 2. The provision of remedies in subsection 1 does not preclude resort to any other appropriate remedy provided by statute or common law.” Nev. Rev. Stat. Ann. § 163.115 (West)

**New Hampshire:** N.H. Rev. State. Ann. § 564-B: 1O-1001(b)(3) (“To remedy a breach of trust that has occurred or may occur, the court may: ... (3) compel the trustee to redress a breach of trust by paying money, restoring property, or other means;”). *In re Houlahan Trust*, 101 A.3d 599, 602 (N.H. 2014) (“[O]ne of the remedies available when a trustee breaches a duty owed to the beneficiaries is to compel the trustee to restore property to the trust. This contemplates that the trust will continue in existence in order for property wrongfully removed by the trustee to be restored to it.”) (citations omitted). *In re Guardianship of Dorson*, 934 A.2d 545, 550 (N.H. 2007) (“Where, as in this case, 'the beneficiary should seek damages on the theory of conversion, the court may award him 'appreciation damages', representing the appreciated value of the property at the time of the beneficiary's suit or judgment thereon rather than its value at the time of misappropriation. '”) (citations omitted).

**New Jersey:**
New Mexico: Possibly supported by Charles v. Myer, 1906-NMSC-011, 13 N.M. 368, 85 Pac. 233 (1906), citing Oliver v. Platt, 44 U.S. 333, 11 L.Ed. 622. Beneficiary has right to follow property in hands of third party—unless bona fide purchaser for value—and if trustee has invested proceeds beneficiary has election to follow into new investment or to hold trustee personally liable.

New York: In New York, a court may require a trustee to repurchase and restore trust assets from his or her own funds. In Application of Kettle, 73 A.D.2d 786 (4th Dep’t. 1979), the testator expressly requested that certain shares of stock not be sold unless there were “compelling reasons” for the sale. The court found that that trustee’s reason for selling—to diversify the trust holdings—was insufficient to be considered “compelling,” in part because the trustee acknowledged the stock was still a good investment at the time of sale. The court ordered the trustee to reimburse the trust by repurchasing a like number of shares and paying 6% interest on the amount of stock removed from the trusts. Id. at 786. New York courts will award appreciation damages where there was a duty to retain the property sold because the “beneficiaries are entitled to be placed in the same position they would have been in had the breach not consisted of a sale of property that should have been retained.” The court further stated that the same theory applies if the breach resulted from a serious conflict of interest. Matter of Rothko, 43 N.Y.2d 305, 321 (1977). In Rothko, the executors of the decedent’s estate sold 708 pieces of valuable artwork to galleries in which they held an interest. In so doing, the court held the executors acted in bad faith and imposed appreciation damages. Id. at 323. It further stated that “the true color [of the damages awarded] is ascertained when viewed in the light of overriding policy considerations and in the realization that the sale and consignment were not merely sales below value but inherently wrongful transfers which should allow the owner to be made whole.” Id. at 322.


North Dakota: N.D. Cent. Code § 59-18-01 (In the case of a breach of trust, the court may “...void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds; or order any other appropriate relief.”)

Prondzinski v. Garbut, 10 N.D. 300, 86 N.W. 969, 972 (1901) (“The general rule is that a trustee who wrongfully disposes of trust property is liable to the beneficiary for the value of the same, with interest. This rule is not changed by section 4273, Rev. Codes, which gives the beneficiary the right to require a restoration of the property, with its fruits, or to recover
the proceeds, with interest. Where an election is made to have the property replaced, the
trustee cannot defeat the beneficiary's legal right thereto by refusing to replace or by placing
it out of his power to do so, and thus compel the beneficiary to accept the proceeds. For a
breach of the duty to restore, the beneficiary may recover the value of the property, with
interest.”

Prondzinski v. Garbut, 10 N.D. 300, 86 N.W. 969 (1901)( “plaintiff may recover the value of
the land, with interest, or the proceeds of the sale, with interest, as he may elect”).

Ohio: Smith v. Mclntire, 83 F. 456, 467 (Ohio Cir. Ct. 1897) (noting where a very long
period of time has elapsed since the sale occurred, the court may indulge in a presumption of
which would otherwise accrue to a beneficiary on account of a wrongful sale may be barred
by the statute of limitations).

Oklahoma: Within the scope of available remedies under Oklahoma statutes, an Oklahoma
court may order restoration of the value of trust property lost as a result of a breach of
fiduciary duty. 60 Okla. Stat. § 175.57(C) (“A beneficiary may charge a trustee who
commits a breach of trust with the amount required to restore the value of the trust property
and trust distributions to what they would have been had the breach not occurred, or, if
greater, the profit that the trustee made by reason of the breach.”). See also In re Burford,
impose “any other appropriate remedy” as well. 60 Okla. Stat. § 175.57(B)(9). “When a
trustee has engaged in a variety of unrelated investment transactions in breach of trust, some
of which resulted in profits and others in losses, the trustee cannot net out the results of his
unauthorized activities where the breaches of trust are separate and distinct. Only if the
breaches in contest are not distinct is the trustee accountable solely for the net gain or
chargeable only with the net loss that results therefrom. Hence, when a variety of improper
investments are made, the trustee may be liable for the losses despite the fact that the other
investments produced offsetting profits. But where a trustee makes investment decisions
resulting in an improper sale of trust property from which a gain or loss occurs and the
proceeds of that sale are then invested in other property which is sold at a loss or gain, there
are not separate and distinct breaches of trust and the trustee is liable to account only for the
difference between a proper investment return and the net result of the improper but related

Oregon: O.R.S. § 130.800 (1) A violation by a trustee of a duty the trustee owes to a
beneficiary is a breach of trust. A breach of trust may occur by reason of an action or by
reason of a failure to act.(2) To remedy a breach of trust that has occurred or to prevent a
breach of trust, the court may: (a) Compel the trustee to perform the trustee's duties; (b)
Enjoin the trustee from committing a breach of trust; (c) *Compel the trustee to pay money or restore property*; (d) Order a trustee to account; (e) Appoint a special fiduciary to take possession of the trust property and administer the trust; (f) Suspend the trustee; (g) Remove the trustee as provided in ORS 130.625; (h) Reduce or deny compensation to the trustee; (i) Subject to ORS 130.855, void an act of the trustee, impose a lien or a constructive trust on trust property, or *trace trust property wrongfully disposed of and recover the property or its proceeds*; or (j) Order any other appropriate relief.

ORS § 130.805 (trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of (a) The amount of damages caused by the breach; (b) The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or (c) The profit the trustee made by reason of the breach.) *Hatcher v. U. S. Nat. Bank of Oregon*, 56 Or App 643, 662 (citing the Restatement (Second) of Trusts, 205)

**Pennsylvania:** Although there does not appear to be a Pennsylvania appellate court opinion directly on point, the following two opinions suggest that Pennsylvania generally follows these precepts: *Banes Estate*, 305 A.2d 723 (Pa. 1973) (where trust instrument bars conveyance of trust property except under specific circumstances, beneficiary can seek to set aside an improper sale); *Binenstock’s Trust*, 190 A.2d 288 (Pa. 1963) (where authority of trustees to convey trust assets is expressly limited, the court can reject a contract of sale and order a public sale of the assets in expectation that the trust will obtain better offers). Also may be covered by 20 Pa. C.S. § 7781(b)(9) (breach can be remedied by “(i) voiding an act of the trustee; (ii) imposing a lien or a constructive trust on trust property; or (iii) tracing trust property wrongfully disposed of and recovering the property or its proceeds.”)

**Rhode Island:** See generally *Probate Court of Warwick v. Bank of America, N.A.*, 813 F. Supp. 2d 277, 323-332

**South Carolina:** No authority found.

**South Dakota:** “If the trustee commits a breach of trust, he is chargeable with any loss or depreciation in value of the trust estate resulting from the breach of trust.” *Willers*, 510 N.W.2d at 680–81 (citing Restatement (Second) of Trusts § 205(a) (1959); 76 Am.Jur.2d Trusts § 367 (1992)).
In re Florence Y. Wallbaum Revocable Living Trust Agreement, 2012 S.D. 18, ¶ 36. (Any breach by trustee of its fiduciary duties, when it sold farm and residence owned by trust without court approval or the consent of trust's remainder beneficiaries, did not damage the trust as required in order for trustee to have an obligation to reimburse the trust, where the farm and residence were sold for market value, the trust received all of the proceeds generated from the sales, and the trust received all of the income generated from the sales.)


SDCL § 55-4-31 (beneficiary may affirm the transaction constituting the breach)


Texas: See Texas Trust Code §§ 114.001 and 114.008 supra. Under Texas Trust Code §114.008 (a)(10)a Court may implement virtually any equitable remedy. Texas Courts routinely rely on the Restatements of Trusts and legal treatises such as Scott and Ascher on Trusts and Bogert, Trusts and Trustees as legal authority for their decisions if the provisions of these sources do not conflict with statutory trust law or specific Texas case law.

Utah: Wheeler v. Mann, 763 P.2d 758, 758 (Utah 1988) (trustee invested trust property contrary to requirements of trust agreement and beneficiary recovered amount of trust fund plus interest). “And it is a well-established principle of trust law that when a trustee breaches its fiduciary duty to the beneficiary by conveying away trust property for insufficient value, it is the trustee, rather than innocent third parties, that must reimburse the trust. Comment ‘d’ of Section 205 of the Restatement (Second) of Trusts sets out the general rule: ‘If the trustee is authorized to sell trust property, but in breach of trust he sells it for less than he should receive, he is liable for the value of the property at the time of the sale less the amount which he received.’” State v. Mathis, 2009 UT 85, P18 (2009).

Vermont: No Vermont cases or statutory authorities on point. Where the Vermont Trust Code does not specifically provide law on a subject, courts look to Vermont common law as a supplement (14A V.S.A § 106) followed by the restatements and common law from other states. (Estate of Nancy B. Alden v. Julia Dee and Todd Alden (2010) 427-12-06 Bncv [Vermont trial court opinion, affirmed in full by Vermont Supreme Court].)
**Virginia:** “A general authorization in a controlling document authorizing a trustee to invest in such assets as the trustee, in his sole discretion, may deem best, or other language purporting to expand the trustee's investment powers, shall not be construed to waive the rule of subsection A [the Prudent Investor Rule] unless the controlling document expressly manifests an intention that it be waived … (iii) by an express authorization to acquire or retain a specific asset or type of asset such as a closely held business …. A trustee shall not be liable to a beneficiary for the trustee's good faith reliance on a waiver of the rule of subsection A.” Va. Code § 64.2-781(B) (2012).

“The inquiry in every case in which it is sought to fix a liability upon a fiduciary is: 1. Did he act within the scope of his powers and duties? 2. Did he act in good faith? 3. Did he act with ordinary prudence? If he did so act, he is not responsible for the consequences of the act, though it result in the loss of the trust fund, or some part of it.” *Parsons v. Wysor*, 180 Va. 84, 89, 21 S.E.2d 753, 755 (1942). “[U]nder well-settled rules of equity the beneficiaries … have the option to hold the trustee or his estate liable for the money with interest, or the property in which it was invested, with all actual profits, where the rights of no third person intervenes. That is to say, equity, in such case, at the option of the beneficiaries, will impress upon such investment the same trust as originally adhered to the money which was used to make the investment.” *Russell's Ex'rs v. Passmore*, 127 Va. 475, 103 S.E. 652, 662 (1920). “Absent a breach of trust, a trustee is not liable to a beneficiary for a loss or depreciation in the value of trust property or for not having made a profit.” Va. Code § 64.2-794(B) (2012).

**Washington:** In Washington, if the trustee affects an unauthorized transfer or sale of trust property, courts have determined that the trustee is liable for the value of the property “on the date of the trial,” plus any other damages “reasonably incurred” (*Baker Boyer National Bank v. Garver*, 719 P.2d 583, 590 (Wash. Ct. App. 1986)). In *Baker Boyer National Bank v. Garver*, the court found that the bank as trustee breached its fiduciary duty by making the unauthorized transfer of 5.44 acres of land of trust property. The court held that the trustee was liable for the value of the land at the time of trial, in addition to any damages incurred by the quiet title action the beneficiaries would have to bring against the current owner. Because the attorney’s fees were a product of the trustee’s “wrongful act,” the beneficiaries were entitled to the “amount of damages reasonably incurred” in righting the wrong (see *Baker Boyer National Bank*).

**West Virginia:** W. Va. Code Ann. § 44D-10-1003 (West). (“Absent a breach of trust, a trustee is not liable to a beneficiary for a loss or depreciation in the value of trust property or for not having made a profit.”); *Cresap v. Brown* (1918) 82 W.Va. 467 [96 S.E. 66, 67] (On wrongful sale and conveyance of land by holders of legal title in trust to a purchaser for value
without notice, trustees become liable to their co-owners in beneficial interest for the loss to
them.)

**Wisconsin:** Wis. Stat. § 701.1001(2)(c), provides: "To remedy a breach of trust that has
occurred or may occur, a court may do any of the following . . . (c) Compel the trustee to
redress a breach of trust by paying money, restoring property, or other means." Wis. Stat. §
701.1002(1) provides: "A trustee who commits a breach of trust is liable to an affected
beneficiary for the greater of the following: (a) The amount required to restore the value of
the trust property and trust distributions to what they would have been had the breach not
occurred. (b) The profit the trustee made by reason of the breach." Under Wis. Stat. §
701.0802(2), where a trustee enters into a transaction which breaches his or her duty of
loyalty, the "sale, encumbrance, or other transaction . . . is voidable by a beneficiary affected
by the transaction unless any of the following applies: . . . (d) The beneficiary consented to
the trustee's conduct, ratified the transaction, or released the trustee in compliance with s.
701.1009." Wisconsin courts historically have looked to the Restatement (Second) of Trusts
as a guide to the common law. See e.g. Matter of Estate of Kugler, 117 Wis. 2d 314, 344
N.W.2d 160, 166 (1984); Dick & Reuteman Co. v. Doherty Realty Co., 16 Wis. 2d 342, 114
N.W.2d 475, 478 (1962). Accordingly, § 208 of the Restatement (Second) of Trusts likely
would be influential in Wisconsin courts.

for less than market value, and court awarded the difference between the sale price and
market value of the lots sold along with post-judgment interest and other fees).
4) **Statutory Interest.** “In some cases, especially involving breaches of short duration, it may be appropriate simply to charge the trustee with interest rather than looking to total return.” Restatement (Third) of Trusts: Prudent Investor Rule, § 205, cmt. a (1992); see also Restatement (Second) of Trusts § 207(1) (1959); Restatement (Third) of Trusts § 100 (2012); Scott and Ascher on Trusts § 24.9 (5th ed. 2007); Loring and Rounds, A Trustee’s Handbook § 7.2.3.2 (2012); Matter of Estate of Janes (1997) 90 N.Y.2d 41, 55; Nordahl v. Dep’t of Real Estate (Cal.Ct.App. 1975) 48 Cal.App.3d 657, 665; Redke v. Silvertrust (1971) 6 Cal.3d 94, 106.

**Alabama:** In *First Alabama Bank of Huntsville v. Spragins*, the Alabama Supreme Court affirmed an award of prejudgment interest on compensatory damages for breach of trust using the simple rate of 6%. See 515 So. 2d 962, 966-67 (Ala. 1987); see also Alabama Code § 8-8-1 (establishing the prejudgment interest rate as 6%). The interest ran from the date of the trial court's initial judgment in the proceeding to the date of the final judgment two years later. See *Spragins*, 515 So. 2d. at 966. Finding that the amount of interest awarded had been "determined by the court to be the amount necessary to adequately compensate the trust" through the date of the final judgment, the Alabama Supreme Court held that the trial court did not commit reversible error. See id. at 967; but see discussion of *First Alabama Bank of Montgomery, N.A. v. Martin*, 425 So. 2d 415 (Ala. 1982), in number 6 below.

**Alaska:** “[T]he rate of interest on judgments and decrees for the payment of money, including prejudgment interest, is three percentage points above the 12th Federal Reserve District discount rate in effect on January 2 of the year in which the judgment or decree is entered.” Alaska Stat. Ann. § 09.30.070 (West)

**Arizona:** “Unless specifically provided for in statute or a different rate is contracted for in writing, interest on any judgment shall be at the lesser of ten per cent per annum or at a rate per annum that is equal to one per cent plus the prime rate[.].” Ariz. Rev. Stat. Ann. § 44-1201; “[W]here amount of overpayment of estate taxes could be computed with exactness, without reliance on opinion or discretion, estate was entitled to prejudgment interest at statutory rates in effect for time periods involved from and after dates when estate taxes were wrongfully paid.” *Matter of Estes’ Estate* (Ariz. Ct. App. 1982) 134 Ariz. 70 [654 P.2d 4].

**Arkansas:** No Arkansas authority found, and none citing Restatement sections.

**California:** *Redke v. Silvertrust* (1971) 6 Cal.3d 94, 106 (awarding value of assets plus 7 percent statutory interest on those amounts from date of testator’s death); *Nordahl v. Dep’t of Real Estate* (Cal. Ct. App. 1975) 48 Cal.App.3d 657, 665 (“When, by virtue of the fraud or breach of fiduciary duty of the defendant, a plaintiff has been deprived of the use of his
money or property and is obliged to resort to litigation to recover it, the inclusion of interest in the award is necessary in order to make the plaintiff whole.”

**Colorado:** “The award of interest in a breach of trust action is wholly independent of statute. Whether interest will be allowed, at what rate, and from what date is wholly in the discretion of the trial court.” *Heller v. First Nat'l Bank, N.A.*, 657 P.2d 992 (Colo. Ct. App. 1982).

**Connecticut:**

**Delaware:** Yes. Cf. *In re The Volfsun/Landy Trust*, No. 4635-VCL 2013 WL 1654881 (Del. Ch. Apr. 16 2013) (Damages awarded plus interest against trustee for a breach of fiduciary duty.)

**Florida:** Florida has no authority on this specific issue.

**Georgia:** O.C.G.A. § 53-12-302; Restatement (Third) of Trusts: Prudent Investor Rule, § 205, cmt. a.

**North Dakota:** N/A

**Hawaii:** In *Nepage-Fontes v. Nepage*, 129 Haw. 450, 303 P.3d 1227 (Ct. App. 2013) (unpublished) a defaulting and self-dealing trustee was surcharged statutory interest at 10% on the value of the assets that he distributed to himself that exceeded the value of the assets that he distributed to the other 50% beneficiary.

**Idaho:** “[O]nce an amount owed on a debt is reduced to a judgment, the post-judgment statutory rate is the only applicable interest rate.” *Roesch v. Klemann* (2013) 155 Idaho 175, 179 [307 P.3d 192, 196]; “In light of the fiduciary duties upon a personal representative, it was proper for the magistrate to order [the personal representative] to pay interest at the statutory rate on the proceeds of the sale of real property.” *Kolouch v. First Sec. Bank of Idaho* (Idaho Ct. App. 1996) 128 Idaho 186, 198 [911 P.2d 779, 791].

**Illinois:** Probably, yes. The underlying purpose of damage awards as stated by Illinois courts likely supports the idea that if the breach is only for a short duration, and if a party can show that the amount of interest would place the beneficiary back in the position he would have been in had the breach not occurred, it would be appropriate to simply charge the trustee with interest. Illinois courts have stated that when a trustee has breached its fiduciary duty, it “must place the beneficiaries in the position they would have held had the breach not occurred.” *Progressive Land Developers, Inc. v. Exchange National Bank of Chicago*, 266

**Indiana:** Burns Ind. Code Ann. § 30-4-3-11(b) (2016), provides that if a trustee commits a breach of trust, the trustee is liable to the beneficiaries for: "(1) any loss or depreciation in the value of the trust property as a result of the breach; (2) any profit made by the trustee through the breach; (3) any reasonable profit which would have accrued on the trust property in the absence of a breach; and (4) reasonable attorney's fees incurred by the beneficiary in bringing the action of the breach." The Trust Code Study Commission comments to Ind. Code § 30-4-3-11(b) provide that: "This subsection adds reasonable attorney's fees to the liabilities imposed by the Restatement on a trustee who commits a breach of trust. See Restatement (Second), Trusts § 205 (1959)." *Eiteljorg v. Eiteljorg* (Ind. Ct. App. 2011) 951 N.E.2d 565, 572 ("In the case of delayed payments, payment of interest may make the beneficiary whole.") (citations omitted).

**Iowa:** “Interest shall be allowed on all money due on judgments and decrees of courts at a rate calculated according to section 668.13, except for interest due pursuant to section 85.30 for which the rate shall be ten percent per year.” Iowa Code Ann. § 535.3 (West); “[Given that the executor profited from improper sales of trust property], it was a proper exercise of the court's discretion… to require the executor to pay interest at the statutory rate of 6 per cent.” *In re Mowrey's Estate* (1930) 210 Iowa 923; *Estate of Lackie* (1919) 185 Iowa 1101; *Brown's Estate* (1901) 113 Iowa 351; *In re Estate of Young* (1896) 97 Iowa 218.

**Kansas:** There is no Kansas law discussing whether it is appropriate to charge a trustee statutory interest for breaches of short term duration. However, in *In re Hilgers* (2006) 352 B.R. 298, 304, the court stated that “the Uniform Trust Code (substantially adopted by the KUTC) was closely coordinated with the Restatement (Third) of Trusts, and both supply trust law where decisional law is commonly lacking.” (See also KSA 58a-106 [the common law of trusts and principles of equity supplement the KUTC].)

**Kentucky:** There is no direct authority.

**Louisiana:** Louisiana law contains no similar provision or rule. The Louisiana Trust Code is supplemented, however, by the Louisiana Civil Code when the Trust Code contains no specific applicable provision. The Louisiana Civil Code does contain a rule on assessing damages via interest, in some instances, for delayed performance in the context breach of contract. See La. Civ. Code art. 2000. La. Civ. Code art. 2000. Damages for delay measured
by interest; no need of proof; attorney fees. When the object of the performance is a sum of money, damages for delay in performance are measured by the interest on that sum from the time it is due, at the rate agreed by the parties or, in the absence of agreement, at the rate of legal interest as fixed by R.S. 9:3500. The obligee may recover these damages without having to prove any loss, and whatever loss he may have suffered he can recover no more. If the parties, by written contract, have expressly agreed that the obligor shall also be liable for the obligee's attorney fees in a fixed or determinable amount, the obligee is entitled to that amount as well.

**Maine:** 18-A M.R.S.A. § 3-904 (“General pecuniary devises bear interest at the legal rate of 5% per year beginning one year after the first appointment of a personal representative until payment, unless a contrary intent is indicated in the will or is implicit in light of the unproductive or underproductive nature or decline in value, during the administration of the estate, of the portion of the estate out of which such devise is payable”).

**Maryland:** There is no Maryland law discussing damages for breaches of a short duration.


**Minnesota:** There is no Minnesota law discussing whether it is appropriate to charge a trustee statutory interest for breaches of short term duration. The Minnesota Supreme Court has adopted the Restatement (Second) of Trusts where there is no controlling Minnesota case law. *Connecticut General Life Ins. Co. v. First Nat'l Bank*, 262 N.W.2d 403, 405 (Minn. 1977); *Kohler v. Fletcher*, 442 N.W.2d 169, 171 (Minn. Ct. App. 1989).

**Mississippi:** Miss. Code Ann. § 91-8-1002(2): "Any measure of damages otherwise provided by law."

Miss. Code. Ann. § 75-17-7: "All judgments or decrees founded on any sale or contract shall bear interest at the same rate as the contract evidencing the debt on which the judgment or decree was rendered. All other judgments or decrees shall bear interest at a per annum rate set by the judge hearing the complaint from a date determined by such judge to be fair but in no event prior to the filing of the complaint." *Kerr v. Laird*, 27 Miss. 544 (Miss. Err. & App. 1854): "It is a well settled principle of law, that a trustee who mingles money received by him as trustee with his own funds, and makes use of it, is liable for interest."

**Missouri:**
Montana: Mont. Code Ann. § 27-1-211 ("Each person who is entitled to recover damages certain or capable of being made certain by calculation and the right to recover that is vested in the person upon a particular day is entitled also to recover interest on the damages from that day except during the time that the debtor is prevented by law or by the act of the creditor from paying the debt.")

Nebraska: There is no Nebraska law discussing whether it is appropriate to charge a trustee statutory interest for breaches of short term duration. However, under Neb. Rev. St. § 30-3806 (UTC 106) “[t]he common law of trusts and principles of equity supplement the Nebraska Uniform Trust Code, except to the extent modified by the code or another statute of this state.”

Nevada: “When no rate of interest is provided by contract or otherwise by law, or specified in the judgment, the judgment draws interest from the time of service of the summons and complaint until satisfied, except for any amount representing future damages, which draws interest only from the time of the entry of the judgment until satisfied, at a rate equal to the prime rate at the largest bank in Nevada as ascertained by the Commissioner of Financial Institutions on January 1 or July 1, as the case may be, immediately preceding the date of judgment, plus 2 percent. The rate must be adjusted accordingly on each January 1 and July 1 thereafter until the judgment is satisfied.” Nev. Rev. Stat. Ann. § 17.130 (West); Gilbellini v. Klindt (1994) 885 P.2d 540, 110 Nev. 1201 (trial court erred in awarding 10.5% interest on judgment because interest rate was governed by statute where parties had no contract governing interest rate; trial judge did not have discretion to set interest rate); Gadbois v. Marathon Racing, Inc. (2013) 2013 WL 7156050 (district court did not abuse its discretion in awarding helicopter service provider interest based on the statutory rates in breach of contract action, where there was no valid written contract, and therefore no written term expressly providing for an interest rate, and there was no evidence of such a term in the oral agreement between the parties).

New Hampshire: N.H. Rev. Code Ann. § 564-B: 10-100 I(b )(3);(10) ("To remedy a breach of trust that has occurred or may occur, the court may: (3) compel the trustee to redress a breach of trust by paying money, restoring property; or other means; ... (10) order any other appropriate relief, including relief under RSA 547:3.b."); N.H. Rev. Stat. Ann. § 524: l-a ("In the absence of a demand prior to the institution of suit, in any action on a debt or account stated or where liquidated damages are sought, interest shall commence to run from the time of the institution of suit. This statute shall be inapplicable where the party to be charged pays the money into court in accordance with the rules of the superior court."); N.H. Rev. Stat. Ann. § 524: l-b ("In all other civil proceedings at law or in equity in which a verdict is rendered or a finding is made for pecuniary damages to any party, whether for personal
injuries, for wrongful death, for consequential damages, for damage to property, business or reputation, for any other type of loss for which damages are recognized, there shall be added forthwith by the clerk of court to the amount of damages interest thereon from the date of the writ or the filing of the petition to the date of judgment even though such interest brings the amount of the judgment beyond the maximum liability imposed by law."). In re Guardianship of Dorson, 934 A.2d 545, 548-49 (N.H. 2007) ("A surcharge is the equitable penalty imposed when a trustee fails to exercise the requisite standard of care and the trust suffers thereby. It is the penalty for failure to exercise common prudence, common skill and common caution in the performance of the fiduciary's duty and is imposed to compensate beneficiaries for loss caused by the fiduciary's want of due care.") (internal quotations omitted).


New Mexico: There was no authority found in New Mexico.

New York: The decision to award interest and at what rate is in the discretion of the court, although the statutory interest rate may provide some guidance. In Matter of HSBC Bank (Knox), 98 A.D.3d 300, 321 (4th Dep’t. 2012), New York’s Appellate Division, Fourth Department found a trustee liable for retaining Woolworth stock after March 1, 1995 when it stopped paying dividends. In so holding, the court reversed the Surrogate’s determination that the trustee was liable for failure to diversify assets in general. Although the court stated it was a moot point considering all damages occurred after 1981, it noted that the Surrogate erred in awarding a 9% interest for damages occurring before that year because the then current statutory interest rate was only 6%. The court did not provide its rationale for relying on the statutory interest rate in this case and remanded the case back to the lower court for a recalculation on the amount of interest. Id. at 313.

North Carolina: N.C.G.S.A. § 24-1 (“The legal rate of interest shall be eight percent per annum for such time as interest may accrue, and no more”).

Ohio: Ohio Rev. Code Ann. § 5810.01(B) ("To remedy a breach of trust that has occurred or may occur, the court may do any of the following: ... (3) Compel the trustee to redress a breach of trust by paying money, restoring property, or other means; ... (10) Order any other appropriate relief."). In re Testamentary Tr. Of Hamm, 707 N.E.2d 524, 530 (1997) ("Generally, however, the trustee is charged only with interest at the usual rate of return for trust investments and not the legal rate, absent a showing of willful misconduct or breach of the duty of loyalty.").
Ohio Rev. Code Ann. § 1343.03 ("(A) In cases other than those provided for in sections 1343.01 and 1343.02 of the Revised Code, when money becomes due and payable upon any bond, bill, note, or other instrument of writing, upon any book account, upon any settlement between parties, upon all verbal contracts entered into, and upon all judgments, decrees, and orders of any judicial tribunal for the payment of money arising out of tortious conduct or a contract or other transaction, the creditor is entitled to interest at the rate per annum determined pursuant to section 5703.47 of the Revised Code, unless a written contract provides a different rate of interest in relation to the money that becomes due and payable, in which case the creditor is entitled to interest at the rate provided in that contract.").

Demming v. Smith, 2010 Ohio App. LEXIS 3512, * 18-19 (Ohio Ct. App. Sept. 2, 2010) (citing to 1343.03(A) as governing prejudgment interest calculation and remanding back to the trial court on whether interest should be a part of the damages for a breach of fiduciary duty in the administration of a trust).

Oklahoma: Oklahoma law allows both (i) prejudgment interest on money judgments, subject to specific rules, and (ii) interest on monetary damages, as a separate element of damages. Statutory prejudgment interest rules are found at 12 Okla. Stat. § 727.1, and would allow prejudgment interest at statutory rates on certain types of money judgments, including those for injury to personal rights. This type of prejudgment interest begins to accrue on the date that suit was commenced. Oklahoma’s more general provision for interest as damages is found at 23 Okla. Stat. § 6, which provides, “[a]ny person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt.” Under Oklahoma law, “[p]re-judgment interest must have statutory authorization.” Pope v. Fulton, 2013 OK CIV APP 84, ¶17, 310 P.3d 1110. In Pope v. Fulton, the Oklahoma Court of Civil Appeals rejected a claim for prejudgment interest on an equitable claim of unjust enrichment, raising the possibility that a court in Oklahoma might exclude interest awards on some types of claims for breach of fiduciary duty. I found no specific statutory or case law on the availability of interest as an alternative form of damages for breach of trust when the breach is of short duration. However, as noted in the general note at the beginning of this memorandum, Oklahoma courts are willing to follow the Restatements, suggesting that Oklahoma courts might be more likely to award prejudgment interest as a remedy in trust cases. Regarding the need for statutory authority, this authority might be bound in 60 Okla. Stat. § 175.57(C), which, as noted above, provides that “[a] beneficiary may charge a trustee who commits a breach of trust with the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred, or, if greater, the profit that the trustee made by reason of the breach.”
Oregon: N/A

Pennsylvania: While there do not appear to be Pennsylvania decisions specifically addressing “breaches of short duration,” it is likely that interest could apply as a remedy to such breaches pursuant to 20 Pa. C.S. §§ 3544, 7799.2 (fiduciary “who has committed a breach of duty with respect to [estate or trust] assets shall, in the discretion of the court, be liable for interest, not exceeding the legal rate on such assets.”). See also Mintz Trust, 282 A.2d 295, 303-04 (Pa. 1971) (ruling that where a loan of trust assets was repaid with interest at the per annum “legal rate,” the trust beneficiary could not seek a surcharge for compound interest as suggested by the Restatement (Second) of Trusts § 207). Pennsylvania’s statutory interest rate is currently 6% per annum. See 41 P.S. § 202.


South Carolina: S.C. Code Ann. § 34-31-20(b) (“A money decree or judgment of a court enrolled or entered must draw interest according to law. The legal rate of interest is equal to the prime rate as listed in the first edition of the Wall Street Journal published for each calendar year for which the damages are awarded, plus four percentage points, compounded annually. The South Carolina Supreme Court shall issue an order by January 15 of each year confirming the annual prime rate. This section applies to all judgments entered on or after July 1, 2005. For judgments entered between July 1, 2005, and January 14, 2006, the legal rate of interest shall be the first prime rate as published in the first edition of the Wall Street Journal after January 1, 2005, plus four percentage points”).

South Dakota: N/A


Texas: See Texas Trust Code §§ 114.001 and 114.008 supra. Under Texas Trust Code §114.008 (a)(10) a Court may implement virtually any equitable remedy. Texas Courts routinely rely on the Restatements of Trusts and legal treatises such as Scott and Ascher on Trusts and Bogert, Trusts and Trustees as legal authority for their decisions if the provisions of these sources do not conflict with statutory trust law or specific Texas case law.

Vermont: There is no Vermont law discussing whether it is appropriate to charge a trustee statutory interest for breaches of short term duration. Where the Vermont Trust Code does not specifically provide law on a subject, courts look to Vermont common law as a supplement (14A V.S.A § 106) followed by the restatements and common law from other states. (Estate of Nancy B. Alden v. Julia Dee and Todd Alden (2010) 427-12-06 Bncv [Vermont trial court opinion].)

Virginia: Judgment interest rate in Virginia is 6%. See Va. Code § 6.2-302 (2010). “Unless a contrary intent is expressed in or to be implied from a will or trust: (i) interest on a pecuniary legacy begins to run at the expiration of one year after the date of the death of the testator and (ii) interest on a pecuniary amount from a trust begins to run at the expiration of one year after the date on which the beneficiary is entitled to receive the pecuniary amount.” Va. Code Ann. § 64.2-425(A) (2012).

Washington: See Response to Question #5 below regarding calculation of interest

West Virginia: W. Va. Code Ann. § 56-6-31 (West) (“[T]he rate of interest on judgments and decrees for the payment of money, including prejudgment interest, is three percentage points above the Fifth Federal Reserve District secondary discount rate in effect on the second day of January of the year in which the judgment or decree is entered.”)

Wisconsin: Where a beneficiary is entitled to interest as a part of damages, the determination of the interest rate used to calculate the amount assessed against the trustee may be left to the trial court's discretion. Matter of Estate of Kugler, 117 Wis. 2d 314, 344 N.W.2d 160, 167 (1984). The facts of Estate of Kugler indicate that the breach was of relatively short duration, and in discussing the measure of damages, the court considered the damage analysis under the prudent person rule and a fiduciary’s general duty to invest. The court stated: “We emphasize that the duty to make the estate productive does not mean that an administrator should invest estate funds in speculative, high-risk investments in order to obtain the highest possible interest rate. In determining whether an investment, when made, is reasonable, the question to be resolved is not whether a greater return on the investment could have been realized; rather, the question to be resolved is whether under the
circumstances then present, the administrator exercised the judgment and care that ‘... persons of prudence, discretion and intelligence exercise in the management of their own affairs ....’” 344 N.W.2d at 164 (quoting Wis. Stat. § 881.01 (as then in effect)). The court quoted § 207(1) of the Restatement (Second) of Trusts in its discussion of the court exercising its discretion in determining the interest rate used to calculate damages. 344 N.W.2d at 166.

**Wyoming:** *Wells Fargo Bank v. Hodder*, 2006 WY 128 (2006) (trustee sold trust real estate for less than market value, and court awarded the difference between the sale price and market value of the lots sold along with post-judgment interest and other fees).
5) DISCRETION TO CHARGE FULL STATUTORY INTEREST. “Where the trustee commits a breach of trust and thereby incurs a liability for a certain amount of money with interest thereon, he is chargeable with interest at the legal rate or such other rate as the court in its sound discretion may determine, but in any event he is chargeable with interest actually received by him or which he should have received.” Restatement (Third) of Trusts §100 cmt. b(1) (2012); Restatement (Second) of Trusts § 207(1) (1959); see also Restatement (Third) of Trusts: Prudent Investor Rule §§ 205 cmt. a, 207 (1992); Scott and Ascher on Trusts § 24.9.3 (5th ed. 2007); Bogert, Trusts and Trustees §§ 862, 863 (2d ed. rev. 1995); Loring and Rounds, A Trustee’s Handbook § 7.2.3.2 (2012); In re Marsh (2013) 106 A.D.3d 1009, 1011-12, 966 N.Y.S.2d 456; In re Lasdon (N.Y. Sur. 2011) 32 Misc.3d 1245(A), 939 N.Y.S.2d 741 (table; text at 2011 WL 4375062, *4, *5).

Alabama:

Alaska: “While “[c]ourts in other jurisdictions have generally held that the decision to grant prejudgment interest rests within the discretion of the trial court,” in Alaska such interest is awarded largely as a matter of course. Id. In cases not involving personal injury, death, or property damage, “all damages ‘should carry interest from the time the cause of action accrues, unless for some reason peculiar to an individual case such an award of interest would do an injustice.’ ” Id. (quoting State v. Phillips, 470 P.2d 266, 274 (Alaska 1970)). The rationale is that the interest compensates “the prevailing party for the loss of use of money received as damages,” and encourages defendants to settle by stripping away a reason to fight the suit. Id. The award is not meant to penalize the loser. Bevins v. Peoples Bank & Trust Co., 671 P.2d 875, 881 (Alaska 1993).” Hofmann v. von Wirth (Alaska 1995) 907 P.2d 454, 455.

Arizona: “The award of prejudgment interest is a matter of right and not a matter of discretion.” Matter of Estate of Miles (Ariz. Ct. App. 1992) 172 Ariz. 442, 445 [837 P.2d 1177, 1180]; “The clerk of the court shall include in the judgment entered by him the costs and interest on the verdict from the time it was rendered.” Ariz. Rev. Stat. Ann. § 12-347; “Since the payment of interest is a part of just compensation, the determination of the proper rate of interest is a judicial function. It has been generally recognized, however, that where the legislature has designated the rate of interest by statute, such rate can be applied to a claim for just compensation as long as the rate is reasonable and judicially acceptable.” Tucson Airport Authority v. Freilich (1983) 136 Ariz. 280, 282 [665 P.2d 1002, 1004] (internal cit. omitted).
Arkansas: A father and mother created a trust that directed equal dispositions to their son and daughter, but before the father's death, in light of gifts he had given inter vivos, he executed an instrument called "Summary" wherein he directed an equalization of the trust dispositions in light of the "advancements" and specified an interest rate of 10%. The son became successor trustee when the father died but both mother and daughter accused him of self-dealing and asked for his removal. The court replaced him with an institutional trustee and ordered that the appellee should be paid $87,000 from the trust upon the final distribution. On appeal the daughter argued that instead of a 6% interest rate from October 1989 (the date of the gift?) to October 1992 (the date of the lawsuit?) and an 8.5% interest rate thereafter, the rate should be 10% as provided in the Summary. The court on appeal determined there was no error. Sease v. Alexander, No. CA 93-607, 1994 WL 188608, at *3 (Ark. Ct. App, May 11, 1994) (unpublished decision).

California: Lynch v. John M. Redfield Foundation (1970) 9 Cal.App.3d 293, 303. (“There is authority that the surcharge is at ‘the usual rate of return on trust investments, and not for interest at the legal rate’ (3 Scott, Supra, s 207.1, pp. 1677—1678), or ‘at the legal rate or such other rate as the court in its sound discretion may determine.’ (1 Rest. Trusts 2d, s 207, pp. 468—470; see also, 90 C.J.S. Trusts s 342.”)


Delaware: Yes. “To remedy a breach of trust that has occurred or may occur, the court may order any equitable remedy, including… (3) Compelling the trustee to redress a breach of trust by paying money, restoring property, or other means; (4) Ordering the trustee to account… or (9) Granting any other appropriate relief.” Del. Code Ann. tit. 12, § 3581(b)(3), (4), (9); see also In re The Volftsun/Landy Trust, No. 4635-VCL 2013 WL 1654881 (Del. Ch. Apr. 16 2013) (Interest calculated at the legal rate determined at the discretion of the court.); Mennen v. Wilmington Trust Co., No. CV 8432-ML, 2015 WL 1914599, at *36 (Del. Ch. Apr. 24, 2015).

Florida: A trustee who commits a breach of trust is liable for the greater of (a) the amount required to restore the value of the trust property and trust distributions to what they would have been if the breach had not occurred, including lost income, capital gain, or appreciation that would have resulted from proper administration; or (b) the profit the trustee made by reason of the breach. § 736.1002(1) Fla.Stat. The Florida statute is similar to Restatement
(Third) of Trusts: Prudent Investor Rule § 205 (1992). This statute would require
disgorgement of interest actually received but there is neither a statute or case law provision
for a charge of statutory interest, except as it comes within the rules for prejudgment interest.
Prejudgment interest is allowable on a pecuniary loss when the loss is liquidated at a specific
date by contract, court order or verdict. Argonaut Insurance Company v. May Plumbing
Company, 474 So.2d 212 (Fla. 1985), quashing 451 So.2d 876. Award of both remedies,
disgorgement and prejudgment interest, might be precluded.

**Georgia:**  O.C.G.A. § 53-12-302.

**Hawaii:**  See Nepage discussion (Question 4 above).

**Idaho:**  “(1) interest may be awarded at a rate within the trial court's sound discretion; (2) the
defendant is only liable for interest he actually received or should have received from the
misappropriated money; and (3) compound interest is not ordinarily allowed unless the
defendant actually received compound interest or the defendant's profit is unascertainable but
is presumably at least as much as compound interest would yield.”  Holladay v. Lindsay
(Idaho Ct. App. 2006) 143 Idaho 767, 770 [152 P.3d 638, 641]; see also In re Randall's
Estate (1943) 64 Idaho 629 (approving charge of full statutory interest for improper sales by
executrices).

**Illinois:**  Probably, yes. The underlying purpose of damage awards as stated by Illinois courts
likely supports the idea that the court has the discretion to charge statutory interest to a
trustee in breach. Illinois law states that a breaching trustee is liable for such compensation as
could restore the beneficiary to a position where it is as if the breach did not take place. See
Progressive Land Developers, Inc. v. Exchange National Bank of Chicago, 266 Ill. App. 3d
934, 942 (1st Dist. 1994). Thus, as the Restatement (Third) of Trusts § 100 (2012) notes, “In
limiting the beneficiaries' remedy to the initial amount of the loss, increased by statutory
interest, however, the law has often failed fully to effectuate that objective. These days,
courts seem increasingly willing to calculate the trust estate's total loss … by reference to the
more general concept of what it would take to make the trust estate whole.”  Additionally,
citing Hadley Gear Manufacturing Co. v. Zmigrocki, 152 Ill.App.3d 358, 103 Ill.Dec. 859,
502 N.E.2d 6 (1986), the court in Bank of Chicago v. Park Nat. Bank, 266 Ill. App. 3d 890,
900, 640 N.E.2d 1288, 1296 (1994) stated that “[t]he decision to allow statutory interest lies
within the sound discretion of the circuit court.”
Indiana: Burns Ind. Code Ann. § 30-4-3-ll(b) (2016), provides that if a trustee commits a breach of trust, the trustee is liable to the beneficiaries for: "(1) any loss or depreciation in the value of the trust property as a result of the breach; (2) any profit made by the trustee through the breach; (3) any reasonable profit which would have accrued on the trust property in the absence of a breach; and (4) reasonable attorney's fees incurred by the beneficiary in bringing the action of the breach." The Trust Code Study Commission comments to Ind. Code § 30-4-3-ll(b) provide that: "This subsection adds reasonable attorney's fees to the liabilities imposed by the Restatement on a trustee who commits a breach of trust. See Restatement (Second), Trusts § 205 (1959)." Eiteljorg v. Eiteljorg (Ind. Ct. App. 2011) 951 N.E.2d 565, 572 ("As a general rule, in the absence of anything to the contrary, the question of requiring a trustee to pay interest on the trust funds is one which must depend upon the facts and circumstances in each particular case; and, where good conscience requires that the trustee be charged with interest, the payment thereof out to be exacted.") (citations omitted). Burns Ind. Code Ann. § 24-4.6-1-103 (2016) ("Interest at the rate of eight percent (8%) per annum shall be allowed ... from the date an itemized bill shall have been rendered and payment demanded on an account stated, account closed or for money had and received for the use of another and retained without his consent.")

Iowa: “Interest shall be allowed on all money due on judgments and decrees of courts at a rate calculated according to section 668.13, except for interest due pursuant to section 85.30 for which the rate shall be ten percent per year.” Iowa Code Ann. § 535.3 (West); “[Given that the executor profited from improper sales of trust property], it was a proper exercise of the court's discretion… to require the executor to pay interest at the statutory rate of 6 per cent.” In re Mowrey's Estate (1930) 210 Iowa 923; Estate of Lackie (1919) 185 Iowa 1101; Brown’s Estate (1901) 113 Iowa 351; In re Estate of Young (1896) 97 Iowa 218.

Kansas: Kansas law is consistent with the above stated law; a great deal of discretion is left to the trial court to decide the rate of interest. Burch v. Dodge (1980) 4 Kan.App.2d 503, 508: “We are of the opinion that the rate of interest to be surcharged is discretionary with the court. It is stated in 90 C.J.S. Trusts s 342. ‘The rate of interest to be charged a trustee is determined by the circumstances of the particular case, and is in the discretion of the court.’ ‘Where a trustee is liable for the payment of interest, there are no particular rates applicable to different classes of cases, but the rate proper to be exacted is determined according to the facts and circumstances of each particular case, and is wholly within the discretion or judgment of the court, which discretion must be exercised equitably in the light of the character of the breach of trust and the degree of fault of the trustee under all the circumstances.’” (Court then goes on to quote Restatement (Second) of Trusts § 207 (1959) [“Ordinarily if a breach of trust consists only in the failure of the trustee to invest trust money, or in the failure to sell trust property and to invest the proceeds, the trustee is..."
chargeable with interest at the current rate of return on trust investments and not with interest at the legal rate.”) The legal rate of interest in Kansas is 10 percent per annum, unless otherwise agreed upon. (KSA 16-201.)


**Louisiana:** Although Louisiana has no statutory provision allowing for the charging of interest on amounts due by a trustee on account of a breach of trust, the Louisiana Supreme court has upheld awards of interest on damages awards against a trustee. See, e.g., In the Matter of Bradford Trust, 538 So. 2d 263 (La. 1989) (stating “[w]e find no error in the court of appeal's decision to apply the legal rate of interest. In the absence of a contract which specifically provides for the rate of interest applicable to the loss in question, the court may require the trustee to pay the legal rate of interest as compensation for the beneficiary's loss of use of the trust proceeds. Bogert, Trusts and Trustees (2d ed. rev. 1982) § 863. Here there is no provision in the trust instrument which designated an applicable rate of interest for funds owed to the trust. Thus we find no error in the court of appeal's decision to apply the legal rate of interest under these circumstances.”).

**Maine:** Moholland v. Empire Fire & Marine Ins. Co., 746 A.2d 362, 365 (Me. 2000) (finding that the general purpose of awarding prejudgment interest is to compensate the judgment creditor for the delay caused by litigation). In re Est. of Silsby, 914 A.2d 703, 709 (Me. 2006) (holding that the Probate Court did not err in surcharging trustee for the full amount of interest of 5%).

**Maryland:** The MD Estates and Trusts Code does not address this, but under the common law, “[t]he question whether interest is chargeable against a trustee in case of loss of trust funds at the legal rate or at the usual rate of return on trust investments is largely within the discretion of the court. In exercising its discretion, the court considers the character of the trustee's breach of trust and the degree of his fault. Where the breach of trust is not intentional, the court ordinarily gives the beneficiary the amount which he would have received if no breach had been committed. On the other hand, where a trustee commits an intentional breach of trust, he is ordinarily charged with interest at the legal rate.” (Riggs v. Loweree (1947) 189 Md. 437, 445.) “There is no statute which fixes the rate of prejudgment interest for [a breach of trust] claim. Absent a contractual stipulation or a statute, the rate of prejudgment interest may not exceed the general legal rate of six percent.” (Maryland Nat. Bank v. Cummins (1991) 322 Md. 570, 599-600 [finding the trial court erred in using a rate
of prejudgment interest of ten percent per annum, which the trial court described as “the legal rate”.


**Michigan:** Michigan law does not contain a similar provision. The broad language contained in MeL 700.7901 and 700.7902 provides the court with discretion to determine appropriate damages. (See response to Question 1).

**Minnesota:** The Minnesota UTC does not deal with statutory interest as a measure of damages for breach of trust. Minnesota case law has dealt with the issue of a court’s ability to award interest. In *In re Comstock's Will*, 17 N.W.2d 656, 663-64 (Minn. 1945), the Court stated that “[w]hether interest will be allowed when the trustee’s account is surcharged and at what rate is within the discretion of the court and must depend upon the facts and circumstances in each particular case.” The Court also held that when a trustee is held liable for interest, the interest is awarded upon equitable principles as compensation for damages to make him whole, to place him in the position he would have been in if the trustee had performed his duty. What is called interest is really damages, computed in terms of interest. *Id.* Minnesota courts have also endorsed the use of statutory interest under certain circumstances. In *Sell v. Sell*, 2009 Minn. App. Unpub. LEXIS 1145, *13 (Minn. Ct. App. Oct. 27, 2009) the Court held that if a trustee mingles the trust fund with his own money, or uses it in his private business, he will be charged with simple interest at the rate established by law as the legal rate. Statutory interest in Minnesota is 6%. Minn. Stat. § 334.01. “Interest awarded under Minn. Stat. § 334.01 (Supp. 1983) is considered a substitute for income the beneficiary might have earned so as to make him or her whole if the amount of damages is readily ascertainable and if there is an equitable basis for the award.” *Toombs v. Daniels*, 361 N.W.2d 801, 810 (Minn. 1985)

**Mississippi:** Neill v. Neill, 31 Miss. 36: "A trustee who receives money which belongs to his cestui que trust, in a foreign state, and fails to account therefore, will be charged with interest according to the rate established by law in the foreign state." *Estate of Van Ryan v. McMurtray*, 505 So. 2d 1015, 1019 (Miss. 1987): "Prejudgment interest was chargeable where fiduciary relationship had been breached, and was due at statutory rate from date of taking."

**Missouri:**
Montana: Mont. Code Ann. § 72-38-1002 (“(3) If the trustee is liable for interest pursuant to this section, interest must be determined as the greater of the following amounts: (a) the amount of interest that accrues at the legal rate on judgments; or (b) the amount of interest the trustee actually received as a result of the breach of trust.”); In re Ricker's Estate (1893) 14 Mont. 153 (“The general rules, so far as they can be drawn from all the cases, are as follows: (1) If a trustee retains balances in his hands which he ought to have invested, or delays, for an unreasonable time, to invest, or if he mingles the money with his own, or uses it in his private business, or deposits it in bank in his own name or in the name of the firm of which he was a member, or neglects to settle his account for a long time, or to distribute or pay over the money when he ought to do so, he will be liable to pay simple interest at the rate established by law as the legal rate in the absence of special agreements. This rule is subject to the qualification that trustees cannot make any advantage to themselves out of the trust fund; and, if they make more than legal interest, they *970 shall pay more, as, if they make usurious loans, they shall be charged with all their gains from the use of the money. If the trustee cannot show what amount of interest he has received, he shall be charged with legal interest from the time when the regular investment ought to have been made. There may be an exception to the rule that a deposit of the trust money in bank in the name of the trustee, or a mixing of the trust fund with his own, will impose a liability of legal interest. There must be some element of a breach of trust in the transaction, or a breach of duty.” 1 Perry, Trusts, § 468.”)

Nebraska: Nebraska law is consistent with the above stated law.

See Morris’ Guardianship v. Cusack, 145 Neb. 319, 323 (1944): “Where the trustee commits a breach of trust (or, as it this case, where the guardian breaches the trust) and thereby incurs a liability for a certain amount of money with interest thereon, he is chargeable with interest at the legal rate or such other rate as the court in its should discretion may determine, but in any event he is chargeable with interest actually received by him or which he should have received.” (Quoting Restatement (Second) § 207.)
The legal rate of interest in Nebraska is 12 percent per annum, unless otherwise agreed upon. (Neb. Rev. St. § 45-104.)

Nevada: “When no rate of interest is provided by contract or otherwise by law, or specified in the judgment, the judgment draws interest from the time of service of the summons and complaint until satisfied, except for any amount representing future damages, which draws interest only from the time of the entry of the judgment until satisfied, at a rate equal to the prime rate at the largest bank in Nevada as ascertained by the Commissioner of Financial Institutions on January 1 or July 1, as the case may be, immediately preceding the date of judgment, plus 2 percent. The rate must be adjusted accordingly on each January 1 and July 1 thereafter until the judgment is satisfied.” Nev. Rev. Stat. Ann. § 17.130 (West); Gilbelllini
v. Klindt (1994) 885 P.2d 540, 110 Nev. 1201 (trial court erred in awarding 10.5% interest on judgment because interest rate was governed by statute where parties had no contract governing interest rate; trial judge did not have discretion to set interest rate); Gadbois v. Marathon Racing, Inc. (2013) 2013 WL 7156050 (district court did not abuse its discretion in awarding helicopter service provider interest based on the statutory rates in breach of contract action, where there was no valid written contract, and therefore no written term expressly providing for an interest rate, and there was no evidence of such a term in the oral agreement between the parties).

New Hampshire: Miller v. Pender, 34 A.2d 663,667 (N.H. 1943) ("Because of the present lower rates of interest, the amount of 3 1/2% allowed by the Court is equitable."); Thompson v. Trs. of Phillips Exeter Acad., 196 A.2d 42, 46 (N.H. 1963) (finding that the trial court did not abuse its discretion in failing to award interest at the legal rate when there was no "finding of bad faith by the trustee" or fraud).


New Mexico: Miller v. Bank of America, N.A., 2014 NMCA-053, 326 P.3d 20 allows prejudgment and post-judgment interest, together with adjustment for inflation, but does not specify interest rate. The opinion of the N.M. Supreme Court in the same case does not address the interest rate.

New York: Although the imposition of interest and the rate thereof is generally up to the discretion of the court, if the breach occurred before June 15, 1981, the appropriate rate of statutory interest in New York is six percent. Afterwards, the appropriate rate of statutory interest is nine percent. Matter of HSBC Bank (Knox), 98 AD3d 300, 322 (4th Dep’t. 2012). See also N.Y. C.P.L.R. § 5004. It is in the court’s discretion whether to award interest and at what rate. Matter of Janes (III), 90 N.Y.2d 41, 5 (1997) (upholding the interest awarded by the lower court and also stating it did not find that the court abused its discretion when including prejudgment interest). The highest rate of interest may be appropriate in cases where the trustee’s actions were willful or in bad faith, while a court may award a lower interest rate when the trustee only acted negligently. In re Marsh, 106 A.D.3d 1009, 1011 (2nd Dep’t 2013). In Marsh, the court held an executor acted negligently with respect to preserving the decedent’s tangible property and rejected the 9% surcharge imposed by the lower court. In addition, the executor had deposited estate assets into a “sub-account,” rather than timely distributing the funds to the beneficiaries. The court found the resulting delay unreasonable as there were no debts or other liabilities of the estate that required the executor
to retain the funds. Thus, it upheld the lower court’s imposition of 9% interest on this point, which was consistent with N.Y. EST. POWERS & TRUSTS § 11-1.5(e) and N.Y. C.P.L.R. § 5004 at the time the case was decided. Id. at 1012. Although Marsh is still good law, it is notable that the New York State Legislature repealed N.Y. EST. POWERS & TRUSTS § 11-1.5(e) in 2014 and simultaneously enacted a revised N.Y. EST. POWERS & TRUSTS § 11-A-2.1(3) which provides that interest charged on delayed payments on pecuniary bequests will correspond with the “target Federal funds rate as announced by the Federal Reserve Board (or in the event the target Federal funds rate is a range of rates, the high of that range) less one percent, but in no event less than one-half of one percent.” Finally, in In re Lasdon, N.Y. Slip Op. No. 51710(U) (N.Y. Surr. Ct 2011), at issue was the trustees’ failure to authorize timely distribution of the remaining trust assets to the beneficiaries at the termination of their individual trusts. During the intervening period between termination and distribution, Pfizer common stock declined in value. The court held that the delay was not caused by self-dealing, but was “to some extent a product of mixed signals among the trustees.” Id. at *5. Since the trustees did not act in bad faith, the court declined to impose a 9% surcharge on the trustees, as the petitioners argued was warranted under the CPLR, and instead imposed a lower 6% surcharge, compounded annually. Id.

North Carolina: Belk ex rel. Belk v. Belk, 728 S.E.2d 356, 363 (N.C. App. 2012) (finding that the trial court committed no error “in selecting the legal rate of interest in calculating the amount of interest owed” given that N.C.G.S.A. § 24-1 gives a rate of eight percent).

North Dakota: Prondzinski v. Garbut, 10 N.D. 300, 86 N.W. 969 (1901) (“The general rule is that a trustee who wrongfully disposes of trust property is liable to the beneficiary for the value of the same, with interest.”)

Felco [v. Doug's North Hill Bottle Shop, Inc.], 1998 ND 111, ¶25, 579 N.W.2d 576 (Where a rate is not provided for in writing, under N.D.C.C. §47-14-05, the legal rate of interest is six percent per annum.)

Ohio: In re Trusteeship of Stone, 34 N.E.2d 755, 762 (Ohio 1941) (“In circumstances like these involving a breach of trust, the fixing of the rate of interest at the legal rate, at the usual rate of return on trust investments, or at some lesser rate considered equitable and fair, is generally within judicial discretion.”).

In re Testamentary Tr. Of Hamm, 707 N.E.2d 524, 530 (1997) (citations omitted) (“Generally, however, the trustee is charged only with interest at the usual rate of return for trust investments and not the legal rate, absent a showing of willful misconduct or breach of
the duty of loyalty. Also, interest in these cases is simple, rather than compound, unless there is a showing of intentional misconduct or bad faith.

In re Estate of Chambers, 36 N.E.2d 175 (Ohio Ct. App. 1939) ("The law is well recognized that anyone misappropriating money is chargeable not only with the amount misappropriated but with interest at the legal rate.").

**Oklahoma:** In determining the applicable rate for prejudgment interest, courts in Oklahoma look first to the existence of a contract between the parties establishing a contractual rate. Bohm, Inc. v. Michael, 2002 OK CIV APP 60, 46 P.3d 1286. Absent a contractual rate, the courts will apply statutory rates of interest. The general statutory rate of interest is 6.0% per annum, and has been for 47 years: “The legal rate of interest shall be six percent (6%) in the absence of any contract as to the rate of interest, and by contract the parties may agree to any rate as may be authorized by law, now in effect or hereinafter enacted.” 15 Okla. Stat. § 266 (last amended in 1970). If statutory prejudgment interest applies under 12 Okla. Stat. § 727.1, then the rate is set at the prime rate of interest “listed” in the Wall Street Journal, plus 2.00%, adjusted annually in January of each year (this is presumed to refer to a prime rate published, or “listed,” in the Wall Street Journal, rather than requiring reference to a rate established or otherwise promulgated by the Wall Street Journal itself.). 12 Okla. Stat. § 727.1(I). Despite these limitations on the applicable rate for prejudgment interest, the courts might reference an actual rate of return earned by the breaching party, based on 60 Okla. Stat. § 175.57(C), which, as noted above, provides that “[a] beneficiary may charge a trustee who commits a breach of trust with the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred, or, if greater, the profit that the trustee made by reason of the breach.”

**Oregon:** “In many cases in which a trustee has mingled trust funds with his own or has used such funds in his own business, courts have held that the trustee should be charged with not less than interest at the legal rate and that if the trustee has made more than legal interest he may also be charged with all of the profit received from the use of the trust funds. Stephan v. Equitable Sav. & Loan Ass’n, 268 Or 544, 573, 522 P2d 478, 492 (1974) (Where trustee breached its duty by reinvesting trust fund in its own “matured passbook accounts”, beneficiaries were entitled to an award of interest at legal rate of six per cent per annum on monies left in trustee's custody, less the amounts which were actually paid by trustee). Marston v. Myers, 217 Or 498, 514, 342 P2d 1111, 1119 (1959); see also Collins v. Collins, 168 Or. 666, 126 P.2d 512.

**Pennsylvania:** 20 Pa. C.S. §§ 3544, 7799.2 (fiduciary “who has committed a breach of duty with respect to [estate or trust] assets shall, in the discretion of the court, be liable for interest,
not exceeding the legal rate on such assets.”). See also Mintz Trust, 282 A.2d 295, 303-04 (Pa. 1971) (ruling that where a loan of trust assets was repaid with interest at the per annum “legal rate,” the trust beneficiary could not seek a surcharge for compound interest as suggested by the Restatement (Second) of Trusts § 207). Pennsylvania’s statutory interest rate is currently 6% per annum. See 41 P.S. § 202.

Rhode Island: Dennis v. RI Hospital Trust Nat’l Bank, 744 F.2d. 893, 900 (1st Cir. 1984)

South Carolina: S.C. Code 1976 § 34-31-20 ((a) “In all cases of accounts stated and in all cases wherein any sum or sums of money shall be ascertained and, being due, shall draw interest according to law, the legal interest shall be at the rate of eight and three-fourths percent per annum” (b) “A money decree or judgment of a court enrolled or entered must draw interest according to law. The legal rate of interest is equal to the prime rate as listed in the first edition of the Wall Street Journal published for each calendar year for which the damages are awarded, plus four percentage points, compounded annually. The South Carolina Supreme Court shall issue an order by January 15 of each year confirming the annual prime rate. This section applies to all judgments entered on or after July 1, 2005. For judgments entered between July 1, 2005, and January 14, 2006, the legal rate of interest shall be the first prime rate as published in the first edition of the Wall Street Journal after January 1, 2005, plus four percentage points”).

South Dakota: Matter of Hadleigh D. Hyde Trust, 458 N.W.2d 802, 805-06 (S.D. 1990) (“When a trustee commits a breach of trust and consequently incurs a liability to the trust, the trustee shall be assessed interest on the liability. The rate of interest to be assessed depends upon the circumstances of the breach of trust. When the breach of trust results from an intentional, improper trust investment, the trustee is chargeable with interest at the legal rate.”) See also Riggs v. Loweree, 189 Md. 437, 56 A.2d 152 (1947); Restatement (Second) Trusts § 207 comment c at 469-70 (1959).

Matter of Hadleigh D. Hyde Trust, 458 N.W.2d 802 (S.D. 1990)( Where trustee was found liable to trust for intentional breach of trust agreement, trust was entitled to interest at legal rate on amount trustee was surcharged, rather than at rate of return on trust's cash investments.)

Texas: It is typical in Texas for plaintiffs in breach of fiduciary cases to seek both prejudgment and postjudgment interest. The principal cases dealing with prejudgment and postjudgment interest are Phillips v. Bramlett, 407 S.W.3d 299 (Tex. 2013) and Johnson v. Higgins, 962 S.W.2d 507 (Tex. 1997). The Johnson Court held that there are two legal sources for an award of prejudgment interest: (1) general principles of equity and (2) an enabling statute. Texas does not have an enabling statute that deals with either prejudgment or postjudgment in a breach of fiduciary context. Prejudgment interest begins to accrue on the earlier of: (1) 180 days after the date a defendant receives written notice of a claim, or (2) the date suit is filed. (See: Johnson, 962 S.W.2d 531). Except as provided in the next sentence, postjudgment interest on a money judgment of a court in Texas accrues during the period beginning on the date the judgment is entered and ending on the date the judgment is satisfied. The only exception to this general rule is that: if a case is appealed and a motion for extension of time to file a brief is granted for a party who was a claimant at trial, interest does not accrue for the period of extension. (See: Phillips, 407 S.W.3d 239). Generally, the interest rate is the same for prejudgment interest and postjudgment interest. (See: Phillips, 407 S.W.3d 238). Both prejudgment interest and postjudgment interest are currently set at five percent. This can change pursuant to Texas Finance Code § 304.003.


Vermont: In the case of St. Germain v. Tuttle (1945) 114 Vt. 263, 272 the Supreme Court of Vermont held: “Ordinarily if a breach of trust consists in an improper purchase of property for the trust, the trustee is chargeable with interest at the current rate of return on trust investments, unless the breach of trust was intentionally committed, in which case he is ordinarily chargeable with interest at the legal rate. (Quoting the Rest. Trusts, Vol. 1, § 207(1), Comment c; other internal citations omitted.) The real question is what the equities of the particular case demand.”
See also *In re Hodges Estate* (1894) 66 Vt. 70: “Whatever may be the reason or motive that prompts it, if the trustee commingles the trust property with his own, and the mingling is followed by actual loss, accidental or otherwise, the trustee must make good, not only the principal sum lost, but also the interest. This is the only safe rule for the administration of trusts.” (Internal citations omitted.) (At *664 [I acknowledge this is inconsistent with the citation above (i.e., 66 Vt. 70), but that’s the only page citation available].)

**Virginia:** “If any personal representative, guardian, conservator, curator, or committee, or any agent or attorney-at-law, by his negligence or improper conduct, loses any debt or other money, he shall be charged with the principal of what is so lost, and interest thereon, in like manner as if he had received such principal.” Va. Code § 64.2-1415 (2012).

“Unless a contrary intent is expressed in or to be implied from a will or trust: (i) interest on a pecuniary legacy begins to run at the expiration of one year after the date of the death of the testator and (ii) interest on a pecuniary amount from a trust begins to run at the expiration of one year after the date on which the beneficiary is entitled to receive the pecuniary amount.” Va. Code Ann. § 64.2-425(A) (2012).

**Washington:** With regards to interest calculations, Washington follows the Restatement (Second) of Trusts, § 207, as provided below:

1. Where the trustee commits a breach of trust and thereby incurs a liability for a certain amount of money with interest thereon, he is chargeable with interest at the legal rate or such other rate as the court in its sound discretion may determine, but in any event he is chargeable with interest actually received by him or which he should have received.
2. Where the trustee is chargeable with interest, he is chargeable with simple and not compound interest, unless:
   a. he has received compound interest, or
   b. he has received a profit which cannot be ascertained but is presumably at least equal to compound interest, or
   c. it was his duty to accumulate the income.


In *Gillespie v. Seattle-First National Bank*, 855 P.2d 680, 694 (Wash. Ct. App. 1993), where the bank was liable for recommending and managing an imprudent investment with trust funds, the court found that damages should include compound interest because “a conservative, adequately managed commercial real estate investment in the greater Seattle area would have yielded a four percent (4%) per annum compounded return.”
Furthermore, in Austin v. U.S. Bank of Washington, the trustee bank had the duty to accumulate and reinvest the income that would have accrued barring extra payments made to a beneficiary. The court cited to a Comment on Subsection(2): “If a trustee is under a duty to reinvest interest received by him and accumulate it for the beneficiary, and fails to do so, he is chargeable with compound interest . . . .” (See Austin, 869 P.2d at 414) Therefore, the bank was liable for compound rather than simple interest because its duty was to accumulate and reinvest the income. The courts have thus developed in their discretion an award they found appropriate under these circumstances: Stating the account with periodic rests, and compounding interest, is only a convenient mode, adopted by the court to charge the trustee with the amount of profits supposed to have been made by him in the use of the money; where the actual amount of profits, which he has made, beyond simple interest, cannot be ascertained.

A Court, in Estate of Wimberley, 186 Wn. App. 475, 511 (2015), charged a removed trustee twelve percent statutory interest, pursuant to Washington’s statutes providing for interest on judgments, RCW 4.56.110(4), and interest on debts, RCW 19.52.010.

**West Virginia:** Cresap v. Brown (1918) 82 W.Va. 467 (Court upheld discretion to increase liability to equitable owners of trustees having legal title to land for value of standing timber on the land wrongfully sold by the trustees by calculating interest on the sale price of the timber at the legal rate from the date of sale to the date of the decree); see also Board of Educ. of McDowell County v. Zando, Martin & Milstead, Inc. (1990) 182 W.Va. 597, 610.

**Wisconsin:** Where a beneficiary is entitled to interest as a part of damages, the determination of the interest rate used to calculate the amount assessed against the trustee may be left to the trial court's discretion. Matter of Estate of Kugler, 117 Wis. 2d 314, 344 N.W.2d 160, 167 (1984). In Estate of Kugler, the Wisconsin Supreme Court quoted § 207(1) of the Restatement (Second) of Trusts in its discussion of the court exercising its discretion in determining the interest rate used to calculate damages. 344 N.W.2d at 166. Where damages are fixed and determinate, the plaintiff in a successful breach of trust case is entitled to prejudgment interest only at the statutory rate established by Wis. Stat. § 138.04 and not at a rate determined by the court. Wisconsin Academy Of Sciences, Art and Letters v. First Wis. Nat. Bank of Madison, 162 Wis.2d 629, 471 N.W.2d 317 (Table) (Ct. App. 1991) (Unpublished) (citing Kilgust Heating Div. of Wolff, Kubly & Hirsig, Inc. v. Kemp, 70 Wis.2d 544, 549, 235 N.W.2d 292, 295 (1975)).
Wyoming: “Wyoming statutes provide for interest on judgments but do not specifically address an award for prejudgment interest.” *Millheiser v. Wallace*, 2001 WY 40, P10 (2001). “Except as provided in subsections (b) and (c) of this section, all decrees and judgments for the payment of money shall bear interest at ten percent (10%) per year from the date of rendition until paid.” Wyo. Stat. § 1-16-102. “Prejudgment interest is an appropriate element of damages in some cases . . . when the amount due is readily computable by simple mathematical calculation.” *Wells Fargo Bank v. Hodder*, 2006 WY 128, P60 (2006); *see also Reed v. Taliaferro*, 37 Wyo. 107 (1927).

**Alabama:** The Alabama Supreme Court in Martin upheld the trial court's decision ordering the trustee to pay interest on the lost principal of common trust funds at a rate equal to the one-year treasury bill rate. See 425 So.2d at 428. Observing that the treasury bill rate represented "a readily determinable specific interest rate to be applied in each year," the court explained that the rate and amount of an award of interest is to be determined by the trial court in its discretion based upon the circumstances of each case. Id. In light of the broad discretion afforded to the trial court, the Alabama Supreme Court concluded that the trial court's application of the treasury bill rate was not an abuse of discretion. See id.; but see discussion of First Alabama Bank of Huntsville v. Spragins, 515 So. 2d 962 (Ala. 1987), at number 4 above.

**Alaska:** No authority found.

**Arizona:** No Arizona cases found addressing this issue.

**Arkansas:** No Arkansas authority found.

**Colorado:** “The award of interest in a breach of trust action is wholly independent of statute. Whether interest will be allowed, at what rate, and from what date is wholly in the discretion of the trial court.” Heller v. First Nat'l Bank, N.A., 657 P.2d 992 (Colo. Ct. App. 1982).

**California:** No case found applying treasury bill rate in context of trust litigation. However, in Kassir v. Zahabi (2008) 164 Cal.App.4th 1352, 1359, the appellate court upheld a trial court’s determination that the treasury bill rate could be used instead of the legal rate of 10% where the entire amount at issue in a real estate action had been invested at the same time in a single transaction.

**Connecticut:**

**Delaware:** Yes, based on experience and on the equitable powers of Chancery court, that measure could be used.
**Florida:** Florida has no authority on this specific issue

**Georgia:** No. Interest calculated pursuant to O.C.G.A. § 53-12-302(b).

**Hawaii:**

**Idaho:** “[I]nterest may be awarded at a rate within the trial court’s sound discretion.” *Holladay v. Lindsay* (Idaho Ct. App. 2006) 143 Idaho 767, 770 [152 P.3d 638, 641]

**Illinois:** Probably, yes. The research did not uncover an Illinois case that explicitly used the treasury bill rate, but the courts’ acceptance of expert estimation of damage in terms of the treasury bill rate suggest the courts may apply a readily determinable interest rate, i.e. the treasury bill rate, to each year. In *Nat’l Bank of Monticello v. Doss*, 141 Ill. App. 3d 1065, 1071-73, 491 N.E.2d 106, 110-11 (1986), the defendant challenged the trial court’s allowance of the testimony of plaintiff’s economic expert who calculated damages based on treasury bill rates (“Dr. Himes’ calculations were based on the figures in evidence and the treasury bill rates, commonly used by economists.”). The court rejected the challenge. The fact that the expert’s reliance on treasury bill rates was not at issue in the case implies that the use of this rate is likely acceptable. As the Illinois courts have stated, damages need not be proven with absolute certainty, but the evidence must allow the court to compute damages with a “fair degree of probability.” *Giammanco v. Giammanco*, 253 Ill. App 3d 750, 765 (2d Dist. 1993). So long as a party can show that there is a “fair degree of probability” that the treasury bill rate would be an appropriate proxy interest rate for a given year, it seems likely a court would accept the treasury bill rate to calculate damages.

**Indiana:** *Eiteljorg v. Eiteljorg* (Ind. Ct. App. 2011) 951 N.E.2d 565, 572 ("As a general rule, in the absence of anything to the contrary, the question of requiring a trustee to pay interest on the trust funds is one which must depend upon the facts and circumstances in each particular case; and, where good conscience requires that the trustee be charged with interest, the payment thereof out to be exacted.") (citations omitted); Burns Ind. Code Ann. § 24-4.6-1-103 (2016) ("Interest at the rate of eight percent (8%) per annum shall be allowed ... from the date an itemized bill shall have been rendered and payment demanded on an account stated, account closed or for money had and received for the use of another and retained without his consent.")

**Iowa:** “Interest shall be calculated as of the date of judgment at a rate equal to the one-year treasury constant maturity published by the federal reserve in the H15 report settled immediately prior to the date of the judgment plus two percent. The state court administrator
shall distribute notice monthly of that rate and any changes to that rate to all district courts.”
Iowa Code Ann. § 668.13 (West)

**Kansas**: There is no Kansas law awarding treasury bill interest as damage for breach of trust. However, as noted above, Kansas courts have broad discretion to award interest damages. *Burch v. Dodge* (1980) 4 Kan.App.2d 503, 508: “We are of the opinion that the rate of interest to be surcharged is discretionary with the court. It is stated in 90 C.J.S. Trusts § 342. ‘The rate of interest to be charged a trustee is determined by the circumstances of the particular case, and is in the discretion of the court.’ ‘Where a trustee is liable for the payment of interest, there are no particular rates applicable to different classes of cases, but the rate proper to be exacted is determined according to the facts and circumstances of each particular case, and is wholly within the discretion or judgment of the court, which discretion must be exercised equitably in the light of the character of the breach of trust and the degree of fault of the trustee under all the circumstances.’” (Court then goes on to quote Restatement (Second) of Trusts § 207 (1959) [“Ordinarily if a breach of trust consists only in the failure of the trustee to invest trust money, or in the failure to sell trust property and to invest the proceeds, the trustee is chargeable with interest at the current rate of return on trust investments and not with interest at the legal rate.”])

**Kentucky**: Legal rate determined by KRS 360.010

**Louisiana**: Louisiana law maintains a statutorily provided legal interest rate applicable in the context of breach. See, e.g., La. Rev. Stat. 9:3500. LSA-R.S. 9:3500. Rates of legal and conventional interest; usury: A. Interest is either legal or conventional; B. Legal interest is fixed at the following rates, to wit: (1) At the rate fixed in R.S. 13:4202 on all sums which are the object of a judicial demand, whence this is called judicial interest; and (2) On sums discounted at banks at the rate established by their charters; C. (1) The amount of the conventional interest cannot exceed twelve percent per annum. The same must be fixed in writing; testimonial proof of it is not admitted in any case; (2) Except in the cases herein provided, if any person shall pay on any contract a higher rate of interest than the above, as discount or otherwise, the same may be sued for and recovered within two years from the time of such payment; (3)(a) The owner or discounter of any note or bond or other written evidence of debt for the payment of money, payable to order or bearer or by assignment, shall have the right to claim and recover the full amount of such note, bond, or other written evidence of debt and all interest not beyond twelve percent per annum interest that may accrue thereon, notwithstanding that the rate of interest or discount at which the same may be or may have been discounted has been beyond the rate of twelve percent per annum interest or discount; (b) This provision shall not apply to the banking institutions of this state in operation under existing laws or to a consumer credit transaction as defined by the Louisiana
Consumer Credit Law; (4)(a) The owner of any promissory note, bond, or other written evidence of debt for the payment of money to order or bearer or transferable by assignment shall have the right to collect the whole amount of such promissory note, bond, or other written evidence of debt for the payment of money, notwithstanding such promissory note, bond, or other written evidence of debt for the payment of money may include a greater rate of interest or discount than twelve percent per annum; such obligation shall not bear more than twelve percent per annum after maturity until paid; (b) This provision shall not apply to a consumer credit transaction as defined by the Louisiana Consumer Credit Law; (c) Where usury is a defense to a suit on a promissory note or other contract of similar character, it is permissible for the defendant to show the usury whether same was given by way of discount or otherwise, by any competent evidence; D. The provisions of this Article shall not apply to a loan made for commercial or business purposes or deferring payment of an obligation for commercial or business purposes.

Maine: No authority found.

Maryland: There is no Maryland law awarding treasury bill interest as damage for breach of trust. However, Maryland courts have broad discretion to award interest damages. “The question whether interest is chargeable against a trustee in case of loss of trust funds at the legal rate or at the usual rate of return on trust investments is largely within the discretion of the court. In exercising its discretion, the court considers the character of the trustee's breach of trust and the degree of his fault. Where the breach of trust is not intentional, the court ordinarily gives the beneficiary the amount which he would have received if no breach had been committed. On the other hand, where a trustee commits an intentional breach of trust, he is ordinarily charged with interest at the legal rate.” (Riggs v. Loweree (1947) 189 Md. 437, 445.)


Michigan: Referring to interest chargeable on civil actions, MCL 600.6013 (8) states, "Except as otherwise provided in subsections (5) and (7) and subject to subsection (13), for complaints filed on or after January 1, 1987, interest on a money judgment recovered in a civil action is calculated at 0-month intervals from the date of filing the complaint at a rate of interest equal to 1% plus the average interest rate paid at auctions of 5-year United States treasury notes during the 6 months immediately preceding July 1 and January 1, as certified by the state treasurer, and compounded annually, according to this section. Interest under this subsection is calculated on the entire amount of the money judgment, including attorney fees and other costs. In an action for medical malpractice, interest under this subsection on costs or attorney fees awarded under a statute or court rule is not calculated for any period before the entry of the judgment. The amount of interest attributable to that part of the money
judgment from which attorney fees are paid is retained by the plaintiff, and not paid to the plaintiff’s attorney."

**Minnesota:** There is no Minnesota law awarding treasury bill interest as damage for breach of trust. However, Minnesota courts have broad discretion to award interest damages. “Whether interest will be allowed when the trustee’s account is surcharged and at what rate is within the discretion of the court and must depend upon the facts and circumstances in each particular case.” *In re Comstock's Will*, 219 Minn. 325, 338 (Minn. 1945). When a trustee is held liable for interest, the interest is awarded upon equitable principles as compensation for damages to make him whole, to place him in the position he would have been in if the trustee had performed his duty. What is called interest is really damages, computed in terms of interest. *Id.*

**Mississippi:** No relevant authorities found.

**Missouri:**

**Montana:** No authority found for awarding of treasury bill interest in Montana.

**Nebraska:** There is no Nebraska law awarding treasury bill interest as damage for breach of trust. However, as noted above, Nebraska courts have broad discretion to award interest damages.

**Nevada:** “When no rate of interest is provided by contract or otherwise by law, or specified in the judgment, the judgment draws interest from the time of service of the summons and complaint until satisfied, except for any amount representing future damages, which draws interest only from the time of the entry of the judgment until satisfied, at a rate equal to the prime rate at the largest bank in Nevada as ascertained by the Commissioner of Financial Institutions on January 1 or July 1, as the case may be, immediately preceding the date of judgment, plus 2 percent. The rate must be adjusted accordingly on each January 1 and July 1 thereafter until the judgment is satisfied.” Nev. Rev. Stat. Ann. § 17.130 (West); *Gilbellini v. Klindt* (1994) 885 P.2d 540, 110 Nev. 1201 (trial court erred in awarding 10.5% interest on judgment because interest rate was governed by statute where parties had no contract governing interest rate; trial judge did not have discretion to set interest rate); *Gadbois v. Marathon Racing, Inc.* (2013) 2013 WL 7156050 (district court did not abuse its discretion in awarding helicopter service provider interest based on the statutory rates in breach of contract action, where there was no valid written contract, and therefore no written term expressly providing for an interest rate, and there was no evidence of such a term in the oral agreement between the parties)
New Hampshire: N.H. Rev. Stat. Ann. § 336: 1 ("The annual simple rate of interest on judgments, including prejudgment interest, shall be a rate determined by the state treasurer as the prevailing discount rate of interest on 26-week United States Treasury bills at the last auction thereof preceding the last day of September in each year, plus 2 percentage points, rounded to the nearest tenth of a percentage point. On or before the first day of December in each year, the state treasurer shall determine the rate and transmit it to the director of the administrative office of the courts. As established, the rate shall be in effect beginning the first day of the following January through the last day of December in each year.").

New Jersey: 

New Mexico: See response to question 5.

New York: Courts should consider both public and private investments when determining an appropriate rate of interest. If a successful claimant were to access his monetary award without delay, he might invest those proceeds in a wide array of investment choices, including low-to-moderate risk equity funds, corporate bonds, and money market funds. Denio v. State, 7 N.Y.3d 159 (2006). Note that Denio is a personal injury case and does not involve a breach of fiduciary duty.

North Carolina: No authority found.

North Dakota: N.D.C.C. § 47-14-09 (In North Dakota, it is usurious to charge interest at a rate higher than 51/2 percent greater than the average rate of interest payable on United States Treasury Bills maturing in six months as computed by the State Banking Commissioner.)

Ohio: No authority found.

Oklahoma: See response to Number 5, above, in which the available interest rates appear to be (i) a fixed statutory rate of 6.00% per annum, or (ii) a statutory rate set at prime plus 2.00%, adjusted annually, or (iii) the rate of return earned by the breaching party.

Oregon: N/A

Pennsylvania: No applicable Pennsylvania case law of which we are aware.

Rhode Island:
**South Carolina:** No authority found.

**South Dakota:** N/A

**Tennessee:** Not discussed in the statute or comments.

**Texas:** Texas Courts do not use “Treasury Bill Interest” in calculating either prejudgment or postjudgment interest.

**Utah:** N/A

**Vermont:** No Vermont law found. Where the Vermont Trust Code does not specifically provide law on a subject, courts look to Vermont common law as a supplement (14A V.S.A § 106) followed by the restatements and common law from other states. (*Estate of Nancy B. Alden v. Julia Dee and Todd Alden* (2010) 427-12-06 Bncv [Vermont trial court opinion].)

**Virginia:**


**West Virginia:** No authorities found for use of treasury bill interest in West Virginia.

**Wisconsin:** Where a beneficiary is entitled to interest as a part of damages, the determination of the interest rate used to calculate the amount assessed against the trustee may be left to the trial court's discretion. *Matter of Estate of Kugler*, 117 Wis. 2d 314, 344 N.W.2d 160, 167 (1984). In Estate of Kugler, the Wisconsin Supreme Court quoted § 207(1) of the Restatement (Second) of Trusts in its discussion of the court exercising its discretion in determining the interest rate used to calculate damages. 344 N.W.2d at 166. In affirming the lower court’s ruling, the court stated: “Under the circumstances in this case, we conclude that the circuit court did not abuse its discretion in calculating the surcharge amount based on what the estate could have earned had the funds been invested alternately between a passbook savings account and treasury bills.” 344 N.W.2d at 167.

**Wyoming:** N/A
7) **Simple or Compound Interest.** “In some situations, especially involving breaches of short duration, or relatively minor or complicated details of loss measurement, it may be appropriate simply to use compound interest rather than total-return projections in determining the amount of loss to be recovered from a trustee.” Restatement (Third) of Trusts § 100, cmt. b(1) (2012); see also Restatement (Second) of Trusts §§ 207(2), 207(2) cmt. d (1959); Restatement (Third) of Trusts: Prudent Investor Rule § 207 (1992); Scott and Ascher on Trusts § 24.9.3 (5th ed. 2007); Bogert, Trusts and Trustees § 863 (2d ed. rev. 1995); Loring and Rounds, A Trustee’s Handbook § 7.2.3.2 (2012); In re Testamentary Trust of Hamm (1997) 124 Ohio App. 3d 683, 692, 693, 707 NE2d 524; but see, Nickel v. Bank of Am. Nat. Trust & Sav. Ass’n, 290 F.3d 1134 (9th Cir. 2002).

**Alabama:** Alabama law is not entirely consistent on this issue. In *First Alabama Bank of Montgomery, N.A. v. Martin*, the Alabama Supreme Court affirmed the trial court's award of interest on lost principal of common trust funds to be compounded quarterly. See 425 So. 2d 415,428-29 (Ala. 1982). The court reasoned that the trustee would have been under a duty to reinvest the income that should have been received had the common trust funds been properly administered. See id. at 429. Relying upon Scott, Law of Trusts and the Restatement 2d of Trusts, the court found that when a trustee is under a duty to reinvest interest and fails to do so, the trustee may be liable for compound interest. See id. The court further noted that a court of equity is authorized to fashion relief in order to adjust the equities of the parties and address the circumstances presented. See id. Accordingly, the Alabama Supreme Court held that the trial court's order to compound interest on a quarterly basis was not erroneous. See id. In contrast, in *First Alabama Bank of Huntsville, N.A. v. Spragins*, the Alabama Supreme Court upheld an award of simple interest on the lost trust principal using the prejudgment interest rate. See 515 So. 2d 962,966-67 (Ala. 1987). The court explained that the trial court had decided to base its assessment of interest on a simple rate of 6% rather than compound the interest due, and that the significance of the award of interest was that the trial court had determined it to be the amount needed to adequately compensate the trust for its losses. See id. at 966. Citing the discretion given to trial courts to determine the proper rate and amount of interest, the Alabama Supreme Court held that the trial court's award of interest was not reversible error. See id. at 966-67. Based on the decisions in *Martin* and *Spragins*, it appears that trial courts in Alabama are given broad discretion in calculating an award of interest in a trust proceeding and that either simple or compound interest may be permissible in light of the facts and circumstances presented in the case.

**Alaska:** “AS 09.30.070 does not provide for compound interest on judgments.” *Alyeska Pipeline Service Co. v. Anderson* (Alaska 1983) 669 P.2d 956, 956 (although the Court
acknowledges, without explicitly endorsing, *McNulty v. Copp*, 125 Cal.App.2d 697, which “was based on cases allowing an award of compound interest where there is a showing of wrongdoing on the part of a trustee.”

**Arizona:** “Unless specifically provided for in statute or a different rate is contracted for in writing, interest on any judgment shall be at the lesser of ten per cent per annum or at a rate per annum that is equal to one per cent plus the prime rate[.]” Ariz. Rev. Stat. Ann. § 44-1201; *Westberry v. Reynolds* (Ariz. Ct. App. 1982) 134 Ariz. 29, 34 [653 P.2d 379, 384] (where statute mandated a specific rate of simple interest, the court erred in using compound interest.)

**Arkansas:** No Arkansas authority found and none citing the Restatement sections.

**California:** “Notwithstanding Section 16442, interest is not compounded under the Trust Law as it was under former Civil Code Section 2262.” (Prob. Code, § 16441, 1990 Law Revision Commission Comments); *Nickel v. Bank of America Nat. Trust and Sav. Ass’n* (2002) 290 F.3d 1134, 1137 (holding that Prob. C. § 16441, governing trustee’s liability for interest, requires use of simple interest only, and not compound interest).

**Colorado:** “As a general rule, compound interest is more often allowed in cases involving fraud, willful misconduct, or other gross delinquency, than in instances of honest mistake or bad judgment.” *Heller v. First Nat'l Bank, N.A.*, 657 P.2d 992, 995 (Colo. Ct. App. 1982); see also *Murphy v. Central Bank & Trust Co.*, 699 P.2d 13 (Colo. Ct. App. 1985).

**Connecticut:** *State ex rel. Raskin v. Schachat* (1935) 120 Conn. 337, 180 A. 502, 505.

**Delaware:** Yes. “The more recent trend in this Court has been to award compound interest, which ‘better comports with fundamental economic reality.’” *Mennen v. Wilmington Trust Co.*, No. CV 8432-ML. 2015 WL 1914599, at *36 (Del. Ch. Apr. 24, 2015) (citing *Henke v. Trilithic, Inc.*, 2005 WL 2899677, at *13 (Del. Ch. Oct. 28, 2005) (quoting *Finkelstein v. Liberty Digital, Inc.*, 2005 WL 1074364, at *26 (Del. Ch. Apr. 25, 2005)); see also *In re The Volfsun/Landy Trust*, No. 4635-VCL 2013 WL 1654881 (Del. Ch. Apr. 16 2013) (Order to trustee to pay beneficiary damages of pre-judgment and post-judgment interest at the legal rate compounded quarterly.); Del. Code Ann. tit. 12, § 3581(b)(3) (“To remedy a breach of trust that has occurred or may occur, the court may order any equitable remedy, including… (3) Compelling the trustee to redress a breach of trust by paying money, restoring property, or other means.”).
Florida: Florida has no authority on this specific issue. When interest is allowable, it is only simple interest. The rate is adjusted on March 1st each year and quarterly thereafter based on the average discount rate of the Federal Reserve Bank of New York for the preceding 12 months then adding 400 basis points and is published by the Chief Financial Officer. However, one old case did address compound interest: “No fixed rule governs all cases, but it appears generally settled that compound interest will not be allowed except as a penalty for willful negligence and duplicity on the part of the trustee, as for using trust funds in his own business or for trading and making profits with trust funds and not accounting for them or for any other gross unfaithfulness to his trust.” Overstreet v. Voorhies, 173 So. 710, 711 (Fla. 1937).

Georgia: No. Interest calculated pursuant to O.C.G.A. § 53-12-302(b).

Hawaii: See HRS § 478-7 “No action shall be maintainable in any court of the State to recover compound interest upon any consumer credit transaction or upon any credit card agreement whatever”; See HRS § 478-3 “Interest at the rate of ten per cent a year, and no more, shall be allowed on any judgment recovered before any court in the State, in any civil suit.”; See NePage in section 4 above.

Idaho: “[C]ompound interest is not ordinarily allowed unless the defendant actually received compound interest or the defendant's profit is unascertainable but is presumably at least as much as compound interest would yield. The third point reflects the unjust enrichment doctrine requiring disgorgement of profits received by the defendant, and it indicates that the rate of compounded interest should be based upon the defendant's actual or presumed gain.” Holladay v. Lindsay (Idaho Ct. App. 2006) 143 Idaho 767, 770-71 [152 P.3d 638, 641-42]

Illinois: Probably, no. We have not found a case where an Illinois court rejected applying compound interest rate, but the courts have expressed reluctance to compound interests. “We do not think that the interest ought to be compounded. A court of equity has power to compound interest annually or at shorter periods, according to the delinquency of a trustee, but interest will not be compounded except in cases of gross delinquency.” Mathewson v. Davis, 191 Ill. 391, 399 (1901); Bankruptcy courts, when making rulings on constructive trusts created by the law, have also held that courts should be careful with compound interest: “[C]ompound interest is allowed if it will more accurately make the parties whole, or when (as here) the defaulting trustee has used the trust funds in his own business and the actual profits cannot be traced.” In re Goldblatt Bros., Inc., 61 B.R. 459, 468 (Bankr. N.D. Ill. 1986).
Indiana: Burns Ind. Code Ann. § 24-4.6-1-104 (2016) (when there was no contractual agreement for interest, interest should be calculated as simple interest).

Iowa: “[W]hen interest is allowable, it is to be computed on a simple rather than a compound basis in the absence of express authorization to the contrary.” Landals v. George A. Rolfes Co. (Iowa 1990) 454 N.W.2d 891, 896

Kansas: Where a trustee commingles his personal funds with trust funds, it is appropriate to charge him with compound interest, even where the trustee has not committed fraud. (Vincent v. Werner (1934) 140 Kan. 599, 690; Charles v. Witt (1913) 88 Kan. 484.); “In the absence of an express agreement, a trustee's duty . . . would include the investment of interest income, and the estate would not be made whole unless the interest were compounded.” Burch v. Dodge (1980) 4 Kan.App.2d 503, 509.

Kentucky: No direct authority.

Louisiana: The Louisiana Supreme court has allowed for interest compounded annually in the context of a trust breach under the following rationale: “[a]n award of compound interest does not serve as a penalty in this case, but instead serves as a means for allowing the trust to be compensated for the interest or other profit that it would have made on the diverted or lost funds through investments had there been no diversions or losses.).” In the Matter of Bradford Trust, 538 So. 2d 263 (La. 1989).

Maine: No authority found.

Maryland: The MD Estates and Trusts Code does not deal with whether interest for breach of trust should be simple or compound. The common law rule is that “[i]f the trustee is chargeable with interest, he is charged with simple interest, not compound interest, unless (1) he has received compound interest, or (2) it was his duty to accumulate the income, or (3) he has received a profit which cannot be ascertained, but is presumably at least equal to compound interest. It is reasoned that when a trustee uses trust funds in connection with his own business, and he is unable or unwilling to show what profit, if any, he has made by the use of the funds, the court should impose compound interest as a substitute for the profit he is presumed to have made by their use. . . . [W]here a trustee takes the risk of investing in a common stock with the hope of making a profit for the beneficiary, and a loss occurs from a depreciation in its value, the court will ordinarily impose simple interest upon the amount of the loss, especially if the beneficiary had knowledge of the investment and consented to it.” (Riggs v. Loweree (1947) 189 Md. 437, 445-446.) However, regarding self-depositing bank trustees, the rule is different: In such a case, the “[c]ompounding of interest, as a substitute
for actual profits realized, is not permitted against the self-depositing bank trustee because... the trustee is not considered to have used trust funds for its own purposes.” (Maryland Nat. Bank v. Cummins (1991) 322 Md. 570, 599; Real Estate Trust Co. v. Union Trust Co. (1905) 102 Md. 41, 55.) “Where the trustee, in breach of trust, has allowed the principal to remain idle, the trustee has been charged with simple interest.” (Ibid. [reversing trial court’s imposition of compound prejudgment interest and imposing simple interest on self-depositing bank trustee who left cash receipts in demand deposit accounts paying no interest until increment of $1,000 was available for investment].) “There is no statute which fixes the rate of prejudgment interest for [a breach of trust] claim. Absent a contractual stipulation or a statute, the rate of prejudgment interest may not exceed the general legal rate of six percent.” (Maryland Nat. Id. at 599-600 [finding the trial court erred in using a rate of prejudgment interest of ten percent per annum, which the trial court described as “the legal rate”].)

Massachusetts: Note: Compounding serves the purposes of making the trust whole. Distinguished in Woodward School for Girls, at 173-174, from statutory prejudgment interest of 12%, intended to compensate for delay in obtaining money available in Massachusetts only from date of complaint.

Michigan: Michigan law does not contain a similar provision. The last case considered somewhat on point was decided. In Perrin v. Lepper, 72 Mich. 454 (1888), the Michigan Supreme Court stated, "If a trustee fails or refuse to account, he may be charged with the trust fund, and such accumulations thereon as the best management of the most successful business man would be likely to secure for it. It will be presumed he has received so much or he would have reported his gains. If such gains be greater than compound interest, that may be allowed to the beneficiary; not on the ground that the fund is presumed to have earned a larger sum, but because the court will not allow the trustee to profit by his own wrong, and because as between him and the beneficiary the latter has the better right to the excess. Id. at 555. Further, the court stated, "If, however, the trustee has shown an utter disregard for the interest of the beneficiary, and deliberately planned to absorb the trust fund by his fraudulent disposition of it to his use, and attempts to destroy or suppress the evidence of his management of the fund, and the profits he has received therefrom, and so far succeeds in his purpose that no one but himself can trace the fund or its accumulations, and when called upon to account he renders false and fictitious accounts, so defective as to be impossible of proper judicial investigation and adjudication, in such case, if the amount of the fund which he has used can be ascertained, he may be charged therewith, and the largest profits that can lawfully be made thereon by the most sagacious and expert business men in their management of money, even to the allowing of compound interest at the highest lawful rates, and making rests annually or semiannually, if it shall appear just and equitable to the court, in
securing to the cestui que trust the use of his property of which he has been deprived." ld. at555-56. This is in line with the broad powers provided in MCL 700.7901 and 700.7902.

**Minnesota:** The Minnesota UTC does not deal with interest awards. The common law rule is that simple interest only should be charged in cases where there has been no fraud or flagrant breach of trust unless (1) the trustee has received compound interest or (2) he has received a profit which cannot be ascertained but is presumably at least equal to compound interest or (3) it was his duty to accumulate the income. *In re Comstock's Will*, 17 N.W.2d 656, 664 (Minn. 1945); *Sell v. Sell*, 2009 Minn. App. Unpub. LEXIS 1145, *13 (Minn. Ct. App. Oct. 27, 2009).

**Mississippi:** *In re Guardianship of DUCKETT*, 991 So. 2d 1165, 1183 (Miss. 2008): the court stated that "we interpret Section 75-17-7 as granting trial courts the discretion to award simple or compound [interest] prejudgment." *In re Guardianship of DUCKETT*, 991 So. 2d 1165, 1185 (Miss. 2008) (citations omitted): "The statute clearly grants trial courts the discretion to set the rate of prejudgment interest: 'All other judgments or decrees shall bear interest at a per annum rate set by the judge .... Miss. Code Ann. § 75-17-7 (Rev.2000). The fact that Section 75-17- 7 grants trial courts the discretion to set the rate of prejudgment interest suggests that the legislature also intended in enacting this statute to grant trial courts the discretion to calculate prejudgment interest on a simple or compound basis." *Estate of Baxter v. Shaw*, 797 So. 2d 396, 407 (Miss. Ct. App. 2001): "Section 75-17-7 ... allows the trial court to set the rate and in effect the method of its calculation."

**Missouri:**

**Montana:** Mont. Code Ann. § 72-38-1002 (“(3) If the trustee is liable for interest pursuant to this section, interest must be determined as the greater of the following amounts: (a) the amount of interest that accrues at the legal rate on judgments; or (b) the amount of interest the trustee actually received as a result of the breach of trust.”); *In re Reed's Estate* (1927) 37 Wyo. 107 “It appears to be a general rule that a trustee will not be charged with compound interest, at least at a high rate, except where his conduct has been willful.”; see also *In re Ricker's Estate* (1893) 14 Mont. 153.

**Nebraska:** “The general rule is that in the absence of contract or statute, compensation in the form of compound interest is not allowed to be computed upon a debt.” *Abbott v. Abbott*, 188 Neb. 61, 68 (1972). However, there is no Nebraska case law addressing whether compound interest can/should be used for breaches of short duration.
**Nevada:** “As a general rule, compound interest is not favored by the law and is generally allowed only in the presence of a statute or an agreement between the parties allowing for compound interest.” *Torres v. Goodyear Tire & Rubber Co.* (2014) 130 Nev. Adv. Op. 3 [317 P.3d 828, 829]; *see also* *Cox v. Smith* (1865) 1 Nev. 161 (Nevada courts will not allow compound interest even where contracts stipulate for such interest)

**New Hampshire:** No authority found.


**New Mexico:** See response to Question 5.

**New York:** “Where a fiduciary, such as an administrator or executor, a guardian, or a trustee, has been guilty of gross negligence or willful misconduct in the administration of an estate, the fiduciary will be liable for compound interest.” 72 N.Y. JUR. 2D Interest and Usury § 36. In New York, compound interest may still be appropriate even if the trustee did not act in bad faith. For example, in *Matter of Janes (Janes III)*, 90 N.Y.2d. 41 (1997), the New York Court of Appeals affirmed the Appellate Division, Fourth Department’s adoption of a “lost capital” damages calculation that specifically applied compound interest, even though the trustee had been found liable for only simple negligence and not of acting in bad faith. *See also* *In re Lasdon*, N.Y. Slip Op. No. 51710(U) (N.Y. Surr. Ct 2011) (imposing a 6% interest, compounded annually, on trustees who negligently delayed distribution of trust assets to the remaindermen beneficiaries upon termination of the trust). In another case, however, the court held that compound interest was not appropriate because there was no evidence of bad faith on the part of the executor of the estate. In *In re Schuster’s Will*, 167 Misc. 194 (N.Y. Surr. Ct. 1938) a widow was given a life estate in all of the decedent’s property for her support and maintenance, with the remainder to the decedent’s children. The trustee had failed to convert non-income producing property held by the trust into income producing property to provide support for the widow, as the decedent had intended. The court found there was no evidence of bad faith to justify compound interest. *Id.* at 195-196.

**North Carolina:** No authority found.

**North Dakota:** *Engstrom v. Larson*, 79 N.D. 188, 206, 55 N.W.2d 579, 589 (1952)(“Where a trustee applies the money to his own use, he may be charged with compound interest, and nothing can be allowed him for his services in caring for the trust fund.”)
Ohio: *In re Testamentary Trust of Hamm*, 707 N.E.2d 524, 530 (Ohio Ct. App. 1997) ("interest ... is simple, rather than compound, unless there is a showing of intentional misconduct or bad faith.").

Oklahoma: Compound interest is available only if the plaintiff selects to recover interest under the procedural prejudgment interest statutes, which allow interest solely dating back to the commencement of the suit. 12 Okla. Stat. § 727.1. In 1999, Oklahoma’s laws on statutory pre- and post-judgment interest (which provide for prejudgment interest only back to the date when suit was commenced) finally entered the modern age by allowing for annual compounding. The general statutes, providing for interest as damages on liquidated claims at the statutory rate of 6.00%, do not specifically provide for compounding and are, therefore, presumed to provide only simple interest unless modified by contract. 23 Okla. Stat. § 6; 15 Okla. Stat. § 266. *See generally Hebble v. Shell W. E & P, Inc.*, 2010 OK CIV APP 61, ¶ 19, 238 P.3d 939, 945-46 (describing enactment of special statutory prejudgment interest for certain oil-and-gas claims, with compounding interest, and referencing the prior application of general statutes for interest as damages).

Oregon: Whether simple or compound interest is applied is a matter largely within the discretion of the court and depends upon the facts and circumstances of each case. *Stephan v. Equitable Sav. & Loan Ass'n*, 268 Or 544, 574, 522 P2d 478, 492 (1974). If simple interest will adequately compensate the cestui que trust, it will be added; if compound interest will more accurately make the beneficiary whole, then that standard of computation will be followed. Id., 4 Bogert, Trusts and Trustees, Part 1, 420, s 863. “Stating the account with periodical rests, and compounding interest, is only a convenient mode, adopted by the court to charge the trustee with the amount of profits supposed to have been made by him in the use of the money; where the actual amount of profits, which he has made, beyond simple interest, cannot be ascertained.” Id., citing 4 Bogert, Op. cit., 423 s 863. Compound interest is more often allowed in cases involving fraud, willful misconduct, or gross delinquency. *Stephan v. Equitable Sav. & Loan Ass'n*, 268 Or 544, 574, 522 P2d 478, 492 (1974). Whether holder of funds acts as trustee or in some other capacity, compound interest is appropriate when holder uses another's funds for its own benefit, exact amount of earnings on that beneficial use is unknown, and holder probably received return at least equal to compound interest. *Guinasso v. Pac. First Fed. Sav. & Loan Ass'n*, 89 Or App 270, 280, 749 P2d 577, 584 (1988).

Pennsylvania: 20 Pa. C.S. §§ 3544, 7799.2 (fiduciary “who has committed a breach of duty with respect to [estate or trust] assets shall, in the discretion of the court, be liable for interest, not exceeding the legal rate on such assets.”). *See also Mintz Trust*, 282 A.2d 295, 303-04 (Pa. 1971) (ruling that where a loan of trust assets was repaid with interest at the *per annum*
“legal rate,” the trust beneficiary could not seek a surcharge for compound interest as suggested by the Restatement (Second) of Trusts § 207). Pennsylvania’s statutory interest rate is currently 6% per annum. See 41 P.S. § 202.


**South Carolina:** *Myers v. Myers*, 7 S.C. Eq. 214, 244 (S.C. App. L. & Eq. 1827) (“Simple interest is now only allowed. Compound interest has never been allowed but in cases of gross breaches of trust, and of detaining he funds of the estate improperly”).

**South Dakota:** SDCL § 55-3-11(Investment of money by trustee--Interest, simple or compound, on omission to invest trust moneys) (“A trustee must invest money received by him under the trust, as fast as he collects a sufficient amount, in such manner as to afford reasonable security and interest for the same. If he fails so to do, he must pay simple interest thereon if such omission is merely negligent, and compound interest thereon if it is willful.”) *Tri-State Refining and Inv. Co., Inc. v. Apaloosa Co.*, 1988, 431 N.W.2d 311 (Plaintiff awarded fraud damages was entitled to prejudgment interest, in trial court's discretion, but court should have calculated amount using simple rather than compound interest. SDCL 21-1-13.)

**Tennessee:** 2-17 Pritchard on the Law of Wills and Admin of Estates § 742: “The personal representative will be charged with simple interest where it is evident that the profit realized did not exceed that amount, although he may not have made so much. If he makes more than simple interest, he will be charged with the whole profits, either by being charged with compound interest or in such other manner as may best carry out the principle of giving the beneficiary all the profits.” Citing *Jameson’s Legatees v. Shelby*, 21 Tenn. 198 (1840); *Stratton v. Thompson*, 78 Tenn. 229, 242 (1882); *Johnson v. Patterson*, 81 Tenn. 626, 656 (1884); *Williams v. Williams*, 83 Tenn. 438, 452 (1885); *Gwynne v. Estes*, 82 Tenn. 662, 674 (1885); *Cannon v. Apperson*, 82 Tenn. 553 (1885). Where breach of duty is merely technical and not attended with loss, representative will not be charged more interest than he received. *Vaccaro v. Cicalla*, 89 Tenn. 63, 14 S.W. 43 (1890). Compound interest is only charged where conduct of representative was culpable. *Alvis v. Oglesby*, 87 Tenn. 172, 10 S.W. 313 (1889).

**Texas:** Prejudgment interest is at simple interest and does not compound. Texas Finance Code § 304.104. Postjudgment interest compounds annually. Texas Finance Code § 304.006.
Utah: “Of course, a case might arise in which an executor, by disregarding the order of the court, could wrongfully divert and use the estate funds for his own private purposes, and in such a case, when called upon to account he should be required to pay at least simple interest, if not compound interest, as justice may require.” *In re Listman's Estate*, 57 Utah 471, 485-486 (1921).

Vermont: See below, but it seems that generally compound interest is not used in the absence of breach of trust. The Vermont “supreme court, as early as the year 1824, made a rule that ‘interest upon interest is not allowed.’” *(Farewell v. Steen* (1874) 46 Vt. 678.) However, “[i]f a trustee receive[s] trust funds and appropriate[s] them to his own use, or if he has unreasonably delayed to render an account, he is chargeable with compound interest upon the funds, and with more, if he has made more by the use of the money. The principle that a trustee must account for all profit, is not confined to the common law. The civil law recognizes the same doctrine, and holds trustees to so strict an account, that if they convert trust funds to their own purposes, they are to be charged interest “*non ex more regionis, sed gravissimas vel maximas usuras,*” or double the usual rates.” *(Id. at 680.)*


Washington: See Response to Question #5 above regarding simple v. compound interest awards. Furthermore, courts in equity charge interest on retained trust funds to compensate owners for loss of use, and will impose simple interest in ordinary cases involving no willful or unlawful use or withholding, and compound interest where trustee withholds trust property or uses it for his own purposes (See *Tucker v. Brown*, 150 P.2d 604, 670 (Wash. 1944) (finding that trustees wrongfully withheld trust property they were rightfully obligated to distribute among the devisees and were chargeable with compound interest during the whole period of their default).

West Virginia: *Hensley v. West Virginia Dept. of Health and Human Resources* (1998) 203 W.Va. 456, 467–68 [508 S.E.2d 616, 627–28] (“[W]here there exists no statute or express written agreement establishing the type of prejudgment interest as being compound, and in the absence of a recognized exception which would permit the recovery of compound prejudgment interest, prejudgment interest is simple in kind.”).

Wisconsin: Where a beneficiary is entitled to interest as a part of damages, the determination of the interest rate used to calculate the amount assessed against the trustee may be left to the trial court's discretion. *Matter of Estate of Kugler*, 117 Wis. 2d 314, 344 N.W.2d 160, 167 (1984). In *Estate of Kugler*, the Wisconsin Supreme Court quoted § 207(1) of the
Restatement (Second) of Trusts in its discussion of the court exercising its discretion in determining the interest rate used to calculate damages. 344 N.W.2d at 166. The court’s citation of § 207(1) of the Restatement (Second) of Trusts with approval in Estate of Kugler suggests that §§ 207(2), 207(2) cmt. d also may be persuasive. In Will of Kalicicki, 33 Wis.2d 277, 147 N.W.2d 343 (1967), though in a different context, in dicta the Wisconsin Supreme Court observed “The general rule applicable to a fiduciary calls for simple interest for breaches of duty except those characterized by fraud or a willful breach, gross negligence or a violation of a primary duty and in such cases compound interest may be charged against the fiduciary.” 147 N.W.2d at 348, citing In re Thurston, 57 Wis. 104, 15 N.W. 126 (1883); Taylor v. Hill, 87 Wis. 669, 58 N.W. 1855 (1894)).

**Wyoming:** See Reed v. Taliaferro, 37 Wyo. 107 (1927).
8) **SPECIFIC REPARATION IF REASONABLE UNDER THE CIRCUMSTANCES.** “If suit for breach of trust is successfully brought against the trustee, recovery may take the form of a money judgment or (if feasible) specific restitution.” Restatement (Third) of Trusts § 100 cmt. a(2) (2012); Restatement (Third) of Trusts § 100 cmt. c (2012); Restatement (Third) of Trusts: Prudent Investor Rule § 208 (1992); Restatement (Second) of Trusts §§208(1)(b), 211 (1959); Scott and Ascher on Trusts § 24.9.3 (5th ed. 2007); Rounds and Rounds, A Trustee’s Handbook § 7.2.3.2 (2014); Matter of Estate of Winston (N.Y.Sur. 1995) 167 Misc. 2d 295, 302, 631 NYS2d 999; Copley v. Copley (Cal.Ct.App. 1981) 126 Cal.App.3d 248, 286-87.

**Alabama:** See: ALA. CODE § 19-3B-1001 (1975) (Remedies for breach of trust.): (a) A violation by a trustee of a duty the trustee owes to a beneficiary is a breach of trust; (b) To remedy a breach of trust that has occurred or may occur, the court may: (1) Compel the trustee to perform the trustee's duties; (2) Enjoin the trustee from committing a breach of trust; (3) Compel the trustee to redress a breach of trust by paying money, restoring property, or other means; (4) Order a trustee to account; (5) Appoint a special fiduciary to take possession of the trust property and administer the trust; (6) Suspend the trustee; (7) Remove the trustee as provided in Section 19-3B-706; (8) Reduce or deny compensation to the trustee; (9) Subject to Section 19-3B-1012, void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds; or (10) Order any other appropriate relief.

**Alaska:** “When a court of equity finds that a defendant is the holder of a property interest which he retains by reason of unjust, unconscionable, or unlawful means, it takes such interest from the defendant and vests it in the wronged party.” McKnight v. Rice, Hoppner, Brown & Brunner (Alaska 1984) 678 P.2d 1330, 1335; “[U]se of either “unjust” means or “unconscionable” means to acquire an interest gives the court a sufficient basis to impose a constructive trust. The superior court in the present case did exactly that, using a constructive trust as an equitable remedy to take Riddell's unjustly acquired interest in the estate and vest it in the rightful beneficiaries of the estate.” Riddell v. Edwards (Alaska 2003) 76 P.3d 847, 857.

**Arizona:** “[T]o remedy a breach of trust that has occurred or may occur, the court may…. Compel the trustee to redress a breach of trust by paying money, restoring property or other means.” Ariz. Rev. Stat. Ann. § 14-11001.

**Arkansas:** No Arkansas authority found and none citing the Restatement sections.
California: *Copley v. Copley* (1981) 126 Cal.App.3d 248, 287 (upholding trial court remedy of transferring shares and appropriate funds to make the trust whole by placing it “in the relative stock ownership position it equitably should have had[].”)

Colorado: “However, we are here concerned with the liability of a constructive trustee (Thurman) to his beneficiary (Unicure) for an abuse of a fiduciary relationship. Although the beneficiary could have maintained an action at law against the constructive trustee, it was not limited to that remedy. It also had and could pursue equitable remedies such as this proceeding for specific restitution, and it was immaterial that there was an adequate remedy at law.” *Unicure, Inc. v. Thurman*, 42 Colo. App. 241, 243-44 (1979).

Connecticut:

Delaware: Yes. “To remedy a breach of trust that has occurred or may occur, the court may order any equitable remedy, including… (3) Compelling the trustee to redress a breach of trust by paying money, restoring property, or other means.” Del. Code Ann. tit. 12, § 3581(b)(3); see also Del. Code Ann. tit. 12, § 3582 (“A beneficiary may charge a trustee who commits a breach of trust with: (1) The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; (2) The profit that the trustee made by reason of the breach; or (3) Such other relief as may be fashioned by the court.”); *McNeil v. McNeil*, 798 A.2d 503, 509 (Del. 2002) (“With respect to the Court of Chancery’s application of remedies for breach of a trustee’s duties… [the] court, in exercise of its plenary equitable authority over the supervision of trusts is accorded broad discretion.”) (citing *Hogg v. Walker*, 622 A.2d 648, 654 (Del. 1993) (Court of Chancery has “broad latitude to exercise its equitable powers to craft a remedy”)).

Florida: A trustee who commits a breach of trust is liable for the greater of (a) the amount required to restore the value of the trust property and trust distributions to what they would have been if the breach had not occurred, including lost income, capital gain, or appreciation that would have resulted from proper administration; or (b) the profit the trustee made by reason of the breach. § 736.1002(1) *Fla.Stat.* The Florida statute is similar to Restatement (Third) of Trusts: Prudent Investor Rule § 205 (1992). Issues of liability between the trust estate and the trustee individually may be determined in a proceeding for accounting, surcharge, or indemnification or in any other appropriate proceeding. § 736.1013(4) *Fla.Stat.* The identical provision as to a personal representative is found in § 733.619 *Fla.Stat.*. In these instances, assuming the court had in personam jurisdiction and the fiduciary met the due process minimum contacts test (or had waived objection to jurisdiction), a money judgment would be appropriate. Fla. Stat. §736.1001 (2)(a)-(j) The court may remedy a breach of trust that has occurred or may occur by compelling the trustee to perform his or
her duties; enjoining the commission of the breach; compelling the trustee to redress the
breach monetarily or by restoring property or by other means. The court also has the
discretion to remedy breach of a trust by, “voiding the act, imposing a lien or constructive
trust on trust property, or trace property wrongly disposed of and recover the property or its
proceeds; or order any other appropriate relief.”

**Georgia:** O.C.G.A. § 53-12-302.

**Hawaii:**

**Idaho:** “A person entitled to restitution is entitled, in an appropriate case, to a remedy by a
proceeding in equity, and not merely to a remedy by a proceeding at law. The available
remedies by a proceeding in equity include: (1) a decree establishing and enforcing a
constructive trust of property; (2) a decree establishing and enforcing an equitable lien upon
property; (3) a decree that the plaintiff be subrogated to the position of another claimant
against the defendant. In some cases where the plaintiff would be entitled to enforce a
constructive trust or equitable lien upon property if the property could be traced, but he is
unable to trace the property, he is to maintain a proceeding in equity to obtain a decree
[722 P.2d 474, 481] (citing Restatement of the Law on Restitution, § 160.)

**Illinois:** The research has not found an Illinois case or treaty on point.

**Indiana:** Burns Ind. Code Ann. § 30-4-3-11(b) (2016), provides that if a trustee commits a
breach of trust, the trustee is liable to the beneficiaries for: "(1) any loss or depreciation in
the value of the trust property as a result of the breach; (2) any profit made by the trustee
through the breach; (3) any reasonable profit which would have accrued on the trust property
in the absence of a breach; and (4) reasonable attorney's fees incurred by the beneficiary in
bringing the action of the breach." The Trust Code Study Commission comments to Ind.
Code § 30-4-3-11(b) provide that: "This subsection adds reasonable attorney's fees to the
liabilities imposed by the Restatement on a trustee who commits a breach of trust. See
Restatement (Second), Trusts § 205 (1959)."

**Iowa:** “A court of equity has jurisdiction of all questions relative to the establishment,
enforcement, and protection and preservation of all trusts… As a general rule, probate,
surrogate's, or orphans' courts have no jurisdiction to establish and enforce a trust in an estate
subject to their jurisdiction, except to the extent that such jurisdiction is conferred on them by
valid statutory provisions. [Iowa statutes do not confer on probate courts jurisdiction to
establish constructive trusts, so they may not do so.]” Matter of Young’s Estate (Iowa 1978) 273 N.W.2d 388, 393.

**Kansas:** As discussed below, constructive trusts and equitable liens are available remedies where the trustee, by the wrongful disposition of trust property, acquires other property. I found no discussion in Kansas case or statutory law regarding “specific restitution” (to the extent it is distinct from the concept of constructive trust). UTC Comments to KSA 58a-106 provide, that “[t]o determine the common law and principles of equity in a particular state, a court should look first to prior case law in the state and then to more general sources, such as the Restatement of Trusts, Restatement (Third) of Property: Wills and Other Donative Transfers, and the Restatement of Restitution. The common law of trusts is not static but includes the contemporary and evolving rules of decision developed by the courts in exercise of their power to adapt the law to new situations and changing conditions. It also includes the traditional and broad equitable jurisdiction of the court, which the Code in no way restricts.” Further, in *In re Hilgers* (2006) 352 B.R. 298, 304, the court stated that “the Uniform Trust Code (substantially adopted by the KUTC) was closely coordinated with the Restatement (Third) of Trusts, and both supply trust law where decisional law is commonly lacking.”

**Kentucky:** KRS 386B.10-010

**Louisiana:** See Response to Question 2. La. Rev. Stat. Ann. 9:2221. Remedies against trustee. A beneficiary of a trust may institute an action: (1) To compel a trustee to perform his duties as trustee; (2) To enjoin a trustee from committing a breach of trust; (3) To compel a trustee to redress a breach of trust; (4) To remove a trustee.

**Maine:** 18-B M.R.S.A. § 1001(b)(C) (“To remedy a breach of trust that has occurred or may occur, the court may do any of the following: (3) Compel the trustee to redress a breach of trust by paying money, restoring property, or other means”)

**Maryland:** There is no Maryland law that specifically addresses whether specific restitution is allowed. However, in *Zimmerman v. Coblentz* (1936) 170 Md. 468, 345-346, though the court ultimately declined to award restitution for co-trustees’ decision to keep trust funds deposited in a specific institution despite unnecessary, known risks (finding that such a decision was not a breach of trust), the court’s discussion of an award of restitution suggests that had the co-trustees’ decision risen to the level of breach of trust, restitution would have been an acceptable form of recovery.

**Massachusetts:** Yes, if feasible.
**Michigan:** Black's Law Dictionary (7th ed, 1999) defines restitution as the return or restoration of some specific thing to its rightful owner or status, MCL 700.7901 (2)(c) provides that the court may, "Compel the trustee to redress a breach of trust by paying money, restoring property, or other means." MCL 700.7902(a) provides that the court may find the trustee liable to the trust beneficiaries for the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred.

**Minnesota:** There is no Minnesota law that specifically addresses whether specific restitution is allowed. The Minnesota Supreme Court has adopted the Restatement (Second) of Trusts where no Minnesota case law is controlling. *Connecticut General Life Ins. Co. v. First Nat'l Bank*, 262 N.W.2d 403, 405 (Minn. 1977); *Kohler v. Fletcher*, 442 N.W.2d 169, 171 (Minn. Ct. App. 1989). In *In re WCAL Charitable Trust*, 2009 Minn. App. Unpub. LEXIS 1356, *16 (Minn. Ct. App. Dec. 29, 2009), petitioners challenged the sale of a radio station, as a breach of trust, and sought to have the sale voided. The court refused to void the sale, but based its decision on laches, because the petitioners had waited almost four years to bring their claim. The reliance of the court on laches seems to suggest that specific restitution could be ordered if reasonable.

**Mississippi:** *Lackey v. Lackey*, 691 So. 2d 990 (Miss. 1997): "Trust beneficiary was entitled to imposition of constructive trust on life insurance proceeds arising from policy purchased by trustee, to extent that stolen trust funds were used to purchase policy, given that trustee, who was also beneficiary's uncle, stole large sums of money from trust beneficiary, to whom he owed both legal fiduciary and familial duties, and that policy beneficiaries, who were trustee's children, received benefit of trustee's misconduct in stealing funds."

**Missouri:** RSMo.456.10-1001.2.

**Montana:** *Word v. Union Bank & Trust Co.* (1940) 111 Mont. 279 (“Where a trustee, in violation of his trust, invests the trust property or its proceeds in any other property, the cestui que trust may elect to hold the substituted property subject to the trust, or to hold the trustee personally liable to him for the breach of the trust.”)

**Nebraska:** I found no discussion in Nebraska case law regarding “specific restitution” (to the extent it is distinct from constructive trust), but Neb. Rev. St. § 30-3890 (UTC 1001) provides that the following remedies may be used by the court to remedy a breach of trust: (1) compel the trustee to perform the trustee's duties; (2) enjoin the trustee from committing a breach of trust;
(3) compel the trustee to redress a breach of trust by paying money, restoring property, or other means;

(4) order a trustee to account;

(5) appoint a special fiduciary to take possession of the trust property and administer the trust;

(6) suspend the trustee;

(7) remove the trustee as provided in section 30-3862;

(8) reduce or deny compensation to the trustee;

(9) subject to section 30-38,101, void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds; or

(10) order any other appropriate relief.

(Emphasis added.)

**Nevada:** “1. If a trustee commits or threatens to commit a breach of trust, a beneficiary or cotrustee of the trust may maintain a proceeding for any of the following purposes that is appropriate: (a) To compel the trustee to perform his or her duties; (b) To enjoin the trustee from committing the breach of trust; (c) To compel the trustee to redress the breach of trust by payment of money or otherwise; (d) To appoint a receiver or temporary trustee to take possession of the trust property and administer the trust; (e) To remove the trustee; (f) To set aside acts of the trustee; (g) To reduce or deny compensation of the trustee; (h) To impose an equitable lien or a constructive trust on trust property; (i) To trace trust property that has been wrongfully disposed of and recover the property or its proceeds; 2. The provision of remedies in subsection 1 does not preclude resort to any other appropriate remedy provided by statute or common law.” Nev. Rev. Stat. Ann. § 163.115 (West)

**New Hampshire:** N.H. Rev. Code Ann. § 564-B: 10-100 l(b )(3);(10) ("To remedy a breach of trust that has occurred or may occur, the court may: (3) compel the trustee to redress a breach of trust by paying money, restoring property; or other means; ... (10) order any other appropriate relief, including relief under RSA 547:3.b."). *In re Houlahan Tr.*, 101 A.3d 599, 602 (N.H. 2014) (noting one of the remedies for a breach of trust is to "restore property to the trust," which "contemplates that the trust will continue in existence in order for the property wrongfully removed by the trustee to be restored to it"); *Pickering v. De Rochemont*, 45 N.H.
"A suit in equity is the usual and most effectual remedy for a breach of trust, and in any case the jurisdiction and machinery of these courts is so much better adapted to meet the exigencies of every case, by enforcing a restitution of the trust property, and compelling an account against the delinquent parties, that any other remedy is rarely resorted to.


**New Mexico:** This would appear to follow from *Miller v. Bank of America, N.A.*, 2015-NMSC-022, but I find no authority directly on point.

**New York:** A New York court laid out several factors when determining the proper mode of distribution of trust assets. These include: “whether the trust instrument makes provision expressly or by implication, as to the mode of distribution; whether all beneficiaries agree upon a mode of distribution; whether the trust consists of fungible or nonfungible property and whether a distribution in-kind is practicable under the circumstances.” *Matter of Winston*, 167 Misc.3d 295, 302 (N.Y. Sur. Ct. 1995) (holding that trustees may distribute the assets in whichever way is most favorable to the remainderman, including an option to distribute in-kind or to liquidate stock and distribute cash).

**North Carolina:** N.C.G.S.A. § 36C-10-1001(b)(3) (“To remedy a breach of trust that has occurred or may occur, the court may do any of the following: (3) Compel the trustee to redress a breach of trust by paying money, restoring property, or other means”). *Matter of Wills of Jacobs*, 370 S.E.2d 860, 865 (N.C. App. 1988) (noting that the trial court’s order mandating the trustee “payment of costs, witness fees, and attorney’s fees” as a proper assessment of damages.

**North Dakota:** N.D. Cent. Code § 59-18-01 (In the case of a breach of trust, the court may “…void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds; or order any other appropriate relief.”

“The general rule is that a trustee who wrongfully disposes of trust property is liable to the beneficiary for the value of the same, with interest.” *Prondzinski v. Garbut*, 10 N.D. 300, 86 N.W. 969 (1901). However, an election may be made to have the trust property replaced. Id. A beneficiary has an absolute right “to have the property, with its fruits, restored, if he so elects; and it requires no argument or citation of authority to show that if that right is denied, and the property is not replaced by the trustee according to such election, he is entitled to his
damages for the breach of the obligation, just as much as though the duty was one created by the contract of the parties, instead of by the statute.” Id. at 972.

**Ohio:** Ohio Rev. Code Ann. § 5810.01(B)(3) ("To remedy a breach of trust that has occurred or may occur, the court may do any of the following: (3) Compel the trustee to redress a breach of trust by paying money, restoring property, or other means").

*Wills v. Kolis*, No. 93900, 2010 Ohio App. LEXIS 3674, at *9 (Ohio Ct. App. Sept. 16, 2010) (noting that "The Official Comments ... explain that "[t]he reference to payment of money in subsection (B)(3) includes liability that might be characterized as damages, restitution, or surcharge").


**Oregon:** In the case of a breach of trust, O.R.S. § 130.800 allows a court to void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds or order any other appropriate relief.”

**Pennsylvania:** 20 Pa. C.S. § 7781(b)(3), (9)(iii) ("To remedy a breach of trust that has occurred or may occur, the court may order any appropriate relief, including . . . Compelling the trustee to redress a breach of trust by paying money, restoring property or other means [or] tracing trust property wrongfully disposed of and recovering the property or its proceeds"). *See also Estate of Scharlach*, 809 A.2d 376, 386 (Pa. Super. 2002) (quoting Restatement (Second) of Trusts §211). Note that the Superior Court later analyzed *Scharlach* and further clarified that the breach therein was not a failure to maximize growth of a trust portfolio, but rather the breaches were the trustee’s failure to (1) consider the needs of the beneficiary; and (2) implement an investment plan specifically designed for that beneficiary’s needs. *Estate of Warden*, 2 A.3d 565, 577 (Pa. Super. 2010).

**Rhode Island:** *Dodge v. Stone*, 76 R.I. 318, 322 (R.I. 1949) (no specific reparation/restitution if purchaser is BFP).
South Carolina: S.C. Code 1976 § 62-7-1001 (“To remedy a breach of trust that has occurred or may occur, the court may do any of the following: (3) Compel the trustee to redress a breach of trust by paying money, restoring property, or other means”).

South Dakota: The remedies stated in § 205 of the Restatement (Second) are applicable when the trustee violates his duty of loyalty. Restatement (Second) of Trusts § 206 (1959). Willers v. Wettestad, 510 N.W.2d 676, 681 (S.D. 1994). Section 205 of the Restatement (Second), comment, states, “If the trustee commits a breach of trust, the beneficiary may have the option of pursuing a remedy which will put him in the position in which he was before the trustee committed the breach of trust; or of pursuing a remedy which will give him any profit which the trustee has made by committing the breach of trust; or of pursuing a remedy which will put him in the position in which he would have been if the trustee had not committed the breach of trust.”


Texas: See Texas Trust Code §§ 114.001 and 114.008 supra. Under Texas Trust Code § 114.008 (a)(10) a Court may implement virtually any equitable remedy. Texas Courts routinely rely on the Restatements of Trusts and legal treatises such as Scott and Ascher on Trusts and Bogert, Trusts and Trustees as legal authority for their decisions if the provisions of these sources do not conflict with statutory trust law or specific Texas case law.

Utah: Ockey v. Lehmer, 2008 UT 37, P49 (Utah 2008) (denying plaintiff’s proposed equitable remedy of returning canceled stock because an adequate remedy at law existed). “To remedy a breach of trust that has occurred or may occur, the court may: . . . (c) compel the trustee to redress a breach of trust by paying money, restoring property, or other means.” Utah Code Ann. § 75-7-1001

Vermont: There is no Vermont law that addresses whether specific restitution is allowed. Where the Vermont Trust Code does not specifically provide law on a subject, courts look to Vermont common law as a supplement (14A V.S.A § 106) followed by the restatements and common law from other states. (Estate of Nancy B. Alden v. Julia Dee and Todd Alden (2010) 427-12-06 Bncv [Vermont trial court opinion].)

Virginia: “It is well settled that where one person sustains a fiduciary relation to another he cannot acquire an interest in the subject matter of the relationship adverse to such other party. If he does so equity will regard him as a constructive trustee and compel him to convey to his associate a proper interest in the property or to account to him for the profits derived therefrom.” Horne v. Holley, 167 Va. 234, 240, 188 S.E. 169, 172 (1936) (citing Miller v. Ferguson, 107 Va. 249, 255, 57 S.E. 649, 122 Am.St.Rep. 840, 13 Ann.Cas. 138; Matney v.
“[E]quity treats as done what ought to be done,’ and courts of equity may utilize flexible remedies to achieve just results. If disbursements are made improperly (i.e., in breach of a fiduciary obligation), then the Court may impose a constructive trust, requiring the transferee to disgorge the payments. Otherwise, the lifetime beneficiary would be unjustly enriched, receiving something she would not have obtained but for the trustee's breach of duty. Similarly, if a trustee acts outside its fiduciary obligations to contingent beneficiaries by making improper disbursements to the lifetime beneficiary and those disbursements are spent by the lifetime beneficiary, the Court possesses the equitable power to require the trustee to make restitution to the trust corpus to remedy the loss to the aggrieved beneficiaries.” *Makel v. Tredegar Trust Co.*, 69 Va. Cir. 204 (2005).

“It is well settled that where one person sustains a fiduciary relation to another he cannot acquire an interest in the subject matter of the relationship adverse to such other party. If he does so equity will regard him as a constructive trustee and compel him to convey to his associate a proper interest in the property or to account to him for the profits derived therefrom.” *Falls Church v. Protestant Episcopal Church in U.S.*, 285 Va. 651, 668, 740 S.E.2d 530, 539–40 (2013) (*citing Horne v. Holley*, 167 Va. 234, 240, 188 S.E. 169, 172 (1936)).

“[U]nder well-settled rules of equity the beneficiaries … have the option to hold the trustee or his estate liable for the money with interest, or the property in which it was invested, with all actual profits, where the rights of no third person intervenes. That is to say, equity, in such case, at the option of the beneficiaries, will impress upon such investment the same trust as originally adhered to the money which was used to make the investment.” *Russell's Ex'r's v. Passmore*, 127 Va. 475, 103 S.E. 652, 662 (1920).

**Washington:** There was no case law in Washington that referred to the courts granting specific restitution or citing to this particular Restatement section. By statute, however, Washington permits exercise by a court of general powers regarding estates and trusts under 11.96A.020 “to proceed with such administration and settlement in any manner and way that to the court seems right and proper . . . .”

**West Virginia:** W. Va. Code Ann. § 44D-10-1001 (West) (“(b) To remedy a breach of trust that has occurred or may occur, the court may: […] (3) Compel the trustee to redress a breach of trust by paying money, restoring property or other means”); *Lawyer Disciplinary Bd. v. Ball* (2006) 219 W.Va. 296, 310 (Total restitution to the client required where an attorney
was found to have violated Rules of Professional Conduct by drafting wills that permitted him to receive excessive fees as an executor and as overseer of funds bequeathed to university foundation);

**Wisconsin:** Wis. Stat. § 701.1001(2)(c) provides: "To remedy a breach of trust that has occurred or may occur, a court may do any of the following: (c) Compel the trustee to redress a breach of trust by paying money, restoring property, or other means.” The Wisconsin Supreme Court upheld an award of restitution for a breach of fiduciary duty in *Dick & Reuteman Co. v. Doherty Realty Co.*, 114 N.W.2d 475 (Wis. 1962). The court ruled that an insurance broker should pay back insurance commissions because the broker had wrongfully acquired the commissions by breaching a fiduciary duty created by a trust. Id. at 482-83. The case later served as Illustration 19 of § 43 of the Restatement (Third) of Restitution & Unjust Enrichment (2011), which states: “A person who obtains a benefit – (a) in breach of a fiduciary duty, (b) in breach of an equivalent duty imposed by a relation of trust and confidence, or (c) in consequence of another’s breach of such a duty, is liable in restitution to the person to whom the duty is owed.”

**Wyoming:** “To remedy a breach of trust that has occurred or may occur, the court may: . . . (iii) Compel the fiduciary to redress a breach of trust by paying money, restoring property or other means.” Wyo. Stat. § 4-10-1001.
9) **Equitable Lien.** “If the trustee sells trust property which it is his duty to retain, the beneficiary can enforce an equitable lien upon the proceeds of the sale as security for his claim under the rules stated in clauses (a) and (b).” Restatement (Second) of Trusts § 208(2) (1959); see also Restatement (Third) of Trusts: Prudent Investor Rule § 208 and § 211 cmt. c & d (1992); Restatement (Third) of Trusts, §100, 100 cmt. c (2012); Restatement (Second) of Trusts §§ 209, 210 (1959); Unif. Trust Code § 1001(b)(9); Scott and Ascher on Trusts § 24.11, 24.7 (5th ed. 2007); Bogert, Trusts and Trustees § 865 (2d ed. rev. 1995); Rounds and Rounds, A Trustee’s Handbook § 7.2.3.1.3 (2014); In re Estate of Talbot (1956) 141 Cal.App.2d 309, 327.

**Alabama:** See: ALA. CODE § 19-3B-1001 (1975) (in particular, § l00l(b)(9), providing that to remedy a breach of trust, a court may "impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds). See also: ALA. CODE § 19-3B-1012 (1975) (Protection of person dealing with trustee): (a) A person other than a beneficiary who in good faith assists a trustee, or who in good faith and for value deals with a trustee, without knowledge that the trustee is exceeding or improperly exercising the trustee's powers is protected from liability as if the trustee properly exercised the power; (b) A person other than a beneficiary who in good faith deals with a trustee is not required to inquire into the extent of the trustee's powers or the propriety of their exercise; (c) A person who in good faith delivers assets to a trustee need not ensure their proper application; (d) A person other than a beneficiary who in good faith assists a former trustee, or who in good faith and for value deals with a former trustee, without knowledge that the trusteeship has terminated is protected from liability as if the former trustee were still a trustee; (e) Comparable protective provisions of other laws relating to commercial transactions or transfer of securities by fiduciaries prevail over the protection provided by this section.

**Alaska:** “When a court of equity finds that a defendant is the holder of a property interest which he retains by reason of unjust, unconscionable, or unlawful means, it takes such interest from the defendant and vests it in the wronged party.” McKnight v. Rice, Hoppner, Brown & Brunner (Alaska 1984) 678 P.2d 1330, 1335; “[U]se of either “unjust” means or “unconscionable” means to acquire an interest gives the court a sufficient basis to impose a constructive trust. The superior court in the present case did exactly that, using a constructive trust as an equitable remedy to take Riddell's unjustly acquired interest in the estate and vest it in the rightful beneficiaries of the estate.” Riddell v. Edwards (Alaska 2003) 76 P.3d 847, 857.

**Arizona:** “[T]o remedy a breach of trust that has occurred or may occur, the court may….impose a lien or a constructive trust on trust property or trace trust property

**Arkansas:** Arkansas has enacted the Uniform Trust Code and section 1001(b)(9) is codified at Ark. Code Ann. § 28-73-1001(b)(9). It has not been cited by any Arkansas appellate decisions. No other Arkansas authority found and none citing the Restatement sections. I did find an Arkansas decision that, quoting Scott, stated that if a trustee commingled trust property with his own, and thereafter dissipated part of the property, the beneficiary had an equitable lien on the part of the fund that remained. *Chambers v. Williams*, 199 Ark, 40, 132 S.W.2d 654, 656 (1939).


**Colorado:** “An equitable lien also may be the preferable remedy in a case in which the defendant has used the plaintiff's property to purchase other property and the other property has decreased in value. In such a case, in proper circumstances the plaintiff can have an equitable lien on the later-acquired property and a money judgment against the defendant for any deficiency between the value of the plaintiff's property and the value of the later-acquired property.” *In re Marriage of Allen*, 724 P.2d 651, 658 (Colo. 1986).


**Delaware:** Yes. “To remedy a breach of trust that has occurred or may occur, the court may order any equitable remedy, including… (3) Compelling the trustee to redress a breach of trust by paying money, restoring property, or other means… (8) Subject to § 3590 of this title, voiding an act of the trustee, imposing a lien or a constructive trust on trust property or tracing trust property wrongfully disposed of and recover the property or its proceed; or (9) Granting any other appropriate relief.” Del. Code Ann. tit. 12, § 3581(b)(3), (8), (9).

**Florida:** Except as to a bona fide purchaser for value without knowledge that the trustee is exceeding his authority, a beneficiary may void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds. § 736.1001(2)(i) Fla.Stat. An equitable lien may be an appropriate remedy in circumstances where a trustee has breached his or her fiduciary duty by transferring trust property to him or herself constituting constructive fraud. *Hirchert Family Trust v. Hirchert*, 65 So.3d 548 (Fla. 5th D.C.A 2011).

**Georgia:** See *Pittman v. Pittman*, 196 Ga. 397 (1943).
Hawaii:  

**Idaho:** “A person entitled to restitution is entitled, in an appropriate case, to a remedy by a proceeding in equity, and not merely to a remedy by a proceeding at law. The available remedies by a proceeding in equity include: (1) a decree establishing and enforcing a constructive trust of property; (2) a decree establishing and enforcing an equitable lien upon property; (3) a decree that the plaintiff be subrogated to the position of another claimant against the defendant. In some cases where the plaintiff would be entitled to enforce a constructive trust or equitable lien upon property if the property could be traced, but he is unable to trace the property, he is to maintain a proceeding in equity to obtain a decree establishing a personal liability of the defendant.” *Witt v. Jones* (1986) 111 Idaho 165, 172 [722 P.2d 474, 481] (citing Restatement of the Law on Restitution, § 160.)

**Illinois:** The research has not found an Illinois case or treaty on point.

**Indiana:** Burns Ind. Code Ann. § 30-4-3-ll(b) (2016), provides that if a trustee commits a breach of trust, the trustee is liable to the beneficiaries for: "( 1) any loss or depreciation in the value of the trust property as a result of the breach; (2) any profit made by the trustee through the breach; (3) any reasonable profit which would have accrued on the trust property in the absence of a breach; and (4) reasonable attorney's fees incurred by the beneficiary in bringing the action of the breach." The Trust Code Study Commission comments to Ind. Code § 30-4-3-ll(b) provide that: "This subsection adds reasonable attorney's fees to the liabilities imposed by the Restatement on a trustee who commits a breach of trust. See Restatement (Second), Trusts § 205 (1959)." *Eiteljorg v. Eiteljorg* (Ind. Ct. App. 2011) 951 N.E.2d 565,572 (a trustee is liable for lost profits stemming from the "trustee's misuse of or failure to acquire trust property.")

**Iowa:** “A court of equity has jurisdiction of all questions relative to the establishment, enforcement, and protection and preservation of all trusts… As a general rule, probate, surrogate's, or orphans' courts have no jurisdiction to establish and enforce a trust in an estate subject to their jurisdiction, except to the extent that such jurisdiction is conferred on them by valid statutory provisions. [Iowa statutes do not confer on probate courts jurisdiction to establish constructive trusts, so they may not do so.]” *Matter of Young's Estate* (Iowa 1978) 273 N.W.2d 388, 393.
Kansas: Where the trustee by the wrongful disposition of trust property acquires other property, the beneficiary is entitled at his option either to enforce a constructive trust of the property so acquired or to enforce an equitable lien upon it to secure his claim against the trustee for damages for breach of trust, as long as the product of the trust property is held by the trustee and can be traced. (*Kline v. Orebaugh* (1974) 214 Kan. 207, 211 [noting that this rule, dubbed the “trust pursuit rule,” has been recognized in Kansas on a number of occasions; see also *Woodrum v. Bank*, 60 Kan. 44.) *Clingman v. Hill*, 104 Kan. 145 [where a guardian of the estate of an incompetent person diverted the funds of the estate and invested them in land, taking the title thereto in the name of his wife, for no consideration for the land, and where the purpose of both was to misappropriate the funds and defraud the estate, the legal representative of the estate could maintain an action against the defaulting guardian and his wife to reclaim the trust fund so diverted, and to establish a lien upon the land in which the trust funds were wrongfully invested].) “Where the trust fund constitutes a part only of the purchase money of the estate, the court usually gives a lien on the land only for the amount of the trust fund invested, and interest; but where the entire land is the fruit of the trust fund, the *cestui que trust* has an election to take the land, or the trust fund and interest.” (*Merket v. Smith*, 33 Kan. 66.)

Kentucky: KRS 386B.10-010

Louisiana: As a civil law jurisdiction, Louisiana does not contain the same scope of equitable remedies that exist under the laws in other states. Consequently, “equitable liens” are not recognized in Louisiana law.

Maine: 18-B M.R.S.A. § 1001(b)(I) (“To remedy a breach of trust that has occurred or may occur, the court may do any of the following: (9) Subject to section 1012, void an act of the trustee, impose a lien or a constructive trust on trust property or trace trust property wrongfully disposed of and recover the property or its proceeds; or”).

Maryland: “Where the trustee by the wrongful disposition of trust property acquires other property, the beneficiary is entitled at his option either to enforce a constructive trust of the property so acquired or to enforce an equitable lien upon it to secure his claim against the trustee for damages for breach of trust, as long as the product of the trust property is held by the trustee and can be traced.” (*Corbett v. Hospelhorn* (1937) 172 Md. 257, 699.)

**Michigan:** MCL 700.7901 (2)(i) provides that the court may void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds.

**Minnesota:** There is no Minnesota law discussing whether a beneficiary can enforce an equitable lien against a trustee who sells property which he has a duty to retain. The Minnesota Supreme Court has adopted the Restatement (Second) of Trusts where there is no controlling Minnesota case law. Connecticut General Life Ins. Co. v. First Nat'l Bank, 262 N.W.2d 403, 405 (Minn. 1977); Kohler v. Fletcher, 442 N.W.2d 169, 171 (Minn. Ct. App. 1989).

**Mississippi:** Miss. Code Ann § 91-8-1001 (b )(9): "To remedy a breach of trust that has occurred or may occur, the court may ... impose a lien or a constructive trust on trust property .... "; Williford on Trusts (citing Simmons v. Simmons, 724 So. 2d 1054 (Miss. Ct. App. 1998)); (citing Planters Bank & Trust Co. v. Sklar, 555 So. 2d 1024 (Miss. 1990)): "The court will do so by imposing an equitable trust on the bare title to protect the interest of that person actually entitled to its benefits."

**Missouri:** RSMo.456.10-1001.2(9). "To remedy a breach of trust that has occurred or may occur, the court may: (9) subject to section 456.10-1012 void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds."

**Montana:** Mont. Code Ann. § 72-38-1001 ( “(2) To remedy a breach of trust that has occurred or may occur, the court may: [...] (i) subject to 72-38-1012, void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds[.]”)

**Nebraska:** There is no Nebraska case law discussing the enforcement of an equitable lien on the proceeds from the sale of trust property that was improperly sold by the trustee.

Though the court in Cepel v. Smallcomb, 261 Neb. 934, 941 (2001) rejected the trust beneficiaries’ argument that the Cepel Trust (of which they were beneficiaries) had an equitable lien on a parcel of real property as they failed to show that they had no adequate remedy at law (e.g., that they had obtained a judgment and tried to collect on it to no avail), the discussion regarding equitable liens suggests that such a remedy may be available if the proper showing is made (i.e., that there is no other adequate remedy at law, and all other means for collecting a debt have been exhausted).
Nevada: “1. If a trustee commits or threatens to commit a breach of trust, a beneficiary or cotrustee of the trust may maintain a proceeding for any of the following purposes that is appropriate: (a) To compel the trustee to perform his or her duties; (b) To enjoin the trustee from committing the breach of trust; (c) To compel the trustee to redress the breach of trust by payment of money or otherwise; (d) To appoint a receiver or temporary trustee to take possession of the trust property and administer the trust; (e) To remove the trustee; (f) To set aside acts of the trustee; (g) To reduce or deny compensation of the trustee; (h) To impose an equitable lien or a constructive trust on trust property; (i) To trace trust property that has been wrongfully disposed of and recover the property or its proceeds; 2. The provision of remedies in subsection 1 does not preclude resort to any other appropriate remedy provided by statute or common law.” Nev. Rev. Stat. Ann. § 163.115 (West).

New Hampshire: N.H. Rev. Stat. Ann. § 564-B: 10-1001(b) (“To remedy a breach of trust that has occurred or may occur, the court may: ... (9) subject to RSA 564-B: 10-1012, void an act of the trustee, impose a lien or a constructive trust on any trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds.”).


New Mexico: See Chaves v. Myer, under question number 3, above.

New York: In New York, a court will impose an equitable lien only if there is an “express or implied agreement” that there will be a lien on a specific piece of property. M & B Joint Venture, Inc. v Laurus Master Fund, Ltd., 12 N.Y.3d 798 (2009) (holding that a lender of a bridge loan did not have an equitable lien against the first mortgagee in a foreclosure case).

North Carolina: N.C.G.S.A. § 36C-10-1001(b)(9) (“To remedy a breach of trust that has occurred or may occur, the court may: (9) Subject to G.S. 36C-10-1012, void an act of the trustee, impose a lien or a constructive trust or trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds”).

North Dakota: In the case of a breach of trust, N.D. Cent. Code § 59-18-01, the court may “...void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds; or order any other appropriate relief.”
“Equity impresses a trust, lien, or charge on the mass for the restitution of the trust property or funds commingled therein until the trust property or fund is separated from the mass, and, where such separation is not possible, until adequate restitution, in some form authorized by law, is made.” *Engstrom v. Larson*, 77 N.D. 541, 563, 44 N.W.2d 97, 109 (1950)

**Ohio:** Ohio Rev. Code Ann. § 5810.01(B)(9) ("To remedy a breach of trust that has occurred or may occur, the court may do any of the following: (9) Subject to section 5810.12 of the Revised Code, void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds").

*Guardianship & Protective Servs. v. Setinsek*, No. 2010-T-0099, 2011 Ohio App. LEXIS 5382, at *4-5 (Ohio Ct. App. Dec. 19, 2011) (noting probate court's order expressly stated that the cause would continue until the Trust assets could be reviewed and a determination made whether any of the trustee's transactions should be voided).

**Oklahoma:** Trust property obtained by a third party can be impressed with an equitable lien or constructive trust. *Peyton v. McCaslin*, 1966 OK 4, 417 P.2d 316, 320; 60 Okla. Stat. § 175.57(B)(8) (authorizing courts to impose an equitable lien or constructive trust “upon on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds").

**Oregon:** In the case of a breach of trust, O.R.S. § 130.800 allows a court to void an act of the trustee, *impose a lien* or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds or order any other appropriate relief.”

The statutes of limitations and time limitations provided by ORS 130.350 to 130.450 do not affect any proceeding to enforce a mortgage, pledge or other lien upon property of the trust estate. O.R.S. § 130.435

**Pennsylvania:** 20 Pa. C.S. § 7781(b)(9)(ii) (“To remedy a breach of trust that has occurred or may occur, the court may order any appropriate relief, including . . . imposing a lien or a constructive trust on trust property”). *See also Stopp’s Estate*, 199 A. 493, 495 (Pa. 1938) (where trustee bank improperly invested trust assets in a mortgage pool managed by the trustee bank, beneficiary could have sought an equitable lien against the mortgage pool as security for a surcharge action, but for the insolvency of the trustee bank).

**Rhode Island:** *Slater v. Oriental Mills*, 27 A. 443, 443 (R.I. 1893)
**South Carolina:** S.C. Code 1976 § 62-7-1001 (“To remedy a breach of trust that has occurred or may occur, the court may: (9) Subject to Section 62-7-1012, void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds”).

**South Dakota:** N/A


**Texas:** See Texas Trust Code §§ 114.001 and 114.008 supra. Under Texas Trust Code §114.008 (a)(10)a Court may implement virtually any equitable remedy. Texas Courts routinely rely on the Restatements of Trusts and legal treatises such as *Scott and Ascher on Trusts* and *Bogert, Trusts and Trustees* as legal authority for their decisions if the provisions of these sources do not conflict with statutory trust law or specific Texas case law.

**Utah:** “To remedy a breach of trust that has occurred or may occur, the court may: . . . impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds.” Utah Code Ann. § 75-7-1001 (emphasis added).

**Vermont:** There is no Vermont law on this subject. Where the Vermont Trust Code does not specifically provide law on a subject, courts look to Vermont common law as a supplement (14A V.S.A § 106) followed by the restatements and common law from other states. (*Estate of Nancy B. Alden v. Julia Dee and Todd Alden* (2010) 427-12-06 Bncv [Vermont trial court opinion].)

**Virginia:** “It is a well settled doctrine that where a trustee or other person standing in a fiduciary character, makes a profit out of any transactions within the scope of his agency, that profit will belong to the *cestui que trust*. And if a trustee should lay out money in land when not so authorized by the terms of the trust, the *cestui que trust* has an option either to take the property or to claim the money.” *Miller v. Holcombe's Ex'r*, 50 Va. 665, 677 (1853).
**Washington:** Washington courts allow for the application of equitable liens when a trustee misappropriates trust funds. In *Casterline v. Roberts* 284 P.3d 743, 744 (Wash. Ct. App. 2012), a trustee used money from her mother’s trust to purchase property and build a home. Upon investigation by the court, the trustee transferred her interest in the property to her husband without consideration. The court imposed an equitable lien on the property because the trustee had violated her fiduciary duty by investing trust funds in a home which did not benefit the trust and wrongfully transferring the property to her husband.

**West Virginia:** W. Va. Code Ann. § 44D-10-1001 (West) “(b) To remedy a breach of trust that has occurred or may occur, the court may: […] (9) Subject to section one thousand twelve of this article, void an act of the trustee, impose a lien or a constructive trust on trust property or trace trust property wrongfully disposed of and recover the property or its proceeds[.]”

**Wisconsin:** Wis. Stat. § 701.1001(2)(i) provides: "To remedy a breach of trust that has occurred or may occur, a court may do any of the following: (i) . . . impose a lien or a constructive trust on trust property." Wisconsin courts have historically looked to the Restatement (Second) of Trusts as a guide to the common law. See e.g. *Matter of Estate of Kugler*, 117 Wis. 2d 314, 344 N.W.2d 160, 166 (1984); *Dick & Reuteman Co. v. Doherty Realty Co.*, 16 Wis. 2d 342, 114 N.W.2d 475, 478 (1962). Accordingly, § 208 of the Restatement (Second) of Trusts likely would be influential in Wisconsin courts.

**Wyoming:** “To remedy a breach of trust that has occurred or may occur, the court may: . . . impose a lien or a constructive trust on trust property or trace trust property wrongfully disposed of and recover the property or its proceeds.” Wyo. Stat. § 4-10-1001 (emphasis added)
10) **DISGORGE PROFIT.** “[A] trustee is liable for any profit he has made through his breach of trust even though the trust has suffered no loss. Thus the trustee will be held liable for profits made through a prohibited dealing even though the trust received or paid fair market value for the property.” Restatement (Third) of Trusts § 100, Reporter’s Notes to cmt. c (2012); see also Restatement (Third) of Restitution and Unjust Enrichment §§ 43 cmt. h, and 51(5) (2011); Restatement (Third) of Trusts: Prudent Investor Rule § 205 (1992); Restatement (Second) of Trusts § 205 (1959); Unif. Trust Code §§ 1001(b)(3), 1002, 1003; Bogert, Trusts and Trustees § 862 (2d ed. rev. 1995); Loring and Rounds, A Trustee’s Handbook § 7.2.3.2 (2012); SEC v. Banner Fund Int’l (D.C. Cir. 2000) 211 F.3d 602, 617; Nickel v. Bank of Am. Nat. Trust & Sav. Ass’n, 290 F.3d 1134, 1138-1139 (9th Cir. 2002); Uzyel v Kadisha (2010) 188 Cal. App. 4th 866, 892-894; Meister v Menninge (2014) 230 Cal. App. 4th 381,398.

**Alabama:** See: ALA. CODE § 19-3B-1003 (1975) (Damages in absence of breach): (a) A trustee is accountable to an affected beneficiary for any profit made by the trustee arising from the administration of the trust, even absent a breach of trust; (b) Absent a breach of trust, a trustee is not liable to a beneficiary for a loss or depreciation in the value of trust property or for not having made a profit.

**Alaska:** “Indeed so great a breach of trust is it for the representative to engage in business with the funds of the estate that the law charges him with all losses thereby incurred without on the other hand allowing him to receive the benefit of any profits which he may make.” Cochran v. City of Nome (D. Alaska 1944) 10 Alaska 425, 436; see also Alaska Stat. Ann. § 13.16.380 (duty of personal representative; possession of estate).

**Arizona:** “[A] trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of either: 1. The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; 2. The profit the trustee made by reason of the breach.” Ariz. Rev. Stat. Ann. § 14-11002.

**Arkansas:** Arkansas has enacted the Uniform Trust Code and sections 1001(b)(3), 1002 and 1003 are codified at Ark. Code Ann. § 28-73-1001(b)(3), 1002 and 1003. They have not been cited by any Arkansas appellate decisions. No relevant Arkansas appellate decisions cite the Restatement sections. Trustee couple who leased farm and then subleased and kept profit instead of paying trust breached the trust. They were liable for profits. Hosey v. Burgess, 319
Ark. 183, 890 S.W.2d 262 (1995). "There is no question that a fiduciary who uses trust property for his own benefit is chargeable with the fair and reasonable rental value thereof .... The question becomes what the fair rental value is. Based on the testimony of the four neighboring landowners, the rental charges ranged from a low of $3.26 per acre to a high of $6.25 per acre, with the average charge being $4.18 per acre. The rental value of the property was a question of fact for the trial court, and the value chosen fell within the range of testimony presented." Pitts v. Mitchell, No. CA05-907, 2006 WL 864552, at *4 (Ark, Ct. App, Apr. 5, 2006) (unpublished decision).

**California:** A trustee who profits from a breach of trust may be required to disgorge the profits, plus interest. (Prob. C. § 16440(a)(2). See also Nickel v. Bank of America (9th Circ. 2002) 290 F.3d 1134, 1138 (finding disgorgement of profits the appropriate remedy for a bank trustee that had overcharged on fees, that it was unnecessary to trace overcharges to specific profits, and that plaintiffs were entitled to a proportionate share of bank profits during years of misappropriation). Also Uzyel v. Kadisha (2010) 188 Cal.App.4th 866, 893 (holding no need to trace funds to support award under section 16440 (a)(2) so long as causal connection is shown between breach and profits to be disgorged).

**Colorado:** A fiduciary is forbidden by law to make a profit out of dealing on behalf of the estate. In re Macky's Estate, 73 Colo. 1 (1922); Murray v. Stuart, 79 Colo. 454 (1926).

**Connecticut:** Appeal of Matthews (1904) 76 Conn. 654, 57 A. 694, 697; Efthimiou v. Smith, 202 WL 1447642.

**Delaware:** Yes. “A beneficiary may charge a trustee who commits a breach of trust with… (2) The profit that the trustee made by reason of the breach.” Del. Code Ann. tit. 12, § 3582(2); see also In re The Volftsun/Landy Trust, No. 4635-VCL 2013 WL 1654881 (Del. Ch. Apr. 16 2013) (Diminution-in-value damages awarded against trustee to disgorge profit earned for breach of fiduciary duty).

**Florida:** A trustee who commits a breach of trust is liable for the greater of (a) the amount required to restore the value of the trust property and trust distributions to what they would have been if the breach had not occurred, including lost income, capital gain, or appreciation that would have resulted from proper administration; or (b) the profit the trustee made by reason of the breach. § 736.1002(1) Fla.Stat. The Florida statute is similar to Restatement (Third) of Trusts: Prudent Investor Rule § 205 (1992).

**Georgia:** O.C.G.A. § 53-12-302.
Hawaii: See Steiner in section 1) above.

Idaho: “If a trustee breaches his duty of loyalty to the beneficiary by entering into competition with the beneficiary, the beneficiary can compel the trustee to account for any profit made. The beneficiary, however, can only compel the trustee to account if the trustee is reimbursed for his expenses.” Pickering v. El Jay Equipment Co., Inc. (Idaho Ct. App. 1985) 108 Idaho 512, 518 [700 P.2d 134, 140].

Illinois: Yes. Illinois courts would order a breaching trustee to disgorge profits. “When a breach of trust is established, the trustee is liable for: (1) any loss or depreciation in value of the trust; (2) any profit made by him through the breach of trust; or (3) any profit which would have accrued to the trust absent the breach of trust.” In re Estate of Halas, 568 N.E.2d 170, 181 (Ill. App. Ct. 1991) (citing Restatement (Second) of Trusts § 205.); “When trustee breaches trust agreement, whether willfully, negligently, or by oversight, he is liable for any loss to estate resulting from breach and must place beneficiaries in position they would have held had breach not occurred . . . Trustee in violation of trust is chargeable with (1) any loss or depreciation in value of trust property as result of breach; (2) any profit made by him as result of the breach; or (3) any profit which would have accrued to trust had there been no breach.” Grot v. First Bank of Schaumburg, 684 N.E.2d 1016, 1018-19 (Ill. App. Ct. 1997) (emphasis added).

Indiana: Burns Ind. Code Ann. § 30-4-3-11(b) (2016), provides that if a trustee commits a breach of trust, the trustee is liable to the beneficiaries for: "( 1) any loss or depreciation in the value of the trust property as a result of the breach; (2) any profit made by the trustee through the breach; (3) any reasonable profit which would have accrued on the trust property in the absence of a breach; and (4) reasonable attorney's fees incurred by the beneficiary in bringing the action of the breach." The Trust Code Study Commission comments to Ind. Code § 30-4-3-11(b) provide that: "This subsection adds reasonable attorney's fees to the liabilities imposed by the Restatement on a trustee who commits a breach of trust. See Restatement (Second), Trusts § 205 (1959)."

Iowa: “A beneficiary may charge a trustee who commits a breach of trust with the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred, or, if greater, the amount of profit lost by reason of the breach.” Iowa Code Ann. § 633A.4503 (West); “The law recognizes three alternative remedies available to beneficiaries when the trustee has breached the duty of loyalty to the trust….Second, the trustee is liable for any profit made through the breach. Third, the beneficiary may recover from the trustee a profit that would have accrued to the trust if there had been no breach. Restatement (Second) of Trusts § 205 (1959); Bogert, Trusts and
Kansas: KSA 58a-1003(a) provides that a "trustee is accountable to an affected beneficiary for any profit made by the trustee, other than compensation earned, arising from the administration of the trust, even absent a breach of trust." (Emphasis added.) Subsection (b) provides that "[a]bsent a breach of trust, a trustee is not liable to a beneficiary for a loss or depreciation in the value of trust property or for not having made a profit." Under KSA 58a-1002, if the trustee has breached his/her duties, the trustee will be liable to the beneficiaries for the greater of: (1) The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; (2) the profit the trustee made by reason of the breach; or (3) if the trustee embezzles or knowingly converts to the trustee's own use any of the personal property of the trust, the trustee shall be liable for double the value of the property so embezzled or converted."

Kentucky: KRS 386B.10-010; KRS 386B.10-030.

Louisiana: Louisiana provides for the remedy of disgorgement of profits made by a trustee as a result of a breach of trust. La. Rev. Stat. Ann. 9:2201. General Rule: If a trustee commits a breach of trust he shall be chargeable with: (1) A loss or depreciation in value of the trust estate resulting from a breach of trust; or (2) A profit made by him through breach of trust; or (3) A profit that would have accrued to the trust estate if there had been no breach of trust.

Maine: 18-B M.R.S.A. § 1001(2)(C) ("To remedy a breach of trust that has occurred or may occur, the court may do any of the following: (C) Compel the trustee to redress a breach of trust by paying money, restoring property, or other means"). 18-B M.R.S.A. § 1002 cmt. ("Even if a loss has not occurred, the trustee may not benefit from the improper action and is accountable for any profit made by reason of the breach"). 18-B M.R.S.A. § 1003 ("(2) Absent a breach of trust, a trustee is not accountable to a beneficiary for any profit made by the trustee arising from the administration of the trust").

Maryland: Section 14.5-902 of the MTA makes the profit obtained through breach of trust, one measure of damages. That section sets damages for breach of trust at "the greater of: (1) [t]he amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or (2) [t]he profit the trustee made by reason of the breach." (MD Code, Estates and Trusts, § 14.5-902(a)(1)-(2).) It also provides that where there are multiple trustees, "[e]xcept as otherwise provided in this subsection, if more than one trustee is liable to the beneficiaries for a breach of trust, a trustee is entitled to contribution from the other trustee or trustees that are also liable; but, (2) A trustee that

received a benefit from a breach of trust under this subsection is not entitled to contribution from another trustee to the extent of the benefit received.” (Id. at (b)(1)-(2).)


**Michigan:** Per MCL 700.7902, "A trustee who commits a breach of trust is liable to the trust beneficiaries affected for whichever of the following is larger: (a) The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred. (b) The profit the trustee made by reason of breach." MCL 700.7903(1) provides, "A trustee is accountable to an affected trust beneficiary for any profit made by the trustee arising from the administration of the trust, even absent a breach of trust."

**Minnesota:** Section 1002 of the Minnesota UTC makes the profit made by a breach of trust, one measure of damages. Section 1002 states: (a) A trustee who commits a breach of trust is liable for the greater of: (1) the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or (2) the profit the trustee made by reason of the breach; (b) If more than one trustee is liable for a breach of trust, a trustee is entitled to contribution or indemnity from the other trustee or trustees as the court may determine. Schug v. Michael, 245 N.W.2d 587, 592 (Minn. 1976) confirmed that where a trustee commits a breach of trust by selling trust property to himself, the proper measure of damages is the profit he received as a result of the sale.

**Mississippi:** Miss. Code Ann § 91-8-1002(a)(I)(B): "A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of (A) the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred, or the profit the trustee made by reason of the breach .... "; "The trustee can derive no personal benefit from his dealing with the trust fund or property, much less can he, after his relation of trustee has ceased, hold on to the trust property or the proceeds thereof improperly acquired during the continuance of his trusteeship. A court of equity will force him to disgorge." Pressly v. Ellis, 48 Miss. 574, 576 (1873) (citations omitted); Wirtz v. Gordon, 192 So. 29, 36 (Miss. 1939) (citing McGowan v. McGowan, 48 Miss. 553); "Executors and administrators are trustees for the benefit of creditors and distributees, so that on selling the land to pay debts, they are bound to obtain as high a price as possible, and cannot directly or indirectly be purchasers thereat." 8 MS Prac. Encyclopedia MS Law § 73: 17 (citing Alexander v. Hancock, 177 Miss. 590, 171 So. 544 (1937): "In general, a trustee is liable to the beneficiaries for a breach of trust. A trustee cannot use the assets of a trust so as to derive personal profits, and whatever profit is made belongs to the trust”; Securities and

Missouri: RSMo. 456.10-1001.2(3). "To remedy a breach of trust that has occurred or may occur, the court may: (3) compel the trustee to redress a breach of trust by paying money, restoring property, or other means." RSMo.456.10-1002; RSMo.456.10-1003. "1. A trustee is accountable to an affected beneficiary for any profit made by the trustee arising from the administration of the trust, even absent a breach of trust. 2. Absent a breach of trust, a trustee is not liable to a beneficiary for a loss or depreciation in the value of trust property or for not having made a profit"; Barnett v. Rogel's, 400 S.W.3d 38, 40 (Mo. App. S.D. 2013); Parker v. Pine, 617 S.W.2d 536, 540 (Mo. App. W.D.1981); Luyties' Estate v. Scudder, 432 S.W.2d 210 (Mo. 1968).

Montana: Mont. Code Ann. § 72-38-1001 (“(2) To remedy a breach of trust that has occurred or may occur, the court may: […] (c) compel the trustee to redress a breach of trust by paying money, restoring property, or other means[.]”) Mont. Code Ann. § 72-38-1002 (“(1) A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of: (a) any loss or depreciation in value of the trust estate resulting from the breach of trust, with interest; (b) the profit the trustee made by reason of the breach of trust, with interest; or (c) any profit that would have accrued to the trust estate if the loss of profit is the result of the breach of trust.”). Mont. Code Ann. § 72-38-1003 (“(1) A trustee is accountable to an affected beneficiary for any profit made by the trustee arising from the administration of the trust, even absent a breach of trust.”)

Nebraska: Neb. Rev. St. § 30-3892 (UTC 1003) provides:
(a) A trustee is accountable to an affected beneficiary for any profit made by the trustee arising from the administration of the trust, even absent a breach of trust.
(b) Absent a breach of trust, a trustee is not liable to a beneficiary for a loss or depreciation in the value of trust property or for not having made a profit.
Under Neb. Rev. St. § 30-3891 (UTC 1002), if the trustee has breached his/her duties, the
trustee will be liable to the beneficiaries for the greater of: (1) The amount required to restore
the value of the trust property and trust distributions to what they would have been had the
breach not occurred; or (2) the profit the trustee made by reason of the breach.

**Nevada:** “In a breach of contract action, ‘lost profits are generally an appropriate measure of
damages so long as the evidence provides a basis for determining, with reasonable certainty,
what the profits would have been had the contract not been breached.’” Georges Tannoury,
1270582, at *1, reh’g denied (May 30, 2014), citing Eaton v. J.H., Inc. (1978) 94 Nev. 446,
450; “1. If a trustee commits or threatens to commit a breach of trust, a beneficiary or
cotrustee of the trust may maintain a proceeding for any of the following purposes that is
appropriate: (a) To compel the trustee to perform his or her duties; (b) To enjoin the trustee
from committing the breach of trust; (c) To compel the trustee to redress the breach of trust
by payment of money or otherwise; (d) To appoint a receiver or temporary trustee to take
possession of the trust property and administer the trust; (e) To remove the trustee; (f) To set
aside acts of the trustee; (g) To reduce or deny compensation of the trustee; (h) To impose an
equitable lien or a constructive trust on trust property; (i) To trace trust property that has been
wrongfully disposed of and recover the property or its proceeds; 2. The provision of remedies
in subsection 1 does not preclude resort to any other appropriate remedy provided by statute

**New Hampshire:** N.H. Rev Stat. Ann. § 564-B: 1O-1002(a) ("A trustee who commits a
breach of trust is liable to the beneficiaries affected for the greater of: (I) the amount required
to restore the value of the trust property and trust distributions to what they would have been
had the breach not occurred; or (2) the profit the trustee made by reason of the breach.").
Ashuelot R.R. v. Elliot, 57 N.H. 397 (1874) (finding where a trustee acted improperly he must
account for any profits made, even if no financial injury occurred). In re Guardianship of
Dorson, 934 A.2d 545, 549 (N.H. 2007) ("Other remedies include ... requiring the trustee to
disgorge any profit that the trustee made through the breach of trust,").

**New Jersey:** In re Heyman Trust, 2008 N.J. Super. Unpub. LEXIS 1435,2008 WL 2885272
(App.Div. July 29, 2008); Restatement (second) of Trusts § 205; County of Essex v. First
(D.N.J. 2001)

**New Mexico:** Miller v. Bank of America, N.A., as Trustee, 2015-NMSC-022.
New York: Where the court found trustees purposely purchased stock from a trust days before the dividend record date, thus denying the trust the benefit of the income, it imposed a surcharge on the trustees in an amount equal to that of the dividend. *In re Soss’ Estate*, 71 N.Y.S.2d 23, 28 (N.Y. Surr. Ct. 1947).

North Carolina: N.C.G.S.A. § 36C-10-1001(b)(3) (“To remedy a breach of trust that has occurred or may occur, the court may do any of the following: (3) Compel the trustee to redress a breach of trust by paying money, restoring property, or other means”). N.C.G.S.A. § 36C-10-1002 cmt. (“Even if a loss has not occurred, the trustee may not benefit from the improper action and is accountable for any profit made by reason of the breach”). N.C.G.S.A. § 36C-10-1003 (“(a) A trustee is accountable for any profit made by the trustee arising from the administration of the trust, even absent a breach of trust. Nothing in this section limits a trustee’s right to compensation under G.S. 36C-7-708 or payments allowed under G.S. 36C-8-802(f); (b) Absent a breach of trust, a trustee is not liable for a loss of depreciation in the value of trust property or for not having made a profit”); *Lichtenfels v. N. Carolina Nat. Bank*, 151 S.E.2d 78, 79 (N.C. 1966) (holding that evidence supported finding that defendant trustee gave due attention to composition of trust as to which the trustee was authorized to retain stock as a proper investment of trust funds, and allowing such investment to remain intact was within trustee’s sole discretion); *Cheshire v. First Presbyterian Church of Raleigh*, 33 S.E.2d 866, 868 (N.C. 1945) (finding that a successor trustee of testamentary trust was not liable for losses resulting from depreciation in value of security on which trust funds were loaned by predecessor trustees, in absence of evidence that investment were not made in good faith or due diligence).

North Dakota: North Dakota Century Code §59-18-02 (“A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred or the profit the trustee made by reason of the breach.”); see also *Broten v. Broten*, 2015 ND 127, ¶ 21, 863 N.W.2d 902. North Dakota Century Code § 59-18-03 (“Absent a breach of trust, a trustee is not liable to a beneficiary for a loss or depreciation in the value of trust property or for not having made a profit.”)

Ohio: Ohio Rev. Code Ann. § 5810.01(B)(3) (“To remedy a breach of trust that has occurred or may occur, the court may do any of the following: (3) Compel the trustee to redress a breach of trust by paying money, restoring property, or other means”).

Ohio Rev. Code Ann. § 5810.02(A)(2) (“A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of the following: ... (2) The profit the trustee made by reason of the breach.”).
Ohio Rev. Code Ann. § 5810.02 cmt. ("Even if a loss has not occurred, the trustee may not benefit from the improper action and is accountable for any profit made by reason of the breach").

Ohio Rev. Code Ann. § 5810.03("(A) Absent a breach of trust, a trustee is not accountable to a beneficiary for any profit made by the trustee arising from the administration of the trust").

_Wills v. Kalis_, No. 93900, 2010 Ohio App. LEXIS 3674, at *9 (Ohio Ct. App. Sept. 16, 2010) (explaining that "under § 5810.0l(B)(3), a trial court may '[c]ompel the trustee to redress a breach of trust by paying money, restoring property, or other means.' The Official Comments under this section explain that '[t]he reference to payment of money in subsection (B)(3) includes liability that might be characterized as damages, restitution, or surcharge.' Thus, if a trial court chooses to remedy a breach of trust by compelling the trustee to pay money, then the court must look to R.C. 5810.02, 'damages for breach of trust,' to calculate the damages").

_Oklahoma_: Under Oklahoma law, “[a] beneficiary may charge a trustee who commits a breach of trust with the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred, or, if greater, the profit that the trustee made by reason of the breach.” 60 Okla. Stat. § 175.57(C).

_Oregon_: ORS § 130.805 (trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of (a) The amount of damages caused by the breach; (b) The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or (c) The profit the trustee made by reason of the breach.)

_Thankland v. Arnold Thomas Seed Serv., Inc._, 277 Or 165, 174, 560 P2d 597, 602 (1977) (“If the trustee in breach of his duty of loyalty to the beneficiary…causing a loss to the trust estate, he is chargeable with the loss, even though the trustee personally makes no profit from such competition; and if he makes a profit thereby, he is accountable for the profit.”)

_Pennsylvania_: 20 Pa. C.S. § 7781(b)(3) (“To remedy a breach of trust that has occurred or may occur, the court may order any appropriate relief, including . . . Compelling the trustee to redress a breach of trust by paying money, restoring property or other means”).  See also Paxson Trust I, 893 A.2d 99, 122-23 (2006).  In Paxson, the settlor placed residential real estate into trust for the benefit of his grandchildren, naming their parents (settlor’s daughter and her husband) as trustees.  The trustee parents obtained various loans for repairs on the residential home, as well as to purchase an adjoining lot and separate commercial properties not owned by the trust, by using the trust property as collateral.  The Pennsylvania Superior Court held that (a) the use of trust property by the trustees for their own personal benefit
constituted a breach of trust; and (b) the trustees would be chargeable for the profits they made from their use of trust property, in this case, any profits made on the loan proceeds obtained by mortgaging the trust-owned real estate. Pointing to longstanding Pennsylvania law, the court rejected the parent trustees’ argument that where there is no loss to a trust, a trustee is not subject to any monetary remedy.


**South Carolina:** S.C. Code 1976 § 62-7-1001(b)(3) (“To remedy a breach of trust that has occurred or may occur, the court may: (3) Compel the trustee to redress a breach of trust by paying money, restoring property, or other means”).

S.C. Code 1976 § 62-7-1002 cmt. (“Even if a loss has not occurred, the trustee may not benefit from the improper action and is accountable for any profit made by reason of the breach”).

S.C. Code 1976 § 62-7-1003 (“(A) Absent a breach of trust, a trustee is not accountable to a beneficiary for any profit made by the trustee arising from the administration of the trust, even absent a breach of trust”).

**South Dakota:** SDCL § 55-2-2 (“A trustee may not in any manner use or deal with the trust property for his own profit or for any other purpose unconnected with the trust. If he does so, he may, at the option of the beneficiary, be required to account for all profits thereby made or to pay the value of the use of the trust property, and if he has disposed thereof, to replace it with its fruits or to account for its proceeds with interest.”)

SDCL § 55-2-10 (“A trustee who uses or disposes of the trust property in any manner not authorized by the trust but in good faith and with intent to serve the interest of the beneficiary is liable only to make good whatever is lost to the beneficiary by his error.”)

The remedies stated in § 205 of the Restatement (Second) are applicable when the trustee violates his duty of loyalty. Restatement (Second) of Trusts § 206 (1959); *Willers v. Wettesstad*, 510 N.W.2d 676, 681 (S.D. 1994). The comment to section 205 states, “If the trustee commits a breach of trust, the beneficiary may have the option of pursuing a remedy which will put him in the position in which he was before the trustee committed the breach of trust; or of pursuing a remedy which will give him any profit which the trustee has made by committing the breach of trust; or of pursuing a remedy which will put him in the position in which he would have been if the trustee had not committed the breach of trust.”
Tennessee: Tenn. Code Ann. § 35-15-1002(a), Damages for breach of trust. Comments provide: “Even if a loss has not occurred, the trustee may not benefit from the improper action and is accountable for any profit the trustee made by reason of the breach.”

Texas: See Texas Trust Code §§ 114.001 (a) supra.

Utah: “A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of: (a) the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or (b) the profit the trustee made by reason of the breach.” Utah Code Ann. § 75-7-1002 (emphasis added). “A trustee is accountable to an affected beneficiary for any profit made by the trustee arising from the administration of the trust, even absent a breach of trust.” Utah Code Ann. § 75-7-1003.

Vermont: 14A V.S.A. §1003 provides:“(a) A trustee is accountable to an affected beneficiary for any profit made by the trustee arising from the administration of the trust, even absent a breach of trust. Nothing in this section limits a trustee's right to reasonable compensation under section 708 of this title.(b) Absent a breach of trust, a trustee is not liable to a beneficiary for a loss or depreciation in the value of trust property or for not having made a profit.”

Virginia: “A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of: 1. The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or 2. The profit the trustee made by reason of the breach.” Va. Code § 64.2-793-A (2012).

“It is also well established by the authorities … that if an agent, trustee, or other fiduciary makes, by fraud, deceit, or concealment, a profit out of a sale of the trust subject, ‘such profit belongs exclusively to the principal.’” Heckscher v. Blanton, 111 Va. 648, 69 S.E. 1045, 1048 (1911).

“It is a well settled doctrine that where a trustee or other person standing in a fiduciary character, makes a profit out of any transactions within the scope of his agency, that profit will belong to the cestui que trust. And if a trustee should lay out money in land when not so authorized by the terms of the trust, the cestui que trust has an option either to take the property or to claim the money.” Miller v. Holcombe's Ex'r, 50 Va. 665, 677 (1853).

Washington: RCW 11.98.085(1)(b) requires that a trustee disgorge “any profit the trustee made by reason of the breach.” Thus, In re Washington Builders Benefit Trust’s court found
that trustees had breached their trust duties by commingling trust funds with their own, and by retaining approximately $400,000 interest earned on trust funds (See at 293 P.3d 1206, 1230 (Wash. Ct. App. 2013). Because the court found that a “trustee can make no profit out of his trust,” the appropriate remedy was for the trustee to return the $400,000 profit in interest (See Id at 1231). Similarly, a trustee in Tucker v. Brown was liable for the full amount of money he received from the sale of bonds belonging to the trust (see at 150 P.2d 604, 674 (Wash. 1944). The court’s judgment required that trustee disgorge the profits he received from the improper sale of trust property.

**West Virginia:** W. Va. Code Ann. § 44D-10-1001 (West) “(b) To remedy a breach of trust that has occurred or may occur, the court may: […] (3) Compel the trustee to redress a breach of trust by paying money, restoring property or other means[.]” W. Va. Code Ann. § 44D-10-1002 (West) “(a) A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of: (1) The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or (2) The profit the trustee made by reason of the breach.” But see W. Va. Code Ann. § 44D-10-1003 (West) “Absent a breach of trust, a trustee is not liable to a beneficiary for a loss or depreciation in the value of trust property or for not having made a profit.”

**Wisconsin:** Wis. Stat. § 701.1002(1) provides: "A trustee who commits a breach of trust is liable to an affected beneficiary for the greater of the following: (a) The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred. (b) The profit the trustee made by reason of the breach." In the context of a receivership, the Wisconsin Court of Appeals in Community Nat. Bank v. Medical Ben. Adm’rs, LLC, 242 Wis.2d 626, 626 N.W.2d 340 (Ct. App. 2001) stated: “If a receiver breaches its fiduciary duty by profiting from the receivership at the expense of the receivership estate, the court must compel it to disgorge its profits and apply them to the receivership estate. . . . Those views are consistent with the duty of loyalty imposed on other fiduciaries under Wisconsin law, and we adopt them.” 626 N.W.2d at 344 (citation omitted).

**Wyoming:** “A fiduciary who commits a breach of trust is liable to the beneficiaries affected for the greater of: (i) The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or (ii) The profit the fiduciary made by reason of the breach. Wyo. Stat. § 4-10-1002 (emphasis added). “A fiduciary is accountable to an affected beneficiary for any profit made by the fiduciary arising from the administration of the trust, even absent a breach of trust.” Wyo. Stat. § 4-10-1003.
11) **WHAT WOULD HAVE BEEN EARNED BUT FOR THE BREACH.** “[T]he liability of a trustee who is sued and found to have committed a breach of trust is the amount required to restore the values of the trust estate and its distributions to what they would have been if the affected portion of the trust estate had been properly administered.” Restatement (Third) of Trusts § 100, cmt. b (2012); see also Restatement (Third) of Trusts: Prudent Investor Rule § 205 (1992); Restatement (Second) of Trusts § 205 (1959); Unif. Trust Code § 1002; Scott and Ascher on Trusts § 24.9 (5th ed. 2007); Scott and Ascher on Trusts § 24.9 (5th ed. 2007); Bogert, Trusts and Trustees § 862 (2d ed. rev. 1995); Loring and Rounds, A Trustee’s Handbook § 7.2.3.2 (2012); Noggle v. Bank of Am. (1999) 70 Cal.App.4th 853; 862; California Ironworkers Field Pension Trust v. Loomis Sayles & Co. (9th Cir. 2001) 259 F.3d 1036, 1047; GIW Indus, Inc. v. Trevor, Stewart, Burton & Jacobsen, Inc. (11th Cir. 1990) 895 F.2d 729, 733.

**Alabama:** See ALA. CODE § 19-3B-1002 (1975) (Damages for breach of trust): (a) A trustee who commits a breach of trust is liable to the beneficiaries affected for: (1) the greater of: (i) the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or (ii) the profit the trustee made by reason of the breach; (2) any measure of damage otherwise provided by law. (b) Except as otherwise provided in this subsection, if more than one trustee is liable to the beneficiaries for a breach of trust, a trustee is entitled to contribution from the other trustee or trustees. A trustee is not entitled to contribution if the trustee was substantially more at fault than another trustee or if the trustee committed the breach of trust in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries. A trustee who received a benefit from the breach of trust is not entitled to contribution from another trustee to the extent of the benefit received.

**Alaska:** “Indeed so great a breach of trust is it for the representative to engage in business with the funds of the estate that the law charges him with all losses thereby incurred….” Cochran v. City of Nome (D. Alaska 1944) 10 Alaska 425, 436 (emphasis added).

**Arizona:** “[A] trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of either: 1. The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; 2. The profit the trustee made by reason of the breach.” Ariz. Rev. Stat. Ann. § 14-11002.

**Arkansas:** Arkansas has enacted the Uniform Trust Code and section 1002 is codified at Ark Code Ann. § 28- 73- 1002. It has not been cited by any Arkansas appellate decisions. No relevant Arkansas appellate decisions cite the Restatement sections. Bank liable for breach of trust, must reimburse beneficiary for amount wrongfully paid, plus income which it would
have received between time of wrongful distribution and time funds returned to trust, rate of return at time of distribution. Liable for attorney's fees. This case applies Florida law. *Dunkley v. Peoples Bank & Trust*, 728 F. Supp. 547 (W.D. Ark. 1989). A father and mother created a trust that directed equal dispositions to their son and daughter, but before the father's death, in light of gifts he had given inter vivos, he executed an instrument called "Summary" wherein he directed an equalization of the trust dispositions in light of the "advancements" and specified an interest rate of 10%. The son became successor trustee when the father died but both mother and daughter accused him of self-dealing and asked for his removal. The court replaced him with an institutional trustee and ordered that the appellee should be paid $87,000 from the trust upon the final distribution. On appeal the daughter argued that instead of a 6% interest rate from October 1989 (the date of the gift?) to October 1992 (the date of the lawsuit?) and an 8.5% interest rate thereafter, the rate should be 10% as provided in the Summary. The court on appeal determined there was no error. *Sease v. Alexander*, No. CA 93-607, 1994 WL 188608, at *3 (Ark. Ct. App, May 11, 1994) (unpublished decision).

**California:** *Noggle v. Bank of America* (1999) 70 Cal.App.4th 853, 862 (where a bank failed to invest assets properly, damages should be calculated based on the amount the affected trusts actually would have earned); *California Ironworkers Field Pension Trust v. Loomis Sayles & Co.* (2001) 259 F.3d 1036, 1047 (court applies “permissible percentage standard,” measuring damages by calculating difference in yields between actual portfolio with imprudent proportion of an investment and hypothetical portfolio containing an appropriate proportion).

**Colorado:** *Marshall v. Grauberger*, 796 P.2d 34, 37 (Colo. Ct. App. 1990) (“[E]quity dictated that the wife be put in the position in which she would have been had the husband [trustee] sold her shares when he sold his own.”); *Buder v. Sartore*, 774 P.2d 1383, 1390 (Colo. 1989) (“thus putting them in the position they would have enjoyed had Buder not inappropriately invested their funds”).

**Connecticut:** *State ex rel. Raskin v. Schachat* (1935) 120 Conn. 137, 180 A. 502, 505.

**Delaware:** Yes. “A beneficiary may charge a trustee who commits a breach of trust with: (1) The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred.” Del. Code Ann. tit. 12, § 3582(1); *see also* Del. Code Ann. tit. 12, § 3581(b)(3) (“To remedy a breach of trust that has occurred or may occur, the court may order any equitable remedy, including… (3) Compelling the trustee to redress a breach of trust by paying money, restoring property, or other means.”); *Mennen v. Wilmington Trust Co.*, No. CV 8432-ML, 2015 WL 1914599, at *35 (Del. Ch. Apr. 24,
2015) (Noting the “appropriate remedy [of] a monetary judgment that includes the value of the lost principal associated with [the trustee’s] breaches and an additional amount to restore the value of the trust to what it would have been had the breach not occurred.”).

Florida: A trustee who commits a breach of trust is liable for the greater of (a) the amount required to restore the value of the trust property and trust distributions to what they would have been if the breach had not occurred, including lost income, capital gain, or appreciation that would have resulted from proper administration; or (b) the profit the trustee made by reason of the breach. § 736.1002(1) Fla.Stat. The Florida statute is similar to Restatement (Third) of Trusts: Prudent Investor Rule § 205 (1992).

Georgia: O.C.G.A. § 53-12-302.

Hawaii: 

Idaho: “The measure of damages in an action for breach of fiduciary duty is the same as the measure of damages in an action for breach of trust. See Hudson v. American Founders Life Insurance Company of Denver, 151 Colo. 54, 377 P.2d 391 (1963). “If the trustee commits a breach of trust, he is chargeable with any profit which would have accrued to the trust estate if he had not committed such breach of trust.” RESTATEMENT (SECOND) OF TRUSTS § 205 comment i (1959) (hereinafter referred to as “Restatement”).” Pickering v. El Jay Equipment Co., Inc. (Idaho Ct. App. 1985) 108 Idaho 512, 517 [700 P.2d 134, 139]; “A trustee who commits a breach of trust is chargeable with (a) the amount required to restore the values of the trust estate and trust distributions to what they would have been if the portion of the trust affected by the breach had been properly administered; or (b) the amount of any benefit to the trustee personally as a result of the breach.” JustMed, Inc. v. Byece (D. Idaho, Nov. 7, 2012, 1:05-CV-00333-MHW) 2012 WL 5463897, at *6 aff’d, (9th Cir. 2014) 580 Fed.Appx. 566.

Illinois: Yes. Under Illinois law, a breaching trustee is liable for what would have been earned but for the breach. “When trustee breaches trust agreement, whether willfully, negligently, or by oversight, he is liable for any loss to estate resulting from breach and must place beneficiaries in position they would have held had breach not occurred . . . Trustee in violation of trust is chargeable with (1) any loss or depreciation in value of trust property as result of breach; (2) any profit made by him as result of the breach; or (3) any profit which would have accrued to trust had there been no breach.” Grot v. First Bank of Schaumburg, 684 N.E.2d 1016, 1018-19 (Ill. App. Ct. 1997) (emphasis added); see also Progressive Land Developers, Inc. v. Exchange Nat. Bank of Chicago, 641 N.E.2d 608, 614 (Ill. App. Ct. 1994).
**Indiana:** Burns Ind. Code Ann. § 30-4-3-l(b) (2016), provides that if a trustee commits a breach of trust, the trustee is liable to the beneficiaries for: "(1) any loss or depreciation in the value of the trust property as a result of the breach; (2) any profit made by the trustee through the breach; (3) any reasonable profit which would have accrued on the trust property in the absence of a breach; and (4) reasonable attorney's fees incurred by the beneficiary in bringing the action of the breach." The Trust Code Study Commission comments to Ind. Code § 30-4-3-l(b) provide that: "This subsection adds reasonable attorney's fees to the liabilities imposed by the Restatement on a trustee who commits a breach of trust. See Restatement (Second), Trusts § 205 (1959)."; *Lincoln Nat. Bank & Trust Co. v. Shriners Hospital for Crippled Children* (Ind. Ct. App. 1992) 588 N.E.2d 597 (trustee improperly sold real property and was held liable to the beneficiaries for the loss incurred from such improper sale, interest on that amount accruing from the date of sale, attorney's fees, and was also denied a trustee fee); *Eiteljorg v. Eiteljorg* (Ind. Ct. App. 2011) 951 N.E.2d 565,572 ("Where the trustee has deprived the beneficiary of the use of trust property or its proceeds, the value of that use may be estimated by charging interest.")( citations omitted).

**Iowa:** “A beneficiary may charge a trustee who commits a breach of trust with the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred, or, if greater, the amount of profit lost by reason of the breach.” Iowa Code Ann. § 633A.4503 (West); “The measure of damages for such breach of trust is the difference between the value of the beneficiary's rights to principal and income before and after the breach.” *Hamilton v. Mercantile Bank of Cedar Rapids* (Iowa 2001) 621 N.W.2d 401, 406

**Kansas:** KSA 58a-1002 makes a breaching trustee liable for the greater of: (1) The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; (2) the profit the trustee made by reason of the breach; or (3) if the trustee embezzles or knowingly converts to the trustee's own use any of the personal property of the trust, the trustee shall be liable for double the value of the property so embezzled or converted.

**Kentucky:** KRS 386B.10-020

**Louisiana:** Louisiana provides for the payment of what the trust would have earned but for a breach of trust. La. Rev. Stat. Ann. 9:2201. See also Brown v. Schwegmann, 958 So. 2d 721 (La. App. 4th Cir. 2007) (upholding a damage award of more than five million dollars based upon an estimated moderate return if the trust dividends and other cash assets had been properly invested and diversified). La. Rev. Stat. Ann. 9:2201. General Rule: If a trustee
commits a breach of trust he shall be chargeable with: (1) A loss or depreciation in value of the trust estate resulting from a breach of trust; or (2) A profit made by him through breach of trust; or (3) A profit that would have accrued to the trust estate if there had been no breach of trust.

**Maine:** 18-B M.R.S.A. § 1002(1) (“A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of the following: (A) The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; (B) The profit the trustee made by reason of the breach”).

**Maryland:** Section 14.5-902 of the MTA makes the amount required to place the trust in the position it would have been in without the breach, one measure of damages. That section sets damages for breach of trust at “the greater of: (1) [t]he amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or (2) [t]he profit the trustee made by reason of the breach.” (MD Code, Estates and Trusts, § 14.5-902(a)(1)-(2).) It also provides that where there are multiple trustees, “[e]xcept as otherwise provided in this subsection, if more than one trustee is liable to the beneficiaries for a breach of trust, a trustee is entitled to contribution from the other trustee or trustees that are also liable; but, (2) A trustee that received a benefit from a breach of trust under this subsection is not entitled to contribution from another trustee to the extent of the benefit received.” (Id. at (b)(1)-(2).) Where a trustee (though not a self-depositing financial institution) has received a profit which cannot be ascertained, and he is unable or unwilling to show what profit, if any, he has made by the use of the funds, “the court should impose compound interest as a substitute for the profit he is presumed to have made by their use.” (*Riggs v. Loweree* (1947) 189 Md. 437, 445-446.)


**Michigan:** Per MCL 700.7902, "A trustee who commits a breach of trust is liable to the trust beneficiaries affected for whichever of the following is larger: (a) The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred. (b) The profit the trustee made by reason of breach.”

**Minnesota:** Section 1002 makes the amount required to place the trust in the position it would have been in without the breach, one measure of damages. Section 1002 states: (a) A trustee who commits a breach of trust is liable for the greater of: (1) the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or (2) the profit the trustee made by reason of the breach. (b) If
more than one trustee is liable for a breach of trust, a trustee is entitled to contribution or indemnity from the other trustee or trustees as the court may determine. In *In re Baker*, 2013 Minn. App. Unpub. LEXIS 718, *33 (Minn. Ct. App. Aug. 5, 2013) the Court applied a growth rate of 3.77% to funds that were missing from the trust. The Court rejected arguments that a higher rate should be applied, reasoning that 3.77% was the average rate of return in the account in which trust principal was being held. Therefore, if the trust assets had not gone missing (the result of the breach), they would have grown at 3.77%.

**Mississippi:** Miss. Code Ann § 91-8-1002: "A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of (A) the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred, or (B) the profit the trustee made by reason of the breach..."; *Lawrence v. Jackson Mack Sales, Inc.*, 837 F. Supp. 771, 788-89 (S.D. Miss. 1992), aff’d sub nom. *Lawrence v. Jackson Mack Sales*, 42: "Section 205 of the Restatement (Second) of Trusts allows for monetary damages as make-whole relief, providing that a beneficiary has "the option of pursuing a remedy which will put him in the position in which he was before the trustee committed the breach of trust" or "of pursuing a remedy which will put him in the position in which *789 he would have been if the trustee had not committed the breach of trust." In the context of breach of a trustee's investment duties, "the general rule [is] that the object of damages is to make the injured party whole, that is, to put him in the same condition in which he would have been if the wrong had not been committed.... Both direct and consequential damages may be awarded." F.3d 642 (5th Cir. 1994). (quoting G. Bogert & G. Bogert, *The Law of Trusts and Trustees*, § 701, at 198 (2d ed. 1982)); see also *Estate of Talbot*, 141 Cal.App.2d 309, 296 P.2d 848 (1956); *In re Cook's Will*, 136 NJ.Eq. 123,40 A.2d 805 (1945).

**Missouri:** RSMo.456.10-1002.

**Montana:** Mont. Code Ann. § 72-38-1002 ("(1) A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of: (a) any loss or depreciation in value of the trust estate resulting from the breach of trust, with interest; (b) the profit the trustee made by reason of the breach of trust, with interest; or (c) any profit that would have accrued to the trust estate if the loss of profit is the result of the breach of trust."); *In re Osorio Irrevocable Trust* (2014) 376 Mont. 524, 527 [337 P.3d 87, 90] (Trustee liable for loss of military veteran benefits to beneficiary as a result of ineligibility due to improper sale of property.)

**Nebraska:** Neb. Rev. St. § 30-3891 (UTC 1002) makes a breaching trustee liable for the greater of:

(1) The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or
(2) The profit the trustee made by reason of the breach.

**Nevada:** “In a breach of contract action, ‘lost profits are generally an appropriate measure of damages so long as the evidence provides a basis for determining, with reasonable certainty, what the profits would have been had the contract not been breached.’” Georges Tannoury, MD, PC v. Stacey Kokopelli Medical, P.C. (Nev., Mar. 26, 2014, No. 58321) 2014 WL 1270582, at *1, reh’g denied (May 30, 2014), citing Eaton v. J.H., Inc. (1978) 94 Nev. 446, 450; see also Nev. Rev. Stat. Ann. § 163.115.

**New Hampshire:** N.H. Rev Stat. Ann. § 564-B: 10-1002 (a) (“A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of: (I) the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or (2) the profit the trustee made by reason of the breach.”); *In re Guardianship of Dorson*, 934 A.2d 545, 549 (N.H. 2007) (quoting *Berish v. Bornstein*, 770 N.E.2d 961, 977 (Mass, 2002)) (“When a breach of trust occurs, the beneficiary of the trust is entitled to be put in the position he would have been if no breach of fiduciary duty had been committed.”).


**New Mexico:** *Miller v. Bank of America, N.A.*, 2015-NMSC-022. Both disgorgement of ill-gotten gains by a trustee and restoration of losses suffered as a result of a trustee’s wrongdoing and required; *Miller v. Bank of America, N.A.*, 2014-NMCA-653, 326 P.3d 20. The proper measure of damages is the amount required to restore the value of the trust estate and all of its income distributions.

**New York:** Lost capital damages equal the value of the stock on the date it “should have been sold, minus the value of the shares when they were ultimately sold or transferred, minus any income attributable to the stock retained, plus interest at the legal rate, compounded from [the date on which the stock should have been sold].” *Matter of Janes*, 223 AD2d 20, 36 (4th Dep’t. 1996); “The market index calculation method...compares the actual portfolio against an alternative hypothetical portfolio that was properly managed during the same time period. This method attempts to turn back the clock and calculate the outcome of the trust management that allegedly should have occurred.” *In re JP Morgan Chase Bank, N.A.*, 41 Misc.3d. 1231, *16-17 (N.Y. Surr. Ct. 2013). In *In re JP Morgan Chase Bank*, the court held that a trustee who retained high a concentration in Kodak stock negligently failed to properly diversify assets. The Objectants advocated for the market index calculation method described above, however, the court found no conflict of interest or self-dealing by the trustee and held that such damages were inappropriate under the circumstances. Since there
was no conflict of interest, self-dealing, or intentional misleading, the calculation of damages should be based upon “lost capital.” *Id.* at 17-19.

**North Carolina:** N.C.G.S.A. § 36C-10-1002(a) (“A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of the following: (1) The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; (2) The profit the trustee made by reason of the breach”); *Freeman v. Cook*, 41 N.C. 373, 377 (1849) (explaining that if the trustee improperly disposed of a trust property, then he or she is liable by payment of the value of the property).

**North Dakota:** North Dakota Century Code §59-18-02 (1002) provides, “A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred or the profit the trustee made by reason of the breach.” *Broten v. Broten*, 2015 ND 127, ¶ 21, 863 N.W.2d 902

**Ohio:** Ohio Rev. Code Ann. § 5810.02 ("A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of the following: (1) The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; (2) The profit the trustee made by reason of the breach").

*Wills v. Kalis*, No. 93900, 2010 Ohio App. LEXIS 3674, at *7-8 (Ohio Ct. App. Sept. 16, 2010) (explaining that § 5810.02 "makes clear that damages and the corresponding calculation of damages apply only if the trial court chooses to remedy the breach of trust by payment of money under R.C. 5810.01(B)(3)").


**Oregon:** ORS § 130.805 (trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of (a) The amount of damages caused by the breach; (b) The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or (c) The profit the trustee made by reason of the breach.)

A breach of trust renders a trustee liable for the amount of the trust assets diverted, plus the actual earnings as a result of the breach and interest that the trust would have received had
there been no breach of trust. 46 Or. Op. Atty. Gen. 180 (Or.A.G.); Restatement (Second) of Trusts secs 205(c), 207(1) (1959).

**Pennsylvania:** Referencing Restatement (Second) § 205, the Pennsylvania Superior Court has stated that “loss may be in the form of lost interest or unrealized capital gain as well as direct capital loss” and courts “may grant a surcharge for the purpose of providing the beneficiaries with the unrealized gain to the value of principal assets of a trust that was lost because of a trustee’s failure to fulfill its duty of care.” *In re Scheidmantel*, 868 A.2d 464, 493 (Pa. Super. 2005). *See also Estate of Scharlach*, 809 A.2d 376, 386 (Pa. Super. 2002) (“Lost income is just as much unrealized gain as unrealized principal growth.”).

However, courts in Pennsylvania strictly adhere to the precepts that there is no surcharge merely for (a) failure to maximize returns during a period selected by the complaining beneficiary, or (b) a loss during a particular period where there was no discernible breach causing such loss. For example, in *Pew Trust*, 655 A.2d 521 (Pa. Super. 1994), the trust held stock in two companies for decades. Beneficiaries objected that the trustees should be surcharged for the decline in the value of the two stocks during a two-and-a-half year accounting period. The Superior Court refused to surcharge the trustees, ruling that there was no breach by the trustees in retaining the stock and that over the longer period the trust owned shares in the two companies, the investments had grown considerably. *See also McFadden Trusts*, 2 Fid. Rep. 3d 41, 76-79 (O.C. Phila. 2011) (where trustee brothers had established a highly successful investment strategy over thirty years, the trustees would not be surcharged for short term losses caused by historic market declines taking place after a change in beneficiaries).


**South Carolina:** S.C. Code 1976 § 62-7-1002 (“A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of the following: (1) The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; (2) The profit the trustee made by reason of the breach”).

**South Dakota:** The remedies stated in § 205 of the Restatement (Second) are applicable when the trustee violates his duty of loyalty. Restatement (Second) of Trusts § 206 (1959); *Willers v. Wettestad*, 510 N.W.2d 676, 681 (S.D. 1994). The comment to section 205 states, “If the trustee commits a breach of trust, the beneficiary may have the option of pursuing a remedy which will put him in the position in which he was before the trustee committed the
breach of trust; or of pursuing a remedy which will give him any profit which the trustee has made by committing the breach of trust; or of pursuing a remedy which will put him in the position in which he would have been if the trustee had not committed the breach of trust.”


**Texas:** See Texas Trust Code §§ 114.001 and 114.008 supra. Under Texas Trust Code §114.008 (a)(10)a Court may implement virtually any equitable remedy. Texas Courts routinely rely on the Restatements of Trusts and legal treatises such as *Scott and Ascher on Trusts* and *Bogert, Trusts and Trustees* as legal authority for their decisions if the provisions of these sources do not conflict with statutory trust law or specific Texas case law.

**Utah:** “A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of: (a) the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or (b) the profit the trustee made by reason of the breach.” Utah Code Ann. § 75-7-1002 (emphasis added).

**Vermont:** 14A V.S.A. §1002 sets damages at the greater of: “(1) the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or (2) the profit the trustee made by reason of the breach.”

**Virginia:** “A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of: 1. The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or 2. The profit the trustee made by reason of the breach.” Va. Code § 64.2-793-A (2012). “Virginia fiduciaries are not personally responsible for every loss of funds where there is no bad faith.” *Conte v. Pilsch*, 2009 Va. Cir. LEXIS 200 (Fairfax, Dec. 18, 2009).

**Washington:** A trustee is liable only for such loss as results from the investment beyond the amount which would have been proper to invest. *Baker Boyer Nat’l Bank v. Garver*, 43 Wn. App. 673, 685, 719 P.2d 583 (1986) (citing Restatement (Second) of Trusts § 228 comment h (1959)). *In Baker Boyer Nat’l Bank v. Garver*, the trustee breached his fiduciary duty by failing to invest in equity securities and thereby failed to properly diversify the portfolio. *Baker Boyer Nat’l Bank*, 719 P.2d at 679-80. In order to compute damages for trustee’s failure to properly diversify, “the court should consider lost appreciation in equity securities
which a properly diversified portfolio would have contained, and which would have been realized but for failure to diversify.” Id. at 686. The court explained that the purpose of awarding damages is to put the beneficiaries in the position they would have been if the trustee had prudently diversified. Id. Therefore, the measure of damages should reflect the increase in their value. Id. Because the court found that forty percent of the funds should have been placed in equity securities, the court measured damages by subtracting what the trust value should have been, had it been properly diversified, from the actual trust amount after breach.

Note: In Baker Boyer, the total investment was $194,000. The court found that forty percent should have been invested in equity. Instead, the trustee invested only in tax-exempt investments. The court calculated that had the portfolio been properly diversified, only sixty percent ($116,400) should have been invested in tax-exempt investments—this amount would have been subject to a 10% discount. Therefore, the court found that $104,760 in tax-exempt investments should have been invested. Instead, the trustee invested 100% of the total investment ($194,000) in tax-exempt investments, which was also subject to a 10% discount. This resulted in $174,600 of actual tax-exempt investments. The court next determined the “actual loss ratio” by dividing the actual loss ($63,750) by the actual amount invested ($174,600). This resulted in a loss ratio equivalent to about 0.365. Applying this loss ratio, the court determined that the expected loss that would have occurred under a properly diversified portfolio equaled $38,250 ($104,760 x 0.365). The actual loss on tax-exempt investments equaled $63,750. A properly diversified portfolio would have only lost $38,250. Therefore, the trust lost $25,500 by only investing in tax-exempt investments. Next, the court determined the damage to the estate by not investing 40% in equity investments. If the trustee had properly invested forty percent of the total investment ($194,000) in equity investments, $77,600 should have been invested in equity investments. Furthermore, because equity investments should have realized a 20% gain, the estate should have had a $15,520 gain on equity. Therefore, the court found that the trust value should be $194,000 (total investment) - $38,250 (expected loss of properly diversified trust) + $15,520 (estimated gain on equity investments) = $171,270. However, the actual value of the trust was only $130,250. Therefore, the estate suffered $41,020 in damages.

West Virginia: W. Va. Code Ann. § 44D-10-1002 (West) “(a) A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of: (1) The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or (2) The profit the trustee made by reason of the breach.”
**Wisconsin:** Wis. Stat. § 701.1002(1) provides: "A trustee who commits a breach of trust is liable to an affected beneficiary for the greater of the following: (a) The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred. (b) The profit the trustee made by reason of the breach."

**Wyoming:** “A fiduciary who commits a breach of trust is liable to the beneficiaries affected for the greater of: (i) The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or (ii) The profit the fiduciary made by reason of the breach.” Wyo. Stat. § 4-10-1002 (emphasis added).
12) **FAILURE TO INVEST.** “If it is the duty of the trustee to invest a specified amount of money in certain designated securities and in breach of trust the trustee has neglected to do so, the beneficiaries may compel the trustee to purchase the securities if it is reasonable under the circumstances to do so. If the securities have increased in value, the trustee must purchase the number of securities that could have been acquired at the time the purchase should have been made. The purchase price is to be paid from the trust estate only to the extent of the funds (or assets traceable to the funds) originally available for that purpose, with any difference to be made up from the trustee’s personal resources. The trustee is also chargeable with the amount of income that would have accrued had the specified securities been purchased within a reasonable period of time, and the trustee is entitled to be credited with the income, if any, actually received in the meantime on the funds that should have been so invested.” Restatement (Third) of Trusts: Prudent Investor Rule §211, com. g (1992); Restatement (Third) of Trusts §§ 90, 90 cmt. g (2012); see also; Restatement (Second) of Trusts §§ 211, 207(1) cmt. c (1959); Scott and Ascher on Trusts § 24.15 (5th ed. 2007); Bogert, Trusts and Trustees (3d ed. 2009) §§ 701, 702; Donovan v. Bierwirth (2d Cir. 1985) 754 F.2d 1049, 1056. [quoted in Schoenholtz v. Doniger (S.D.N.Y 1987) 657 F.Supp. 899, 907.]; Marshall v. Grauberger (Colo. Ct. App. 1990) 796 P.2d 34, 37.

**Alabama:** See Prudent Investor Standard, ALA. CODE §§ 19-3B-804, 901 & 902 (1975).


**Arizona:** “[A] trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of either: 1. The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; 2. The profit the trustee made by reason of the breach.” Ariz. Rev. Stat. Ann. § 14-11002; “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.” Ariz. Rev. Stat. Ann. § 14-10902.

**Arkansas:** No Arkansas cases cite the Restatement sections listed here, and there is no recent appellate case law, although one 1896 case was found.
California: *Manchester Band of Pomo Indians, Inc. v. U.S.* (N.D. Cal. 1973) 363 F.Supp. 1238, 1247-1248 (government breached fiduciary duty to properly manage trust funds where governmental officers repeatedly borrowed Indian band funds at lower rate of interest than they would have had to pay in the open market, held funds generated by band’s dairy enterprise and made no investment of such funds, and later deposited such funds in Treasury at interest of only 4% when numerous short-term government bonds were paying higher rates.)


Delaware: Yes. “Any determination of liability for investment performance shall consider the performance of the entire portfolio and such other factors as the fiduciary considered when the investment decision was made.” Del. Code Ann. tit. 12, § 3302; *see also* Del. Code Ann. tit. 12, § 3581(b)(3) (“To remedy a breach of trust that has occurred or may occur, the court may order any equitable remedy, including… (3) Compelling the trustee to redress a breach of trust by paying money, restoring property, or other means.”); Del. Code Ann. tit. 12, § 3582 (“A beneficiary may charge a trustee who commits a breach of trust with: (1) The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; (2) The profit that the trustee made by reason of the breach; or (3) Such other relief as may be fashioned by the court.”).

Florida: A trustee who commits a breach of trust is liable for the greater of (a) the amount required to restore the value of the trust property and trust distributions to what they would have been if the breach had not occurred, including lost income, capital gain, or appreciation that would have resulted from proper administration; or (b) the profit the trustee made by reason of the breach. § 736.1002(1) *Fla.Stat*. The Florida statute is similar to Restatement (Third) of Trusts: Prudent Investor Rule § 205 (1992). *Fla. Stat.* §736.1001 (2)(a)-(j) The court may remedy a breach of trust that has occurred or may occur by compelling the trustee to perform his or her duties; enjoining the commission of the breach; compelling the trustee to redress the breach monetarily or by restoring property or by other means.

Georgia: Unable to find authority other than *O.C.G.A.* § 53-12-302.

Hawaii:
Idaho: “If the trustee commits a breach of trust, he is chargeable with any profit which would have accrued to the trust estate if he had not committed such breach of trust.”

Illinois: Illinois law holds that the interest on a trust fund is a proper measure of damages for trustee's breach of duty to invest funds of the trust as directed by beneficiary. *See In re O'Donnell's Estate*, 132 N.E.2d 74, 77 (Ill. App. Ct. 1956) (citing S.H.A. Ch. 3, § 462). However, no Illinois court has rejected the Restatement approach described in the question.

Indiana: Nothing specific. Burns Ind. Code Ann. § 30-4-3.5-2(a) (2016) ("A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms of the trust, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.")

Iowa: *In re Young's Estate* (1896) 97 Iowa 218 [66 N.W. 163] (An administrator having funds of the estate, which he used in his private business without attempting to invest them for the benefit of the estate, though he could have realized a profit thereon greater than 6 per cent., was properly charged with interest at 6 per cent. on the average amount while it was in his hands); “[I]t is well established that a guardian may not keep idle the money or property of his wards, but is bound to all reasonable diligence in keeping the money loaned out on good security under the orders of the court and in procuring ordinary returns from other property, and if he refuses or neglects to invest the money in loans such as may be approved by the court, the general rule is that he will be charged a reasonable rate of interest for the use of the money he has neglected to loan. Of course he is not required at his peril to keep the funds of his wards so invested at all times, but he must exercise reasonable diligence to keep it so invested, and if he fails so to do he will, as said, be charged with a reasonable rate of interest for the use of the money during the period it might have been loaned out.” *In re Stude's Estate* (1917) 179 Iowa 785 [162 N.W. 10, 12]; *Bradford's Minor Heirs v. Bodfish* (1874) 39 Iowa 681, 685.

Kansas: “Ordinarily if a breach of trust consists only in the failure of the trustee to invest trust money, or in the failure to sell trust property and to invest the proceeds, the trustee is chargeable with interest at the current rate of return on trust investments and not with interest at the legal rate.” *Burch v. Dodge* (1980) 4 Kan.App.2d 503, 509, quoting Restatement (Second) of Trusts § 207 (1959).

Kentucky: No direct authority, See KRS 286.3-277 for Kentucky's Prudent Investor Statute.
**Louisiana:** Louisiana maintains a rule making a trustee chargeable with (1) A loss or depreciation in value of the trust estate resulting from a breach of trust; or (2) A profit made by him through breach of trust; or (3) A profit that would have accrued to the trust estate if there had been no breach of trust. La. Rev. Stat. Ann. 9:2201. Louisiana, however, does not explicitly provide for a beneficiary’s right to elect to affirm or reject the purchase. Rather, it provides more generally that the beneficiary maintains remedies against the trustee, including compelling him to perform his duties, enjoining him from breaches, compelling him to redress a breach, or removing the trustee. La. Rev. Stat. Ann. 9:2221.

**Maine:** 18-B M.R.S.A. § 1001(2) (“To remedy a breach of trust that has occurred or may occur, the court may do any of the following: (A) Compel the trustee to perform the trustee’s duties”).

**Maryland:** Maryland does not have statutory authority addressing this principle. In *MacBryde v. Burnett* (1942) 44 F. Supp. 833, 841, where all cash funds of trust had been invested in good bonds, and stock was purchased by trustee on margin in his name individually, and was long held in brokers' names, and some of bonds were pledged with brokers as collateral for margin account, and trustee handled the trust loosely, purchase of stock would not be regarded as reasonably prudent investment by trustee, and trustee was held liable for its original purchase price but could retain the stock for himself. In *McDaniel v. Hughes* (1955) 206 Md. 206, 220-221, the appellate court held that even though the trustee purchased a one-sixth interest in the corporation that purchased land held in the trust, where the beneficiary of the trust had full information and complete understanding of all facts concerning the property and transaction and gave consent to such purchase of one-sixth interest, beneficiary's administratrix would be precluded from asserting error as to the account filed by such trustee. (“The transaction will be sustained by a court of equity if the trustee shows by convincing evidence that the beneficiary had full information and complete understanding of all the facts concerning the property and the transaction and gave free consent, and that the amount paid was fair and adequate, and that he made the beneficiary a perfectly honest and complete disclosure of all the information which he had concerning the property, and that he has obtained no undue or inequitable advantage, and especially, but not necessarily, if it appears that the beneficiary acted in the transaction upon independent information and advice of some intelligent third person competent to give such advice.”)

**Massachusetts:** Yes. Restatement (Third) of Trusts, §211, cmt. (g); *Eliot v. Sparrel* (1875) 114 Mass. 404; *Scott and Ascher on Trusts* § 24.15 (5th Ed. 2007.)
**Michigan:** MCL 700.7801 provides, "Upon acceptance of a trusteeship, the trustee shall administer the trust in good faith, expeditiously, in accordance with its terms and purposes, for the benefit of the trust beneficiaries, and in accordance with this article"; MCL 700.7803 states, "The trustee shall act as would a prudent person in dealing with the property of another, including following the standards of the Michigan prudent investor rule. If the trustee has special skills or is named trustee on the basis of representation of special skills or expertise, the trustee is under a duty to use those skills”; Personal liability on behalf of the trustee is found in MCL 700.7910, which states in part, "(2) A trustee is personally liable for an obligation arising from ownership or control of the trust estate property or for a tort committed in the course of administration of the trust estate only if the trustee is personally a fault." To remedy a breach, MCL 700.7901(2)(c) provides that the court can, "Compel the trustee to redress a breach of trust by paying money, restoring property, or by other means."

**Minnesota:** There is no Minnesota law on the proper measure of damages, specifically for failure to invest a specified amount of money in designated securities. The Minnesota Supreme Court has adopted the Restatement (Second) of Trusts where there is no controlling Minnesota case law. *Connecticut General Life Ins. Co. v. First Nat'l Bank*, 262 N.W.2d 403, 405 (Minn. 1977); *Kohler v. Fletcher*, 442 N.W.2d 169, 171 (Minn. Ct. App. 1989).

**Mississippi:** No relevant authorities found.

**Missouri:** RSMo.456.8-804. "A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution”; RSMo.469.902. "A trustee shall invest and manage trust assets as a prudent investor would .... " (MO version of Prudent Investor Act in Chapter 469, Sees. 469.900-.913); RSMo.469.903. "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."

**Montana:** Mont. Code Ann. § 72-38-804 (“A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.”); Mont. Code Ann. § 72-38-902 (“(1) 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.”)
Nebraska: There is no Nebraska law applying or adopting this measure of damages.


New Hampshire: McLinnes v. Goldthwaite, 52 A.2d 795,799 (N.H. 1947) ("A trustee should not be liable for the failure to keep all the funds invested unless there has been neglect on his part. 'If a guardian or trustee keeps the funds of his trust separate from his own, and accounts for the interest received, he is not to be charged when the money lies idle, except for his neglect; and it cannot be considered neglect if a sum sufficient to meet contingent expenses be kept on hand, or if a sum so small that a prudent person would not seek an investment for it lies idle.'") (internal quotations omitted).


New Mexico: I find nothing that fits this detailed fact pattern in New Mexico. But SEC 46A-10-1002 NMSA—required to restore the value of the trust property and trust distributions to what they would have been.

New York: In Schoenholtz v. Doniger, 657 F.Supp. 889 (S.D.N.Y 1987), the court held that the proper measure of damages was the difference between what the plan actually earned and what it could have earned when an ERISA fiduciary failed to invest in securities of an employer, as instructed in the plan, and instead held assets in a money market account. Id. at 903.

North Carolina: N.C.G.S.A. § 36C-10-1001(b) (“To remedy a breach of trust that has occurred or may occur, the court may do any of the following: (1) Compel the trustee to perform the trustee’s duties”); Carter v. Young, 193 N.C. 678, 681–82 (1927) (“When it appears that a trustee has exercised, or proposes to exercise, such discretion in good faith, and with an honest purpose to effectuate the trust, the courts will not undertake to supervise or control his actions. They will not undertake to set aside or over-ride his judgment in matters clearly committed to his discretion, and to substitute therefor the judgment of others,
or their own judgment, upon the sole allegation that the action of the trustee is not wise or just").

**North Dakota:** NDCC § 59-17-01 (Prudent investor rule)
NDCC § 59-16-04. (Prudent administration) (A trustee shall administer the trust as a prudent person would by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.)

North Dakota Century Code §59-18-01 (“To remedy a breach of trust that has occurred or may occur, the court may compel the trustee to perform the trustee's duties; enjoin the trustee from committing a breach of trust; compel the trustee to redress a breach of trust by paying money, restoring property, or other means; order a trustee to account; appoint a special fiduciary to take possession of the trust property and administer the trust; suspend the trustee; remove the trustee as provided in section 59-15-06; reduce or deny compensation to the trustee; subject to section 59-18-12, void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds; or order any other appropriate relief.”)

North Dakota Century Code §59-18-02 (A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred or the profit the trustee made by reason of the breach.)
*Broten v. Broten*, 2015 ND 127, ¶ 21, 863 N.W.2d 902

**Ohio:** Ohio Rev. Code Ann. § 5810.01(B)(1) (“To remedy a breach of trust that has occurred or may occur, the court may do any of the following: (1) Compel the trustee to perform the trustee's duties”)

*Stevens v. Nat'l City Bank*, 544 N.E.2d 612, 617 (Ohio 1989) (quoting Ohio Rev. Code Ann. § 2109.371) (“the trustee has a duty to invest idle trust funds so that they will be productive of income. In doing so, the trustee is under a duty to make such investments ‘in such securities as would be acquired by prudent men of discretion and intelligence in such matters who are seeking a reasonable income and the preservation of their capital.’”).

**Oklahoma:** See response to Question 3, above.

**Oregon:** O.R.S. § 130.750 (Trustee’s duty to comply with prudent investor rule)
O.R.S. § 130.755 (prudent investor rule)

O.R.S. § 130.765 (Trustee’s duty)(“ Within a reasonable time after accepting a trusteeship or receiving trust assets, a trustee shall review the trust assets and make and implement decisions concerning the retention and disposition of assets in order to bring the trust portfolio into compliance with the requirements of ORS 130.750 to 130.775 and with the purposes, terms, distribution requirements and other circumstances of the trust.”)

ORS § 130.800 (Remedies for breach of trust) (“To remedy a breach of trust that has occurred or to prevent a breach of trust, the court may: (a) Compel the trustee to perform the trustee's duties;”)

ORS § 130.805 (Damages for breach of trust; see comments for additional information); “A breach of trust renders a trustee liable for the amount of the trust assets diverted, plus the actual earnings as a result of the breach and interest that the trust would have received had there been no breach of trust. Restatement (Second) of Trusts secs 205(c), 207(1) (1959).” 46 Or. Op. Atty. Gen. 180 (1989)


**Rhode Island:**

**South Carolina:** S.C. Code 1976 § 62-7-1001 (“To remedy a breach of trust that has occurred or may occur, the court may do any of the following: (1) Compel the trustee to perform the trustee’s duties”).

**South Dakota:** SDCL § 55-5-6 (Standards for investing and managing assets)(“ The trustee shall invest and manage trust assets as a prudent investor would considering the purposes, terms, distribution requirements, and other circumstances of the trust. This standard requires the exercise of reasonable care, skill, and caution and shall be applied to investments not in isolation, but in the context of the trust portfolio as a whole and as a part of an overall investment strategy that should incorporate risk and return objectives reasonably suitable to the trust.”).

SDCL § 55-5-7 (Prudent investor rule) (“No specific investment or course of action is, taken alone, prudent or imprudent. The trustee may invest in every kind of property and type of investment, subject to this chapter. The prudent investor rule is a test of conduct and not of
resulting performance. The prudent investor rule may be expanded, restricted, eliminated, or otherwise altered by the terms of the trust instrument or court order. Unless expanded, restricted, eliminated, or otherwise altered by the terms of the trust instrument or a court order, the trustee's investment decisions and actions shall be judged in terms of the trustee's reasonable judgment regarding the anticipated effect on the trust portfolio as a whole under the facts and circumstances prevailing at the time of the decision or action. No trustee is liable to a beneficiary to the extent that the trustee acted in reliance on the provisions of the trust instrument or court order.

SDCL § 55-2-2 (Trustee not to use property for his own benefit--Profit of trustee from use of property, extent of liability).

When a trustee makes an investment which he is not authorized to make, the trustee is liable for the amount of the trust funds expended on the investment. Matter of Hadleigh D. Hyde Trust, 458 N.W.2d 802, 805 (S.D. 1990); See In re Estate of Bartlett, 680 P.2d 369 (Okla.1984); Restatement (Second) Trusts § 210 (1959).

Although a particular investment may be impermissible under the prudent-man rule, the terms of the trust may authorize such an investment. Matter of Hadleigh D. Hyde Trust, 458 N.W.2d 802, 804 (S.D. 1990); See Hoffman v. First Virginia Bank of Tidewater, 220 Va. 834, 263 S.E.2d 402 (1980); Restatement (Second) Trusts § 227 (1959).

**Tennessee:** Where an executor unnecessarily keeps money of the estate by him without payment or investment, he is chargeable with interest thereon, as it will be presumed that he received a profit therefrom. Turney v. Williams, 15 Tenn. 172 (1834).

**Texas:** See Texas Trust Code §§ 114.001 and 114.008 supra.
Under Texas Trust Code §114.008 (a)(10)a Court may implement virtually any equitable remedy.

Texas Courts routinely rely on the Restatements of Trusts and legal treatises such as *Scott and Ascher on Trusts* and *Bogert, Trusts and Trustees* as legal authority for their decisions if the provisions of these sources do not conflict with statutory trust law or specific Texas case law.

**Utah:** Where the executor “did not invest the funds of the estate as directed by the order of the court . . . the consequent loss of the trust funds by leaving them in the Merchants' Bank must be charged” to that executor. *In re Listman’s Estate*, 57 Utah 471, 483-84 (1921).
**Vermont:** There is no Vermont law on the proper measure of damages, specifically for failure to invest a specified amount of money in designated securities. Where the Vermont Trust Code does not specifically provide law on a subject, courts look to Vermont common law as a supplement (14A V.S.A § 106) followed by the restatements and common law from other states. ([Estate of Nancy B. Alden v. Julia Dee and Todd Alden](2010) 427-12-06 Bncv [Vermont trial court opinion].)

The only semi-on-point authority is found in 14A V.S.A. § 902(b), which states that a “trustee's investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.”

However, this default rule would likely not apply if the trust specifies that a trustee invest “x” amount of money in designated securities. (See 14A V.S.A. § 901(b): “The prudent investor rule, a default rule, may be expanded, restricted, eliminated, or otherwise altered by the provisions of a trust. A trustee is not liable to a beneficiary to the extent that the trustee acted in reasonable reliance on the provisions of the trust.”)

**Virginia:** “Within a reasonable time after accepting a trusteeship or receiving trust assets, a trustee shall review the trust assets and make and implement decisions concerning the retention and disposition of assets, in order to bring the trust portfolio into compliance with the purposes, terms, distribution requirements, and other circumstances of the trust, and with the requirements of this article.” Va. Code § 64.2-784 (2012).

**Washington:** There is no case in Washington that specifically addresses a breach of trust based on failure to invest.

It is briefly mentioned in [Vogt v. Seattle-First Nat’l Bank](117 Wn.2d 541, 544, 817 P.2d 1364 (1991)). Trustees have a general duty to diversify under the prudent person rule unless there is an express provision relieving the trustee of its duty to diversify, or if it would not be prudent to diversify under the circumstances. [Baker Boyer Nat’l Bank v. Garver](43 Wn. App. 673, 679-80, 719 P.2d 583 (1986); see also RCW 11.100.020. [In Baker Boyer Nat’l Bank v. Garver](the trustee argued that even if it had a duty to diversify, it had fulfilled this duty based on the diversification between fixed-income, tax-exempt securities, and equity investments. [Id. at 679]. The court held that unless expressly provided by the terms of the
trust, the trustee must distribute the risk of loss by a reasonable diversification of investments, unless it is not prudent to do so. *Id.* The court found that the trustee should have invested forty percent of the funds in equity securities. *Id.* at 686. Consequently, the trustee had gone “beyond the bounds of reasonable judgment in concentrating investments almost exclusively in municipal bonds” and therefore breached its duty. *Id.* at 680.

In *Baldus v. Bank of California*, the life testamentary trust brought an action against the trustee for failure to diversify trust assets. *Baldus v. Bank of California*, 12 Wn. App. 621, 621-22, 530 P.2d 1350 (1975). The trustee had invested over 80 percent of the trust assets in the stock of one corporation. *Id.* However, the trust instrument specifically directed the trustee to retain stock in the specified corporation. *Id.* at 622-23. The court held that the trustee had a duty to diversify assets only if it was reasonably prudent to do so in exercise of its discretion. *Id.* at 627. The court further stated that in absence of any showing of an abuse of discretion because of failure to diversify, there was no basis for imposing liability. *Id.* at 632-33. See also RCW 11.100.020 (Prudent Investor Rule).

**West Virginia:** W. Va. Code Ann. § 44D-8-804 (West) “A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill and caution.”; W. Va. Code Ann. § 44-6C-2 (West) “(a) 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.”

**Wisconsin:** There is no direct authority regarding a remedy for failure of the trustee to invest a specified property. The general authority provided by Wis. Stat. §§ 701.1001(2)(a) and 701.1002(1)(a) is broad enough to encompass the type of relief described in Restatement (Second) of Trusts § 211 (1959). Wisconsin courts historically have looked to the Restatement (Second) of Trusts as a guide to the common law. See e.g. *Matter of Estate of Kugler*, 117 Wis. 2d 314, 344 N.W.2d 160, 166 (1984); *Dick & Reuteman Co. v. Doherty Realty Co.*., 16 Wis. 2d 342, 114 N.W.2d 475, 478 (1962). Accordingly, § 211 of the Restatement (Second) of Trusts likely would be influential in Wisconsin courts.

**Wyoming:** “If a trustee retains balances in his hands which he ought to have invested, or delays for an unreasonable time to invest . . . he will be liable to pay simple interest at the rate established by law as the legal rate in the absence of special agreements.” *Reed v. Taliaferro*, 37 Wyo. 107, 116-17 (1927) (quoting Perry on Trusts (6th ed.), sec. 468).
13) **DAMAGES FOR PURCHASE OF IMPRUDENT INVESTMENT.** “If the trustee improperly purchases investments for the trust estate, the beneficiaries: (a) may charge the trustee with the amount of trust funds expended in the purchase plus or minus the amount of a reasonably appropriate positive or negative total return thereon; or (b) may either affirm the purchase or, if the improperly purchased property has already been sold, require the trustee to account for the proceeds and return traceable to that property.” Restatement (Third) of Trusts: Prudent Investor Rule § 210(1) (1992); see also Restatement (Third) of Trusts §§ 100, 100 cmt. b (2012); Restatement (Second) of Trusts §§ 210, 207(1) cmt. c (1959); Scott and Ascher on Trusts § 24.13 (5th ed. 2007); Bogert, Trusts and Trustees § 862 (2d ed. rev. 1995).

**Alabama:** See ALA. Code § 19-3B-1002 (1975); ALA. Code § 19-3B-1001; ALA. Code § 19-3B-1009.

**Alaska:** “Indeed so great a breach of trust is it for the representative to engage in business with the funds of the estate that the law charges him with all losses thereby incurred….” *Cochran v. City of Nome* (D. Alaska 1944) 10 Alaska 425, 436 (emphasis added).

**Arizona:** “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.” Ariz. Rev. Stat. Ann. § 14-10902; “If the trust had suffered because poor investments were made, the delegation of investment authority would unquestionably be the cause of the loss [and hence delegating trustee would be liable].” *Shriners Hospitals for Crippled Children v. Gardiner* (1987) 152 Ariz. 527, 530 [733 P.2d 1110, 1113].

**Arkansas:** No Arkansas cases cite the Restatement sections listed here; "If a trustee purchases property that the trustee had no authority to purchase, a beneficiary may either charge the trustee for the amount of the purchase or force the trustee to account for the property." Rest. (2d) of Trusts § 210, *Riegler v. Reigler*, 262 Ark. 70, 553 S.W.2d 37 (1977). In this case, the trustee purchased property for his own medical clinic, an investment profitable only to him. The court decreed that the trustee should restore the full cost of the real estate to the trust with an interest rate of 6%, from the date of the decree. Also listed above.

**California:** California courts have barred actions against trustees where beneficiaries have consented knowledgeably. See *De Vrahnos v. George* (1962) 203 Cal.App.2d 210, 223.
However, mere acquiescence in activities of trustees does not in itself constitute a defense to breach of trust (Ferro v. Citizens Nat’l Trust & Sav. Bank (1950) 44 Cal.2d 401, 414), and trustee has burden of showing that the transaction was fair. (McDonald v. Hewlett (1951) 102 Cal.App.2d 680, 687.) Also see Noggle v. Bank of America (1999) 70 Cal.App.4th 853, 862 (court reasons that whatever portion of trust estate that should have been invested in assets that would benefit remaindermen over their parents should have been invested in the bank’s common equity trust fund, so damages should be calculated based on amount those funds would have earned);

**Colorado:** “It is a fundamental principle of fiduciary law that a trustee is individually liable for losses incurred by the trust property if his misfeasance caused the losses. As well-stated by one commentator: ‘Where the trustee's breach has been the making of an investment that is unauthorized, in whole or in part, and a loss resulted from the breach, the trustee may be compelled to restore the amount paid for the investment even though the loss may not have been entirely due to the trustee's breach, for example in the case of a general market decline.’” Buder v. Sartore, 774 P.2d 1383, 1390 (Colo. 1989) (citation omitted) (fiduciary who made speculative and improper investments ordered to pay back funds expended, loss of appreciation on funds, and interest).

**Connecticut:**

**Delaware:** Yes. “To remedy a breach of trust that has occurred or may occur, the court may order any equitable remedy, including… (3) Compelling the trustee to redress a breach of trust by paying money, restoring property, or other means; (4) Ordering a trustee to account.” Del. Code Ann. tit. 12, § 3581(b)(3), (4); see also Del. Code Ann. tit. 12, § 3582 (“A beneficiary may charge a trustee who commits a breach of trust with: (1) The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; (2) The profit that the trustee made by reason of the breach; or (3) Such other relief as may be fashioned by the court.”); see also Mennen v. Wilmington Trust Co., No. CV 8432-ML, 2015 WL 1914599, at *37 (Del. Ch. Apr. 24, 2015) (Noting that “recovery from a trustee for improper investments ‘ordinarily would be the difference between (1) the value of [the improper] investments and their income and other product at the time of surcharge and (2) the amount of funds expended in making the improper investments, increased (or decreased) by a projected amount of total return (or negative total return) that would have accrued to the trust and its beneficiaries if the funds had been properly invested.’”).

**Florida:** A trustee who commits a breach of trust is liable for the greater of (a) the amount required to restore the value of the trust property and trust distributions to what they would
have been if the breach had not occurred, including lost income, capital gain, or appreciation that would have resulted from proper administration; or (b) the profit the trustee made by reason of the breach. § 736.1002(1) Fla.Stat. The Florida statute is similar to Restatement (Third) of Trusts: Prudent Investor Rule § 205 (1992). A trustee must administer the trust as a prudent person would, “in satisfying this standard, the trustee shall exercise reasonable care, skill and caution.” Fla. Stat. §736.0804. See also Fla. Stat. §518.11. The actions of the trustee are voidable by any affected beneficiary under the trust. See Fla. Stat. §736.0802(2)(a)-(f). This may be precluded by consent, ratification, or release by the beneficiary. See Fla. Stat. §736.1012. Fla. Stat. §736.1001(2)(a)-(j) The court may compel the trustee to redress the breach monetarily or by restoring property or by other means. The court also has the discretion to remedy breach of a trust by, “voiding the act, imposing a lien or constructive trust on trust property, or trace property wrongly disposed of and recover the property or its proceeds; or order any other appropriate relief.”

**Georgia:** O.C.G.A. § 53-12-302.

**Hawaii:** See Dwight discussion in Question 1 above.

**Idaho:** “If the trustee commits a breach of trust, he is chargeable with any profit which would have accrued to the trust estate if he had not committed such breach of trust.” *Pickering v. El Jay Equipment Co., Inc.* (Idaho Ct. App. 1985) 108 Idaho 512, 517 [700 P.2d 134, 139]

**Illinois:** Probably, yes. The research has not found an Illinois case on point. However, an Illinois treaty contains passages that support giving the beneficiary the type of compensation that would make the beneficiary whole. “A trustee must exercise due care, diligence and skill in administering the trust, both as to affirmative and negative conduct, unless relieved therefrom by the terms of the trust, by statute, or by order of the court. Where a trustee, through negligence or willfulness, fails to meet the standard or measure of care required of him, he is liable for all losses resulting to the trust estate.” Hunter, *Estate Planning and Administration in Illinois*, § 218:14 (4th ed. 2007).

**Indiana:** Nothing specific. Burns Ind. Code Ann. § 30-4-3.5-2(a) (2016) ("A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms of the trust, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.")
Iowa: “To invest in trade or speculation would be a breach of duty on the part of the guardian.” In re Stude’s Estate (1917) 179 Iowa 785. See also Iowa Code Ann. § 633A.4302 (West) [prudent investor rule]

Kansas: There is no Kansas law on the proper measure of damages, specifically for purchasing an imprudent investment. In In re Hilgers (2006) 352 B.R. 298, 304, however, the bankruptcy court stated that “the Uniform Trust Code (substantially adopted by the KUTC) was closely coordinated with the Restatement (Third) of Trusts, and both supply trust law where decisional law is commonly lacking.”

Kentucky: No direct authority.

Louisiana: Louisiana maintains a rule making a trustee chargeable with (1) A loss or depreciation in value of the trust estate resulting from a breach of trust; or (2) A profit made by him through breach of trust; or (3) A profit that would have accrued to the trust estate if there had been no breach of trust. La. Rev. Stat. Ann. 9:2201. Louisiana, however, does not explicitly provide for a beneficiary’s right to elect to affirm or reject the purchase. Rather, it provides more generally that the beneficiary maintains remedies against the trustee, including compelling him to perform his duties, enjoining him from breaches, compelling him to redress a breach, or removing the trustee. La. Rev. Stat. Ann. 9:2221.

Maine: 18-B M.R.S.A. § 1001(2) (“To remedy a breach of trust that has occurred or may occur, the court may do any of the following: (C) Compel the trustee to redress a breach of trust by paying money, restoring property, or other means”).

Maryland: Maryland does not have statutory authority addressing this principle. In MacBryde v. Burnett (1942) 44 F. Supp. 833, 841, where all cash funds of trust had been invested in good bonds, and stock was purchased by trustee on margin in his name individually, and was long held in brokers' names, and some of bonds were pledged with brokers as collateral for margin account, and trustee handled the trust loosely, purchase of stock would not be regarded as reasonably prudent investment by trustee, and trustee was held liable for its original purchase price but could retain the stock for himself. In McDaniel v. Hughes (1955) 206 Md. 206, 220-221, the appellate court held that even though the trustee purchased a one-sixth interest in the corporation that purchased land held in the trust, where the beneficiary of the trust had full information and complete understanding of all facts concerning the property and transaction and gave consent to such purchase of one-sixth interest, beneficiary's administratrix would be precluded from asserting error as to the account filed by such trustee. (“The transaction will be sustained by a court of equity if the trustee shows by convincing evidence that the beneficiary had full information and complete
understanding of all the facts concerning the property and the transaction and gave free consent, and that the amount paid was fair and adequate, and that he made the beneficiary a perfectly honest and complete disclosure of all the information which he had concerning the property, and that he has obtained no undue or inequitable advantage, and especially, but not necessarily, if it appears that the beneficiary acted in the transaction upon independent information and advice of some intelligent third person competent to give such advice.”)

**Massachusetts:** Yes. Restatement (Third) of Trusts, § 100.

**Michigan:** MCL 700;7910(2) states, "A trustee is personally liable for an obligation arising from ownership or control of the trust estate property or for a tort committed in the course of administration of the trust estate only if the trustee is personally a fault."; MCL 700.7909 provides, "A trustee is not liable to a trust beneficiary for breach of trust if the trust beneficiary consented to the conduct constituting the breach, released the trustee from liability for the breach, or ratified the transaction constituting the breach, unless either of the following applies: (a) The consent, release, or ratification of the trust beneficiary was induced by improper conduct of the trustee. (b) At the time of the consent, release, or ratification, the trust beneficiary did not know of 1 or more of the material facts relating to the breach." To remedy a breach, MCL 700.7901 (2)(c) provides that the court can, "Compel the trustee to redress a breach of trust by paying money, restoring property, or by other means." Also, MCL 700.790l(2)(i), which states the court may, "... void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds."

**Minnesota:** There is no Minnesota law on the proper measure of damages, specifically for purchasing an imprudent investment. The Minnesota Supreme Court has adopted the Restatement (Second) of Trusts where there is no controlling Minnesota case law. *Connecticut General Life Ins. Co. v. First Nat'l Bank*, 262 N.W.2d 403, 405 (Minn. 1977); *Kohler v. Fletcher*, 442 N.W.2d 169, 171 (Minn. Ct. App. 1989).

**Mississippi:** No relevant authorities found.

**Missouri:**

**Montana:** Mont. Code Ann. § 72-38-804 (“A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.”); Mont. Code Ann. § 72-38-902 (“(1) 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.”)

**Nebraska:** There is no Nebraska law applying or adopting this measure of damages.

**Nevada:** “In a breach of contract action, ‘lost profits are generally an appropriate measure of
damages so long as the evidence provides a basis for determining, with reasonable certainty,
what the profits would have been had the contract not been breached.’” *Georges Tannoury, MD, PC v. Stacey Kokopelli Medical, P.C.* (Nev., Mar. 26, 2014, No. 58321) 2014 WL

**New Hampshire:** *Miller v. Pender*, 34 A.2d 663,663 (N.H. 1943) ("In making investments
for a trust, the proper standard to follow is the care and skill of a prudent man in conserving
the property-not that of a man of ordinary prudence. It is true that in certain transactions, as
in the making of investments, it is not sufficient that the trustee should use the care and skill
of a prudent man in investing his own property. There is an additional requirement that he
should use the caution exercised by a prudent man in conserving the property. In making
investments the trustee is under a duty not only to exercise such care and skill as a man of
ordinary prudence would exercise in dealing with his own property, but he must use the
cautions of one who has primarily in view the preservation of the estate entrusted to him, a
cautions which may be greater than that of a prudent man who is dealing with his own
("[U]nder general principles of New Hampshire common law, the scope of trust investments
a trustee can make is narrow.").

**New Jersey:**

**New Mexico:** Would seem to follow from the *Miller* opinions discussed above and from the
general damages provisions of the Uniform Trust Code, 46A-10-1002, NMSA.

**New York:**

**North Carolina:** N.C.G.S.A. § 36C-10-1001(b) (“To remedy a breach of trust that has
occurred or may occur, the court may do any of the following: (3) Compel the trustee to
redress a breach of trust by paying money, restoring property, or other means”). *Matter of
Wills of Jacobs*, 370 S.E.2d 860, 865 (N.C. App. 1988) (adopting general common law
principles which “hold that a trustee’s breach of trust subjects him to personal liability”).
North Dakota: North Dakota Century Code §59-18-02 (1002) provides, “A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred or the profit the trustee made by reason of the breach.” North Dakota Century Code §59-18-01 (“To remedy a breach of trust that has occurred or may occur, the court may compel the trustee to perform the trustee's duties; enjoin the trustee from committing a breach of trust; compel the trustee to redress a breach of trust by paying money, restoring property, or other means; order a trustee to account; appoint a special fiduciary to take possession of the trust property and administer the trust; suspend the trustee; remove the trustee as provided in section 59-15-06; reduce or deny compensation to the trustee; subject to section 59-18-12, void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds; or order any other appropriate relief.”)

North Dakota Century Code § 59-18-09 (beneficiary may affirm the transaction constituting the breach).

Ohio: Ohio Rev. Code Ann. § 5810.0l(B)(3) ("To remedy a breach of trust that has occurred or may occur, the court may do any of the following: (3) Compel the trustee to redress a breach of trust by paying money, restoring property, or other means").

Wills v. Kalis, No. 93900, 2010 Ohio App. LEXIS 3674, at *9 (Ohio Ct. App. Sept. 16, 2010) (explaining that under § 5810.01(B)(3), a trial court may "[c]ompel the trustee to redress a breach of trust by paying money, restoring property, or other means").

Oklahoma: See response to Question 3, above.

Oregon: O.R.S. § 130.750 (Trustee’s duty to comply with prudent investor rule)

O.R.S. § 130.755 (prudent investor rule)

ORS § 130.805 (Damages for breach of trust; see comments for additional information)

O.R.S. § 130.800 (Remedies for breach of trust)

“A breach of trust renders a trustee liable for the amount of the trust assets diverted, plus the actual earnings as a result of the breach and interest that the trust would have received had there been no breach of trust. Restatement (Second) of Trusts secs 205(c), 207(1) (1959).” 46 Or. Op. Atty. Gen. 180 (1989)
O.R.S. § 130.840 (beneficiary may affirm the transaction constituting the breach)

Pennsylvania: Pennsylvania courts have not expressly adopted these sections of the Third Restatement, but its enacted version of UTC § 1001 probably encompasses these kinds of equitable remedies. See 20 Pa. C.S. § 7781(b)(3) (“Compelling the trustee to redress a breach of trust by paying money, restoring property or other means”), (b)(9) (“(i) voiding an act of the trustee; (ii) imposing a lien or a constructive trust on trust property; or (iii) tracing trust property wrongfully disposed of and recovering the property or its proceeds.”) In addition, the Pennsylvania Superior Court has applied the core precept that the proper surcharge following an imprudent investment is “the difference between what the asset would have brought, had the trustee exercised an appropriate level of care, and the amount actually received upon sale.” In re: Scheidmantel, 868 A.2d 464, 493 (Pa. Super. 2005) (awarding a surcharge against a fiduciary for mechanically diversifying trust investments without any reference to the trust instrument or the needs of the beneficiary). See also 20 Pa. C.S. §§ 7203 (prudent investor rule), 7213.

Rhode Island:

South Carolina: S.C. Code 1976 § 62-7-1001(b)(3) (“To remedy a breach of trust that has occurred or may occur, the court may do any of the following: (3) Compel the trustee to redress a breach of trust by paying money, restoring property, or other means”).

South Dakota: SDCL § 55-4-31 (beneficiary may affirm the transaction constituting the breach)

SDCL § 55-2-2 (Trustee not to use property for his own benefit--Profit of trustee from use of property, extent of liability)

“If the trustee commits a breach of trust, he is chargeable with any loss or depreciation in value of the trust estate resulting from the breach of trust. Restatement (Second) of Trusts § 205(a) (1959); 76 Am.Jur.2d Trusts § 367 (1992).” In re Florence Y. Wallbaum Revocable Living Trust Agreement, 2012 S.D. 18, ¶ 36.

The remedies stated in § 205 of the Restatement (Second) are also applicable when the trustee violates his duty of loyalty. Restatement (Second) of Trusts § 206 (1959)(See comment “If the trustee commits a breach of trust, the beneficiary may have the option of pursuing a remedy which will put him in the position in which he was before the trustee committed the breach of trust; or of pursuing a remedy which will give him any profit which
the trustee has made by committing the breach of trust; or of pursuing a remedy which will put him in the position in which he would have been if the trustee had not committed the breach of trust.”) *Willers v. Wettesstad*, 510 N.W.2d 676, 681 (S.D. 1994)


**Texas:** See Texas Trust Code §§ 114.001 and 114.008 supra.

Under Texas Trust Code §114.008 (a)(10)a Court may implement virtually any equitable remedy. Texas Courts routinely rely on the Restatements of Trusts and legal treatises such as *Scott and Ascher on Trusts* and *Bogert, Trusts and Trustees* as legal authority for their decisions if the provisions of these sources do not conflict with statutory trust law or specific Texas case law.

**Utah:** “Plaintiff had a right to reject the purported investment and upon such rejection to receive back his money as his own property.” *In re Ogden State Bank*, 94 Utah 61, 72 (1938); see also *Wheeler v. Mann*, 763 P.2d 758, 758 (Utah 1988) (trustee invested trust property contrary to requirements of trust agreement and beneficiary recovered amount of trust fund plus interest).

**Vermont:** There is no Vermont law on the measure of damages for purchase of an imprudent investment. Where the Vermont Trust Code does not specifically provide law on a subject, courts look to Vermont common law as a supplement (14A V.S.A § 106) followed by the restatements and common law from other states. (*Estate of Nancy B. Alden v. Julia Dee and Todd Alden* (2010) 427-12-06 Bncv [Vermont trial court opinion]).

**Virginia:** “It is well settled that trustees investing trust money in an unauthorized security are responsible for any future loss traceable to their error.” *Carr's Adm'r v. Morris*, 85 Va. 21, 6 S.E. 613, 615 (1888).

“Virginia fiduciaries are not personally responsible for every loss of funds where there is no bad faith.” *Conte v. Pilsch*, 2009 Va. Cir. LEXIS 200 (Fairfax, Dec. 18, 2009).

**Washington:** In *Gillespie v. Seattle-First Nat'l Bank*, the trustee improperly recommended the beneficiary family to acquire property that was an unsuitable investment. *Gillespie v.*
Seattle-First Nat’l Bank, 70 Wn. App. 150, 175, 855 P.2d 680 (1993). Furthermore, the trustee negligently managed the property after acquiring it. Id. at 174. The court held that “where a trustee breaches his duty by purchase of property that he had a duty not to purchase, he is liable for the amount ‘expended in such purchase, with interest thereon…’” Id. at 175 (citing Restatement (Second) of Trusts § 210). The court found that the “make whole” measure of damages was appropriate in this case. Id. at 173.

**West Virginia:** W. Va. Code Ann. § 44D-8-804 (West) “A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill and caution.”; W. Va. Code Ann. § 44-6C-2 (West) “(a) 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.”

**Wisconsin:** The Wisconsin Trust Code provisions regarding remedies for breach of trust do not specify available remedies for imprudent investing. But the trust code defines a breach of trust in Wis. Stat § 701.1001(1) as "[a] violation by a trustee of a duty the trustee owes to a beneficiary," which would include imprudent investing of trust assets. Wis. Stat § 701.1001(2)(c)-(d) lists the following remedies: "(c) Compel the trustee to redress a breach of trust by paying money, restoring property, or other means. (d) Order a trustee to account."

**Wyoming:** “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.” Wyo. Stat. Ann. § 4-10-902. But there are no cases regarding damages for the purchase of an imprudent investment.
14) **Failure to Sell or Diversify.** “The trustee has a duty to the beneficiaries to invest and manage the funds of the trust as a prudent investor would, in light of the purposes, terms, distribution requirements, and other circumstances of the trust. (a) This standard requires the exercise of reasonable care, skill, and caution, and is to be applied to investments not in isolation but in the context of the trust portfolio and as a part of an overall investment strategy, which should incorporate risk and return objectives reasonably suitable to the trust. (b) In making and implementing investment decisions, the trustee has a duty to diversify the investments of the trust unless, under the circumstances, it is prudent not to do so.” Restatement (Third) of Trusts § 90 (2007); see also Restatement (Third) of Trusts: Prudent Investor Rule § 209 (1992); Restatement (Second) of Trusts §§ 205 cmt. f, 209; Scott and Ascher on Trusts § 24.9.1, 24.12 (5th ed. 2007); Loring and Rounds, A Trustee’s Handbook § 7.2.3.2 (2012). Matter of Janes, 681 N.E.2d332 (N.Y. 1997); Matter of Hunter, 955 N.Y.S. 2d 163 (A.D. 2012); Jicarillo Apache Nation v. United States (2013) 112 Fed. Cl. 274.

**Alabama:*** See Prudent Investor Standard, ALA. Code §§ 19-3B-804, 901 & 902 (1975). In *First Alabama Bank of Huntsville, N.A., v. Spragins*, the Alabama Supreme Court upheld an award of damages based on the trustee bank's failure to diversify the investments of the trust when 70 to 75% of the trust property consisted of the bank's stock during the bank's tenure as trustee. See 515 So. 2d 962,965-68 (Ala. 1987)

Note that while the *Spragins* case may remain good law with respect to an Alabama court's discretion to establish the amount and rate of interest when awarding damages for breach of trust, the standard by which the trustee's conduct was evaluated in *Spragins* was modified by ALA. Code § 19-3-120.2, which the Alabama Legislature passed in response to *Spragins* and which was merged into ALA. Code §§ 19-3B-804, 901 & 902 upon Alabama's adoption of the Alabama Uniform Trust Code.

**Alaska:*** “(a) 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. (b) A trustee's investment and management decisions respecting individual assets shall be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.” Alaska Stat. Ann. § 13.36.230 (West); *Marshall v. First Nat. Bank Alaska* (Alaska 2004) 97 P.3d 830, 839.
Arizona: “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.” Ariz. Rev. Stat. Ann. § 14-10903; “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.” Ariz. Rev. Stat. Ann. § 14-10902. However, there are no cases regarding damages for the failure to sell or diversify.

Arkansas: No Arkansas cases cite the Restatement sections listed here. There seem to be no appellate decisions. No Arkansas decision contains the phrase "duty to diversify."

California: Estate of Talbot (1956) 141 Cal.App.2d 309 (trustee held liable for capital gains taxes paid as a result of sale of securities as well as for brokerage costs charged against the estate); Noggle v. Bank of America (1999) 70 Cal.App.4th 853 (court of appeals affirms decision surcharging trustee for investing primarily in bonds, finding the “most accurate rate of appreciation for determination of… damages… would be the rate of appreciation experience[d] by the common equity funds utilized by the [b]ank.”)

Colorado: Uniform Prudent Investor Act, C.R.S. § 15-1.1; Marshall v. Grauberger, 796 P.2d 34, 37 (Colo. Ct. App. 1990) (trustee breached fiduciary duty by failing to sell ex-wife’s stock at the same time he sold his stock at a profit). “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.” C.R.S. § 15-1.1-103. But see Van Gundy v. Van Gundy, 2012 COA 194 (2012) (trustee’s investments were sufficiently diverse to meet the relaxed standard of diversification set forth by the trust agreement terms).


Delaware: Yes. “When investing, reinvesting, purchasing, acquiring, exchanging, retaining, selling and managing property for the benefit of another, a fiduciary shall act with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use to attain the purposes of the account.” Del. Code Ann. tit. 12, § 3302; see also DuPont v. Delaware Trust Co., 320 A.2d 694, 697 (Del. 1974) (“Not only must the trustee deal with trust property with ordinary prudence but he is held to two additional standards: (1) since he is dealing with the property of another for whom he is morally bound to provide, he must avoid even those risks which he might take with his own property and (2) he must take no risk which endangers the integrity
of the trust corpus.”); *Cf., Mennen v. Wilmington Trust Co.*, No. CV 8432-ML, 2015 WL 1914599, at *22 (Del. Ch. Apr. 24, 2015) (Noting that a settlor is free to exculpate a trustee from liability for imprudent decisions under Delaware law, but “the Trust Act precludes a settlor from exculpating a trustee for willful misconduct.”).

**Florida:** Florida has adopted a statute similar to Restatement (Third) of Trusts: Prudent Investor Rule § 227 (1992), that being § 518.11 entitled “Investments by fiduciaries; prudent investor rule.” Under this statute, the fiduciary has a duty to diversify the investments unless, under the circumstances, the fiduciary believes reasonably it is in the interests of the beneficiaries and furthers the purposes of the trust, guardianship, or estate not to diversify. § 518.11(1)(d). A trustee must administer the trust as a prudent person would, “in satisfying this standard, the trustee shall exercise reasonable care, skill and caution.” Fla. Stat. §736.0804. Fla. Stat. §518.11(1): “The fiduciary has a duty to invest and manage investment assets as a prudent investor would considering the purposes, terms, distribution requirements, and other circumstances of the trust.” There is no particular investment strategy required; however all decisions are reviewed in terms of “reasonable business judgment”. “This is a rule of conduct and not of resulting performance.” There is a duty to diversify under Fla. Stat. §518.11(1)(c), unless the trustee has a reasonable belief that it is in the interest of the beneficiaries and to “further the purpose of the trust” not to diversify.

**Georgia:** O.C.G.A. §§ 53-12-340 and 341.

**Hawaii:** In *Steiner v. Hawaiian Trust Co.*, 47 Haw. 548, 570, 393 P.2d 96 (1964) the settlor retained inception assets (common stock) at the oral request of the settlor. This resulted in an undiversified portfolio with 80% of the trust assets comprising this common stock. Prudence required that some of common stock should have been sold. Damages were computed on the difference between the approximate average price of $22 per share during the three year period starting at inception when the Court found that the stock should have been sold and the price realized when it was actually sold nine years later. In *Dowsett v. Hawaiian Trust Co.*, 47 Haw. 577, 578, 584-85, 393 P.2d 89 (1964) two stocks at trust inception comprised 33.1% and 32.1% of the value of the assets, respectively. The trust provided that inception assets were not to be sold unless the trustee thought it “clearly advisable because of changing conditions or other special reasons.” The trustee regularly reviewed the trust’s portfolio. Thirteen years later, the price increases for the first stock took its value to 66% of the trust assets, and the price declines of the second stock took its value to 5.6% of trust assets. The trustee then began to sell the first stock to diversify assets and sold the second stock to offset capital gains. Beneficiaries complained that the stock sales violated the terms of the trust. The Supreme Court affirmed the lower court’s determination that the trustee had properly exercised the discretion given it by the trust.
**Idaho:** “(1) 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. (2) A trustee’s investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.” Idaho Code Ann. § 68-502 (West); *Knudson v. Bank of Idaho* (1967) 91 Idaho 923, 931 [435 P.2d 348, 356].

**Illinois:** The trustee probably has a duty to sell. It is unclear whether under Illinois law the trustee has a duty to diversify. The Trust and Trustee Act recognizes the duty, but there are cases explicitly rejecting the duty to diversify. **Duty to Sell:** “[I]f property held in trust to pay the income to a beneficiary for a designated period and thereafter to pay the principal to another beneficiary produces no income or an income substantially less than the current rate of return on trust investments, and is likely to continue unproductive or under-productive, the trustee is under a duty to the beneficiary entitled to the income to sell the property within a reasonable time . . . and invest the proceeds.” Hunter, *Estate Planning and Administration in Illinois*, § 218:24, (4th ed. 2007). **Duty to Diversify:** “The trustee has a duty to diversify the investments of the trust unless, under the circumstances, the trustee reasonably believes it is in the interests of the beneficiaries and furthers the purposes of the trust not to diversify.” 760 Illinois Compiled Statutes § 5/5. No case has yet construed this provision, and, as the following case law demonstrates, it seems to have been added to the statute sometime after 1990 (Westlaw provides only limited legislative history for this statute): Judge Richard Posner, writing for the Seventh Circuit in 1982, stated that “We know of no Illinois case that states explicitly that a trustee has a duty to diversify the trust assets.” *Hamilton v. Nielson*, 678 F.2d 709, 712 (7th Cir. 1982). Citing to Posner’s *Hamilton* opinion, the Illinois Appellate Court held that “Illinois law does not impose a duty on a trustee to diversify the trust assets.” *McCormick v. McCormick*, 180 Ill.App.3d 184, 198 (Ill. App. Ct. 1988). The Seventh Circuit subsequently noted that the Illinois Appellate Court’s holding in *McCormick* “misread *Hamilton* as holding that ‘Illinois law does not impose a duty on a trustee to diversify the trust assets.’” *Central National Bank of Mattoon v. United States Department of Treasury*, 912 F.2d 897, 902 (7th Cir. 1990). The court then stated, “This leaves the status of the duty to diversify in Illinois law in a fog that neither the statute itself . . . nor the cryptic discussion of diversification in [the case law] can penetrate.” Id. at 902–03.

**Indiana:** Burns Ind. Code Ann. § 30-4-3.5-l(a) (2016) ("A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms of the trust, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.") Burns Ind. Code Ann. § 30-4-3.5-3
"A trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of the special circumstances, the purposes of the trust are better served without diversifying.")

**Iowa:** “All proposed investments of trust funds by fiduciaries shall first be reported to the court or a judge for approval and be approved and unless otherwise authorized or directed by the court under authority of which the fiduciary acts, or by the will, trust agreement, or other document which is the source of authority, a trustee, executor, administrator, or guardian shall invest all moneys received by such fiduciary, to be by the fiduciary invested, in securities which at the time of the purchase thereof are included in one or more of the following classes....” Iowa Code Ann. § 636.23 (West); **however, see Conservatorship of Alessio v. First Community Trust, N.A.** (Iowa Ct. App. 2010) 791 N.W.2d 711 aff’d sub nom. In re Conservatorship of Alessio (Iowa 2011) 803 N.W.2d 656 (“When a conservator fails to obtain prior court approval, the conservator has violated section 633.647, and will be held liable for subsequent losses if the violation is subsequently determined to have been a breach of fiduciary duty”)

**Kansas:** There is no Kansas law on the proper measure of damages, specifically for failure to diversify. In In re Hilgers (2006) 352 B.R. 298, 304, however, the bankruptcy court stated that “the Uniform Trust Code (substantially adopted by the KUTC) was closely coordinated with the Restatement (Third) of Trusts, and both supply trust law where decisional law is commonly lacking.”

**Kentucky:** Yes. KRS 386B.9-010; KRS 286.3-277(3)

**Louisiana:** Louisiana does not maintain the prudent man rule but rather the product investor rule for investment and management of trust property See, La. Rev. Stat. 9:2127. La. Rev. Stat. §9: 2127. Standard of care in investing and management. Unless the trust instrument provides otherwise, a trustee shall invest and manage trust property as a prudent investor. In satisfying this standard, the trustee shall consider the purposes, terms, distribution requirements, and other circumstances of the trust. A trustee's investment and management decisions are to be evaluated in the context of the trust property as a whole and as part of an overall investment strategy having risk and return objectives reasonably suited to the trust. In investing within the limitations of the foregoing standard, a trustee is authorized to retain and acquire every kind of property. COMMENTS—2001: (a) The primary source of the new formulation for this Section is Section 2 of the Uniform Prudent Investor Act (1994). It sets forth the “prudent investor rule”, which has been widely adopted in the other states in place of the “prudent man rule”. The prudent investor rule makes it clear that the trustee's duty is determined by the purposes of the trust and the circumstances of the beneficiaries, not in light
of how a prudent man would manage his own property; (b) The prudent investor rule makes it clear that the prudence of the trustee's actions is determined with respect to the portfolio as a whole: “an investment that might be imprudent standing alone can become prudent if undertaken in sensible relation to other trust assets, or other nontrust assets.” (Quote from comment to Uniform Prudent Investor Act (1994) Section 2.); (c) Diversification usually is necessary to reduce risk. For small trusts this can be accomplished through pooled investments such as mutual funds. See R.S. 9:2087. “Circumstances can, however, overcome the duty to diversify. For example, if a tax-sensitive trust owns an under diversified block of low-basis securities, the tax costs of recognizing the gain may outweigh the advantages of diversifying the holding. The wish to retain a family business is another situation in which the purposes of the trust sometimes override the conventional duty to diversify.” (Quote from comment to Uniform Prudent Investor Act (1994) Section 3.); (d) Rules that had been added in the past to this Section, authorizing investments that might otherwise have been prohibited because of the rules against self-dealing and delegation, have been moved to R.S. 9:2086 and 2087.

**Maine:** 18-B M.R.S.A. § 902 (“(1) 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 requirement, the trustee shall exercise reasonable care, skill, and caution”); 18-B M.R.S.A. § 902 (“(5) A trustee may invest in any kind of property or type of investment consistent with the standards of this chapter”).

**Maryland:** “In administering trust property, a trustee shall observe the standard of care that would be observed by a prudent person dealing with property of another and is not limited by any other statute restricting investments by fiduciaries.” (MD Code, Estates and Trusts, § 14-405 (c).) Under the MD Code, Estates and Trusts, § 15-114(b), a fiduciary shall: (1) Invest and manage fiduciary assets as a prudent investor would, considering the purposes, terms, distribution requirements, and other circumstances of the governing instrument and the nature of the fiduciary appointment; (2) Exercise reasonable care, skill, and caution regarding the anticipated effect on the fiduciary assets as a whole under the facts and circumstances prevailing at the time of any action by the fiduciary; (3) Invest and manage not in isolation but in the context of the fiduciary assets as a whole and as part of an overall investment strategy that incorporates risk and return objectives reasonably suitable under the terms of the governing instrument and the nature of the fiduciary appointment; (4) Diversify investments unless, under the circumstances, the fiduciary reasonably believes it is in the best interests of the beneficiaries or furthers the purposes for which the fiduciary was appointed not to diversify [. . .]. In managing and investing an institutional fund, “[a]n institution shall diversify the investments of an institutional fund unless the institution reasonably determines that, because of special circumstances, the purposes of the fund are better served without
diversification.” (MD Code, Estates and Trusts, § 15-402(e)(5).) “While diversification is not under all circumstances required, *York v. Md. Trust Co.*, 149 Md. 608, 131 A. 829 (1926), a prudent man, considering the size and content of [the] estate, the needs of the beneficiary and other relevant matters, would in all probability have concluded, as did Judge Childs, that Green should not have placed so many eggs in the BPM mortgage basket. Green, within one year of taking office, invested, with 41 percent secured by the Charles Street properties, and subsequently increased and re-increased the amount of those loans.” (*Green v. Lombard* (1975) 28 Md. App.1, 8 [finding that the “substitute committee” (i.e., conservator) for incompetent ward breached his fiduciary duties by investing 61 percent of the gross estate in mortgage loans to BPM, his client and White, his personal friend].)

**Massachusetts: Yes**

**Michigan:** The Michigan prudent investor rule, found in MCL 700.1503, states: (1) A fiduciary's investment and management decisions with respect to individual assets shall be evaluated not in isolation, but rather in the context of the fiduciary estate portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the fiduciary estate; (2) Among circumstances that a fiduciary must consider in investing and managing fiduciary assets are all of the following that are relevant to the fiduciary estate or its beneficiaries: (a) General economic conditions; (b) The possible effect of inflation or deflation; (c) The expected tax consequences of an investment decision or strategy; (d) The role that each investment or course of action plays within the overall portfolio, which may include financial assets, interests in closely-held enterprises, tangible and intangible personal property, and real property; (e) The expected total return from income and the appreciation of capital; (f) Other resources of the beneficiaries; (g) The need for liquidity, regularity of income, and preservation or appreciation of capital; (h) An asset's special relationship or special value, if any, to the purposes of the fiduciary estate or to I or more of the beneficiaries; (3) A fiduciary shall make a reasonable effort to verify facts relevant to the investment and management of fiduciary assets; (4) A fiduciary may invest in any kind of property or type of investment consistent with the standards of the Michigan prudent investor rule. A particular investment is not inherently prudent or imprudent; (5) A fiduciary who has special skill or expertise, or is named fiduciary in reliance upon the fiduciary's representation that the fiduciary has special skill or expertise, has a duty to use that special skill or expertise. Specifically addressing diversification, MCL 700.1504 states, "A fiduciary shall diversify the investments of a fiduciary estate unless the fiduciary reasonably determines that, because of special circumstances, the purpose of the fiduciary estate are better served without diversifying."
**Minnesota:** Section 901, subd. 3 of the Minnesota UTC establish a duty to diversify trust investments by stating: “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.” Section 501C.1002, sets damages for any breach of trust at the greater of: (1) the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or (2) the profit the trustee made by reason of the breach. The Court addressed damages specifically for failure to diversify in *In Will of Williams*, 2000 Minn. Dist. LEXIS 2, *134 (Minn. Dist. Ct. 2000) by stating: “Trust law provides that if the trustee fails to sell trust property that the trustee has a duty to sell, the beneficiaries may charge the trustee with the amount of proceeds that would have been received had the Trust properly sold the property, ordinarily with an appropriate additional amount to compensate for loss of return on those proceeds.” (quoting Restatement (Third) of Trusts §209, pp. 156-57.). The *Williams* Court calculated failure to diversify damages by taking the value of stock on the day it should have been sold and then assuming the proceeds were invested 50% in stocks and 50% in bonds, as measured by the S&P 500 Composite Index and by the Lehman Brother's Intermediate Treasury Bond Index. *Id.* at 119.

**Mississippi:** *Johnson v. Board of Trustees Miss. Annual Conference Methodist Church*, 492 So. 2d 269, 274 (Miss. 1986): "[T]he trustee shall be charged with the duty, as provided by law, that he deal with and manage the property as any prudent trustee would, including selling or disposing thereof as prudence would dictate, .... ". Miss. Code Ann. § 91-9-601(a, b): "Except as otherwise provided in subsection (b), a trustee who invests and manages trust assets owes a duty to the beneficiaries of the trust to comply with the prudent investor rule set forth in this article. The prudent investor rule, a default rule, may be expanded, restricted, eliminated, or otherwise altered by the provisions of a trust. A trustee is not liable to a beneficiary to the extent that the trustee acted in reasonable reliance on the provisions of the trust; Miss. Code Ann. § 91-9-603(a, b): "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. A trustee's investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust."; Miss. Code. Ann. § 91-9-605: "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."; Miss. Code Ann. § 91-9-613: "In investing and managing trust assets, a trustee may only incur costs that are appropriate and reasonable in relation to the assets, the purposes of the trust, and the skills of the trustee."; Miss. Code Ann. § 91-9-615: "Compliance with the prudent
investor rule is determined in light of the facts and circumstances existing at the time of a
trustee's decision or action and not by hindsight."); Miss. Code. Ann. § 91-8-804: "A trustee
shall administer the trust as a prudent person would, by considering the purposes, terms,
distributional requirements, and other circumstances of the trust. In satisfying this standard,
the trustee shall exercise reasonable care, skill, and caution."

**Missouri:** RSMo. 456.8-804. RSMo. 469.903; *O'Riley v. U.S. Bank, N.A.*, 412 S.W.3d 400,
414 (Mo. App. W.D., 2013). Except as otherwise provided by the terms of the trust, under the
"prudent man rule," the trustee is under a duty to the beneficiary to distribute the risk of loss
by a reasonable diversification of investments, unless under the circumstances it is prudent
not to do so; *Witmer v. Blair*, 588 S.W.2d 222 (Mo. Ct. App. W.D. 1979). The trustee's
failure to invest a large portion of the trust assets designated for education prior to the time
the beneficiary attained college age was a breach of the duty to invest. The trustee was
personally liable for the amount that might have been earned by investment of these trust
assets during the period prior to beneficiary's attaining college age; *Russell v. Russell*, 427
S.W.2d 471 (Mo. 1968). The will did not contain any provision authorizing retention of the
stock of a family corporation in the trust. The stock appreciated in value but paid limited
amounts of dividends. The court held that there was a conflict of interest on the part of the
trustees who were remaindermen. The dividend policy of the trustees as directors was
improper since it deprived the income beneficiary of adequate income and built up principal
for the trustees as remaindermen-trustees at the expense of the income beneficiary. The cause
was remanded to determine the amounts that should have been paid out as dividends,
considering the corporation's needs, and the determined amounts should be paid by the
trustees to plaintiff as executrix of the estate of the income beneficiary; *Vest v. Bialson*, 293
S.W.2d 369, 379, 365 Mo. 1103, 1117 (Mo. 1956). The trustee who has incurred liability by
reason of a breach of a duty regarding investments cannot reduce his liability by proving that
he has made a profit for the trust by other legal or illegal conduct in the trust administration;
funds for three years, during which settlement of the trust is delayed, may be charged with
interest on the uninvested balances.

**Montana:** Mont. Code Ann. § 72-38-804 ("A trustee shall administer the trust as a prudent
person would, by considering the purposes, terms, distributional requirements, and other
circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable
care, skill, and caution."); Mont. Code Ann. § 72-38-902 ("(1) 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.")
Nebraska: Under *In re Trust Created by Inman v. Tremaine*, 269 Neb. 376 (2005), the court found that there was no absolute duty to diversify the trust assets which would compel court approval of the proposed sale of certain portion of family farm held by the trust to trustee; although trust instrument gave trustee broad powers in dealing with trust assets, it also conferred upon trustee the power to retain nondiversified assets if retention would be in the best interests of the beneficiaries.

Neb. Rev. St. § 30-3885 leaves a great deal of discretion to a trustee regarding whether to diversify: “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.” (Emphasis added.)

Neb. Rev. St. § 30-3884 is consistent with the above stated law, i.e., that “[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.” (Neb. Rev. St. § 30-3884(a).) That section continues:

(b) A trustee's investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.

(c) Among circumstances that a trustee shall consider in investing and managing trust assets are such of the following as are relevant to the trust or its beneficiaries:

1. General economic conditions;
2. The possible effect of inflation or deflation;
3. The expected tax consequences of investment decisions or strategies;
4. The role that each investment or course of action plays within the overall trust portfolio, which may include financial assets, interests in closely held enterprises, tangible and intangible personal property, and real property;
5. The expected total return from income and the appreciation of capital;
6. Other resources of the beneficiaries;
7. Needs for liquidity, regularity of income, and preservation or appreciation of capital; and
8. An asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.

(d) A trustee shall make a reasonable effort to verify facts relevant to the investment and management of trust assets.

(e) A trustee may invest in any kind of property or type of investment consistent with the standards of the prudent investor rule set forth in sections 30-3883 to 30-3889.
**Nevada:** “Except as otherwise provided in chapter 669A of NRS, a trustee who invests and manages trust property owes a duty to the beneficiaries of the trust to comply with the prudent investor rule as set forth in NRS 164.700 to 164.775, inclusive” Nev. Rev. Stat. Ann. § 164.740 (West); “1. A trustee shall invest and manage trust property as a prudent investor would, considering the terms, purposes, requirements for distribution, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill and caution. 2. A trustee's decisions concerning investment and management as applied to individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as part of an overall strategy of investment having objectives for risk and return reasonably suited to the trust.” Nev. Rev. Stat. Ann. § 164.745 (West); “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.” Nev. Rev. Stat. Ann. § 164.750 (West).

**New Hampshire:** N.H. Rev. Stat. Ann. § 564-B:8-804 ("A trustee shall administer, invest, and manage the trust and distribute the trust property as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution."); N.H. Rev. Stat. Ann. § 564-B:9-902 ("(a) 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. (b) A trustee's investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as part of an overall investment strategy having risk and return objectives reasonably suited to the trust."); N.H. Rev. Stat. Ann. § 564-B:9-903 ("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."); In re Goodlander & Tamposi, 20 A.3d 199,205 (N.H. 2011) ("[W]hile the trustee does not have unfettered discretion to do whatever she wants with funds from the trust, she nonetheless possesses discretion to distribute to the beneficiaries, or retain in the sub-trusts, funds disbursed by the investment directors."). Shelton v. Tamposi, 2010 N.H. Super. LEXIS 78, *53 (N.H. Super. Ct. 2010) ("Maintaining the family business constitutes a special circumstance exonerating the investment directors from a duty to further diversify under RSA 564-B:9").

New Mexico: Trustee has a duty to administer the trust as a prudent person would. Uniform Trust Code, 46A-8-804, NMSA.

New York: Trustees are required to “exercise reasonable care, skill and caution to make and implement investment and management decisions as a prudent investor would for the entire portfolio, taking into account the purposes and terms and provisions of the governing instrument.” N.Y. EST. POWERS & TRUSTS LAW § 11-2.3(b)(2). The statute also requires that trustees: (i) pursue an overall investment strategy, (ii) consider tax consequences and general economic consequences, (iii) diversify assets, and (iv) determine reasonable time frame for retaining or disposing of initial trust assets. N.Y. EST. POWERS & TRUSTS LAW § 11-2.3(b)(3); “Where…a fiduciary’s imprudence consists solely of negligent retention of assets it should have sold, the proper measure of damages is the value of lost capital.” Matter of Janes (Janes III), 90 N.Y.2d 41, 55 (1997). In addition, “no precise formula exists for determining whether a prudent person standard has been violated in a particular situation; rather, the determination depends on the facts and circumstances of each case.” Id. at 50; In In re Saxton, 274 A.D.2d 110 (3rd Dep’t. 2000), a trustee breached his fiduciary duty by failing to diversify trust investments when he retained only IBM stock for 35 years. Over time, the IBM stock lost $4 million in value. Although the trustee obtained an Investment Direction Agreement authorized the trustee to hold the IBM stock, the agreement was made without the beneficiaries having “actual and full knowledge of all legal rights.” In addition, the beneficiaries had requested diversification prior to the loss in value and the trustee’s own written investment policies required diversification. Id. at 119. The court found the trustees liable for lost capital, as calculated in Matter of Janes, and also held that the calculation of damages required a review of net after-tax proceeds. Id. at 121.

North Carolina: N.C.G.S.A.§ 36C-9-902 (“(a) 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 requirement, the trustee shall exercise reasonable care, skill, and caution”).

N.C.G.S.A.§ 36C-9-903 (“A trustee shall diversify the investment of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying”); Heinitsh v. Wachovia Bank, Nat. Ass’n, 665 S.E.2d 541, 576 (N.C. App. 2008) (holding that trustee did not breach fiduciary duty by retaining the disputed funds in money market account until litigation was resolved).

North Dakota: NDCC § 59-17-01 (Prudent investor rule)
NDCC § 59-16-04. (Prudent administration)(A trustee shall administer the trust as a prudent person would by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.)

NDCC § 59-17-03. (Diversification)(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.)

NDCC § 59-17-02. (Standard of care--Portfolio strategy--Risk and return objectives)

**Ohio:** Ohio Rev. Code Ann. § 5809.02("(A) 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 requirement, the trustee shall exercise reasonable care, skill, and caution").

Ohio Rev. Code Ann. § 5809.03("(A) A trustee may invest in any kind of property or type of investment provided that the investment is consistent with the requirements and standards of the Ohio Uniform Prudent Investor Act. (B) A trustee shall diversify the investments of a trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying.

), *O'Neill v. O'Neill*, 865 N.E.2d 917 (Ohio Ct. App. 2006) (holding that a trustee did not breach his fiduciary duty by delegating investment of assets to a registered financial advisor).

*Fifth Third Bank & Reagan v. Firstar Bank, N.A.*, No. C-050518, 2006 Ohio App. LEXIS 4456 (Ohio Ct. App. Sept. 1, 2006) (noting questions of fact existed whether trustee "failed 'to verify facts relevant to the investment and management'" of the trust, and failed to consider "the economic conditions, the tax consequences, and the need for liquidity" when he sold stock "gradually over the course of the year").

*Puhl v. U.S. Bank*, 34 N.E.3d 530, 535 (Ohio Ct. App. 2015) (explaining that the terms of the trust can remove the duty to diversify).

*Bank One Trust Co., N.A. v. Scherer*, No. IIAP-1140, 2012 Ohio App. LEXIS 4631, *14 (Ohio Ct. App. Nov. 15, 2012) ("Bank One was not required to diversify when the specific wish of Roger Scherer was that his children be allowed to continue managing the family businesses"). *Wood v. U.S Bank, N.A.*, 828 N.E.2d 1072, 1078 (Ohio Ct. App. 2005) (holding "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.


**Oklahoma:** The prudent investor rule is adopted by Oklahoma in 60 Okla. Stat. § 175.62. The duty to diversify is set forth in Section 175.63, which provides: “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.” *But see In re Burford*, No. PT-2006-013, 2012 WL 6777389 (Tulsa County, Okla., Oct. 9, 2012) (requiring restoration of the value of 220,122 shares of XOM).

**Oregon:** O.R.S. § 130.750 (Trustee’s duty to comply with prudent investor rule)

O.R.S. § 130.755 (prudent investor rule)

O.R.S. § 130.760 (Diversification of trust investments)(“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.”)

*Stephan v. Equitable Sav. & Loan Ass’n*, 268 Or 544, 564, 522 P2d 478, 488 (1974)(“[A]trustee is ordinarily under a duty to dispose of any such improper investment within a reasonable time.)


RI Gen. Laws Sections 18-15-1, 2, 3.


**South Carolina:** S.C. Code 1976 § 62-7-933 (“(C)(1) 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 requirement, the trustee shall exercise reasonable care, skill, and caution”).

S.C. Code 1976 § 62-7-933 (“(5)(a) A trustee may invest in any kind of property or type of investment provided that the investment is consistent with the requirements and standards this act”).

*Ex parte Wheeler v. Est. of Green*, 673 S.E.2d 836, 389–40 (S.C. App. 2009) (holding that personal representative did not breach her fiduciary duty by accepting an offer for real estate that exceeded estate’s own appraisal and contained no contingencies, rather than accepting a subsequent higher offer containing several contingencies).

**South Dakota:** SDCL § 55-5-6 (Standards for investing and managing assets)

SDCL § 55-5-7 (Prudent Investor rule)

SDCL § 55-5-8 (Diversification of investments)

SDCL § 55-5-10 (Investment strategy--Productivity judged by whole portfolio)(“The trustee shall pursue an investment strategy that considers both the reasonable production of income and safety of capital, consistent with the trustee's duty of impartiality and the purpose of the trust. Whether investments are underproductive or overproductive of income shall be judged by the portfolio as a whole and not as to any particular asset.”)

SDCL § 55-5-11 (Circumstances considered in investment decisions)

*Matter of Kuehn*, 308 N.W.2d 398, 400 (S.D. 1981)( “[W]here assets are unproductive or underproductive and likely to remain so, the trustee is under a duty to the income beneficiaries to sell such assets within a reasonable time, unless it is otherwise provided by the terms of the trust.”)

**Tennessee:** Tenn. Code. Ann. 35-14-105: Diversification. (a) A trustee shall diversify the investments of the trust:

(1) Unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying, or
(2) Except as otherwise provided in subsection (b).

(b)  
(1) In the absence of express provisions to the contrary in the governing instrument, a fiduciary may without liability continue to hold property received into a trust at its inception or subsequently added to it or acquired pursuant to proper authority if and as long as the fiduciary, in the exercise of good faith and reasonable prudence, discretion and intelligence, may consider that retention is in the best interest of the trust and its beneficiaries or in furtherance of the goals of the trustor as determined from that instrument. Such property may include capital stock in the corporate fiduciary and stock in any corporation controlling, controlled by or under common control with such fiduciary; and the fiduciary may acquire additional shares of such stock by stock dividends, stock splits, exchanges and conversions for other stock or debentures and exercise of rights to acquire stock of the corporation or another corporation acquiring the stock of the corporation by merger, consolidation or reorganization.

(2) In the absence of express provisions to the contrary in the governing instrument, a deposit of trust funds at interest in any bank, savings and loan association or other financial institution (including the fiduciary and an affiliated depository institution) shall be a qualified investment to the extent that such deposit is insured under any present or future law of the United States. The fiduciary may also hold deposits in such institutions without interest in reasonable amounts and for reasonable times for operating expenses, anticipated distributions and pending investments.

(c)  
(1) Notwithstanding any other provision of this chapter to the contrary, and except as otherwise provided in the governing instrument, the duties of a trustee regarding the acquisition, retention or ownership of a contract of insurance on the life of the grantor of the trust, or on the lives of the grantor and the grantor's spouse, children, grandchildren, or parents, do not include a duty to:

(A) Determine whether any contract of life insurance in the trust, or to be acquired by the trust, is or remains a proper investment;

(i) As to the type of insurance contract;

(ii) As to the quality of the insurance company;

(iii) Or otherwise.

(B) Diversify the investment; or

(C) Exercise any policy options, rights, or privileges available under any contract of life insurance in the trust, including any right to borrow the cash value or reserve of the policy, acquire a paid-up policy, or convert to a different policy.

(2) The trustee is not liable to the beneficiaries of the contract of insurance or to any other party for loss arising from the absence of these duties regarding insurance contracts under this subsection (c).
**Texas:** The duty to diversify is specified in § 117.005 Remedies are specified in the Texas Uniform Prudent Investor Act. Texas Trust Code, Chapter 117. For remedies for the breach of this duty See Texas Trust Code §§ 114.001 and 114.008 supra. Under Texas Trust Code §114.008 (a)(10)a Court may implement virtually any equitable remedy.

Texas Courts routinely rely on the Restatements of Trusts and legal treatises such as *Scott and Ascher on Trusts* and *Bogert, Trusts and Trustees* as legal authority for their decisions if the provisions of these sources do not conflict with statutory trust law or specific Texas case law.

**Utah:** “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.” Utah Code Ann. § 75-7-902. “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.” Utah Code Ann. § 75-7-903. But there are no cases regarding damages for the failure to sell or diversify.

**Vermont:** 14A V.S.A. § 902 is consistent with the above stated rule:
(a) 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.
(b) A trustee's investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust. (Subsection (c) [quite lengthy] addresses the circumstances that a trustee shall consider in investing and managing trust assets.)

14A V.S.A. § 903 requires diversification unless the purposes of the trust are better served by not diversifying: “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.”

See also 14A V.S.A. § 804: “A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.”

**Virginia:** “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.” Va. Code § 64.2-783 (2012).
“A. 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. B. A trustee's investment and management decisions respecting individual assets shall be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.” Va. Code § 64.2-782 (2012)

“It was the duty of the executor to have sold all the bank stocks, and all the fancy stocks of the estate, and all the Confederate bonds which came to his hands, and with the proceeds of them to have satisfied the legacies and such debts as were payable in Confederate money; and failing to do so, he is responsible for the loss of those stocks. To retain those stocks was equivalent to investing the assets of the estate in them; and while a man may invest his own money in such securities, an executor or administrator cannot, except under the penalty of being liable for the amount invested, if the stocks fail. This is the law even when the question is as to the investment of a surplus fund; but it applies with much more stringency in a case like this, when there were legacies, as well as debts, to the satisfaction of which those stocks, or the proceeds of them, should have been applied, among which were the debts and legacy due to the executor himself. It was the duty of the executor, therefore, to sell those stocks.” Crouch v. Davis' Ex'r, 64 Va. 62, 76 (1873).

**Washington**: A fiduciary has a duty to diversify the investments of a trust unless the fiduciary reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying. RCW 11.100.060. In *Baker Boyer Nat’l Bank v. Garver*, the court found that the bank as trustee breached its duty for failing to properly diversify trust assets by only investing in tax-exempt securities. *Baker Boyer Nat’l Bank v. Garver*, 43 Wn. App. 673, 674-75, 719 P.2d 583 (1986). Relying on Restatement (Second) of Trusts § 228 (1959), the court adopted the view that a trustee as a prudent person has a duty to diversify and held that “a trustee has a general obligation to diversify, subject to at least two exceptions: (1) an express provision by the settlor relieving the trustee of the duty to diversify, or (2) the circumstances dictate that it is not prudent to diversify.” *Id.* at 679-80. The court found that neither of these exceptions applied and therefore, the trustee breached its fiduciary duty. *Id.* at 680.

See also RCW 11.100.047 (A trustee also has the duty to diversify the trust's assets in order to minimize the risk of large losses.).

**West Virginia**: W. Va. Code Ann. § 44D-8-804 (West) “A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements
and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill and caution.”; W. Va. Code Ann. § 44-6C-2 (West) “(a) 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.”

**Wisconsin:** Under Wis. Stat. § 701.0804, “[a] trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonably care, skill, and caution.” Wis. Stat. § 701.0901 cross-references Chapter 881 of the Wisconsin Statutes, which embodies the Wisconsin Prudent Investor Act. Section 881.01(4)(a) creates a duty to diversify investments unless the trustee reasonably determines the trust is better served without diversifying. The Wisconsin Trust Code provisions regarding remedies for breach of trust do not specify available remedies for a trustee’s failure to diversity. But the trust code defines a breach of trust in Wis. Stat § 701.1001(1) as "[a] violation by a trustee of a duty the trustee owes to a beneficiary," which would include the duty under Wis. Stat § 881.01(4)(a). Wis. Stat § 701.1001(2)(c)-(d), includes the following remedies: "(c) Compel the trustee to redress a breach of trust by paying money, restoring property, or other means. (d) Order a trustee to account."

**Wyoming:** “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.” Wyo. Stat. Ann. § 4-10-902. “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.” Wyo. Stat. Ann. § 4-10-903. But there are no cases regarding damages for the failure to sell or diversify.
15) **DETERMINATION OF DATE FOR SALE—A QUESTION OF FACT.** “If the time at which the trustee should have made the sale is definitely ascertainable, the trustee is chargeable with the value of the property at that time.” Scott and Ascher on Trusts § 24.12 (5th ed. 2007); “No precise formula exists for determining whether the prudent person standard has been violated in a particular situation; rather, the determination depends on an examination of the facts and circumstances of each case.” Matter of Estate of Janes (1997) 90 N.Y.2d 41, 50; see also Restatement (Third) of Trusts: Prudent Investor Rule § 209 (1992); Matter of JP Morgan Chase Bank, N.A. (Strong) (N.Y. Sur. Ct. 2013) 41 Misc.3d 1231(A), 981 N.Y.S.2d 636 (table; text at 2013 WL 6182548, at *16.).


**Alaska:** *Willner's Fuel Distributors, Inc. v. Noreen* (Alaska 1994) 882 P.2d 399, 406 (whether or not there has been a breach of fiduciary duty is a question of fact); *Gudschinsky v. Hartill* (Alaska 1991) 815 P.2d 851, 853-54 (before surcharging personal representative, court must make findings of fact to determine whether personal representative improperly exercised power, is liable for damage or loss, and whether or not damage or loss resulted from breach of fiduciary duty.); *Marshall v. First Nat. Bank Alaska* (Alaska 2004) 97 P.3d 830 (question of fact whether former trustee's efforts in opposing trust beneficiary's substitution of trustee resulted in excessive compensation.)


**Arkansas:** No Arkansas cases cite the Restatement section listed here.

**California:** *Uzyel v. Kadisha* (2010) 188 Cal.App.4th 866, 916 (“[w]ether the decline in the market value of Qualcomm stock beginning in January 2000 should have caused Kadisha to take measures to protect the value of the trust's investment is a question of fact.”)

**Colorado:** Where husband sold his own shares but failed to sell his wife’s shares over which he was a fiduciary, the date from which damages were computed was the date he sold his own shares. “This remedy served the purpose of doing justice under the particular
circumstances and restoring to wife the benefit which husband instead had received.”

Connecticut:  (No response)

Delaware:  Yes. Paradee v. Paradee, No. CIV.A. 4988-VCL, 2010 WL 3959604, at *15 (Del. Ch. Oct. 5, 2010) (Explaining the beneficiary’s receipt of damages suffered by the trust because the beneficiary was deprived of dividends that the trust would have received if the trustee had not breached fiduciary duty and sold shares held by the trust on a particular date.).

Florida:  Florida has no authority on this specific issue. Florida has only general authority that a trustee who commits a breach of trust is liable for the greater of (a) the amount required to restore the value of the trust property and trust distributions to what they would have been if the breach had not occurred, including lost income, capital gain, or appreciation that would have resulted from proper administration; or (b) the profit the trustee made by reason of the breach. § 736.1002(1) Fla.Stat. The Florida statute is similar to Restatement (Third) of Trusts: Prudent Investor Rule § 205 (1992). Fla. Stat. §736.1001 (2)(a)-(j) The court may remedy a breach of trust that has occurred or may occur by compelling the trustee to perform his or her duties; enjoining the commission of the breach; compelling the trustee to redress the breach monetarily or by restoring property or by other means. The court also has the discretion to remedy breach of a trust by, “voiding the act, imposing a lien or constructive trust on trust property, or trace property wrongly disposed of and recover the property or its proceeds; or order any other appropriate relief.”


Hawaii:  See Steiner in answer to Question 1.

Idaho:  “Once a court determines that a [testamentary] document is ambiguous, interpretation of the document presents a question of fact which focuses upon the intent of the parties. This issue of the settlors’ intent, as a question of fact, could not be resolved on summary judgment.”  (internal cit. om.) Carl H. Christensen Family Trust v. Christensen (1999) 133 Idaho 866, 873-74 [993 P.2d 1197, 1204-05]

Illinois:  Probably, yes. The research has not found an Illinois case directly on point. However, an Illinois treaty supports the proposition that whether the reasonable investor rule is violated should be answered by examining the facts. “Where there is a duty to convert trust property, the conversion must be made within a reasonable time after the creation of the trust. Ordinarily, any time within a year is reasonable. Under some circumstances, a year may be
too long. Under other circumstances, a trustee is not liable even though he fails to convert the property within a year. If there is a ready market for the property, it is usually improper to delay the sale for more than a year. The question in each case is whether, under all the circumstances, the trustee acted with prudence in delaying the sale.” Hunter, *Estate Planning and Administration in Illinois*, § 222:11 (4th ed. 2007).

**Indiana:** Burns Ind. Code Ann. § 30-4-3.5-8 (2016) ("Compliance with the prudent investor rule is determined in light of the facts and circumstances existing at the time of a trustee's decision or action and not by hindsight."); Burns Ind. Code Ann. § 30-4-3.5-3 (2016) ("A trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of the special circumstances, the purposes of the trust are better served without diversifying.")

**Iowa:** *Poulsen v. Russell* (Iowa 1981) 300 N.W.2d 289, 294 (reviewing evidentiary record supporting claims of breach of fiduciary duty as establishing questions of fact for the jury).

**Kansas:** There is no Kansas law regarding whether damages should be calculated from a specific date upon which investments should have been sold.

**Kentucky:** No direct authority; however see KRS 386B.10-020(1)(a), which infers rule.

**Louisiana:** Louisiana does not have a rule with this level of specificity, but see response to Question 14.

**Maine:** None.

**Maryland:** There is no Maryland law adopting or applying this measure of damages.

**Massachusetts:** Yes.

**Michigan:** MCL 700.1509 states, "Compliance with the prudent investor rule is determined in light of the facts and circumstances that exist at the time of a fiduciary's decision or action, and not by hindsight. The prudent investor rule requires a standard of conduct, not outcome or performance."

**Minnesota:** Minnesota courts have held that damages should be calculated from a specific date upon which investments should have been sold. In *In Will of Williams*, 2000 Minn. Dist. LEXIS 2, *134 (Minn. Dist. Ct. 2000) the Court calculated failure to diversify damages by starting with the value of stock on the day it should have been sold.
Mississippi: No relevant authorities found.

Missouri:

Montana: Mont. Code Ann. § 72-38-905. (“Compliance with the prudent investor rule is determined in light of the facts and circumstances existing at the time of a trustee's decision or action and not by hindsight.”)

Nebraska: There is no Nebraska law applying or adopting this measure of damages.


New Hampshire: N.H. Rev. Stat. Ann. § 564-B:9-905 (“(a) Compliance with the prudent investor rule is determined: (1) in light of the facts and circumstances existing at the time of a trustee's decision or action and not by hindsight; and (2) by the trustee's conduct and not by the return realized from the investment and management of the trust assets.”).

New Jersey:

New Mexico: Not sure I understand the question. Suppose it is governed by prudent administration value and whether that has been a loss.

New York: “A court may examine a fiduciary’s conduct through the entire period during which the investment at issue was held. The court may then determine, within that period, the reasonable time within which divestiture of the imprudently held investment should have occurred.” Matter of Janes (III), 90 NY2d 41, 54 (1997). What is considered reasonable will vary based on the underlying facts of the case and is not “fixed or arbitrary.” Id. “[No] fixed standard exists for the time in which divestiture of an imprudently held investment must occur.” In re Saxton, 274 A.D.2d 110, 120 (3rd Dep’t. 2000) (holding a corporate trustee negligent for failing to diversify trust assets). Once a court has determined there was imprudence, the court may designate a reasonable time under which the sale of the investment should have occurred. Id.

North Carolina: None.

North Dakota: NDCC § 59-16-04. (Prudent administration) ) (“A trustee shall administer the trust as a prudent person would by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.”)
NDCC § 59-17-05. (Reviewing compliance)(“Compliance with the prudent investor rule is determined in light of the facts and circumstances existing at the time of a trustee's decision or action and not by hindsight.”)

North Dakota Century Code §59-18-02 (Damages for breach of trust)(“A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred or the profit the trustee made by reason of the breach.”)

**Ohio:** Pickerel v. Huntington Nat'l Bank, No. 01AP-9ll, 2002 Ohio App. LEXIS 1229, at *15 (Ohio Ct. App. Mar, 19, 2002) (“If the trustee fails to sell trust property which it is his duty to sell, the beneficiary can charge him with the amount which he would have received if he had properly sold the property, with interest thereon.”).

**Oklahoma:** The prudent investor rule is adopted by Oklahoma in 60 Okla. Stat. § 175.62. The duty to diversify is set forth in Section 175.63, which provides: “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.” But see In re Burford, No. PT-2006-013, 2012 WL 6777389 (Tulsa County, Okla., Oct. 9, 2012) (requiring restoration of the value of 220,122 shares of XOM).

**Oregon:** O.R.S. § 130.755 (prudent investor rule).

ORS § 130.805 (Damages for breach of trust) (“Trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of (a) The amount of damages caused by the breach; (b) The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or (c) The profit the trustee made by reason of the breach.”).

O.R.S. § 130.770 (“Compliance with the prudent investor rule is determined in light of the facts and circumstances existing at the time of a trustee's decision or action and not by hindsight.”)

**Pennsylvania:** Pennsylvania courts are very consistent in holding that whether there has been a breach of trust cannot be a matter of hindsight, of looking back to a limited period of time when a trustee should have taken some specific action. See, e.g., Estate of Pew, 655 A.2d 521, 544-45 (Pa. Super. 1994). Instead, both breach and the measure of loss are measured over an appropriate period of trust administration such as the life of the trust, the
length of an investment program, or a period of accounting. Estate of Warden, 2 A.3d 565, 577-78 (Pa. Super. 2010); McFadden Trusts, 2 Fid. Rep. 3d 41, 76-79 (O.C. Phila. 2011) (where trustee brothers had established a highly successful investment strategy over thirty years, the trustees would not be surcharged for short term losses caused by historic market declines taking place after a change in beneficiaries). But see Rosenfeld Foundation Trust, 29 Fid. Rep. 2d 271, 286-291 (O.C. Phila. 2006) (concluding that breach of duty regarding investments could be pinpointed to a fairly certain date when co-trustees expressly challenged investment decisions).


Donato, 110 F. Supp. 2d at 48.

**South Carolina:** No authority found.

**South Dakota:** SDCL § 55-5-7 (Prudent Investor rule)

“If the trustee commits a breach of trust, he is chargeable with any loss or depreciation in value of the trust estate resulting from the breach of trust. Restatement (Second) of Trusts § 205(a) (1959); 76 Am.Jur.2d Trusts § 367 (1992).” In re Florence Y. Wallbaum Revocable Living Trust Agreement, 2012 S.D. 18, ¶ 36.


**Texas:** See Texas Trust Code §§ 114.001 and 114.008 supra. Under Texas Trust Code §114.008 (a)(10)a Court may implement virtually any equitable remedy.
Texas Courts routinely rely on the Restatements of Trusts and legal treatises such as *Scott and Ascher on Trusts* and *Bogert, Trusts and Trustees* as legal authority for their decisions if the provisions of these sources do not conflict with statutory trust law or specific Texas case law.

**Utah:** “We believe that the trial court is in the best position to determine what award of damages will make a plaintiff whole, and, thus, we are willing to permit the trial court to use its discretion in determining the date from which damages will be measured.” *Kilpatrick v. Wiley*, 2001 UT 107, P72 (2001) (in the tort context).

**Vermont:** 14A V.S.A. § 905 implies that breach/damages are to be determined on a case by case basis, with emphasis on the time of the action (or inaction) at issue: “Compliance with the prudent investor rule is determined in light of the facts and circumstances existing at the time of a trustee's decision or action and not by hindsight.”

**Virginia:** “We have cited with approval the legal principle that a trustee who retains a trust asset during a “‘precipitous decline in the market,’” when there was no market for the asset, “‘cannot be held to account,’” so long as the trustee acted as a reasonable and prudent person would act in light of then existing conditions.” *SunTrust Bank v. Farrar*, 277 Va. 546, 556, 675 S.E.2d 187, 192 (2009).

“Unless it is otherwise provided by the terms of the trust, if property held in trust to pay the income to a beneficiary for a designated period and thereafter to pay the principal to another beneficiary produces no income or an income substantially less than the current rate of return on trust investments, and is likely to continue unproductive or under-productive, the trustee is under a duty to the beneficiary entitled to the income to sell such property within a reasonable time.” *Sturgis v. Stinson*, 241 Va. 531, 535, 404 S.E.2d 56, 58 (1991).

**Washington:** If the value of the property in question is of fluctuating value, the measure of damages is the highest market value of the property within a reasonable time after the conversion. *Brougham v. Swarva*, 34 Wn. App. 68, 77, 661 P.2d 138 (1983). However, if the value of the property is stable, it will be determined as of the date of conversion. *Id*.

**West Virginia:** W. Va. Code Ann. § 44-6C-8 (West) “Compliance with the prudent investor rule is determined in light of the facts and circumstances existing at the time of a trustee's decision or action and not by hindsight.”

**Wisconsin:** There is no statutory or case law authority addressing date of sale as a question of fact in determining damages. In *Wisconsin Medical Society, Inc. v. Morgan*, 328 Wis.2d 469, 787 N.W.2d 22 (2010), the Wisconsin Supreme Court cited the Restatement (Third) of
Trusts as authority, though in a different context. On numerous occasions the court has looked to the Restatement (Second) of Trusts as authority. Restatement (Third) of Trusts: Prudent Investor Rule § 209 (1992) likely would be influential in Wisconsin courts.

**Wyoming:** Reed v. Taliaferro, 37 Wyo. 107 (1927) (date from which interest should be charged was “somewhat arbitrary”).
16) **Calculation of Damages From Date Asset Should Have Been Sold:**

a. **Highest or Lowest Intervening Value.** “A trustee who improperly fails to sell trust property is chargeable with the proceeds the trustee would have received upon a proper sale, increased or decreased to reflect the results of prudent investment.” Scott and Ascher on Trusts § 24.12 (5th ed. 2007); see also Restatement (Third) of Trusts: Prudent Investor Rule § 209(1), cmt. b (1992); Brougham v. Swarva (1983) 34 Wash. App. 68, 76-78; Schug v. Michael (1976) 310 Minn. 22, 31.

b. **Average Price.** “In some of the cases in which the trustee was held chargeable with a loss resulting from a failure to sell trust property within a reasonable time, the courts have held that the amount the trustee should have received is the average price during the period in which the trustee should have sold the property.” Scott and Ascher on Trusts § 24.12 (5th ed. 2007); see also Babbitt v. Fidelity Trust Co. (N.J. Ch. 1907) 66 Atl. 1076; Steiner v. Hawaiian Trust Co. (1964) 47 Haw. 548, 570, n. 8.

c. **Value at the Time of the Decree.** “Sometimes, perhaps for lack of any other more reliable guideline, the courts have held trustees accountable for the difference between the inventory value of the property and the price received or the property’s present value.” Scott and Ascher on Trusts § 24.12 (5th ed. 2007); see also Restatement (Third) of Trusts: Prudent Investor Rule § 208 (1992); Matter of Frame (App. Div. 1935) 284 N.Y.S. 153.

d. **Price Obtained by Fiduciary Selling His Own Shares.** “In our view, the court properly placed itself in the husband’s position at the time he sold his shares without using the advantage of hindsight as prohibited by Heller v. First National Bank, 657 P.2d 992 (Colo.App.1982). The evidence revealed that if wife’s shares had been sold by husband along with his own, she too would have profited in the same way that husband had. Hence, there was no error in valuing the shares as of that date. See People in the Interest of M.S.H., 656 P.2d 1294 (Colo.1983).” Marshall v. Grauberger (Colo. Ct. App. 1990) 796 P.2d 34, 37-38.

Alaska: “When a court of equity finds that a defendant is the holder of a property interest which he retains by reason of unjust, unconscionable, or unlawful means, it takes such interest from the defendant and vests it in the wronged party.” McKnight v. Rice, Hoppner, Brown & Brunner (Alaska 1984) 678 P.2d 1330, 1335; “[U]se of either “unjust” means or “unconscionable” means to acquire an interest gives the court a sufficient basis to impose a constructive trust. The superior court in the present case did exactly that, using a constructive trust as an equitable remedy to take Riddell's unjustly acquired interest in the estate and vest it in the rightful beneficiaries of the estate.” Riddell v. Edwards (Alaska 2003) 76 P.3d 847, 857.

Arizona: No Arizona cases found addressing this issue.

Arkansas: There seems to be no Arkansas decisions dealing with these fact patterns and legal issues.

California:

a) Uzyel v. Kadisha (2010) 188 Cal.App.4th 866 (court could have concluded that award of damages based on later tremendous appreciation of stock from time of purchase was unwarranted, whereas trustee was properly held liable for decline in value of shares in same company during same period).

b) No authorities found.

c) Estate of Anderson (1983) 149 Cal.App.3d 336, 355 (supporting inclusion of appreciation damages where executor deprived beneficiaries of real property that court found would probably have been retained in the family “at least long enough to enjoy its appreciated value to the time of trial”).

d) No authorities found.


Connecticut:

Delaware:

a) Yes. “To remedy a breach of trust that has occurred or may occur, the court may order any equitable remedy, including… (3) Compelling the trustee to redress a breach of trust by paying money, restoring property, or other means.” Del. Code Ann. tit. 12, § 3581(b)(3); see also Del. Code Ann. tit. 12, § 3582 (“A beneficiary
may charge a trustee who commits a breach of trust with: (1) The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; (2) The profit that the trustee made by reason of the breach; or (3) Such other relief as may be fashioned by the court.”); *Mennen v. Wilmington Trust Co.*, No. CV 8432-ML, 2015 WL 1914599, at *37 (Del. Ch. Apr. 24, 2015) (Noting that “recovery from a trustee for improper investments ‘ordinarily would be the difference between (1) the value of [the improper] investments and their income and other product at the time of surcharge and (2) the amount of funds expended in making the improper investments, increased (or decreased) by a projected amount of total return (or negative total return) that would have accrued to the trust and its beneficiaries if the funds had been properly invested.’”).

b) Most likely yes; my belief is that the Delaware courts would follow Scott and Ascher on Trusts § 24.12 (5th ed. 2007)

c) Maybe; my belief is that the Delaware courts would follow Scott and Ascher on Trusts § 24.12 (5th ed. 2007) and the Restatements.

d) Answer is likely yes give the equitable power of the Court of Chancery to fix appropriate remedy.

**Florida:** Florida has no authority on this specific issue. Florida has only general authority that a trustee who commits a breach of trust is liable for the greater of (a) the amount required to restore the value of the trust property and trust distributions to what they would have been if the breach had not occurred, including lost income, capital gain, or appreciation that would have resulted from proper administration; or (b) the profit the trustee made by reason of the breach. § 736.1002(1) Fla.Stat. The Florida statute is similar to Restatement (Third) of Trusts: Prudent Investor Rule § 205 (1992).

**Georgia:**


b) – d) – Unable to find authority.

**Hawaii:** See *Steiner* in answer to Question 1.

**Idaho:** “A person entitled to restitution is entitled, in an appropriate case, to a remedy by a proceeding in equity, and not merely to a remedy by a proceeding at law. The available remedies by a proceeding in equity include: (1) a decree establishing and enforcing a constructive trust of property; (2) a decree establishing and enforcing an equitable lien upon property; (3) a decree that the plaintiff be subrogated to the position of another claimant against the defendant. In some
cases where the plaintiff would be entitled to enforce a constructive trust or equitable lien upon property if the property could be traced, but he is unable to trace the property, he is to maintain a proceeding in equity to obtain a decree establishing a personal liability of the defendant.” Witt v. Jones (1986) 111 Idaho 165, 172 [722 P.2d 474, 481] (citing Restatement of the Law on Restitution, § 160.)

Illinois:

a) **Highest or Lowest Intervening Value.** Yes. “Failure of the trustee to administer the trust in accordance with the terms renders a trustee liable for any injury sustained thereby the trust estate or by any person beneficially interested therein, irrespective of the trustee’s good faith. It is presumed that a trustee, in accepting the trust, knows the limitations of his powers. If he transgresses, he must abide the consequences.” Hunter, Estate Planning and Administration in Illinois § 218:3 (4th ed. 2007). “Misapplication of the trust estate violates the duty and renders the trustee immediately liable for the proceeds or the value of the property misapplied, at the option of the beneficiary.” Id. See also In re Will of Hartzell, 43 Ill.App.2d 118 (1963) (the trustee is liable if he fails to exercise reasonable care, prudence and diligence in protecting and preserving the trust property from loss or injury); Restatement (Third) of Trusts § 100 (“[a] trustee who commits a breach of trust is chargeable with … the amount required to restore the values of the trust estate and trust distributions to what they would have been if the portion of the trust affected by the breach had been properly administered).

b) **Average Price.** The research has not found an Illinois case or treaty directly on point.

c) **Value at the Time of the Decree.** The research has not found an Illinois case or treat directly on point.

d) **Price Obtained by Fiduciary Selling His Own Shares.** The research has not found an Illinois case or treaty directly on point.

Indiana:

a) **Highest or Lowest Intervening Value.** Eiteljorg v. Eiteljorg (Ind. Ct. App. 2011) 951 N.E.2d 565,572 (a trustee is liable for lost profits stemming from the "trustee's misuse of or failure to acquire trust property.")

b) **Average Price.** No authority found.

c) **Value at the Time of the Decree.** No authority found.
d) **Price Obtained by Fiduciary Selling His Own Shares.** No authority found.

**Iowa:** “A court of equity has jurisdiction of all questions relative to the establishment, enforcement, and protection and preservation of all trusts… As a general rule, probate, surrogate's, or orphans' courts have no jurisdiction to establish and enforce a trust in an estate subject to their jurisdiction, except to the extent that such jurisdiction is conferred on them by valid statutory provisions. [Iowa statutes do not confer on probate courts jurisdiction to establish constructive trusts, so they may not do so.]” *Matter of Young's Estate* (Iowa 1978) 273 N.W.2d 388, 393.

**Kansas:**

a) **Highest or Lowest Intervening Value.** There is no Kansas law applying or adopting this measure of damages. In *In re Hilgers* (2006) 352 B.R. 298, 304, however, the bankruptcy court stated that “the Uniform Trust Code (substantially adopted by the KUTC) was closely coordinated with the Restatement (Third) of Trusts, and both supply trust law where decisional law is commonly lacking.”

b) **Average Price.** There is no Kansas law applying or adopting this measure of damages.

c) **Value at the Time of the Decree.** There is no Kansas law applying or adopting this measure of damages.

d) **Price Obtained by Fiduciary Selling His Own Shares.** There is no Kansas law applying or adopting this measure of damages.

**Kentucky:** No direct authority. See KRS 386B.10-020 which generally seems to endorse the approach of paragraph c, supra.

**Louisiana:** Louisiana does not have statutory or jurisprudential rule that specifically answers this question. Louisiana, however, does maintain the “prudent investor” rule adopted from the Uniform Prudent Investor Act. See La. La. Rev. Stat. §9: 2127; see also response to Question 2. The rule in 9:2127 combined with the general assessment of damages for breach of trust in La. Rev. Stat. La 9:2021 seems to suggest that (a) below would be the correct result in Louisiana.

**Maine:** 18-B M.R.S.A. § 1001(2) (“To remedy a breach of trust that has occurred or may occur, the court may . . . compel the trustee to redress a breach of trust by paying money,
restoring property, or other means.”); 18-B M.R.S.A. § 1002(1) (“A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of the following: (A) The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; (B) The profit the trustee made by reason of the breach.”); 18-B M.R.S.A. § 1002 official cmt. (“For extensive commentary on the determination of damages, traditionally known as trustee surcharge, with numerous specific applications, see Restatement (Third) of Trusts: Prudent Investor Rule §§ 205–213 (1992).”).

Maryland: There is no Maryland law adopting or applying this measure of damages.

Massachusetts:

Michigan:

a) **Highest or Lowest Intervening Value.** MCL 700.7901 (2)(c) states to remedy a breach, the court may, "Compel the trustee to redress a breach of trust by paying money, restoring property, or other means."

MCL 700.7902, provides, "A trustee who commits a breach of trust is liable to the trust beneficiaries affected for whichever of the following is larger: (a) The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred, (b) The profit the trustee made by reason of breach."

b) **Average Price.** Michigan case and statutory law is devoid of any reference using an "average price" scheme for the basis of damages when a fiduciary improperly sells an asset of the estate. However, Michigan statutes provide the court with broad authority to redress a breach. MCL 700.7901(2)(c) states that the court may, "Compel the trustee to redress a breach of trust by paying money, restoring property, or other means." Also, MCL 700.7901(2)(c) states that the court may, "Order any other appropriate relief."

c) **Value at the Time of the Decree.** *In Thiel v. Cruikshank*, 96 Mich.App. 7 (1980), facts of which provide that the fiduciary, through self-dealing, sold property to his son at a price above the inventory value, but below fair market value. The son then quickly sold the property for a $7,000 profit. The court stated, "In summary, we find that the defendant engaged in self-dealing in violation of the statute, that defendant failed to obtain the highest price obtainable for the subject real property, that by defendant's self-dealing, the estate was deprived of $7,000 which it would otherwise have received ... " *Id.* at 14.

The *Thiel* ruling is in line with MCL 700.7902, which states, "A trustee who commits a breach of trust is liable to the trust beneficiaries affected for whichever of the following is
larger: (a) The amount required to restore the value of the trust property and trust
distributions to what they would have been had the breach not occurred. (b) The profit the
trustee made by reason of breach."

Court of Appeals stated in its ruling, "As in this case, where liability is based on selling
property for less than its fair value, the general rule is that the loss to the trust is measured
by the difference between the fair value and the amount received, 01' the amount the
estate would otherwise have received. *Id.* at 330-31, citing *Thiel*, supra; Bogert, Trusts &

d) **Price Obtained by Fiduciary Selling His Own Shares.** There is no Michigan authority
on point regarding the price obtained by a fiduciary selling his own shares.

**Minnesota:**

a) **Highest or Lowest Intervening Value.** In *In Will of Williams*, 2000 Minn. Dist. LEXIS
2, *134 (Minn. Dist. Ct. 2000) the Court calculated failure to diversify damages by taking
the value of stock on the day it should have been sold and then added an additional
amount to compensate for loss of return on those proceeds. In *Schug v. Michael*, 245
N.W.2d 587 (Minn. 1976), the trustee sold 1,000 shares of stock he was obligated to
retain for the benefit of the beneficiary. The measure of damages was found to be “the so-
called New York rule under which the proper measure of damages for the conversion of
stock is the highest value which the stock reaches within a reasonable time after the
owner has knowledge of the conversion.” *Id.* at 592.

b) **Average Price.** There is no Minnesota law applying or adopting this measure of
damages.

c) **Value at the Time of the Decree.** There is no Minnesota law applying or adopting this
measure of damages.

d) **Price Obtained by Fiduciary Selling His Own Shares.** There is no Minnesota law
applying or adopting this measure of damages.

**Mississippi:** No relevant authorities found.

**Missouri:**
Montana: No cases specifically dealing with these issues. Any of these results might follow from Mont. Code Ann. § 72-38-1002 (“(1) A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of: (a) any loss or depreciation in value of the trust estate resulting from the breach of trust, with interest; (b) the profit the trustee made by reason of the breach of trust, with interest; or (c) any profit that would have accrued to the trust estate if the loss of profit is the result of the breach of trust.”)

Nebraska: Calculation of Damages From Date Asset Should Have Been Sold:

a. Highest or Lowest Intervening Value. “A trustee who improperly fails to sell trust property is chargeable with the proceeds the trustee would have received upon a proper sale, increased or decreased to reflect the results of prudent investment.” Scott and Ascher on Trusts § 24.12 (5th ed. 2007); see also Restatement (Third) of Trusts: Prudent Investor Rule § 209(1), cmt. b (1992); Brougham v. Swarva (1983) 34 Wash. App. 68, 76-78; Schug v. Michael (1976) 310 Minn. 22, 31.
There is no Nebraska law applying or adopting this measure of damages.

b. Average Price. “In some of the cases in which the trustee was held chargeable with a loss resulting from a failure to sell trust property within a reasonable time, the courts have held that the amount the trustee should have received is the average price during the period in which the trustee should have sold the property.” Scott and Ascher on Trusts § 24.12 (5th ed. 2007); see also Babbitt v. Fidelity Trust Co. (N.J. Ch. 1907) 66 Atl. 1076; Steiner v. Hawaiian Trust Co. (1964) 47 Haw. 548, 570, n. 8.
There is no Nebraska law applying or adopting this measure of damages.

c. Value at the Time of the Decree. “Sometimes, perhaps for lack of any other more reliable guideline, the courts have held trustees accountable for the difference between the inventory value of the property and the price received or the property’s present value.” Scott and Ascher on Trusts § 24.12 (5th ed. 2007); see also Restatement (Third) of Trusts: Prudent Investor Rule § 208 (1992); Matter of Frame (App. Div. 1935) 284 N.Y.S. 153.
There is no Nebraska law applying or adopting this measure of damages.

d. Price Obtained by Fiduciary Selling His Own Shares. “In our view, the court properly placed itself in the husband's position at the time he sold his shares without using the advantage of hindsight as prohibited by Heller v. First National Bank, 657 P.2d 992 (Colo.App.1982). The evidence revealed that if wife's shares had been sold by husband along with his own, she too would have profited in the same way that husband had. Hence, there was no error in valuing the shares as of that date. See People in the

There is no Nebraska law applying or adopting this measure of damages.

Nevada: “Courts of equity have traditionally had the power to authorize a trustee's sale subject to a requirement that the proposed sale be submitted to the court for approval. 7 Bogert, Trusts s 742, pp. 587-88 (2d ed. 1960). In confirming the sale, the court simply borrowed a procedure from statutes governing estate sales for receipt of higher bids in open court, a practical and fair method for determining the best price available.” Diotallevi v. Sierra Development Co. (1979) 95 Nev. 164, 167–68 [591 P.2d 270, 272]

New Hampshire:

a) **Highest or Lowest Intervening Value.** In re Estate of McCool, 553 A.2d 761, 769 (N.H. 1988) (remanding the case to probate court and finding that where trustee failed to sell stock while it still had value, the court should "determine what the selling price would have been and impose a surcharge accordingly.").

b) **Average Price.** None. In re Guardianship of Dorson, 934 A.2d 545, 550 (N.H. 2007) ("Where, as in this case, 'the beneficiary should seek damages on the theory of conversion, the court may award him 'appreciation damages', representing the appreciated value of the property at the time of the beneficiary's suit or judgment thereon rather than its value at the time of misappropriation. "") (citations omitted).

c) **Value at the Time of the Decree.** None. In re Guardianship of Dorson, 934 A.2d 545, 550 (N.H. 2007) ("Where, as in this case, 'the beneficiary should seek damages on the theory of conversion, the court may award him 'appreciation damages', representing the appreciated value of the property at the time of the beneficiary's suit or judgment thereon rather than its value at the time of misappropriation. "") (citations omitted).

d) **Price Obtained by Fiduciary Selling His Own Shares.** None

New Jersey: **Average Price.** Babbitt v. Fidelily Trust Co., 72 N.J. Eq. 745, 66A. 1076,1907 N.J. Ch. LEXIS 77 (Ch. 1907).
New Mexico:  
c) See Uniform Trust Code. Trustee who commits breach is liable for amount required to restore value and trust distributions if there had not been a breach and profit made by trustee by reason of breach (46A-10-1002, NMSA).

New York: Value at the Time of the Decree. In In re Frame’s Estate, 245 A.D. 675 (1st Dep’t. 1935), the court stated it is impossible to know the exact date that executors should have sold securities they had a duty to liquidate. The court further stated that is was unlikely that the beneficiaries would have complained had the estate assets been liquidated within a reasonable time at the inventory value. Therefore, the executors were held responsible for the difference between the inventory value and the proceeds from the actual sale. Id. at 686.

North Carolina: N.C.G.S.A. § 36C-10-1001(b)(3) (“To remedy a breach of trust that has occurred or may occur, the court may . . . compel the trustee to redress a breach of trust by paying money, restoring property, or other means.”); N.C.G.S.A. § 36C-10-1002(a) (“A trustee who commits a breach of trust is liable for the greater: (1) The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; (2) The profit the trustee made by reason of the breach.”); N.C.G.S.A. § 36C-10-1002 official cmt. (“For extensive commentary on the determination of damages, traditionally known as trustee surcharge, with numerous specific applications, see Restatement (Third) of Trusts: Prudent Investor Rule §§ 205–213 (1992).”).

North Dakota:  
a) Highest or Lowest Intervening Value. North Dakota Century Code §59-18-02 (1002) provides, “A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred or the profit the trustee made by reason of the breach.”

Ohio: Ohio Rev. Code Ann. § 5810.01(B)(3) (“To remedy a breach of trust that has occurred or may occur, the court may . . . compel the trustee to redress a breach of trust by paying money, restoring property, or other means.”).

Ohio Rev. Code Ann. § 5810.02(A) (“A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of the following: (1) The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; (2) The profit the trustee made by reason of the breach.”).
Ohio Rev. Code Ann. § 5810.02 official cmt. (“For extensive commentary on the
determination of damages, traditionally known as trustee surcharge, with numerous specific
applications, see Restatement (Third) of Trusts: Prudent Investor Rule §§ 205–213 (1992).”).

(“[D]amages and the corresponding calculation of damages apply only if the trial court
chooses to remedy the breach of trust by payment of money under [ORC Ann.
5810.01(B)(3)].”).

the 'New York Rule', a plaintiff can receive either the value of the stock at the time of
the wrongful act or the highest intermediate stock price between the date of the act and a
reasonable time thereafter during which the stock could have been replaced by the
plaintiff, whichever is greater .... Although the New York Rule is often cited in
connection with conversion actions, it is not limited to conversion alone.”).

b)–d) No authority found.

Oklahoma: Oklahoma law is scarce on this issue. The trial court in Burford required
restoration of 220,122 shares of XOM, then used the value of such shares as of the date of
completion of the bench trial in ordering the entry of a money judgment against the trustee in
County, Okla., Oct. 9, 2012). When dealing with personal property, “[t]he detriment caused
by the wrongful conversion of personal property is presumed to be: 1. The value of the
property at the time of the conversion with the interest from that time; or, 2. Where the action
has been prosecuted with reasonable diligence, the highest market value of the property at
any time between the conversion and the verdict, without interest, at the option of the injured
party; and, 3. A fair compensation for the time and money properly expended in pursuit of
the property.” 23 Okla. Stat. § 64.

Oregon:

a) Highest or Lowest Intervening Value. ORS § 130.805 (trustee who commits a breach of
trust is liable to the beneficiaries affected for the greater of (a) The amount of damages
caused by the breach; (b) The amount required to restore the value of the trust property
and trust distributions to what they would have been had the breach not occurred; or (c)
The profit the trustee made by reason of the breach.).

b) –d) No authority found.
Pennsylvania: Because Pennsylvania courts generally eschew any “specific date” doctrine, this question and its subsections likely have little application in Pennsylvania.


South Carolina: S.C. Code Ann. § 62-7-1001 (“To remedy a breach of trust that has occurred or may occur, the court may . . . compel the trustee to redress a breach of trust by paying money, restoring property, or other means.”)

S.C. Code Ann. § 62-7-1002 (“A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of the following: (1) The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; (2) The profit the trustee made by reason of the breach.”).

S.C. Code Ann. § 62-7-1002 official cmt. (“For extensive commentary on the determination of damages, traditionally known as trustee surcharge, with numerous specific applications,

South Dakota:

a) Highest or Lowest Intervening Value. “If the trustee commits a breach of trust, he is chargeable with any loss or depreciation in value of the trust estate resulting from the breach of trust. Restatement (Second) of Trusts § 205(a) (1959); 76 Am.Jur.2d Trusts § 367 (1992).” *In re Florence Y. Wallbaum Revocable Living Trust Agreement*, 2012 S.D. 18, ¶ 36. The remedies stated in § 205 of the Restatement (Second) are also applicable when the trustee violates his duty of loyalty. Restatement (Second) of Trusts § 206 (1959)(See comment “ If the trustee commits a breach of trust, the beneficiary may have the option of pursuing a remedy which will put him in the position in which he was before the trustee committed the breach of trust; or of pursuing a remedy which will give him any profit which the trustee has made by committing the breach of trust; or of pursuing a remedy which will put him in the position in which he would have been if the trustee had not committed the breach of trust.”) *Willers*, 510 N.W.2d at 680–81.

Tennessee:

a) Highest or Lowest Intervening Value. T.C.A. 35-15-1002. Section Comment. For extensive commentary on the determination of damages, traditionally known as trustee surcharge, with numerous specific applications, see Restatement (Third) of Trusts: Prudent Investor Rule §§ 205-213 (1992). For the use of benchmark portfolios
to determine damages, see Restatement (Third) of Trusts: Prudent Investor Rule Reporter's Notes to §§ 205 and 208-211 (1992).

b) **Average Price.** Not discussed in Tennessee statutes or comments.


d) **Price Obtained by Fiduciary Selling His Own Shares.** Not discussed in Tennessee statutes or comments.

**Texas:**

a) **Highest or Lowest Intervening Value.** See Texas Trust Code §§ 114.001 and 114.008 supra. Under Texas Trust Code §114.008 (a)(10)a Court may implement virtually any equitable remedy.

b) **Average Price.** See Texas Trust Code §§ 114.001 and 114.008 supra. Under Texas Trust Code §114.008 (a)(10)a Court may implement virtually any equitable remedy.

c) **Value at the Time of the Decree.** Texas Law does not require trustees to inventory property. See Texas Trust Code §§ 114.001 and 114.008 supra. Under Texas Trust Code §114.008 (a)(10)a Court may implement virtually any equitable remedy.

d) **Price Obtained by Fiduciary Selling His Own Shares.** See Texas Trust Code §117.010 which provides that: “Compliance with the prudent investor rule is determined in light of the facts and circumstances existing at the time of a trustee’s decision and not in hindsight.” Under Texas Trust Code §114.008 (a)(10)a Court may implement virtually any equitable remedy.

**Utah:**

**Vermont:**
a) **Highest or Lowest Intervening Value.** 14A V.S.A. § 905 implies that breach/damages are to be determined on a case by case basis, with emphasis on the time of the action (or inaction) at issue: “Compliance with the prudent investor rule is determined in light of the facts and circumstances existing at the time of a trustee's decision or action and not by hindsight.”

b) **Average Price.** No Vermont law adopting/discussing this measure of damages.

c) **Value at the Time of the Decree.** No Vermont law adopting/discussing this measure of damages.

d) **Price Obtained by Fiduciary Selling His Own Shares.** No Vermont law adopting/discussing this measure of damages.

**Virginia:** “[T]he Uniform Principal and Income Act … beneficiary ‘shall be entitled to share in the net proceeds received from [conversion of] the property as delayed income.’ … The term ‘delayed income’ is defined as the difference between the net proceeds received from the property and the amount which, had it been placed at simple interest at the rate of five per centum per annum for the period during which the change was delayed, would have produced the net proceeds at the time of the change.... The period of delay is calculated ‘from the time when the duty to make [a change] first arose, which shall be presumed, in the absence of evidence to the contrary, to be one year after the trustee first received the property if then unproductive, otherwise one year after it became unproductive.’” *Sturgis v. Stinson*, 241 Va. 531, 538–39, 404 S.E.2d 56, 60–61 (1991). *[note this court decision relies on a statute that has since been repealed]*

**Washington:** The courts calculate damages in Washington using the “Highest or Lowest Intervening Value” standard. If the value of the property in question is of fluctuating value, the measure of damages is the highest market value of the property within a reasonable time after the conversion. *Brougham v. Swarva*, 34 Wn. App. 68, 77, 661 P.2d 138 (1983). This rule protects the victim who has invested in the property from either rises or falls subsequent to the conversion, but also does not provide complete umbrella protection until the entry of judgment. Id. at 77-78.

**West Virginia:** Any of these results might follow from W. Va. Code Ann. § 44D-10-1002 (West) “(a) A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of: (1) The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or (2) The profit the trustee made by reason of the breach.”; W. Va. Code Ann. § 44D-10-1001 (West) “(b) To
remedy a breach of trust that has occurred or may occur, the court may: (10) Order any other appropriate relief.”

**Wisconsin:**

(a) **Highest or Lowest Intervening Value:** No authority on point.

(b) **Average Price:** No authority on point. In two Wisconsin Supreme Court decisions, the court cited *Babbit v. Fidelity Trust Co.*, 72 N.J. Eq. 745, 66 A. 1076 (N.J. Ch. 1907), though not for the proposition stated above concerning average price. See *Welch v. Welch*, 235 Wis. 282, 290 N.W. 758, 773 (1940); *In re Allis' Estate*, 191 Wis. 23, 209 N.W. 945, 949 (1926).

(c) **Value at the Time of the Decree:** No authority on point.

(d) **Price Obtained by Fiduciary Selling His Own Shares:** No authority on point.

**Wyoming:** a. Highest or Lowest Intervening Value. N/A b. Average Price. N/A c. Value at the Time of the Decree. N/A d. Price Obtained by Fiduciary Selling His Own Shares. N/A


**Alaska:** “(a) 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. (b) A trustee's investment and management decisions respecting individual assets shall be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.” Alaska Stat. Ann. § 13.36.230 (West); “A trustee has a duty to use reasonable care and skill to make the trust property productive, and to invest and manage the funds of the trust as a prudent investor would, in light of the purposes, terms, distribution requirements, and other circumstances of the trust.” (internal cit. om.) Marshall v. First Nat. Bank Alaska (Alaska 2004) 97 P.3d 830, 839.

**Arizona:** “Mere proof that one could have earned 15% to 18% on insured certificates of deposit for part of the relevant time period is not sufficient to establish that a prudent person investing in an appropriate portfolio of bonds or other obligations comparable to that of the condemnor, United States v. Blankinship, 543 F.2d at 1276, would have obtained a return so far in excess of the statutory rate that the latter must be considered so unreasonable as to be constitutionally infirm.” Tucson Airport Authority v. Freilich (1983) 136 Ariz. 280, 284 [665 P.2d 1002, 1006]
Arkansas: No Arkansas cases cite the Restatement sections listed here. There seem to be no appellate decisions.

California: *California Ironworkers Field Pension Trust v. Loomis Sayles & Co.* (2001) 259 F.3d 1036, 1046 (court uses benchmark yield for fixed income assets of type described in Welfare Trust Plan as approximation of what improperly invested funds would have earned if properly invested)

Colorado: N/A

Connecticut:

Delaware: Yes. “Any determination of liability for investment performance shall consider the performance of the entire portfolio and such other factors as the fiduciary considered when the investment decision was made.” Del. Code Ann. tit. 12, § 3302(c); see also *Mennen v. Wilmington Trust Co.*, No. CV 8432-ML, 2015 WL 1914599, at *37 (Del. Ch. Apr. 24, 2015) (Noting that “recovery from a trustee for improper investments ‘ordinarily would be the difference between (1) the value of [the improper] investments and their income and other product at the time of surcharge and (2) the amount of funds expended in making the improper investments, increased (or decreased) by a projected amount of total return (or negative total return) that would have accrued to the trust and its beneficiaries if the funds had been properly invested.””) (Citing Restatement (Third) Trusts §100, cmt. (b)(1)).

Florida: Florida has no authority on this specific issue. Florida has only general authority that a trustee who commits a breach of trust is liable for the greater of (a) the amount required to restore the value of the trust property and trust distributions to what they would have been if the breach had not occurred, including lost income, capital gain, or appreciation that would have resulted from proper administration; or (b) the profit the trustee made by reason of the breach. § 736.1002(1) Fla.Stat. The Florida statute is similar to Restatement (Third) of Trusts: Prudent Investor Rule § 205 (1992). Fla. Stat. §518.11(1): “The fiduciary has a duty to invest and manage investment assets as a prudent investor would considering the purposes, terms, distribution requirements, and other circumstances of the trust.” There is no particular investment strategy required; however all decisions are reviewed in terms of “reasonable business judgment”. “This is a rule of conduct and not of resulting performance.” Fla. Stat. §518.11(1)(f): “The circumstances that the fiduciary may consider in making investments include, without limitation, the general economic conditions, the possible effect of inflation, the expected tax consequences of investment decisions or strategies, the role each investment or course of action plays within the overall portfolio, the
expected total return, including both income yield and appreciation of capital, and the duty to incur only reasonable and appropriate costs.”

**Georgia:** Unable to find authority on this issue.

**Hawaii:**

**Idaho:** “(1) 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. (2) A trustee's investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.” Idaho Code Ann. § 68-502 (West); Knudson v. Bank of Idaho (1967) 91 Idaho 923, 931 [435 P.2d 348, 356].

**Illinois:** Yes. Total return projection is an acceptable benchmark in Illinois courts. In Swenson v. Oxford Bank & Trust (N.D. Ill. Aug. 26, 2004) 2004 WL 1918778, the court refused to strike down an expert’s estimation of damages using total return projection, even if the projection is based on an investment strategy that the beneficiary would not have chosen: “To calculate Swenson's damages, Dr. Lawrence compares the portfolio value obtained through Oxford's investment strategy to values which may have been obtained using other investment strategies. In taking this comparative approach, Dr. Lawrence acknowledges that part of the decline in value of Swenson's portfolio was the result of a downturn in the market as a whole. Dr. Lawrence suggests that Oxford's investment management performance should be compared to the performance of the investments in Swenson's portfolio when he moved his account to Oxford had he held them all this time (the “buy and hold” strategy), the performance of passively managed portfolios, such as the Dow Jones Industrial Average or the S & P 500, and actively managed portfolios, such as Vanguard or Fidelity mutual funds. Oxford argues that Dr. Lawrence's use of the “buy and hold” strategy is inappropriate because it was not a strategy that Swenson would have pursued. Swenson's desire to have his investment managers actively trade his securities does not, however, affect the “buy and hold” portfolio's usefulness as a benchmark.”

**Indiana:** No authority found on this issue.

**Iowa:** “1. A trustee shall invest and manage trust property 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.
2. A trustee's investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.” Iowa Code Ann. § 633A.4302 (West); “[T]he prudent investor rule allows trustees to “invest and manage the funds of the trust as a prudent investor would, in light of the purposes, terms, distribution requirements, and other circumstances of the trust.” Heidecker Farms, Inc. v. Heidecker (Iowa Ct. App. 2010) 791 N.W.2d 429; In re Conservatorship of Alessio (Iowa 2011) 803 N.W.2d 656, 662 (court finds fiduciary not liable for breach where fiduciary considered that conservatee was in a nursing home and suffered from terminal illness as factors in selecting investments)

Kansas: KSA 58a-1002 provides that one measure of damages for breach of trust is “[t]he amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred[.]” This suggests that a benchmark portfolio could be used determine what would put the trust in the position it would have been without the breach if funds would have been invested in something approximating the benchmark. Additionally, though there no Kansas cases using the total return or benchmark approach, the UTC Comments that follow section 58a-1002 refer to the Restatement (Third) of Trusts: Prudent Investor Rule Reporter's Notes to Sections 205 and 208-211 for use of benchmark portfolios to determine damages.

Kentucky: No authorities on point.

Louisiana: Louisiana does not maintain a “benchmark” standard in the law. Rather, Louisiana maintains the product investor rule for investment and management of trust property. See, La. Rev. Stat. 9:2127. La. Rev. Stat. §9: 2127. Standard of care in investing and management. Unless the trust instrument provides otherwise, a trustee shall invest and manage trust property as a prudent investor. In satisfying this standard, the trustee shall consider the purposes, terms, distribution requirements, and other circumstances of the trust. A trustee's investment and management decisions are to be evaluated in the context of the trust property as a whole and as part of an overall investment strategy having risk and return objectives reasonably suited to the trust. In investing within the limitations of the foregoing standard, a trustee is authorized to retain and acquire every kind of property.

COMMENTS—2001. (a) The primary source of the new formulation for this Section is Section 2 of the Uniform Prudent Investor Act (1994). It sets forth the “prudent investor rule”, which has been widely adopted in the other states in place of the “prudent man rule”. The prudent investor rule makes it clear that the trustee's duty is determined by the purposes of the trust and the circumstances of the beneficiaries, not in light of how a prudent man
would manage his own property; (b) The prudent investor rule makes it clear that the
certainty of the trustee's actions is determined with respect to the portfolio as a whole: “an
investment that might be imprudent standing alone can become prudent if undertaken in
sensible relation to other trust assets, or other nontrust assets.” (Quote from comment to
Uniform Prudent Investor Act (1994) Section 2.); (c) Diversification usually is necessary to
reduce risk. For small trusts this can be accomplished through pooled investments such as
mutual funds. See R.S. 9:2087. “Circumstances can, however, overcome the duty to
diversify. For example, if a tax-sensitive trust owns an under diversified block of low-basis
securities, the tax costs of recognizing the gain may outweigh the advantages of diversifying
the holding. The wish to retain a family business is another situation in which the purposes of
the trust sometimes override the conventional duty to diversify.” (Quote from comment to
Uniform Prudent Investor Act (1994) Section 3.); (d) Rules that had been added in the past to
this Section, authorizing investments that might otherwise have been prohibited because of
the rules against self-dealing and delegation, have been moved to R.S. 9:2086 and 2087.

**Maine:** 18-B M.R.S.A. § 1002 official cmt. (“For the use of benchmark portfolios to
determine damages, see Restatement (Third) of Trusts: Prudent Investor Rule Reporter’s
Notes to §§ 205 and 208–211 (1992).”).

**Maryland:** Section 14.5-902 of the MD Code, Estates and Trusts sets damages for breach of
trust at “the greater of: (1) [t]he amount required to restore the value of the trust property and
trust distributions to what they would have been had the breach not occurred.” This would
suggest that a benchmark portfolio could be used determine what would put the trust in the
position it would have been without the breach if funds would have been invested in
something approximating the benchmark.

**Massachusetts:** Yes.

**Michigan:** The Michigan Prudent Investor Rule does not contain any references to a
benchmark as a determination of damages. Rather, the rule states: 1) A fiduciary's investment
and management decisions with respect to individual assets shall be evaluated not in
isolation, but rather in the context of the fiduciary estate portfolio as a whole and as a part of
an overall investment strategy having risk and return objectives reasonably suited to the
fiduciary estate. MCL 700.1503(1); 2) A fiduciary may delegate investment and
management functions provided that the fiduciary exercises reasonable care, skill, and
caution in all of the following; (a) Selecting an agent. (b) Establishing the scope and terms of
the delegation, consistent with the purpose and terms of the governing instrument; (c).
Periodically reviewing the agent's actions in order to monitor the agent's performance and
compliance with the terms of the delegation. MCL 700.1510(1)(a)-(c). The Michigan Court of
is true that damages that are speculative or based on conjecture are not recoverable. [citing Ensink v. Mecosta Co. Gen. Hosp., 262 Mich.App. 518, 525 (2004)] However, it is not necessary that damages be determined with mathematical certainty; rather, it is sufficient if a reasonable basis for the computation exists." Id. at 255.

**Minnesota:** Section 1002(a)(1) of the Minnesota UTC states that one measure of damages is “the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred.” This would suggest that a benchmark portfolio could be used determine what would put the trust in the position it would have been without the breach if funds would have been invested in something approximating the benchmark. In *Sell v. Sell*, 2009 Minn. App. Unpub. LEXIS 1145, *10 (Minn. Ct. App. Oct. 27, 2009) the District Court calculated “reasonable growth” by using a hypothetical portfolio of 60% stocks and 40% bonds. The Court of Appeals reversed, holding that there was no evidence the beneficiaries would have invested in such a portfolio, and therefore, damages were limited to simple interest in the absence of evidence that the trustee received a greater return. In *In Will of Williams*, 2000 Minn. Dist. LEXIS 2, *119 (Minn. Dist. Ct. 2000), the Court calculated failure to diversify damages by taking the value of stock on the day it should have been sold and then assuming the proceeds were invested 50% in stocks and 50% in bonds, as measured by the S&P 500 Composite Index and by the Lehman Brother's Intermediate Treasury Bond Index. The Court reasoned that applying the statutory interest rate would not have fairly compensated the trust or its beneficiaries for the loss of use of the proceeds of the trust.

**Mississippi:** No relevant authorities.

**Missouri:** No authorities found.

**Montana:** No authorities found.

**Nebraska:** Neb. Rev. St. § 30-3891 (UTC 1002) provides that one measure of damages for breach of trust is “[t]he amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred[.]” This suggests that a benchmark portfolio could be used determine what would put the trust in the position it would have been without the breach if funds would have been invested in something approximating the benchmark.

**Nevada:** “Except as otherwise provided in chapter 669A of NRS, a trustee who invests and manages trust property owes a duty to the beneficiaries of the trust to comply with the prudent investor rule as set forth in NRS 164.700 to 164.775, inclusive” Nev. Rev. Stat. Ann.
§ 164.740 (West); “1. A trustee shall invest and manage trust property as a prudent investor would, considering the terms, purposes, requirements for distribution, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill and caution. 2. A trustee's decisions concerning investment and management as applied to individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as part of an overall strategy of investment having objectives for risk and return reasonably suited to the trust.” Nev. Rev. Stat. Ann. § 164.745 (West); “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.” Nev. Rev. Stat. Ann. § 164.750 (West).

**New Hampshire:** No authorities found.

**New Jersey:**

**New Mexico:** See discussion in *Miller* opinions referred to above.

**New York:** In New York, the rule is that the trustee must exercise “reasonable care, skill and caution to make and implement investment and management decisions as a prudent investor would for the entire portfolio….” N.Y. EST. POWERS & TRUSTS LAW § 11-2.3(b)(2). In *Matter of HSBC Bank USA (Ely)*, 37 Misc.3d 875 (N.Y. Surr. Ct. 2012), the court examined the entire portfolio when determining whether a trustee met the standard required by Prudent Investor Act. In *Ely*, 60% of the trust’s assets were held in the stock of a closely held family corporation (Soper). The executor for the estate of a deceased beneficiary objected to an accounting because 30% of the trust assets (or 70% of the non-Soper stock) was held in four stocks. The Objectants did not question whether retaining the Soper stock was imprudent. Rather, they asked the court to focus only on the remaining 40% of trust assets when determining whether the trustee had breached a fiduciary duty. The court held that the decisions related to the corporate trustees with respect to those four securities could not be “evaluated in a vacuum and without consideration of 60% of the trust assets” and found that the trustee did not breach his duty to the trust. *Id.* at 881-82.

**North Carolina:** N.C.G.S.A. § 36C-10-1002 official cmt. (“For the use of benchmark portfolios to determine damages, see Restatement (Third) of Trusts: Prudent Investor Rule Reporter’s Notes to §§ 205 and 208–211 (1992).”)

**North Dakota:** N/A

Oklahoma: No Oklahoma law was found on this issue. Expert witnesses tend to consider benchmarks or indices as potential damages models.

Oregon: N/A


Rhode Island: 


South Dakota: Matter of Kuehn, 308 N.W.2d 398, 401 (S.D. 1981)( In determining the current rate of return on trust investments, the trial court derived the percentages used from the investment results of three Sioux Falls bank trust departments during the time involved herein.)


Texas: See Texas Trust Code § 117.004: "A trustee’s investment and management decisions representing individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as part of an overall investment strategy having risk and return objectives reasonably suited to the trust."

Because Texas has adopted the Uniform Prudent Investor Rule, I assume that the Reporters Notes would be considered by a Court in calculating total return damages.
Texas law presently gives no guidance as to how to carry out a total return approach to damages. Having said this, Under Texas Trust Code §114.008 (a) (10) a Court may implement virtually any equitable remedy.

**Utah: N/A**

**Vermont:** A possible measure of damages under 14A V.S.A. §1002 is “the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred.” This would suggest that a benchmark portfolio could be used to determine what would put the trust in the position it would have been without the breach if funds would have been invested in something approximating the benchmark.

**Virginia:**

**Washington:** In *Mark Anthony Fowler Special Needs Trust*, the court compared the trust’s poor performance against the Standard & Pours 500 index for the same time period. *Mark Anthony Fowler Special Needs Trust*, 2011 WL 441702, *7 (Wn. App. Feb. 8, 2011)*. The court stated that although the specific stocks that the trustee had selected for the trust had experienced significant losses, the trust’s stocks had outperformed the S&P 500 index by 2.5 percent. *Id.* Therefore, the court concluded that the trust’s losses resulted from a volatile market, rather than the trustee’s selection of assets. *Id.* See also *Matter of HSBC Bank USA (Knox)*, No. DO-0659, 2010 WL 518667 (2010); *Baker Boyer Nat’l Bank v. Garver*, 43 Wn. App. 673, 676, 719 P.2d 583 (1986).

**West Virginia:** No authorities found for use of benchmarks in determining breach of trust damages in West Virginia.

**Wisconsin:** There is no statutory or case law authority supporting use of a total return benchmark for measuring damages for breach of trust. In *Wisconsin Medical Society, Inc. v. Morgan*, 328 Wis.2d 469, 787 N.W.2d 22 (2010), the Wisconsin Supreme Court cited the Restatement (Third) of Trusts as authority, though in a different context. On numerous occasions the court has looked to the Restatement (Second) of Trusts as authority. Restatement (Third) Trusts §100, cmt. b(1) (2012) likely would be influential in Wisconsin courts.

**Wyoming:** “[T]he criterion as to what rate of interest he should be compelled to pay in case he mingles the fund with his own and uses it in his own business cannot in such case be based on what he could have received if he had invested the fund in securities of the United States or in banks.” *In re Reed's Estate*, 37 Wyo. 107 (1927).
18) **OFFSETTING LOSSES WITH GAINS.** “A trustee who is liable for a loss caused by a breach of trust may not reduce the amount of the liability by deducting the amount of a profit that accrued through another and distinct breach of trust; but if the breaches of trust are not separate and distinct, the trustee is accountable only for the net gain or chargeable only with the net loss resulting therefrom.” Restatement (Third) of Trusts: Prudent Investor Rule § 213 (1992); see also Restatement (Third) of Trusts § 101 (2012); Restatement (Third) Restitution and Unjust Enrichment § 51(5); Restatement (Second) of Trusts § 213 (1959); Scott and Ascher on Trusts § 24.18 (5th ed. 2007); Bogert, Trusts and Trustees § 862 (2d ed. rev. 1995); Loring and Rounds, A Trustee’s Handbook, § 7.2.3.2 (2012); California Ironworkers Field Pension Trust v. Loomis Sayles & Co. (9th Cir. 2001) 259 F.3d 1036, 1047; In re Estate of Stowell (Me. 1991) 595 A.2d 1022, 1026; Vredenburgh v. Jones (Del. Ch. 1975) 349 A.2d 22, 43; Meister v Menninge (2014) 230 Cal. App. 4th 381, 397.


**Alaska:** No authorities found.

**Arizona:** In re Newman-Pauley Residential Trust (Ariz. Ct. App., Aug. 31, 2015, No. 2 CA-CV 2015-0030) 2015 WL 5120097, at *1 (“The trial court also ordered that the decedent's trust was entitled to an offset from the survivor's trust for damages for substitution of the residence as collateral on a loan Mary had taken out.”); Offsets to damages have also been allowed in other contexts. See, e.g., Arizona Eastern R. Co. v. Stewart (1915) 17 Ariz. 227, 229; State ex rel. Miller v. Filler (1991) 168 Ariz. 147, 149.

**Arkansas:** No Arkansas cases cite the Restatement sections listed here. There seem to be no appellate decisions.

**California:** Meister v. Mensinger (2014) 230 Cal.App.4th 381, 397 (“[i]n business cases, damages are based on net profits, as opposed to gross revenue”); California Ironworkers Field Pension Trust v. Loomis Sayles & Co. (2001) 259 F.3d 1036, 1046 (“[i]f a breach of trust consists only in investing too large an amount in a single security or type of security, the trustee is liable only for such loss as results from the investment of the excess beyond the amount which it would have been proper so to invest”); also see Cal. Prob. C. § 16047(b) on need to examine portfolio as a whole to determine imprudence of particular investment.

Connecticut:

Delaware: Yes. *Vredenburg v. Jones*, 349 A.2d 22, 43 (Del. Ch. 1975); see also *Stegemeier v. Magness*, 728 A.2d 557, 566 (Del. 1999) (Explaining that the “beneficiary is entitled to any profit made by the trustee [who is guilty of a breach of fiduciary duty], and may recover from the trustee the amount for which he sold the property to another, less the expenses of the trustee incurred in the resale or in perfecting title and the amount of taxes paid by the trustee after his purchase of the property.”).

Florida: Florida has no authority on this specific issue. Florida has only general authority that a trustee who commits a breach of trust is liable for the greater of (a) the amount required to restore the value of the trust property and trust distributions to what they would have been if the breach had not occurred, including lost income, capital gain, or appreciation that would have resulted from proper administration; or (b) the profit the trustee made by reason of the breach. § 736.1002(1) Fla.Stat. The Florida statute is similar to Restatement (Third) of Trusts: Prudent Investor Rule § 205 (1992). See also Fla. Stat. §736.1001 (2)(i) & (j) where the court may remedy breach of a trust by, “voiding the act, imposing a lien or constructive trust on trust property, or trace property wrongly disposed of and recover the property or its proceeds; or order any other appropriate relief.”


Idaho: *State, ex rel. Moon v. State Bd. of Examiners* (1983) 104 Idaho 640, 648 [662 P.2d 221, 229]; “If a trustee breaches his duty of loyalty to the beneficiary by entering into competition with the beneficiary, the beneficiary can compel the trustee to account for any profit made. The beneficiary, however, can only compel the trustee to account if the trustee is reimbursed for his expenses. Restatement § 206 comment 1, illustration 12. The question becomes: what expenses are properly chargeable to a trust estate? The Restatement offers no specific guidance; but we believe that only those expenses a prudent and properly acting trustee would have incurred in making the same transaction should be allowed as an offset. To allow more would be to punish the innocent beneficiary and, at the same time, make the trustee, who was guilty of a breach of trust, whole.” *Pickering v. El Jay Equipment Co., Inc.* (Idaho Ct. App. 1985) 108 Idaho 512, 518 [700 P.2d 134, 140].
Illinois: The research has not found an Illinois case or treaty directly on point.

Indiana: No authorities found.

Iowa: No authorities found.


Kentucky: No direct authority.

Louisiana: Louisiana maintains the above rule. See *La. Rev. Stat. Ann. 9: 2203*. Balancing losses against gains. A trustee who is liable for a loss occasioned by one breach of trust cannot reduce the amount of his liability by deducting the amount of a gain that has accrued through another distinct breach of trust; but if the two breaches of trust are not distinct, a trustee is accountable only for the net gain or chargeable only for the net loss resulting therefrom.

Maine: *In re Est. of Stowell*, 595 A.2d 1022, 1026 (Me. 1991) (finding that trustee “is not entitled to deduct from his profits the loss from his other, unsuccessful investment of loans from the estate”).

Maryland: There is no Maryland case law specifically discussing this issue.

Massachusetts: Yes.

Michigan: There is no similar provision contained in the Michigan statutes; however, *In the Matter of Green Charitable Trust*, 172 Mich.App. 298 (1988), the defendant corporate fiduciary argued that damages should be offset with income received and expenses saved as a result of the improper sale of real estate. The court rejected this argument stating, "As in this case, where liability is based on selling property for less than its fair value, the general rule is that the loss to the trust is measured by the difference between the fair value and the amount received, or the amount the estate would otherwise have received." *Id.* at 330-31.

Minnesota: There is no Minnesota case law specifically discussing this issue. The Minnesota Supreme Court has adopted the Restatement (Second) of Trusts where no Minnesota case law is controlling. *Connecticut General Life Ins. Co. v. First Nat'l Bank*, 262 N.W.2d 403, 405 (Minn. 1977); *Kohler v. Fletcher*, 442 N.W.2d 169, 171 (Minn. Ct. App. 1989).
Mississippi: No relevant authorities.


Montana: No authorities found.

Nebraska: There is no Nebraska case law specifically discussing this issue.

Nevada: No authority found.

New Hampshire: Melhnes v. Goldthwaite, 52 A.2d 795,799 (N.H. 1947) ("[W]here a trustee purchased shares of a corporation and some were sold at a profit and others at a loss, the investment was treated as an entirety and he was held liable only for the net loss.").

New Jersey: 

New Mexico: See Miller v. Bank of America, N.A., as Trustee, 2015-NMSC-022.

New York: A trustee cannot use gains in one portion of the trust assets to offset losses from another. In re Buck's Will, 55 N.Y.S.2d 841 (N.Y. Surr. Ct. 1945) (holding “[a] trustee who is liable for a loss resulting from a breach of trust with respect to one portion of the trust cannot reduce his liability by reason of a gain with respect to another portion of the trust property occasioned by a separate and distinct breach of trust.”).

North Carolina: No authority found.

Ohio: Schuster v. North American Mortg. Loan Co., 65 N.E.2d 667,668 (Ohio Ct. App. 1942) ("[A] trustee who is liable for a loss occasioned by one breach of trust, cannot reduce the amount of his liability by deducting the amount of a gain which has accrued through another and distinct breach of trust.").

Oklahoma: “When a trustee has engaged in a variety of unrelated investment transactions in breach of trust, some of which resulted in profits and others in losses, the trustee cannot net out the results of his unauthorized activities where the breaches of trust are separate and distinct. Only if the breaches in contest are not distinct is the trustee accountable solely for the net gain or chargeable only with the net loss that results therefrom. Hence, when a
variety of improper investments are made, the trustee may be liable for the losses despite the fact that the other investments produced offsetting profits. But where a trustee makes investment decisions resulting in an improper sale of trust property from which a gain or loss occurs and the proceeds of that sale are then invested in other property which is sold at a loss or gain, there are not separate and distinct breaches of trust and the trustee is liable to account only for the difference between a proper investment return and the net result of the improper but related investments.” Matter of Estate of Bartlett, 1984 OK 9, 680 P.2d 369, 375.

Oregon: N/A

Pennsylvania: Cuyler’s Estate, 5 Pa. D. & C. 317, 319 (Phila. O.C. 1924) (where there are separate breaches, a trustee cannot offset the gain from one against the losses from others); Patterson’s Estate, 65 Pa. D. & C. 201, 213-14 (Phila. O.C. 1949) (where a series of transactions actually constitutes a single breach of trust, trustee is liable only for losses net of gains). See also Paxson Trust I, 893 A.2d 99, 122 (Pa. Super. 2006) (citing various cases for the proposition that gains made by a trustee for wrongful conduct stay with the trust while the trustee must bear the losses for wrongful conduct).

Rhode Island:

South Carolina: S.C. Code Ann. § 62-7-1002(a)(2) (“A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of the profit the trustee made by reason of the breach”).


Texas: There is no Texas statute or case specifically implementing this rule. I have, however, been involved in cases (none of which were reported in appellate decisions) where the trial Court has implemented this rule.


Vermont: There is no Vermont case law specifically discussing this issue.
Virginia:

Washington: No Washington authorities found.

West Virginia: *State v. Morgan Stanley & Co., Inc.* (1995) 194 W.Va. 163, 177 (“[T]he law in West Virginia is that when a fiduciary (or aider and abetter) is attempting in good faith to maximize the trust estate for his, her or its beneficiary, yet *innocently* violates traditional fiduciary principles, losses that occur through innocent violation may, nonetheless, be offset by gains achieved at roughly the same time by the same type of violations. Essentially, we are simply reformulating *Restatement (Second) Trusts* § 213, Comment d in a slightly more candid and comprehensive manner. In this regard, the jury must determine that the fiduciary, or any person who aided and abetted the fiduciary, acted out of honorable motives and did not intentionally violate his, her or its fiduciary duty or intentionally and knowingly aid and abet such violation. If, therefore, the jury concludes that the fiduciary and/or any aider and abetter is entirely innocent of intentional wrongdoing, then the jury may offset losses that arose from speculation with gains that arose as a direct result of the same type of speculation.”)

Wisconsin: Wisconsin courts historically have looked to the Restatement (Second) of Trusts. See, e.g., *Kugler*, 117 Wis. 2d 314, 344 N.W.2d 160, 166 (1984); *Dick & Reuteman Co. v. Doherty Realty Co.*, 16 Wis. 2d 342, 114 N.W.2d 475, 478 (1962). Accordingly, §213 of the Restatement (Second) of Trusts likely would be influential in Wisconsin courts.


**Alaska:** “[L]ost profits must be proven with reasonable certainty.” …. The evidence must afford sufficient data from which the court or jury may properly estimate the amount of damages, which data shall be established by facts rather than by mere conclusions of witnesses.” (internal citations omitted) Geolar, Inc. v. Gilbert/Commonwealth Inc. of Michigan (Alaska 1994) 874 P.2d 937, 946; “Damages must be proven beyond speculation. Generally, however, the degree of certainty required to establish tort damages will vary with the nature of the tort and the circumstances.” Conam Alaska v. Bell Lavalin, Inc. (Alaska 1992) 842 P.2d 148, 154.

**Arizona:** “It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount.” Jacob v. Miner (1948) 67 Ariz. 109, 116 [191 P.2d 734, 738].

**Arkansas:** No Arkansas cases cite either this Restatement section or the treatise sections. No Arkansas cases on point found.

**Colorado:** “Where there can be no doubt as to the fact that a trust has been damaged but there may be uncertainty as to the extent of the damage, damages are to be closely approximated by drawing reasonable and probable inferences from the facts proven.” Murphy v. Central Bank & Trust Co., 699 P.2d 13, 14 (Colo. Ct. App. 1985).
**California:** *California Ironworkers Field Pension Trust v. Loomis Sayles & Co.* (9th Cir. 2001) 259 F.3d 1036, 1047 (“[w]hen precise calculations are impractical, trial courts are permitted significant leeway in calculating a reasonable approximation of the damages suffered”); *Meister v. Mensinger* (2014) 230 Cal.App.4th 381, 396, quoting *GHK Associates v. Mayer Group, Inc.* (1990) 224 Cal.App.3d 856, 873 (“[w]here the fact of damages is certain, the amount of damages need not be calculated with absolute certainty.”).

**Connecticut:** *Wight v. Lee* (1924) 101 Conn. 401, 126 A. 218, 220.

**Delaware:** Yes. “A beneficiary may charge a trustee who commits a breach of trust with: (1) The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; (2) The profit that the trustee made by reason of the breach; or (3) Such other relief as may be fashioned by the court.” Del. Code Ann. tit. 12, § 3582; *see also McNeil v. McNeil*, 798 A.2d 503, 509 (Del. 2002) (“With respect to the Court of Chancery’s application of remedies for breach of a trustee’s duties… [the] court, in exercise of its plenary equitable authority over the supervision of trusts is accorded broad discretion.”) *(citing Hogg v. Walker, 622 A.2d 648, 654 (Del. 1993) (Court of Chancery has “broad latitude to exercise its equitable powers to craft a remedy”))*.

**Florida:** Florida has no authority on this specific issue. Florida has only general authority that a trustee who commits a breach of trust is liable for the greater of (a) the amount required to restore the value of the trust property and trust distributions to what they would have been if the breach had not occurred, including lost income, capital gain, or appreciation that would have resulted from proper administration; or (b) the profit the trustee made by reason of the breach. § 736.1002(1) Fla.Stat. The Florida statute is similar to Restatement (Third) of Trusts: Prudent Investor Rule § 205 (1992). The court may remedy a breach of trust that has occurred or may occur by compelling the trustee to perform his or her duties; enjoining the commission of the breach; compelling the trustee to redress the breach monetarily or by restoring property or by other means. See Fla. Stat. §736.1001(2)(a)-(j).


**Hawaii:**

**Idaho:** “When damages are sought for lost business profits, the amount of the loss must be proven with reasonable certainty. “Reasonable certainty” does not require that damages be proved with mathematical exactitude, but the evidence must be sufficient to take the damages out of the realm of speculation. Damages also must be shown to be the proximate consequence of the defendant's actionable conduct.” (internal citations omitted) *Magic*

Illinois: Question about Swenson v. Oxford Bank & Trust (N.D. Ill. Aug. 26, 2004) 2004 WL 1918778 (listed among the cases here): not sure if the case stands for the idea that “trial courts are permitted significant leeway in calculating a reasonable approximation of the damages suffered.” Rather, it states, “In determining whether the expert witness's testimony is reliable, the court looks at whether it is based on reliable methodology. Cummins v. Lyle Indus., 93 F.3d 362, 368 (7th Cir.1996).” Swenson v. Oxford Bank & Trust, No. 03 C 336, 2004 WL 1918778, at 1 (N.D. Ill. Aug. 26, 2004). The opinion is a ruling on both parties’ motion to strike the other side’s expert testimony. Court denied both motions. The case is later cited by an Ohio court to stand for the idea that experts should be barred from testifying on matters not disclosed in advance. U.S. v. United Technologies Corp. 2004 WL 5626494, (S.D. Ohio, Oct 11, 2004).

Indiana: Eiteljorg v. Eiteljorg (Ind. Ct. App. 2011) 951 N.E.2d 565,572 ("Where the trustee has deprived the beneficiary of the use of trust property or its proceeds, the value of that use may be estimated by charging interest. ") (citations omitted).

Iowa: “If the damages are the result of the breach the fact that the amount of the damages is uncertain or difficult to determine does not prevent recovery if the amount of the damages can be established with reasonable certainty. Sufficient evidence must be produced to afford a basis for estimating the amount of the damages.” City of Corning v. Iowa-Nebraska Light & Power Co. (1938) 225 Iowa 1380 [282 N.W. 791, 796].

Kansas: Although complete certainty is not required, “[d]amages cannot be awarded when they are too conjectural and speculative to form a sound basis for measurement.” Johnson v. Baker (1986) 11 Kan.App.2d 274, 276. To warrant recovery of damages, . . . there must be some reasonable basis for computation which will enable the trier of fact to arrive at an estimate of the amount of loss.” Cerretti v. Flint Hills Rural Electric Co-op. Ass'n (1992) 251 Kan. 347, 362.)

Kentucky: No direct authority, but see Gibson v. Kentucky Farm Bureau Mut. Ins. Co. Inc., 328 SW3d 195 (Ky. App.201 0) for the proposition that where fact of damage is established, uncertainty as to amount will not defeat recovery.

Louisiana: Louisiana law does not provide a specific rule in the trust code regarding the estimation of damages. The Louisiana Trust Code, however, is supplemented by the Louisiana Civil Code in the absence of a more specifically applicable provision of the Trust

Assessment of damages left to the court. When damages are insusceptible of precise measurement, much discretion shall be left to the court for the reasonable assessment of these damages.

Maine: Maine Shipyard & Marine Ry. v. Lilley, 743 A.2d 1264, 1269 (Me. 2000) (finding that the lower court based its award of damages on competent evidence and thus properly calculated damages).

Maryland: Absolute certainty in calculating damages is not required. (GAI Audio of New York, Inc. v. Columbia Broadcasting System, Inc. (1975) 27 Md.App. 172, 200 [“Courts have modified the ‘certainty’ rule into a more flexible one of ‘reasonable certainty’.”].) “An equity court may fashion a remedy by approximation, particularly where the defendant’s conduct makes precision impossible.” (Maryland Nat. Bank v. Cummins (1991) 322 Md. 570, 599.)

Massachusetts: Yes.

Michigan: The Michigan Court of Appeals in Chelsea Investment Group LLC v. Chelsea, 288 Mich.App. 239 (2010) stated, "It is true that damages that are speculative or based on conjecture are not recoverable. [citing Ensink v. Mecosta Co. Gen. Hosp., 262 Mich.App. 518, 525 (2004)] However, it is not necessary that damages be determined with mathematical certainty; rather, it is sufficient if a reasonable basis for the computation exists." Id. at 255.

Minnesota: Absolute certainty of damages is not required under Minnesota law and an award of damages will not be denied merely because of difficulty in ascertaining them. Henning Nelson Const. Co. v. Fireman’s Fund, 383 N.W.2d 645, 653 (Minn. 1983). Once the fact of a loss has been shown, the difficulty of proving its amount will not preclude recovery so long as there is proof of a reasonable basis upon which to approximate the amount. Cashman v. Allied Products Corp., 761 F.2d 1250, 1253 (8th Cir. Minn. 1985) (applying Minnesota law).

Mississippi: No relevant authorities.

Missouri:
Montana: *Crystal Springs Trout Co. v. First State Bank of Froid* (1987) 225 Mont. 122, 132–33 [732 P.2d 819, 825], *on reh'g* (1987) 225 Mont. 139 [736 P.2d 95] (“5 Corbin on Contracts, § 1029, provides as an alternative measure of damages where the profits presented are too uncertain: ‘Where it is clear that the defendant's breach of contract has prevented the plaintiff from making profits the amount of which cannot be proved with reasonable certainty, it should be remembered that this situation has been brought about by the wrongful conduct of the defendant. He should not be allowed to escape by merely paying nominal damages if there is any reasonable way in which the amount that he should pay as damages can be determined. There are a few alternative rules for determining this amount. Their purpose is to make compensation for the profits prevented and losses caused, measuring the amount by a method that is reasonably definite, and that is not likely to give compensation in excess of the profits that would have been made, and the losses that have been suffered. Thus, where the breach by the defendant has prevented the use and operation of property by the plaintiff from which use profits would probably have been made, the damages to be recovered *133 may be measured by the rental value of the property, or by interest on the reasonable value of the property as an investment.’”); Substantial authority in other contexts: *Sebena v. American Auto. Ass'n* (1996) 280 Mont. 305, 311 [930 P.2d 51, 54] (“[I]t is not the amount of damages which must be proven with certainty. It is the fact that damages have been sustained which must be proven with reasonable certainty.”); *Frisnegger v. Gibson* (1979) 183 Mont. 57, 71 [598 P.2d 574, 582] (“[S]ince no man has the gift of knowledge of the future, it is possibly less confusing to a jury, given the task of determining future damages, to be instructed that it may not rely “solely” on speculation or conjecture, but may utilize the reasonable certainty the evidence presents with respect to those damages.”)

Nebraska: “[U]ncertainty as to the amount [of damages] is not [fatal to recovery] if the evidence furnishes a reasonably certain factual basis for computation of the probable loss. A plaintiff's burden of offering evidence sufficient to prove damages cannot be sustained by evidence which is speculative and conjectural, but proof of damages to a mathematical certainty is not required; the proof is sufficient if the evidence is such as to allow the trier of fact to estimate actual damages with a reasonable degree of certainty and exactness.” (*Pribl v. Koinzan*, 266 Neb. 222, 226-227 (2003); see also *Katskee v. Nevada Bob’s Golf of Nebraska, Inc.*, 238 Neb. 654, 662-663 (1991) [“While it is true that such damages need not be proved with mathematical certainty, neither can they be established by evidence which is speculative and conjectural.”].)

New Hampshire: In re Estate of McCool, 553 A.2d 761, 766 (N.H. 1988) ("After receiving substantial evidence from the plaintiffs as to both the fact and the amount of damage, the Rippey court stated, 'If there is uncertainty as to the extent of damage to the trust, there can be no doubt as to the fact of damage. In such a case, [we] hold that damages are to be closely approximated by drawing reasonable and probable inferences from the facts proven.'"") (citations omitted).

New Jersey:

New Mexico: I find no authority for reasonable approximation of damages with regard to trusts. In other contexts, award would depend on testimony on which reasonable approximation was based and whether testimony supported award. For discussion of types of damages, see Faber v. King 2015-NMSC-015 (opinion concerns inspection of Public Records).

New York: Bluebird Partners, L.P. v. First Fid. Bank, N.A., N.J., 11 A.D.3d 232 (1st Dep’t 2004) involved the purchaser of a bankrupt airline’s equipment trust certificates. The purchaser brought an action against the collateral trustees claiming an alleged failure to timely file a motion in bankruptcy court to protect the collateral securing the trust instruments. New York’s Appellate Division, First Department, upon appeal from the lower court, determined that the testimony provided at trial was sufficient to find causation between First Fidelity Bank’s actions and Bluebird’s financial loss. The court held the evidence was “no more speculative than in a legal malpractice trial, where the proponent must show that the client would have prevailed in the underlying action,” thus providing significant leeway when estimating damages.

North Carolina: No authorities found.

North Dakota: Langer v. Bartholomay, 2008 ND 40, ¶ 27, 745 N.W.2d 649 ( “[W]here damage obviously has been suffered, but there is no definite evidence available for an exact determination of the amount of damage resulting from a breach of contract, the best evidence which the circumstances will permit is all the law requires. Damages for lost profits are recoverable where they are reasonable and not speculative. In cases where the amount of damages may be hard to prove, the amount of damages is to be left to the sound discretion of the finder of facts.”) (internal citations omitted)

Ohio: Geygan v. Queen City Grain Co., 593 N.E.2d 328, 334 (Ohio Ct. App. 1991) (Summary judgment granted to trustee in bankruptcy when business judgment rule failed to attach to corporate officers' imprudent grain commodity trading. "[T]he court's difficulty in
ascertaining damages does not preclude the recovery of a damage award. Once a right to
damages has been established, that right cannot be denied because the damages are incapable
of being calculated with mathematical certainty. . . .An award of damages will be upheld by
an appellate court if there is competent evidence supporting the award.

*Seasons Coal Co. v. Cleveland*, 461 N.E.2d 1273, 1276 (Ohio 1984) ("Judgments supported
by some competent, credible evidence going to all the essential elements of the case will not
be reversed by a reviewing court as being against the manifest weight of the evidence.").

**Oklahoma:** “[W]here the issue of uncertainty of damages arises, the rule limiting recovery
of uncertain damages applies to the fact of such damages, not their measure.” *Bane v.
Anderson, Bryant & Co.*, 1989 OK 140, 786 P.2d 1230, 1236. The Oklahoma Uniform Jury
Instructions provide that no instruction should be given regarding “uncertainty as to amount
of damages.” OUJI 2d § 5.2.

**Oregon:** *Cont'l Plants Corp. v. Measured Mktg. Serv., Inc.*, 274 Or 621, 627, 547 P2d 1368,
1372 (1976) (It is not a sufficient reason for disallowing damages claimed that they cannot be
exactly calculated. It is sufficient if, from proximate estimates of witnesses, a satisfactory
conclusion can be reached.)

*Welch v. U. S. Bancorp Realty & Mortgage Trust*, 286 Or 673, 706, 596 P2d 947, 964
(1979)(Trial court did not err in instructing plaintiff he must prove his damages “to a
reasonable certainty,” that a claim for lost profits must be proved “with reasonable certainty”
and plaintiff would only be entitled to recover “reasonably certain” profits.)

“reasonably certain” estimate will suffice where damages cannot be calculated with
“mathematical precision”). In undertaking its damages review, the court in *Rosenfeld* cited
established Pennsylvania case law on estimating damages including *Friedman v. Parkway

**Rhode Island:** *Probate Court of Warwick v. Bank of America, N.A.*, 813 F. Supp. 2d 277,
323-324 (D.R.I. 2011).*Dennis v. RI Hospital Trust Nat’l Bank*, 744 F.2d 893, 897 (1st Cir.
1984)

**South Carolina:** No authorities found.
South Dakota: *City of Bridgewater v. Morris, Inc.*, 1999 S.D. 64, ¶ 12, 594 N.W.2d 712, 716. (“Under any damage model, there need only be a reasonable basis for measuring the loss and it is only necessary that damages can be measured with reasonable certainty.”) SDCL § 21-1-1 (Right to damages for detriment from unlawful act or omission of another)

Tennessee: Not discussed in Tennessee statutes or comments.

Texas: Not aware of any statute or case in Texas that permits a court to estimate or approximate damages.

Utah: “It is well settled that, although the plaintiff has the burden of proving the fact, causation, and amount of damages, he need only do so with reasonable certainty rather than with absolute precision. ‘[A]lthough damages may not be determined by speculation or guesswork, evidence allowing a just and reasonable estimate of the damage based on relevant data is sufficient.’” *Price-Orem Inv. Co. v. Rollins, Brown & Gunnell, Inc.*, 784 P.2d 475, 478 (Utah Ct. App. 1989) (internal citations omitted); see also *Wachocki v. Luna*, 2014 UT App 139, ¶¶ 14-15 (2014).


“[T]o the extent that the defendants commingled their own property with [the trust’s] assets and sought recovery of such property, they had the burden of proving how much of the commingled funds they owned personally. The defendants bore this evidentiary burden because when trustees conduct their affairs in a manner that prevents a precise accounting of trust assets, the trustees, rather than the trust, must suffer the consequences.” *Tauber v. Com.*


West Virginia: West Virginia courts have supported awarding of damages calculated with a reasonable degree of certainty in the context of personal injury torts. See, e.g., Wilt v. Buracker (1993) 191 W.Va. 39, 50 (“In an injury case where the manifestations of the permanent injury may be obscure and the extent of the injury itself may be obscure because of its character, positive medical evidence to a degree of reasonable certainty that the injury is permanent is sufficient to take the question to the jury and to support an award of damages for the future effects of such injury.”) Likewise in actions based on contract. See Art's Flower Shop, Inc. v. Chesapeake and Potomac Telephone Co. of West Virginia, Inc. (1991) 186 W.Va. 613, 619 (“The Restatement (Second) of Contracts, § 352 (1981) discusses the reasonable certainty rule in awarding damages: “[d]amages are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty.” West Virginia adopted the reasonable certainty rule in syllabus point 5 of State ex rel. Shatzer v. Freeport Coal Co., 144 W.Va. 178, 107 S.E.2d 503 (1959): “Loss of profits can not be based on estimates which amount to mere speculation and conjecture but must be proved with reasonable certainty.” In syllabus point 3 of Kentucky Fried Chicken of Morgantown v. Sellaro, 158 W.Va. 708, 214 S.E.2d 823 (1975), we reiterated that “[c]ompensatory damages recoverable by an injured party incurred through the breach of a contractual obligation must be proved with reasonable certainty.”

Wisconsin: Estimation or approximation of damages to remedy a breach of trust is not expressly addressed in the Wisconsin Trust Code or case law. Wis. Stat. § 701.1001(2)(j) provides: “To remedy a breach of trust that has occurred or may occur, a court may do any of the following: . . . (j) Order any other appropriate relief, whether provided elsewhere in this chapter, available at common law, or under equity principles." Though not involving a trust or estate, in Smith v. Kleynerman, 370 Wis.2d 786, 882 N.W.2d 870 (Table) (Ct. App. 2016) (Unpublished), the court considered the issue of damages resulting from a breach of fiduciary duty. The court stated: “To support a damage award, the evidence must demonstrate that a party was injured in some way and establish sufficient data from which the jury could
properly estimate the amount of damages.’” (quoting Tony Spychalla Farms, Inc. v. Hopkins Agr. Chemical Co., 151 Wis.2d 431, 442, 444 N.W.2d 743 (Ct. App.1989)).

Wyoming: “The measure of damages for the loss, conversion, or destruction of personal property is the fair market value of the property at the time of loss, or, when there is no ascertainable market value, the actual economic value to the owner. Valuation of property is a question of fact, and there is no universal standard for such a determination. Thus, the question is left to the trier of fact to be decided on the basis of the facts and circumstances of each case. We have said that damages must be susceptible of ascertainment with a reasonable degree of certainty, and that a court may not speculate or conjecture in awarding damages. We further observed in Douglas Reservoirs Water Users Association v. Cross, 569 P.2d 1280, 1284 (Wyo. 1977), quoted in Reiman Construction Company, 709 P.2d at 1277, that: ‘While damages may not be calculable with absolute certainty, they should be susceptible of ascertainment with a reasonable degree of certainty and if there is evidence from which a reasonable estimate of money damages may be made that is sufficient, the primary objective being to determine the amount of loss, applying whatever rule is best suited to that purpose.’” O's Gold Seed Co. v. United Agri-Products Fin. Servs., 761 P.2d 673, 676 (Wyo. 1988) (internal citations omitted).
20) **Failure to Purchase Assets.** “If the trustee is under a duty to purchase property for the trust estate and fails to purchase that property within a reasonable time, the beneficiaries: (1) may affirm the inaction or the improper investments, if any, made by the trustee together with the income resulting from those investments; or (2) may, if the duty was to acquire specific investments, charge the trustee with the value of the specified property at the time of the decree, plus the income that property would have produced had it been purchased within a reasonable time; or may, if the duty was to acquire any property constituting a proper investment for the trust, charge the trustee with the amount of the funds the trustee failed properly to invest, adjusted for the amount of the total return, positive or negative, that would have accrued to the trust estate had the funds been invested in a timely fashion, this return to be based on a total return experience for suitable investments of generally comparable trusts…” Restatement (Third) of Trusts: Prudent Investor Rule § 211 (1992); see also Restatement (Third) of Trusts § 100 (2012); Restatement (Second) of Trusts § 211 (1959; Scott and Ascher on Trusts § 24.14 (5th ed. 2007); Bogert, Trusts and Trustees § 862 (2d ed. rev. 1995); Loring and Rounds, A Trustee’s Handbook § 7.2.3.2 (2012); Jicarillo Apache Nation v. United States (2013) 112 Fed. Cl. 274.


**Alaska:** See Alaska Stat. Ann. § 13.36.230 (West) [prudent investor rule]

**Arizona:** No Arizona cases found addressing this issue.

**Arkansas:** No Arkansas cases cite either these Restatement sections or the treatise sections. No Arkansas cases on point found.

**California:** *Manchester Band of Pomo Indians, Inc. v. U.S.* (N.D. Cal. 1973) 363 F.Supp. 1238, 1247-1248 (government breached fiduciary duty to properly manage trust funds where governmental officers repeatedly borrowed Indian band funds at lower rate of interest than they would have had to pay in the open market, held funds generated by band’s dairy enterprise and made no investment of such funds, and later deposited such funds in Treasury at interest of only 4% when numerous short-term government bonds were paying higher rates.)

**Connecticut:** *Wight v. Lee*, 101 Conn. 401, 126, A. 218, 220 (1924)

**Delaware:** Yes. “To remedy a breach of trust that has occurred or may occur, the court may order any equitable remedy, including… (3) Compelling the trustee to redress a breach of trust by paying money, restoring property, or other means; (4) Ordering a trustee to account… (8) Subject to § 3590 of this title, voiding an act of the trustee, imposing a lien or constructive trust on trust property or tracing trust property wrongfully disposed of and recover the property or its proceeds; or (9) Granting any other appropriate relief.” Del. Code Ann. tit. 12, § 3581(b)(3), (4), (8), (9); see also Del. Code Ann. tit. 12, § 3582 (“A beneficiary may charge a trustee who commits a breach of trust with: (1) The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; (2) The profit that the trustee made by reason of the breach; or (3) Such other relief as may be fashioned by the court.”); *Mennen v. Wilmington Trust Co.*, No. CV 8432-ML, 2015 WL 1914599, at *37 (Del. Ch. Apr. 24, 2015) (Noting that “recovery from a trustee for improper investments ‘ordinarily would be the difference between (1) the value of [the improper] investments and their income and other product at the time of surcharge and (2) the amount of funds expended in making the improper investments, increased (or decreased) by a projected amount of total return (or negative total return) that would have accrued to the trust and its beneficiaries if the funds had been properly invested.’”).

**Florida:** Florida has no authority on this specific issue. Florida has only general authority that a trustee who commits a breach of trust is liable for the greater of (a) the amount required to restore the value of the trust property and trust distributions to what they would have been if the breach had not occurred, including lost income, capital gain, or appreciation that would have resulted from proper administration; or (b) the profit the trustee made by reason of the breach. § 736.1002(1) Fla.Stat. The Florida statute is similar to Restatement (Third) of Trusts: Prudent Investor Rule § 205 (1992). Fla. Stat. §518.11(1): “The fiduciary has a duty to invest and manage investment assets as a prudent investor would considering the purposes, terms, distribution requirements, and other circumstances of the trust.” There is no particular investment strategy required; however all decisions are reviewed in terms of “reasonable business judgment”. “This is a rule of conduct and not of resulting performance.” Damages for failure to comply with the terms of the trust are governed under Fla. Stat. §736.1001(2)(a)-(j), where the court has discretion to determine appropriate relief.
Georgia: Closest authority found: O.C.G.A. § 53-12-302.

Hawaii:

Idaho: See Idaho Code Ann. § 68-502 (West) [prudent investor rule]

Indiana: *Eiteljorg v. Eiteljorg* (Ind. Ct. App. 2011) 951 N.E.2d 565,572 (a trustee is liable for lost profits stemming from the "trustee's misuse of or failure to acquire trust property.")

Iowa: See Iowa Code Ann. § 633A.4302 (West) [prudent investor rule]

Kansas: There is no Kansas law on the proper measure of damages, specifically for failure to acquire a specific investment. However, the Restatement (Third) of Trusts supplements case law where decisional authority is lacking. *In re Hilgers* (2006) 352 B.R. 298, 304. Additionally, KSA 58a-1002 appears consistent with the above principle as it sets damages for breach of trust at the greater of: (1) the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred or (2) the profit the trustee made by reason of the breach.

Kentucky: No direct authority.

Louisiana: Louisiana does not have a rule with this level of specificity, but see response to Question 2.

Maine: 18-B M.R.S.A. § 1001(1) (“A violation by a trustee of a duty the trustee owes to a beneficiary is a breach of trust.”). 18-B M.R.S.A. § 1002, official cmt. (“If a trustee commits a breach of trust, the beneficiaries may either affirm the transaction or, if a loss has occurred, hold the trustee liable for the amount necessary to compensate fully for the consequences of the breach. This may include recovery of lost income, capital gain, or appreciation that would have resulted from proper administration.”).

Maryland: Though no cases or statutes on point, MD Code, Estates and Trusts, § 14.5-902 appears to adopt the view taken above, in that it would restore the value of the trust property and trust distributions to what they would have been had the breach not occurred. Section 14.5-902 sets damages for breach of trust at “the greater of: (1) [t]he amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or (2) [t]he profit the trustee made by reason of the breach.”

Massachusetts: Yes.
**Michigan:** There is no Minnesota law on the proper measure of damages, specifically for failure to acquire a specific investment. The Minnesota Supreme Court has adopted the Restatement (Second) of Trusts where there is no controlling Minnesota case law. *Connecticut General Life Ins. Co. v. First Nat'l Bank*, 262 N.W.2d 403, 405 (Minn. 1977); *Kohler v. Fletcher*, 442 N.W.2d 169, 171 (Minn. Ct. App. 1989). However, Section 501C.1002 of the Minnesota UTC dealing with damages for breach of trust appears to adopt the view taken above, in that it would restore the value of the trust property and trust distributions to what they would have been had the breach not occurred. Section 501C.1002 sets damages at the greater of: (1) the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or (2) the profit the trustee made by reason of the breach.

**Minnesota:** There is no Minnesota law on the proper measure of damages, specifically for failure to acquire a specific investment. The Minnesota Supreme Court has adopted the Restatement (Second) of Trusts where there is no controlling Minnesota case law. *Connecticut General Life Ins. Co. v. First Nat'l Bank*, 262 N.W.2d 403, 405 (Minn. 1977); *Kohler v. Fletcher*, 442 N.W.2d 169, 171 (Minn. Ct. App. 1989). However, Section 501C.1002 of the Minnesota UTC dealing with damages for breach of trust appears to adopt the view taken above, in that it would restore the value of the trust property and trust distributions to what they would have been had the breach not occurred. Section 501C.1002 sets damages at the greater of: (1) the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or (2) the profit the trustee made by reason of the breach.

**Mississippi:** No relevant authorities.


**Montana:** *In re Ricker's Estate* (1893) 14 Mont. 153 (“If a trustee retains balances in his hands which he ought to have invested, or delays, for an unreasonable time, to invest, or if he mingles the money with his own, or uses it in his private business, or deposits it in bank in his own name or in the name of the firm of which he was a member, or neglects to settle his account for a long time, or to distribute or pay over the money when he ought to do so, he will be liable to pay simple interest at the rate established by law as the legal rate in the absence of special agreements. This rule is subject to the qualification that trustees cannot make any advantage to themselves out of the trust fund; and, if they make more than legal interest, they *shall pay more, as, if they make usurious loans, they shall be charged with all their gains from the use of the money.”)
Nebraska: There is no Nebraska law on the proper measure of damages, specifically for failure to acquire a specific investment.

The above is consistent with Neb. Rev. St. § 30-3891 (UTC 1002) as that section sets damages for breach of trust at the greater of: (1) the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred or (2) the profit the trustee made by reason of the breach.

Additionally, a trustee is not liable to a beneficiary for breach of trust if the beneficiary consented to the conduct constituting the breach, released the trustee from liability for the breach, or ratified the transaction constituting the breach. (Neb. Rev. St. § 30-3898 (UTC 1009)).

Nevada: “Except as otherwise provided in chapter 669A of NRS, a trustee who invests and manages trust property owes a duty to the beneficiaries of the trust to comply with the prudent investor rule as set forth in NRS 164.700 to 164.775, inclusive” Nev. Rev. Stat. Ann. § 164.740 (West); “1. A trustee shall invest and manage trust property as a prudent investor would, considering the terms, purposes, requirements for distribution, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill and caution. 2. A trustee's decisions concerning investment and management as applied to individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as part of an overall strategy of investment having objectives for risk and return reasonably suited to the trust.” Nev. Rev. Stat. Ann. § 164.745 (West); “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.” Nev. Rev. Stat. Ann. § 164.750 (West).

New Hampshire: In re Guardianship of Dorson, 934 A.2d 545, 548 (N.H. 2007) (Supporting the award of income on the assets: "Similarly, here, the funds that Nelson unlawfully withdrew from the Hartford Life Annuity were debts that he owed the estate and any surcharge that the probate court decided to impose upon Nelson, whether it took the form of interest or lost appreciation, was part of this debt, and not an award of prejudgment interest.").

New Jersey:

New Mexico: Find no authority to address this specific question.

New York:
North Carolina: N.C.G.S.A. § 36C-10-1001 (“A violation by a trustee of a duty the trustee owes to a beneficiary is a breach of trust.”). N.C.G.S.A. § 36C-10-1002, official cmt. (“If a trustee commits a breach of trust, the beneficiaries may either affirm the transaction or, if a loss has occurred, hold the trustee liable for the amount necessary to compensate fully for the consequences of the breach. This may include recovery of lost income, capital gain, or appreciation that would have resulted from proper administration.”); Callaham v. Newsom, 110 S.E.2d 802, 805 (N.C. 1959) (finding that based on the trust agreement “confidence in the business acumen and integrity of the trustee. It is not to be supposed that having expressly invested the trustee with authority to manage, sell, and reinvest the entire trust estate that the grantor intended to limit such authority to grantor's life, and at the same time impose by implication a duty to invest income which he had the power to withhold”).

North Dakota: North Dakota Century Code §59-18-02 (“A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred or the profit the trustee made by reason of the breach.”)

North Dakota Century Code §59-18-01(“To remedy a breach of trust that has occurred or may occur, the court may compel the trustee to perform the trustee's duties; enjoin the trustee from committing a breach of trust; compel the trustee to redress a breach of trust by paying money, restoring property, or other means; order a trustee to account; appoint a special fiduciary to take possession of the trust property and administer the trust; suspend the trustee; remove the trustee as provided in section 59-15-06; reduce or deny compensation to the trustee; subject to section 59-18-12, void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds; or order any other appropriate relief.”)

North Dakota Century Code § 59-18-09 (beneficiary may affirm the transaction constituting the breach)

Prondzinski v. Garbut, 10 N.D. 300, 86 N.W. 969, 972 (1901)( For a breach of the duty to restore, the beneficiary may recover the value of the property, with interest.)

Ohio: Ohio Rev. Code Ann. § 5810.0l(A) ("A violation by a trustee of a duty the trustee owes to a beneficiary is a breach of trust."). Ohio Rev. Code Ann. § 5810.02, official cmt. ("If a trustee commits a breach of trust, the beneficiaries may either affirm the transaction or, if a loss has occurred, hold the trustee liable for the amount necessary to compensate fully for the consequences of the breach. This may include recovery of lost income, capital gain, or appreciation that would have resulted from proper administration.").
Oklahoma: Unable to find authority on this point.

Oregon: O.R.S. § 130.800 (1) A violation by a trustee of a duty the trustee owes to a beneficiary is a breach of trust. A breach of trust may occur by reason of an action or by reason of a failure to act.(2) To remedy a breach of trust that has occurred or to prevent a breach of trust, the court may: (a) Compel the trustee to perform the trustee's duties; (b) Enjoin the trustee from committing a breach of trust; (c) Compel the trustee to pay money or restore property; (d) Order a trustee to account; (e) Appoint a special fiduciary to take possession of the trust property and administer the trust; (f) Suspend the trustee; (g) Remove the trustee as provided in ORS 130.625; (h) Reduce or deny compensation to the trustee; (i) Subject to ORS 130.855, void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds; or (j) Order any other appropriate relief.

ORS § 130.805 (trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of (a) The amount of damages caused by the breach; (b) The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or (c) The profit the trustee made by reason of the breach.)

O.R.S. § 130.840 (beneficiary may affirm the transaction constituting the breach)

Pennsylvania: The Pennsylvania Superior Court has stated that “[i]f the trustee fails to purchase specific property which it is his duty to purchase, the beneficiary can charge him with its value at the time of the decree together with the income which would have accrued thereon if he had purchased it.” Estate of Scharlach, 809 A.2d 376, 386 (Pa. Super. 2002) (quoting Restatement (Second) of Trusts § 211 (1959)). The Scharlach court adds that “when the trustee fails to purchase property that it is his duty to purchase, the beneficiary then is entitled to be placed in the same situation as he would have been had the trustee purchased the property when it was his duty to purchase it.” Id. (citing Restatement (Second) of Trusts § 211 (1959) cmt. (b)).

Rhode Island:

South Carolina: S.C. Code 1976 § 62-7-1001 (a) (“A violation by a trustee of a duty the trustee owes to a beneficiary is a breach of trust.”).
S.C. Code 1976 § 62-7-1002, official cmt. (“If a trustee commits a breach of trust, the beneficiaries may either affirm the transaction or, if a loss has occurred, hold the trustee liable for the amount necessary to compensate fully for the consequences of the breach. This may include recovery of lost income, capital gain, or appreciation that would have resulted from proper administration.”).

**South Dakota:** The remedies stated in § 205 of the Restatement (Second) are applicable when the trustee violates his duty of loyalty. Restatement (Second) of Trusts § 206 (1959). *Willers v. Wettestad*, 510 N.W.2d 676, 681 (S.D. 1994)(see comment on clause(c); “If the trustee commits a breach of trust, he is chargeable with any profit which would have accrued to the trust estate if he had not committed such breach of trust. This rule is applicable where the trustee in breach of trust...fails to purchase property which it was his duty to purchase for the trust.”)

SDCL § 55-4-31 (beneficiary may affirm the transaction constituting the breach)

**Tennessee:** *See also* Tenn. Code Ann. § 35-15-1002(a). A trustee may be liable to the beneficiaries for the amount required to restore the value of the trust to value it would have been if the trustee had purchased the required property.

**Texas:** See Texas Trust Code §§ 114.001 and 114.008 supra. Under Texas Trust Code §114.008 (a)(10)a Court may implement virtually any equitable remedy. Texas Courts routinely rely on the Restatements of Trusts and legal treatises such as *Scott and Ascher on Trusts* and *Bogert, Trusts and Trustees* as legal authority for their decisions if the provisions of these sources do not conflict with statutory trust law or specific Texas case law.

**Utah:** Where the executor “did not invest the funds of the estate as directed by the order of the court...the consequent loss of the trust funds by leaving them in the Merchants' Bank must be charged” to that executor. *In re Listman’s Estate*, 57 Utah 471, 483-84 (1921).

**Vermont:** There is no Vermont law on the proper measure of damages, specifically for failure to acquire a specific investment. Where the Vermont Trust Code does not specifically provide law on a subject, courts look to Vermont common law as a supplement (14A V.S.A § 106) followed by the restatements and common law from other states. (*Estate of Nancy B. Alden v. Julia Dee and Todd Alden* (2010) 427-12-06 Bncv [Vermont trial court opinion].) However, 14A V.S.A. §1002 seems consistent with the above stated law as it sets damages at the greater of: “(1) the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or (2) the profit the trustee made by reason of the breach.”
Virginia: “It is certainly true that where a trustee is required by the terms of the trust to invest in public securities funds in his possession, and instead of doing so, he appropriates them to his own use, or otherwise, unreasonably delays the investment, the *cestui que trust* has the option of charging him with the principal sum and its interest, or with the amount of stock he might have purchased with the money. And the same rule applies to an executor, who is also a trustee, but having fully administered the estate retains the legacy in his possession, not as assets of the estate, but as trustee of the legacy.” *Perry v. Smoot*, 64 Va. 241, 246 (1873).

Washington: See RCW 11.100.020.

West Virginia: *Johnston v. Bee* (1919) 84 W.Va. 532 [100 S.E. 486, 490–491] (“Whenever a trustee or other person standing in fiduciary relations, acting apparently within the scope of his powers, has trust funds in his hands, which he ought, in pursuance of his fiduciary duty, to employ in the purchase of property for the purposes of the trust, and he does purchase property with such funds, but takes the title thereto in his own name, without any declaration of trust, then a trust with respect to such property at once arises in favor of the original *cestui que trust* or other beneficiary. Equity imputes an intention to fulfill the obligation resting upon the trustee; and, independently of any element of fraud, it regards the trustee as intending to perform the obligation—as intending to act in accordance with his fiduciary duty, and not in violation thereof. It therefore treats the purchase as made for the benefit of the person beneficially interested. This doctrine is one of wide operation, of great efficiency, and is applied to every variety of persons occupying fiduciary relations.”)

Wisconsin: There is no direct authority regarding a remedy for failure of the trustee to invest in specified property. The general authority provided by Wis. Stat. §§ 701.1001(2)(a) and 701.1002(1)(a) is broad enough to encompass the type of relief described in Restatement (Second) of Trusts § 211 (1959). Wisconsin courts historically have looked to the Restatement (Second) of Trusts as a guide to the common law. See e.g. *Matter of Estate of Kugler*, 117 Wis. 2d 314, 344 N.W.2d 160, 166 (1984); *Dick & Reuteman Co. v. Doherty Realty Co.*, 16 Wis. 2d 342, 114 N.W.2d 475, 478 (1962). Accordingly, § 211 of the Restatement (Second) of Trusts likely would be influential in Wisconsin courts.

Wyoming: “‘If a trustee retains balances in his hands which he ought to have invested, or delays for an unreasonable time to invest . . . he will be liable to pay simple interest at the rate established by law as the legal rate in the absence of special agreements.’” *Reed v. Taliaferro* 37 Wyo. 107, 116-17 (1927) (quoting *Perry on Trusts* (6th ed.), sec. 468).
21) **FAILURE TO MAXIMIZE INCOME WHERE SAME RISK.** “As to funds which were invested, but at rates less than those found by the trial judge to be the maximum available, the trial judge will have to determine whether defendant breached its duties by not making a switch in investments which would have been made by ‘a man of ordinary prudence in dealing with his own property.’” Restatement of Trusts 2d § 174 (1959).”


**Alaska:** “(a) 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. (b) A trustee's investment and management decisions respecting individual assets shall be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.” Alaska Stat. Ann. § 13.36.230 (West); Marshall v. First Nat. Bank Alaska (Alaska 2004) 97 P.3d 830, 839.

**Arizona:** “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.” Ariz. Rev. Stat. Ann. § 14-10902. However, there are no cases regarding damages for the failure to maximize income where there is same risk.

**Arkansas:** Arkansas has enacted UTC section 1002 at Ark. Code Ann. § 28-73-1002. No cases cite it. No cases cite any of the restatement sections except for Riegler v. Riegler. Could find no relevant appellant cases.

**California:** Manchester Band of Pomo Indians, Inc. v. U.S. (N.D. Cal. 1973) 363 F.Supp. 1238, 1247-1248 (government breached fiduciary duty to properly manage trust funds where governmental officers repeatedly borrowed Indian band funds at lower rate of interest than they would have had to pay in the open market, held funds generated by band’s dairy
enterprise and made no investment of such funds, and later deposited such funds in Treasury at interest of only 4% when numerous short-term government bonds were paying higher rates.); *Conservatorship of Pelton* (1982) 132 Cal.App.3d 496 (fiduciary liable for allowing substantial sums to sit in a passbook savings account for seventeen months while waiting for appointment of new conservator); but see *Van de Kamp v. Bank of America* (1988) 204 Cal.App.3d 819, 852-853 (trustee successfully defended “fail float” practice by demonstrating that use of zero balance accounts would neither be feasible nor cost effective when applied to bank’s trust accounts).

**Colorado:** “. . . Bank acted as a reasonably prudent person in managing the property of another when the Bank replaced bonds, rated AAA, with Common Trust Fund Units managed by the Bank.” *Heller v. First Nat'l Bank, N.A.*, 657 P.2d 992, 998-99 (Colo. Ct. App. 1982). A trustee has a duty to invest the trust assets in productive property. Restatement (Second) of Trusts §§ 181 and 240 (1959). Riegler v. Riegler, 262 Ark. 70, 77, 553 S.W.2d 37, 40 (1977). Riegler did not involve the fact situation listed above, but in it the trustee invested in unproductive property that he personally wished to use. See the discussion of Riegler, above.

**Connecticut:**

**Delaware:** Yes. “When investing, reinvesting, purchasing, acquiring, exchanging, retaining, selling and managing property for the benefit of another, a fiduciary shall act with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use to attain the purposes of the account.” Del. Code Ann. tit. 12, § 3302(a); see also Del. Code Ann. tit. 12, § 3302(c) (“Any determination of liability for investment performance shall consider the performance of the entire portfolio and such other factors as the fiduciary considered when the investment decision was made.”); *Mennen v. Wilmington Trust Co.*, No. CV 8432-ML, 2015 WL 1914599, at *37 (Del. Ch. Apr. 24, 2015) (Noting that “recovery from a trustee for improper investments ‘ordinarily would be the difference between (1) the value of [the improper] investments and their income and other product at the time of surcharge and (2) the amount of funds expended in making the improper investments, increased (or decreased) by a projected amount of total return (or negative total return) that would have accrued to the trust and its beneficiaries if the funds had been properly invested.’”).

**Florida:** Florida has no authority on this specific issue. Florida has only general authority that a trustee who commits a breach of trust is liable for the greater of (a) the amount required to restore the value of the trust property and trust distributions to what they would have been if the breach had not occurred, including lost income, capital gain, or appreciation
that would have resulted from proper administration; or (b) the profit the trustee made by reason of the breach. § 736.1002(1) Fla.Stat. The Florida statute is similar to Restatement (Third) of Trusts: Prudent Investor Rule § 205 (1992).

**Georgia:** Closest authority found: O.C.G.A. §§ 53-12-340.

**Hawaii:**

**Idaho:** “(1) 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. (2) A trustee's investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.” Idaho Code Ann. § 68-502 (West); *Knudson v. Bank of Idaho* (1967) 91 Idaho 923, 931 [435 P.2d 348, 356].

**Illinois:** An Illinois trustee has a statutory duty to act as a “prudent investor” under the Trust and Trustee Act. (760 ILCS 5/5) (from Ch. 17, par. 1675). The statute specifies the content of the duty in a way that suggests that the failure to maximize income where the risk is the same may be a breach of this duty. But the “prudent investor” duty may be abridged or modified by express contract terms. (760 ILCS 5/5) (from Ch. 17, par. 1675). **Content of the “Prudent Investor” Duty:** “The trustee has a duty to pursue an investment strategy that considers both the reasonable production of income and safety of capital, consistent with the trustee’s duty of impartiality and the purposes of the trust. Whether investments are underproductive or overproductive of income shall be judged by the portfolio as a whole and not as to any particular asset. (760 ILCS 5/5) (from Ch. 17, par. 1675); “The circumstances that the trustee may consider in making investment decisions include, without limitation, the general economic conditions, the possible effect of inflation, the expected tax consequences of investment decisions or strategies, the role each investment or course of action plays within the overall portfolio, the expected total return (including both income yield and appreciation of capital), and the duty to incur only reasonable and appropriate costs. The trustee may but need not consider related trusts and the assets of beneficiaries when making investment decisions.” (760 ILCS 5/5) (from Ch. 17, par. 1675)

**Indiana:** Burns Ind. Code Ann. § 30-4-3.5-l(b) (2016) (Unless the terms of the trust provide otherwise, "a trustee who invests and manages trust assets owes a duty to the beneficiaries of the trust to comply with the prudent investor rule .... "); Burns Ind. Code Ann. § 30-4-3.5-2(a) (2016) ("A trustee shall invest and manage trust assets as a prudent investor would, by
considering the purposes, terms of the trust, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

Iowa: “All proposed investments of trust funds by fiduciaries shall first be reported to the court or a judge for approval and be approved and unless otherwise authorized or directed by the court under authority of which the fiduciary acts, or by the will, trust agreement, or other document which is the source of authority, a trustee, executor, administrator, or guardian shall invest all moneys received by such fiduciary, to be by the fiduciary invested, in securities which at the time of the purchase thereof are included in one or more of the following classes....” Iowa Code Ann. § 636.23 (West); however, see Conservatorship of Alessio v. First Community Trust, N.A. (Iowa Ct. App. 2010) 791 N.W.2d 711 aff’d sub nom. In re Conservatorship of Alessio (Iowa 2011) 803 N.W.2d 656 (“When a conservator fails to obtain prior court approval, the conservator has violated section 633.647, and will be held liable for subsequent losses if the violation is subsequently determined to have been a breach of fiduciary duty”)

Kansas: There is no Kansas law dealing specifically with the proper measure of damages where funds could have been invested at a higher rate. However, the Restatement (Third) of Trusts supplements case law where decisional authority is lacking. In re Hilgers (2006) 352 B.R. 298, 304; However, KSA 58-a02 24 provides that 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 fiduciary [the definition of which includes trustee] shall exercise reasonable care, skill and caution.”

Kentucky: No direct authority.

Louisiana: Louisiana does not maintain the prudent man rule but rather the product investor rule for investment and management of trust property See, La. Rev. Stat. 9:2127. La. Rev. Stat. §9: 2127. Standard of care in investing and management: Unless the trust instrument provides otherwise, a trustee shall invest and manage trust property as a prudent investor. In satisfying this standard, the trustee shall consider the purposes, terms, distribution requirements, and other circumstances of the trust. A trustee's investment and management decisions are to be evaluated in the context of the trust property as a whole and as part of an overall investment strategy having risk and return objectives reasonably suited to the trust. In investing within the limitations of the foregoing standard, a trustee is authorized to retain and acquire every kind of property. COMMENTS—2001: (a) The primary source of the new formulation for this Section is Section 2 of the Uniform Prudent Investor Act (1994). It sets forth the “prudent investor rule”, which has been widely adopted in the other states in place
of the “prudent man rule”. The prudent investor rule makes it clear that the trustee's duty is determined by the purposes of the trust and the circumstances of the beneficiaries, not in light of how a prudent man would manage his own property; (b) The prudent investor rule makes it clear that the prudence of the trustee's actions is determined with respect to the portfolio as a whole: “an investment that might be imprudent standing alone can become prudent if undertaken in sensible relation to other trust assets, or other nontrust assets.” (Quote from comment to Uniform Prudent Investor Act (1994) Section 2.); (c) Diversification usually is necessary to reduce risk. For small trusts this can be accomplished through pooled investments such as mutual funds. See R.S. 9:2087. “Circumstances can, however, overcome the duty to diversify. For example, if a tax-sensitive trust owns an under diversified block of low-basis securities, the tax costs of recognizing the gain may outweigh the advantages of diversifying the holding. The wish to retain a family business is another situation in which the purposes of the trust sometimes override the conventional duty to diversify.” (Quote from comment to Uniform Prudent Investor Act (1994) Section 3.); (d) Rules that had been added in the past to this Section, authorizing investments that might otherwise have been prohibited because of the rules against self-dealing and delegation, have been moved to R.S. 9:2086 and 2087.

Maine: 18-B M.R.S.A. § 804 (“A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill and caution.”); 18-B M.R.S.A. § 902 (“(1) 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 governing instrument and the nature of the fiduciary appointment; (2) Exercise reasonable care, skill, and caution regarding the anticipated effect on the fiduciary assets as a whole under the facts and circumstances prevailing at the time of any action by the fiduciary; (3) Invest and manage not in isolation but in the context of the fiduciary assets as a whole

Maryland: There is no Maryland law dealing specifically with the proper measure of damages where funds could have been invested at a higher rate. MD Code, Estates and Trusts, § 14-405(c) requires a trustee to “observe the standard of care that would be observed by a prudent person dealing with property of another.” (Emphasis added.) This rule, while similar to the view, thus does not adopt an identical rule, at least with respect to the expectation that the trustee take actions consistent with those “a man of ordinary prudence” would take “in dealing with his own property.” Under the MD Code, Estates and Trusts, § 15-114(b), a fiduciary shall: (1) Invest and manage fiduciary assets as a prudent investor would, considering the purposes, terms, distribution requirements, and other circumstances of the governing instrument and the nature of the fiduciary appointment; (2) Exercise reasonable care, skill, and caution regarding the anticipated effect on the fiduciary assets as a whole under the facts and circumstances prevailing at the time of any action by the fiduciary; (3) Invest and manage not in isolation but in the context of the fiduciary assets as a whole
and as part of an overall investment strategy that incorporates risk and return objectives reasonably suitable under the terms of the governing instrument and the nature of the fiduciary appointment; (4) Diversify investments unless, under the circumstances, the fiduciary reasonably believes it is in the best interests of the beneficiaries or furthers the purposes for which the fiduciary was appointed not to diversify [ . . . ].

**Massachusetts:** Yes.

**Michigan:** Failure to Maximize Income Where Same Risk. The Michigan prudent investor rule, found in MCL 700.1503, states: (1) A fiduciary's investment and management decisions with respect to individual assets shall be evaluated not in isolation, but rather in the context of the fiduciary estate portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the fiduciary estate. (2) Among circumstances that a fiduciary must consider in investing and managing fiduciary assets are all of the following that are relevant to the fiduciary estate or its beneficiaries: (a) General economic conditions; (b) The possible effect of inflation or deflation; (c) The expected tax consequences of an investment decision or strategy; (d) The role that each investment or course of action plays within the overall portfolio, which may include financial assets, interests in closely-held enterprises, tangible and intangible personal property, and real property; (e) The expected total return from income and the appreciation of capital; (f) Other resources of the beneficiaries; (g) The need for liquidity, regularity of income, and preservation or appreciation of capital; (h) An asset's special relationship or special value, if any, to the purposes of the fiduciary estate or to I or more of the beneficiaries; (3) A fiduciary shall make a reasonable effort to verify facts relevant to the investment and management of fiduciary assets. (a) A fiduciary may invest in any kind of property or type of investment consistent with the standards of the Michigan prudent investor rule. A particular investment is not inherently prudent or imprudent. Further, in *In re Buhl's Estate*, 211 Mich. 124 (1920), the Michigan Supreme Court stated, "A reasonable investment in dividend-paying stocks and interest-bearing bonds of a private business corporation may be permitted when the corporation has acquired, by reason of the amount of its property and the prudent management of its affairs for a considerable period of time, such a reputation for permanence and stability as to command universal confidence, and so that careful and intelligent persons, familiar with such corporations and the manner in which their business should be conducted, commonly invest their money in them as a permanent investment, and not for the primary purpose of securing a considerable income therefrom. A trustee has not unlimited authority to invest as an ordinarily prudent man would invest his own; he must take such risks only as an ordinarily prudent man would take who is a trustee of the money of others. In making such an investment, he always assumes the risk of searching scrutiny in a court of equity as to the diligence employed and sound judgment exercised by him in the transaction. He must always bear in mind that the primary object of the creation of the trust is not, ordinarily,
accumulation, but preservation and perpetuity of the fund until the time for its distribution arrives, and he must make no investment by which this object may be at all likely to be defeated." Id. at 132. While the standard of care that trustees are held to is governed by the "prudent investor rule", supra, the Buhl case provides clarity in terms of what Michigan courts deem prudent. Also, MCL 700.7903(2) provides; "Absent a breach of trust, a trustee is not liable to a trust beneficiary for a loss or depreciation in the value of trust property, for failure to generate income, or for not having made a profit."

**Minnesota:** There is no Minnesota law dealing specifically with the proper measure of damages where funds could have been invested at a higher rate. The Minnesota Supreme Court has adopted the Restatement (Second) of Trusts where there is no controlling Minnesota case law. *Connecticut General Life Ins. Co. v. First Nat'l Bank*, 262 N.W.2d 403, 405 (Minn. 1977); *Kohler v. Fletcher*, 442 N.W.2d 169, 171 (Minn. Ct. App. 1989). However, the Section 901, subd. 2(a) of the Minnesota UTC does place on the trustee a duty to “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.” Finally, Section 501C.1002 of the Minnesota UTC dealing with damages for breach of trust should be used to determine damages where a trustee invests in an improper investment. Section 501C.1002 sets damages at the greater of: (1) the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or (2) the profit the trustee made by reason of the breach.

**Mississippi:** No relevant authorities.

**Missouri:** RSMo. 456.8-804; RSMo.456.10-1002; *O'Riley v. U.S. Bank, N.A.*, 412 S.W.3d 400,414 (Mo. App, W.D., 2013); *Tyler v. Citizens Home Bank of Greenfield*, 670 S.W.2d 954, 956 (Mo.App.,1984). The trustee is under a duty to the beneficiary to use reasonable care and skill to make the trust property productive; *Witmer v. Blair*, 588 S.W.2d 222, 224 (Mo. App. W.D. 1979).

**Montana:** Mont. Code Ann. § 72-38-1002 (“(1) A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of: (a) any loss or depreciation in value of the trust estate resulting from the breach of trust, with interest; (b) the profit the trustee made by reason of the breach of trust, with interest; or (c) any profit that would have accrued to the trust estate if the loss of profit is the result of the breach of trust.”)

**Nebraska:** There is no Nebraska law dealing specifically with the proper measure of damages where funds could have been invested at a higher rate. However, Neb. Rev. St. §
30-3884(a) provides that 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.”

**Nevada:** “Except as otherwise provided in chapter 669A of NRS, a trustee who invests and manages trust property owes a duty to the beneficiaries of the trust to comply with the prudent investor rule as set forth in NRS 164.700 to 164.775, inclusive” Nev. Rev. Stat. Ann. § 164.740 (West); “1. A trustee shall invest and manage trust property as a prudent investor would, considering the terms, purposes, requirements for distribution, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill and caution. 2. A trustee's decisions concerning investment and management as applied to individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as part of an overall strategy of investment having objectives for risk and return reasonably suited to the trust.” Nev. Rev. Stat. Ann. § 164.745 (West); “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.” Nev. Rev. Stat. Ann. § 164.750 (West).

**New Hampshire:** N.H. Rev. Stat. Ann. § 564-B:9-902(a) ("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."); N.H. Rev. Stat. Ann. § 564-B:9-905(b) ("A trustee's failure to realize a return that equals or exceeds any financial index is not evidence of a trustee's failure to comply with the prudent investor rule."). Rejecting the "ordinary prudence" standard: *Bartlett v. Dumaine*, 523 A.2d 1, 7 (N.H. 1986) ("It is a general principle of New Hampshire's common law of trusts that, in making investments for a trust, the trustee must exercise the care and skill of a prudent person in conserving the property, rather than the care and skill of a person of ordinary prudence.") (citations omitted).


**New Mexico:** *Jicarillo Apache Nation v. United States* (2013) 112 Fed. Cl. 274 involves investment of tribal funds by US Jicarillo Nation, and is in New Mexico, but this is a federal, not a N.M. case. Uniform Trust Code has a prudent investment rule.
**New York:** *In re Soss’ Estate*, 71 N.Y.S.2d 23 (N.Y. Surr. Ct. 1947), the court imposed a surcharge on a trustee representing the amount of income lost when the trustee had a choice to invest in government bonds yielding 2 or 2.5% per annum, and deliberately chose the 2% bonds. The court concluded the choice was made without regard to the income beneficiary’s interests and ordered the trustees to reimburse the trust for the lost income.

**North Carolina:** N.C.G.S.A.§ 36C-9-902 (“(a) 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 requirement, the trustee shall exercise reasonable care, skill, and caution”); N.C.G.S.A. § 36C-8-804 (“A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.”).


NDCC § 59-16-04. (Prudent administration)(“A trustee shall administer the trust as a prudent person would by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution”)

NDCC § 59-17-02. (Standard of care--Portfolio strategy--Risk and return objectives)

**Ohio:** Ohio Rev. Code Ann. § 5808.04 ("A trustee shall administer the trust as a prudent person would and shall consider the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution."), Ohio Rev. Code Ann. § 5809.02(A) ("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 requirement, the trustee shall exercise reasonable care, skill, and caution."), *Wood v. U.S. Bank, N.A.*, 828 N.E.2d 1072, 1077, 1079 (Ohio Ct. App. 2005) (remanding to trial court whether a trustee that failed to re-invest and diversify trust securities failed to act prudently, or whether there was a special circumstance permitting the trustee not to diversify).

*Stevens v. Nat'l City Bank*, 544 N.E.2d 612,616 (Ohio 1989) ("a trustee is required to exercise the same care, skill and diligence that an ordinarily prudent man would exercise over his own affairs and property").
In re Bentley's Estate, 127 N.E.2d 749, 752 (Ohio 1955) ("where a finduciary [sic] is entrusted with securities and has the power of sale, in the absence of fraud or bad faith he cannot be charged with any loss if he fails to make a sale at the peak of the market.").


In re Testamentary Trust of Hamm, 707 N.E.2d 524, 529 (Ohio Ct. App. 1997) (noting a court could order a trustee who "negligently or illegally managed the trust funds" to reimburse the trust).

Oklahoma: Oklahoma appears to modify this rule by allowing the trustee to exercise good faith in furthering its duty to maximize income. See Apache Corp. v. State ex rel. Comm'r's of Land Office, 1992 OK CIV APP 67, 845 P.2d 1281, 1283 (finding that the Commissioners of the Land Office, in its fiduciary capacity managing lands for the State of Oklahoma, exercised good faith in maximizing return).

Oregon: Jarrett v. U.S. Nat. Bank of Oregon, 81 Or App 242 (trustee breached fiduciary duty by failing to demand payment on promissory note after interest rates rose above 7% and was liable to beneficiaries for lost income to trust as result of failing to demand payment on promissory note.)

Jarrett v. United States National Bank of Oregon, 725 P. 2d 384 ( Ct. App. Or. 1986) (Trustee failed to test the market for a lease renewal and improperly allowed a company to exercise lease option, which “locked up” the property at below market value, leading him to be liable for damages which the beneficiaries have suffered and will suffer in the future.) O.R.S. § 130.665 (Prudent administration)

Pennsylvania: Hamill’s Estate, 410 A.2d 770, 773 (Pa. 1980) (holding that there is no “absolute duty to maximize current trust income” for the income beneficiary). Also, in Mereto Estate, the Pennsylvania Supreme Court held that retention of assets in a particular form, when authorized by the governing instrument, “will not amount to supine negligence or wilful [sic] default unless facts known to the trustees or which, by proper attention and consideration could have been known to them, rendered the retention clearly unwise and unjustifiable in the exercise of ordinarily good business judgment or foresight.” Mereto Estate, 96 A.2d 115, 116 (Pa. 1953). See also Estate of Warden, 2 A.3d 565, 573 (Pa. Super. 2010).
Rhode Island:

South Carolina: S.C. Code 1976 § 62-7-9330(b) (“(b)(1) Except as otherwise provided in item (2) of this subsection, a trustee who invests and manages trust assets owes a duty to the beneficiaries of the trust to comply with the prudent investor rule in this act.” “(b)(2) The prudent investor rule is a default rule that may be expanded, restricted, eliminated, or otherwise altered by the provisions of a trust. A trustee is not liable to a beneficiary to the extent that the trustee acted in reasonable reliance on the provisions of the trust.”) S.C. Code 1976 § 62-7-9330(c) (“(c)(1) 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.”).

South Dakota: SDCL § 55-5-7 (Prudent Investor rule)

SDCL § 55-5-6 (Standards for investing and managing assets)

Matter of Hadleigh D. Hyde Trust, 458 N.W.2d 802, 805 (S.D. 1990)( Since commodity trading is speculative in nature, it must be considered an improper trust investment and, therefore, the trustee breached its duties)

Tennessee: Note: Whiskers v. U.S., 600 F.2d 1332 (10th Cir. 1979) declined to follow Cheyenne-Arapaho Tribes of Indians of Oklahoma v. U. S.

An executor bank should have deposited estate funds in an account earning maximum interest instead of in the bank’s regular savings account. See Love v. First Nat’l Bank of Clarksville, 646 S.W.2d 163, 166 (Tenn. App. 1982).

Texas: Texas no longer has the “prudent man investment rule” relating to investments. This rule has been supplanted by the so called “prudent investor rule” set forth in Texas Trust Code § 117.004 (a) which provides, in part, that: “A trustee shall invest and manage trust assets as a prudent investor would, 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.”

Utah: “[T]rustee must maximize the income from school lands in the long run” and “did not breach its trust duties by refusing to give priority to the scenic, aesthetic, and recreational values . . . over economic values” when modifying trust investments. Nat'l Parks & Conservation Ass'n v. Bd. of State Lands, 869 P.2d 909, 920-21 (Utah 1993).
**Vermont:** No Vermont law exactly on point. However, 14A V.S.A. §§ 804, 902(a) state that “[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.” Further, under § 902(b), “[a] trustee’s investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.

14A V.S.A. §1002 sets damages at the greater of: “(1) the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or (2) the profit the trustee made by reason of the breach.”

**Virginia:**

**Washington:** No Washington case law citing this rule. However, in *Baker Boyer Nat’l Bank v. Garver*, the court held that a trustee has a duty to diversify under the prudent person rule which provided that “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.” *Baker Boyer Nat’l Bank v. Garver*, 43 Wn. App. 673, 678, 719 P.2d 583 (1986) (citing RCW 30.24.020 as previously codified). The court further relied on Restatement Second of Trusts §228 comment a which provides that “[t]he trustee is under a duty to the beneficiary to exercise prudence in diversifying the investments so as to minimize the risk of large losses, and therefore he should not invest a disproportionately large part of the trust estate in a particular security or type of security. It is not enough that each of the investments is a proper investment…” Id. at 679 (citing Restatement Second of Trusts §228 comment a). The court held that the trustee had breached its duty because it “did not at any time make any considered conscious balancing of risk and advantages weighing the amount invested in farmland equity against the amount invested in fixed-income securities.” Id. at 681 (emphasis added).

**West Virginia:** W. Va. Code Ann. § 44D-10-1002 (West) “(a) A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of: (1) The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or (2) The profit the trustee made by reason of the breach.”
Wisconsin: In *Matter of Estate of Kugler*, 117 Wis. 2d 314, 344 N.W.2d 160 (1984), citing to the then applicable prudent person rule, the Wisconsin Supreme Court stated: “We emphasize that the duty to make the estate productive does not mean that an administrator should invest estate funds in speculative, high-risk investments in order to obtain the highest possible interest rate. In determining whether an investment, when made, is reasonable, the question to be resolved is not whether a greater return on the investment could have been realized; rather, the question to be resolved is whether under the circumstances then present, the administrator exercised the judgment and care that ‘... persons of prudence, discretion and intelligence exercise in the management of their own affairs ....’” 344 N.W.2d at 164 (citing Wis. Stat. § 881.01(1)). Wisconsin courts historically have looked to the Restatement (Second) of Trusts as a guide to the common law. See e.g. *Matter of Estate of Kugler*, 117 Wis. 2d 314, 344 N.W.2d 160, 166 (1984); *Dick & Reuteman Co. v. Doherty Realty Co.*, 16 Wis. 2d 342, 114 N.W.2d 475, 478 (1962). Accordingly, §§ 174, 181, and 181 cmt. c of the Restatement (Second) of Trusts likely would be influential in Wisconsin courts.

Wyoming: “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.” Wyo. Stat. Ann. § 4-10-902. But there are no cases regarding damages for the failure to maximize income where there is the same risk.


**Alaska:** “(a) 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. (b) A trustee's investment and management decisions respecting individual assets shall be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.”  Alaska Stat. Ann. § 13.36.230 (West); Marshall v. First Nat. Bank Alaska (Alaska 2004) 97 P.3d 830, 839.

**Arizona:** “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.” Ariz. Rev. Stat. Ann. § 14-10902. However, there are no cases regarding damages for the failure to maximize income by retaining too much cash.

**Arkansas:** No Arkansas cases cite this section of the Restatement for the rule expressed, and none apparently have a similar holding.

**California:** Lynch v. John M. Redfield Foundation (1970) 9 Cal.App.3d 293 (where the trustees cannot agree on an investment policy, they breach their trust by allowing cash to sit uninvested for a substantial period of time); Conservatorship of Pelton (1982) 132 Cal.App.3d 496 (fiduciary liable for allowing substantial sums to sit in a passbook savings account for seventeen months while waiting for appointment of new conservator); but see Van de Kamp v. Bank of America (1988) 204 Cal.App.3d 819, 852-853 (trustee successfully defended “fail float” practice by demonstrating that use of zero balance accounts would neither be feasible nor cost effective when applied to bank’s trust accounts).

**Colorado:** “Year after year, year after year, for fourteen years large sums running from $10,000 to over $130,000 have lain idle on open account in the bank, with not one cent of
increase for the estate. No ordinarily prudent man would so treat his own.” In re MACKY ESTATE, 73 Colo. 1, 6 (1922). “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.” C.R.S. 15-1.1-102.

Connecticut:

Delaware: Yes. “When investing, reinvesting, purchasing, acquiring, exchanging, retaining, selling and managing property for the benefit of another, a fiduciary shall act with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use to attain the purposes of the account.” Del. Code Ann. tit. 12, § 3302(a); see also Del. Code Ann. tit. 12, § 3302(c) (“Any determination of liability for investment performance shall consider the performance of the entire portfolio and such other factors as the fiduciary considered when the investment decision was made.”); Mennen v. Wilmington Trust Co., No. CV 8432-ML, 2015 WL 1914599, at *37 (Del. Ch. Apr. 24, 2015) (Noting that “recovery from a trustee for improper investments ‘ordinarily would be the difference between (1) the value of [the improper] investments and their income and other product at the time of surcharge and (2) the amount of funds expended in making the improper investments, increased (or decreased) by a projected amount of total return (or negative total return) that would have accrued to the trust and its beneficiaries if the funds had been properly invested.”).

Florida: Florida has no authority on this specific issue. Florida has only general authority that a trustee who commits a breach of trust is liable for the greater of (a) the amount required to restore the value of the trust property and trust distributions to what they would have been if the breach had not occurred, including lost income, capital gain, or appreciation that would have resulted from proper administration; or (b) the profit the trustee made by reason of the breach. § 736.1002(1) Fla.Stat. The Florida statute is similar to Restatement (Third) of Trusts: Prudent Investor Rule § 205 (1992). Fla. Stat. §518.11(1): “The fiduciary has a duty to invest and manage investment assets as a prudent investor would considering the purposes, terms, distribution requirements, and other circumstances of the trust.” There is no particular investment strategy required; however all decisions are reviewed in terms of “reasonable business judgment”. “This is a rule of conduct and not of resulting performance.” Fla. Stat. §518.11(1)(f): “The circumstances that the fiduciary may consider in making investments include, without limitation, the general economic conditions, the possible effect of inflation, the expected tax consequences of investment decisions or strategies, the role each investment or course of action plays within the overall portfolio, the
expected total return, including both income yield and appreciation of capital, and the duty to incur only reasonable and appropriate costs.”

**Georgia:** O.C.G.A. § 53-12-302.

**Hawaii:**

**Idaho:** “(1) 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. (2) A trustee's investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.” Idaho Code Ann. § 68-502 (West).

**Illinois:** Probably, yes. An Illinois treaty supports the position that if a trustee failed to maximize income by not making timely investment, he is liable for the amount of income that would have accrued had the investment been properly made. “It is [the trustee’s] duty to invest money so that it will produce an income. He is liable if he fails to invest trust funds which it is his duty to invest for a period which, under all the circumstances, is unreasonably long. If he commits a breach of trust in neglecting within a reasonable time to invest the money, he is chargeable with the amount of income which normally would accrue from proper trust investments.” Hunter, *Estate Planning and Administration in Illinois*, § 218:24 (4th ed. 2007). However, we note that the Restatement (Third) of Trusts is moving toward damages determined by reference to a total-return-analysis: “A trustee who improperly fails to invest trust assets is chargeable with the amount of the funds the trustee failed properly to invest, adjusted for the amount of the total return, positive or negative, that would have accrued to the trust estate had the funds been invested in a timely fashion, this return to be based on a total return experience for suitable investments of generally comparable trusts.”

**Indiana:** Burns Ind. Code Ann. § 30-4-3-ll(b) (2016), provides that if a trustee commits a breach of trust, the trustee is liable to the beneficiaries for: "(1) any loss or depreciation in the value of the trust property as a result of the breach; (2) any profit made by the trustee through the breach; (3) any reasonable profit which would have accrued on the trust property in the absence of a breach; and (4) reasonable attorney's fees incurred by the beneficiary in bringing the action of the breach." The Trust Code Study Commission comments to Ind. Code § 30-4-3-ll(b) provide that: "This subsection adds reasonable attorney's fees to the liabilities imposed by the Restatement on a trustee who commits a breach of trust. See Restatement (Second), Trusts § 205 (1959)." *Eiteljorg v. Eiteljorg* (Ind. Ct. App. 2011) 951
N.E.2d 565, 572 ("As a general rule, in the absence of anything to the contrary, the question of requiring a trustee to pay interest on the trust funds is one which must depend upon the facts and circumstances in each particular case; and, where good conscience requires that the trustee be charged with interest, the payment thereof out to be exacted.") (citations omitted).

_Eiteljorg v. Eiteljorg_ (Ind. Ct. App. 2011) 951 N.E.2d 565,572 (a trustee is liable for lost profits stemming from the "trustee's misuse of or failure to acquire trust property.")

**Iowa:** “All proposed investments of trust funds by fiduciaries shall first be reported to the court or a judge for approval and be approved and unless otherwise authorized or directed by the court under authority of which the fiduciary acts, or by the will, trust agreement, or other document which is the source of authority, a trustee, executor, administrator, or guardian shall invest all moneys received by such fiduciary, to be by the fiduciary invested, in securities which at the time of the purchase thereof are included in one or more of the following classes….” Iowa Code Ann. § 636.23 (West); however, see _Conservatorship of Alessio v. First Community Trust, N.A._ (Iowa Ct. App. 2010) 791 N.W.2d 711 aff’d sub nom. _In re Conservatorship of Alessio_ (Iowa 2011) 803 N.W.2d 656 (“When a conservator fails to obtain prior court approval, the conservator has violated section 633.647, and will be held liable for subsequent losses if the violation is subsequently determined to have been a breach of fiduciary duty”)

**Kansas:** KSA 58a-1002 appears consistent with the above principle as it sets damages for breach of trust at the greater of: (1) the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred or (2) the profit the trustee made by reason of the breach. In _Burch v. Dodge_, the trustee failed to invest certain trust monies in interest earning accounts. The appellate court found that the trial court properly surcharged the trustee with the amount of interest that would have accrued but for his failure to invest the monies, and noted that the rate of interest to be charged a trustee who negligently fails to invest money is determined by the circumstances of the particular case and lies in the discretion of the trial court. ( _Burch v. Dodge_ (1980) 4 Kan.App.2d 503, 508.) However, the appellate court remanded for the trial court to determine whether the parties agreed to only invest set funds and, if there was such an agreement, whether there was an agreement to withdraw interest as it was paid from interest-bearing account rather than to allow it to compound. ( _Id._ at 509.) In the absence of express agreement, the appellate court suggested that surcharge against the negligent trustee would have to take into account any compounding effect. ( _Id._)

**Kentucky:** No direct authority; but see KRS 386B.10-020(I).

**Louisiana:** Louisiana generally retains this rule. See response to Question 11 above.
Maine: 18-B M.R.S.A. § 1001(2)(C) (“To remedy a breach of trust that has occurred . . . the court may . . . [c]ompel the trustee to redress a breach of trust by paying money”). 18-B M.R.S.A. § 1002(1)(A) (“A trustee who commits a breach of trust is liable to the beneficiaries affected for . . . [t]he amount required to restore the value of the trust property . . .”).

Maryland: While not an identical approach to that set forth above, the imposition of simple interest where a trustee has retained assets and failed to invest them appropriately is at least consistent with the above principle. “Where the trustee, in breach of trust, has allowed the principal to remain idle, the trustee has been charged with simple interest.” (Maryland Nat. Bank v. Cummins (1991) 322 Md. 570, 599 [reversing trial court’s imposition of compound prejudgment interest and imposing simple interest on self-depositing bank trustee who left cash receipts in demand deposit accounts paying no interest until increment of $1,000 was available for investment].)

Massachusetts: Yes.

Michigan: In In re Buhl's Estate, 211 Mich. 124 (1920), the Michigan Supreme Court stated, "A reasonable investment in dividend-paying stocks and interest-bearing bonds of a private business corporation may be permitted when the corporation has acquired, by reason of the amount of its property and the prudent management of its affairs for a considerable period of time, such a reputation for permanence and stability as to command universal confidence, and so that careful and intelligent persons, familiar with such corporations and the manner in which their business should be conducted, commonly invest their money in them as a permanent investment, and not for the primary purpose of securing a considerable income therefrom. A trustee has not unlimited authority to invest as an ordinarily prudent man would invest his own; he must take such risks only as an ordinarily prudent man would take who is a trustee of the money of others. In making such an investment, he always assumes the risk of searching scrutiny in a court of equity as to the diligence employed and sound judgment exercised by him in the transaction. He must always bear in mind that the primary object of the creation of the trust is not, ordinarily, accumulation, but preservation and perpetuity of the fund until the time for its distribution arrives, and he must make no investment by which this object may be at all likely to be defeated." Id. at 132. Also, MCL 700.7903(2) provides, "Absent a breach of trust, a trustee is not liable to a trust beneficiary for a loss or depreciation in the value of trust property, for failure to generate income, or for not having made a profit." Further, MCL 700.1505 states, "Within a reasonable time after accepting appointment as a fiduciary or receiving fiduciary assets, a fiduciary shall review the assets, and make and implement decisions concerning the retention and disposition of assets, in order to bring the fiduciary portfolio into compliance with the purposes, terms, distribution requirements expressed in the governing instrument, and other circumstances of the fiduciary estate, and
with the requirements of the Michigan prudent investor rule." In an unpublished opinion of the Michigan Court of Appeals, the Court upheld a surcharge imposed on a fiduciary for failure to promptly move assets of a decedent held in the attorney IOLTA account to the estate account after the death of the client. In re Thomas Estate, 1051 WL 4546989.

**Minnesota:** There is no Minnesota law which deals specifically with the issue of retaining too much cash. However, there are applicable provisions of the Minnesota UTC and applicable Minnesota case law. Section 501C.1002 of the Minnesota UTC dealing with damages for breach of trust appears to adopt the view taken above, in that it would restore the value of the trust property and trust distributions to what they would have been had the breach not occurred. Section 501C.1002 sets damages at the greater of: (1) the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or (2) the profit the trustee made by reason of the breach. In Will of Williams, 2000 Minn. Dist. LEXIS 2, *134 (Minn. Dist. Ct. 2000) also supports charging the trustee with the amount of income which normally would accrue from proper trust investments. In Williams, the Court took the amounts of money that should have been invested and calculated lost return by investing those amounts and investing them in a hypothetical portfolio in order to compensate for the loss of return on the funds that should have been invested.

**Mississippi:** No relevant authorities.

**Missouri:** RSMo. 456.8-804; Tyler v, Citizens Home Bank of Greenfield, 670 S. W.2d 954, 956 (Mo.App.,1984); Witmer v. Blair, 588 S.W.2d 222, 224 (Mo. App, w,n, 1979); Lipic v, Wheeler, 362 Mo. 499, 242 S.W.2d 43 (1951).

**Montana:** Mont. Code Ann. § 72-38-804 (“A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.”); Mont. Code Ann. § 72-38-902 (“(1) 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.”)

**Nebraska:** Neb. Rev. St. § 30-3891 (UTC 1002) appears consistent with the above principle as it sets damages for breach of trust at the greater of: (1) the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred or (2) the profit the trustee made by reason of the breach.
Nevada: “Except as otherwise provided in chapter 669A of NRS, a trustee who invests and manages trust property owes a duty to the beneficiaries of the trust to comply with the prudent investor rule set forth in NRS 164.700 to 164.775, inclusive” Nev. Rev. Stat. Ann. § 164.740 (West); “1. A trustee shall invest and manage trust property as a prudent investor would, considering the terms, purposes, requirements for distribution, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill and caution. 2. A trustee's decisions concerning investment and management as applied to individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as part of an overall strategy of investment having objectives for risk and return reasonably suited to the trust.” Nev. Rev. Stat. Ann. § 164.745 (West); “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.” Nev. Rev. Stat. Ann. § 164.750 (West).

New Hampshire: N.H. Rev. Stat. Ann. § 564-B: 10-100 ("(b) To remedy a breach of trust that has occurred or may occur, the court may: ... (3) compel the trustee to redress a breach of trust by paying money, restoring property, or other means"); N.H. Rev. Stat. Ann. § 564-B: 10-100 ("(a) A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of: (1) the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred"); Melmes v. Goldthwaite, 52 A.2d 795,799 (N.H. 1947) ("A trustee should not be liable for the failure to keep all the funds invested unless there has been neglect on his part."); Knowlton v. Bradley, 17 N.H. 458, 460 (N.H. Super. Ct. 1845) ("If a guardian or trustee keeps the funds of his trust separate from his own, and accounts for the interest received, he is not to be charged when the money lies idle, except for his neglect; and it cannot be considered neglect if a sum sufficient to meet contingent expenses be kept on hand, or if a sum so small that a prudent person would not seek an investment for it lies idle.").


New Mexico: This could amount to a breach of trust under the Uniform Trust Code, 46A-10-1001, NMSA.

New York: It is an executor’s duty to keep estate assets invested unless distribution to the beneficiaries will occur within a reasonably short time period. In Cooper v. Jones, 78 A.D.2d 423 (4th Dep’t. 1981), an executor was held in breach of his fiduciary duty when he failed to invest cash funds in an interest-bearing account. The court imposed a surcharge calculated off of the then prevailing rates of interest paid by savings banks. Id. at 428-29. In
New York, when a trustee negligently left assets in cash and invested only in tax-exempt bonds, the court awarded lost income and capital damages. Williams v. J.P. Morgan & Co., Inc., 199 F.Supp.2d 189, 196 (S.D.N.Y. 2002). The court did not award appreciation damages because there was no self-dealing or fraud. Id. at 194-95.

**North Carolina:** N.C.G.S.A. § 36C-10-1001(b)(3) ("To remedy a breach of trust that has occurred or may occur, the court may do any of the following: (3) Compel the trustee to redress a breach of trust by paying money, restoring property, or other means"); N.C.G.S.A. § 36C-10-1001(a)(1) ("A trustee who commits a breach of trust is liable for the greater of . . . [t]he amount required to restore the value of the trust property . . ."). Fisher v. Brown, 47 S.E. 398, 400 (N.C. 1904) ("Where the fiduciary does not use the money, but merely fails to loan it or to invest it, he is chargeable only with the ordinary and usual rate of interest, the amount which he should have made for the trust fund, if he had not been negligent").

**North Dakota:** North Dakota Century Code § 59-17-14 (Duties at inception of trusteeship)("Within a reasonable time after accepting a trusteeship or receiving trust assets, a trustee shall review the trust assets and make and implement decisions concerning the retention and disposition of assets, in order to bring the trust portfolio into compliance with the purposes, terms, distribution requirements, and other circumstances of the trust and with the requirements of this chapter.")

North Dakota Century Code §59-18-02 (Damages for breach of trust) ("A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred or the profit the trustee made by reason of the breach.")

**Ohio:** Ohio Rev. Code Ann. § 581O.0l(B)(3) ("To remedy a breach of trust that has occurred ... the court may ... [c]ompel the trustee to redress a breach of trust by paying money"). Ohio Rev. Code Ann. § 581O.02(A)(1) ("A trustee who commits a breach of trust is liable to the beneficiaries affected for ... [t]he amount required to restore the value of the trust property ... "), Ohio Rev. Code Ann. § 2109.42 (regarding probate matters "a fiduciary ... shall ... invest those funds [belonging to the trust] within a reasonable time ... [o]n failure to do so, the fiduciary shall account to the trust for any loss of interest that is found by the court to be due to the fiduciary's negligence.").

Stevens v. Natl. City Bank, 544 N.E.2d 612,617,619 (Ohio 1989) (noting a trustee "has a duty to invest idle trust funds so that they will be productive of income" and that "the trustee would then be liable only if ... retention were an abuse of discretion").
In re Testamentary Trust of Hamm, 707 N.E.2d 524, 530 (Ohio Ct. App. 1997) ("it is only appropriate in measuring the loss to the trust and in attempting to make the trust whole ... to impose some measure of interest upon funds negligently managed").

In re Trusteeship of Stone, 34 N.E.2d 755, 762 (Ohio 1941) ("In circumstances like these involving a breach of trust, the fixing of the rate of interest at the legal rate, at the usual rate of return on trust investments, or at some lesser rate considered equitable and fair, is generally within judicial discretion").

In re Shanafelt's Estate, 129 N.E.2d 816, 818 (Ohio 1955) (noting that if the trust funds had been invested according to testator's instructions in government bonds then the maximum rate of return on the bonds would have been two and one-half per cent, and the executor was obligated to pay that amount).

Oklahoma: In a case pre-dating Oklahoma’s adoption of the Uniform Prudent Investor Act, the Oklahoma Supreme Court held that a trustee should make investments “such as a prudent man would make of his own property having primarily in view the preservation of the estate and regularity of income.” Finley v. Exch. Trust Co., 1938 OK 178, 80 P.2d 296, 302.

Oregon: O.R.S. § 130.765 (Trustee duty) (“Within a reasonable time after accepting a trusteeship or receiving trust assets, a trustee shall review the trust assets and make and implement decisions concerning the retention and disposition of assets in order to bring the trust portfolio into compliance with the requirements of ORS 130.750 to 130.775 and with the purposes, terms, distribution requirements and other circumstances of the trust.”) ORS § 130.805 (trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of (a) The amount of damages caused by the breach; (b) The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or (c) The profit the trustee made by reason of the breach.)

Pennsylvania: Lychos Trust, 1 Fid. Rep. 2d 254 (O.C. North. 1981), aff’d in part, Estate of Lychos, 470 A.2d 136, 142-43 (Pa. Super. 1983). In Lychos, the principal asset of the trust was a commercial building that the trustees grossly mismanaged, including under-insuring the property. In preparing to undertake renovations for a tenant, the corporate trustee secured a $50,000 mortgage at 7½ % interest – and then placed $15,000 of the mortgage money in a no-interest account for over a year with no justification. The Orphans’ Court and Superior Court both concluded that this created an actual loss for the trust because the trust was paying 7½ % interest on the $15,000 while it inexplicably sat unproductive during that time – neither funding renovations nor earning any income. See also Race Trust, 18 Fid. Rep. 2d 53 (O.C. Lehigh 1997) (trustee surcharged in the amount of its fees).
Rhode Island:

South Carolina: S.C. Code 1976 § 62-7-1001(b)(3) (“To remedy a breach of trust that has occurred ... the court may ... [c]ompel the trustee to redress a breach of trust by paying money”). S.C. Code 1976 § 62-7-1002(a)(1) (“A trustee who commits a breach of trust is liable to the beneficiaries affected for ... [t]he amount required to restore the value of the trust property ...”).

South Dakota: SDCL § 55-5-9 (Review of assets upon acceptance of trusteeship--Basis for disposition or retention of assets--Interest in closely held entity.)

The remedies stated in § 205 of the Restatement (Second) are applicable when the trustee violates his duty of loyalty. Restatement (Second) of Trusts § 206 (1959). Willers v. Wetttestad, 510 N.W.2d 676, 681 (S.D. 1994). Section 205 of the Restatement (Second), comment, states, “If the trustee commits a breach of trust, the beneficiary may have the option of pursuing a remedy which will put him in the position in which he was before the trustee committed the breach of trust; or of pursuing a remedy which will give him any profit which the trustee has made by committing the breach of trust; or of pursuing a remedy which will put him in the position in which he would have been if the trustee had not committed the breach of trust.”

Tennessee: Tenn. Code Ann. 35-6-413. Property not productive of income. (a) If a marital deduction is allowed for all or part of a trust whose assets consist substantially of property that does not provide the spouse with sufficient income from or use of the trust assets, and if the amounts that the trustee transfers from principal to income under § 35-6-104 and distributes to the spouse from principal pursuant to the terms of the trust are insufficient to provide the spouse with the beneficial enjoyment required to obtain the marital deduction, the spouse may require the trustee to make property productive of income, convert property within a reasonable time, or exercise the power conferred by § 35-6-104(a). The trustee may decide which action or combination of actions to take.

“[W]here a trust fund cannot be applied either immediately or within a short time to the purposes of the trust, it is the duty of the trustee to invest the fund in a proper interest bearing account.” Cook v. Cook, 559 S.W.2d 329, 334 (Tenn. Ct. App. 1977). If there is no reason for removing funds from an interest bearing account, then the trustee is liable for the interest that would have accrued. Id. at 334 – 35.

Texas: See Texas Trust Code §§ 114.001 and 114.008 supra.
See Moore v. Sanders, 106 S.W.2d 337 (Tex. Civ. App. – San Antonio, 1937, no writ) where the trust fund cannot be applied for trust purposes immediately, or within a reasonable time, trustee has a duty to invest and make fund productive of income; leaving trust fund uninvested for eight months constituted one of several grounds for removal.

Texas Courts routinely rely on the Restatements of Trusts and legal treatises such as Scott and Ascher on Trusts and Bogert, Trusts and Trustees as legal authority for their decisions if the provisions of these sources do not conflict with statutory trust law or specific Texas case law.

Utah: “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.” Utah Code Ann. § 75-7-902. But there are no cases regarding damages for the failure to maximize income by retaining too much cash.

Vermont: There is no Vermont law which deals specifically with the issue of retaining too much cash. 14A V.S.A. §1002 sets damages at the greater of: “(1) the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or (2) the profit the trustee made by reason of the breach.”

Virginia: Washington: Washington courts have not cited this rule. It is likely to be treated as a failure to diversify or failure to invest. See also RCW 11.100.020; RCW 11.100.037.

West Virginia: W. Va. Code Ann. § 44D-8-804 (West) “A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill and caution.”; W. Va. Code Ann. § 44-6C-2 (West) “(a) 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.”

Wisconsin: In Matter of Estate of Kugler, 117 Wis. 2d 314, 344 N.W.2d 160 (1984), citing former Wis. Stat. § 881.01(1) (the prudent person rule) in a proceeding to surcharge an estate administrator for failing to invest the liquidated estate assets, the Wisconsin Supreme Court stated: “[A]n administrator’s duty to manage the estate as a prudent person ordinarily includes a duty to reasonably invest estate funds not needed to meet current estate claims and administrative expenses.” 344 N.W.2d at 164. The court quoted § 207(1) of the Restatement
(Second) of Trusts in its discussion of the court exercising its discretion in determining the interest rate used to calculate damages. 344 N.W.2d at 166.

**Wyoming:** “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.” Wyo. Stat. § 4-10-902. But there are no cases regarding damages for the failure to maximize income by retaining too much cash.

**Alabama:** Alabama traditionally has embraced the common law concept that remedies for breach of trust are exclusively equitable, and thus that while surcharge is available, punitive damages are not. As the Alabama Legislature made clear in passing the Alabama Uniform Trust Code in 2006: Traditionally, remedies for breach of trust at law were limited to suits to enforce unconditional obligations to pay money or deliver chattels. Otherwise, remedies for breach of trust were exclusively equitable, and as such, punitive damages were not available and findings of fact were made by the judge and not a jury. Comment to ALA. CODE § 19-3B-1001. In *Regions Bank v. Reed*, 60 So. 3d 868 (Ala. 2010), the Alabama Supreme Court underscored that Alabama has not departed from the longstanding principle of Alabama law that "all matters pertaining to trusts [lie] within equity's exclusive jurisdiction." *Reed*, 60 So. 3d at 882 (quoting Spragins, 475 So. 2d at 14 (emphasis added); see also *Ex parte Holt*, 599 So. 2d 12, 14 (Ala. 1992)("[e]quity retains exclusive jurisdiction over the remedies available to a beneficiary against a trustee, with two limited exceptions")." The Alabama Supreme Court has since held that beneficiaries may also maintain a claim against the trustee under the Alabama Securities Act, ALA. CODE § 8-6-1 et seq. (1975) and muddied the question whether jurisdiction of trusts otherwise remains exclusively equitable in Alabama. *Regions Bank v. Kramer*, 98 So. 3d 510 (2012).

In adopting the Alabama Uniform Trust Code, the Legislature did not expressly add punitive damages to the extensive list of traditional remedies for breach of trust and, as such, punitive damages are not available. Rather, the Legislature reserved the availability of punitive damages as a question "to be dealt with by the Alabama Supreme Court." Comment to ALA.
CODE § 19-3B-1002(a)(2). A review of BOGERT, THE LAW OF TRUST AND TRUSTEES § 862, which implies that Alabama awards punitive damages for breach of trust, reveals a solitary citation under Alabama law to *Rainsville Bank v. Willingham*, 485 So. 2d 319 (Ala. 1986), which is not a trust case at all, but rather a dispute over a checking account in a commercial bank. *Rainsville* involved at-law allegations of conversion and fraud, tried to a jury, with respect to a checking account found to constitute a special deposit. The jury had found that the bank had committed conversion and fraud in setting off against the account by applying it to a note owed by the depositor to the bank. Similarly, the other citation in the Comment to ALA. CODE § 19-3B-1002(a)(2) as a source of uncertainty on this point, *Fairhope Single Tax Corp. v. Rezner*, 527 So. 2d 1232 (Ala. 1987), did not involve an express trust, nor did the Rezner case even consider the availability of punitive damages against the *quasi* trustee, but rather only against the individual defendants who were directors of the corporation. Accordingly, the Rezner case does not stand for the proposition that Alabama law has departed from traditional trust law principles to allow an award of punitive damages against the trustee of an express trust.


**Arkansas:** In Arkansas, punitive damages may be awarded only when the evidence indicates that a person acted wantonly, or in such a manner that malice may be inferred. *Feibelman v. Worthen Nat. Bank, N.A.*, 20 F.3d 835, 837 (8th Cir. 1994). Where the court ordered the trustee to pay $50,000 in punitive damages, characterizing the trustee's conduct as "intentional, willful, and in complete disregard of the testator's purpose, .... [c]learly, the chancellor perceived appellant's actions as going beyond negligence to the point of a deliberate and intentional course of conduct involving a violation of duty based on trust or confidence." *Whitehead v. King*, No. CIV. A. 96-570, 1997 WL 327233, at *2 (Ark. Ct. App. June 11, 1997) (unpublished decision).
California: *Pelletier v. Eisenberg* (1986) 177 Cal.App.3d 558 (ordering new trial on issues of both compensatory and punitive damages in action arising from damage to artist’s paintings from gallery fire where gallery owners had converted the entrusted artworks; court reasoned that fraud arising from breach of trust relationship would justify award of punitive damages); Pelletier, as well as *Werschkull v. United California Bank* (Ct. App. 1978) 85 Cal.App.3d 981, are cited approvingly for punitive damages in breach of trust actions in Law Revision Commission Comments to Cal. Prob. C. § 16440,


Connecticut:

Delaware: No, the Delaware Court of Chancery does not award punitive damages. The Court of Chancery is a court of equity and, consequently, it awards damages only to make aggrieved parties whole. See, e.g., *Beals v. Washington Int’l, Inc.*, 386 A.2d 1156, 1159 (Del. Ch. 1978) (Holding that Chancery does not have jurisdiction to award punitive damages.).

Florida: “[T]he law is clear in Florida that absent a statutory authority, a judge sitting as a trier of fact in an action formally cognizable in equity may not award punitive damages.” There is no Florida statute that authorizes punitive damages in this instance. The court in *Hoppe v. Hoppe* (Fla. Dist. Ct. App. 1978) 370 So. 2d 374, 376 dismissed the claim for punitive damages. Punitive damages could be assessed against a tortfeaser-trustee in the same manner such damages may be assessed against a tortfeaser individual. The Florida supreme court has held that punitive damages may not be assessed against a decedent’s estate for torts committed during the decedent’s lifetime because the purpose of such damages is to punish and such punishment is inappropriate against a person’s estate. *Snyder v. Bell*, 746 so.2d 1096 (Fla. 2d DCA 1999). Florida has statutory regulation of punitive damage civil proceedings. Chapter 768 Florida Statutes.

Hawaii: In *Kunewa v. Joshua*, 83 Hawaii 65, 924 P.2d 559 (1996) an attorney in fact used his power of attorney to gift his mother’s estate to himself. Under her will, the estate was to be divided equally between him and his four sisters. The transaction was set aside and the attorney in fact became a constructive trustee. Punitive damages were held to be awardable, and the sisters’ attorneys’ fees could be considered in calculating the amount.


Illinois: Yes. Punitive damages are available under Illinois law if the trustee’s unlawful conducts are egregious. In *NC Illinois Trust Co. v. First Illini Bancorp, Inc.*, 323 Ill.App.3d 254 (2001), the court upheld the lower court’s awarding of punitive damages, stating: “punitive damages are appropriate only in cases where the wrongful acts in question are characterized by aggravated circumstances such as fraud, actual malice, deliberate oppression, willful and wanton behavior or where the wrong involved some violation of duty springing from a relation of trust and confidence.” In a case in which punitive damages are ultimately denied, the court emphasized that punitive damages are disfavored: “The purpose of punitive damages is twofold: to punish the wrongdoer, and to deter the particular wrongdoer, as well as others, from committing similar acts in the future. Because of the penal nature, punitive damages are not favored in the law, and courts must be cautious in seeing that they are not improperly or unwisely awarded. Punitive damages may be awarded in cases where the wrongful act complained of is characterized by wantonness, malice, oppression or other circumstances of aggravation.” *Estate of Wernick*, 127 Ill.2d 61 (1989).

Indiana: Burns Ind. Code Ann. § 30-4-3.5-1(b) (2016) (“A punitive damage award may not be more than the greater of: (1) three (3) times the amount of compensatory damages awarded in the action; or (2) fifty thousand dollars ($50,000)."

Iowa: *Hamilton v. Mercantile Bank of Cedar Rapids* (Iowa 2001) 621 N.W.2d 401, 407 (Evidence that relationship between bank and trust beneficiary was fiduciary in nature and that bank repeatedly breached its most basic duty to protect and preserve the trust property, including to collect revenue, to pay taxes, to insure against loss, and to preserve value through routine maintenance and repair, was sufficient to support award of $750,000 in punitive damages to beneficiary); Iowa Code Ann. § 668A.1 (West).
Kansas: “Punitive damages may be awarded to the victim of a willful breach of trust even though the injury suffered is fully remedied by an equitable decree so that no monetary award of actual damages is made.” (Capital Fed. Sav. & Loan Ass’n v. Hohman (1984) 235 Kan. 815.) KSA 58a-1002(c) also provides that “the provisions of this section [regarding damages for breach of trust] shall not exclude an award of punitive damages.” As for punitive damages generally, KSA 60-3701 controls punitive damages in Kansas. The relevant statutory language reads: “(c) In any civil action where claims for exemplary or punitive damages are included, the plaintiff shall have the burden of proving, by clear and convincing evidence in the initial phase of the trial, that the defendant acted toward the plaintiff with willful conduct, wanton conduct, fraud or malice; (d) In no case shall exemplary or punitive damages be assessed pursuant to this section against: (1) A principal or employer for the acts of an agent or employee unless the questioned conduct was authorized or ratified by a person expressly empowered to do so on behalf of the principal or employer; or (2) an association, partnership or corporation for the acts of a member, partner or shareholder unless such association, partnership or corporation authorized or ratified the questioned conduct; (e) Except as provided by subsection (f), no award of exemplary or punitive damages pursuant to this section shall exceed the lesser of: (1) The annual gross income earned by the defendant, as determined by the court based upon the defendant's highest gross annual income earned for any one of the five years immediately before the act for which such damages are awarded; or (2) $5 million; (f) In lieu of the limitation provided by subsection (e), if the court finds that the profitability of the defendant's misconduct exceeds or is expected to exceed the limitation of subsection (e), the limitation on the amount of exemplary or punitive damages which the court may award shall be an amount equal to 1 ½ times the amount of profit which the defendant gained or is expected to gain as a result of the defendant's misconduct; (g) The provisions of this section shall not apply to any action governed by another statute establishing or limiting the amount of exemplary or punitive damages, or prescribing procedures for the award of such damages, in such action.”

Kentucky: None under Kentucky version of UTC. However see Anderson v. Old National Bancorp, 675 F. Supp 2d 701 (W.O. KY 2009).

Louisiana: Louisiana law does not provide for punitive damages in the case of breaches by trustees. The Louisiana Trust Code, however, is supplemented by the Louisiana Civil Code in the absence of a more specifically applicable provision of the Trust Code. See explanation under Question 25. According to Louisiana civil law principles, bad faith breaches makes the breaching party liable for all damages, foreseeable or not, provided they are directly caused by the breach. La. Civ. Code art. 1997. La. Civ. Code art. 1997. **Obligor in bad faith** An obligor in bad faith is liable for all the damages, foreseeable or not, that are a direct consequence of his failure to perform.
Maine: 18-B M.R.S.A. § 1001, official cmt. (noting that punitive damages were not traditionally allowed in breach of trust claims, but the “Uniform Trust Code does not preclude the possibility that a particular enacting jurisdiction might” allow punitive damages).


Michigan: In Prentis Family Foundation v. Barbara Ann Karmanos Cancer Institute, 266 Mich.App. 39 (2005), the Michigan Court of Appeals, citing Vicencio v. Ramirez, 211 Mich.App, 501 (1995), stated, "Damages may be obtained for a breach of fiduciary duty when a position of influence has been acquired and abused, or when confidence has been reposed and betrayed." Prentis, supra at 47. In the matter of Green v. Evans, 156 Mich.App. 145 (1987), the Michigan Court of Appeals upheld the award of exemplary damages for humiliation, embarrassment, and senses of outrage resulting from the defendant's breach of fiduciary duty and/or exercise of undue influence.

Minnesota: Minn. Stat. § 549.20 controls punitive damages in Minnesota. The relevant statutory language reads: (a) Punitive damages shall be allowed in civil actions only upon clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights or safety of others; (b) A defendant has acted with deliberate disregard for the rights or safety of others if the defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury to the rights or safety of others and:(1) deliberately proceeds to act in conscious or intentional disregard of the high degree of probability of injury to the rights or safety of others; or (2) deliberately proceeds to act with indifference to the high probability of injury to the rights or safety of others. “Generally, in Minnesota, outside a defamation context, punitive damages are permitted only when actual or compensatory damages are also present.” Kohler v. Fletcher, 442 N.W.2d 169, 173 (Minn. Ct. App. 1989). A jury may in its discretion award punitive damages in any tort case. Sullivan v. Ouimet, 377 N.W.2d 24 (Minn. Ct. App. 1985).
Mississippi: *Warren v. Derivaux*, 996 So. 2d 729, 737-38 (Miss. 2008) (citing *Hurst v. SW Miss. Legal Servs. Corp.*, 708 So.2d 1347, 1350 (Miss.1998)): "The award of punitive damages, along with the amount of such, are within the discretion of the trier of fact." *Warren v. Derivaux*, 996 So. 2d 729, 738 (Miss. 2008): Punitive damages should be awarded in addition to actual or compensatory damages where the violation of a right or the actual damages sustained, import insult, fraud, or oppression and not merely injuries, but injuries inflicted in the spirit of wanton disregard for the rights of others; in other words, there must be some element of aggression or some coloring of insult, malice or gross negligence, evincing ruthless disregard for the rights of others, so as to take the case out of the ordinary rule." *Muirhead v. Cogan*, 158 So. 3d 1259, 1267 (Miss. Ct. App. 2015): "If, on remand, the chancery court finds that punitive damages are warranted, then the chancery court must consider the factors enumerated in section 11-1-65(f)(ii) in determining the amount of punitive damages to be awarded." *Standard Life Ins. Co. of Indiana v. Veal*, 354 So. 2d 239, 247 (Miss. 1977): "punitive damages are assessed as an example and warning to others and should be allowed only with caution and within narrow limits." *Tideway Oil Programs, Inc. v. Serio*, 431 So. 2d 454, 460 (Miss. 1983) (citing Fowler Butane Gas Co. v. Varner, 141 So. 2d 226, 233 (Miss. 1962)): "[Punitive damages] are awarded upon proof of fraud or oppression."

*Tideway Oil Programs, Inc. v. Serio*, 431 So. 2d 454, 460 (Miss. 1983) (citing Milner Hotels, Inc. v. Brent, 43 So. 2d 654 (Miss. 1950)): "Plaintiff must prove a wrongful act intentionally performed or a gross disregard of the rights of plaintiff." *Tideway Oil Programs, Inc. v. Serio*, 431 So. 2d 454, 464 (Miss. 1983): "We hold that our chancery courts have actual, not just pendent, subject matter jurisdiction over claims for punitive damages." *Tideway Oil Programs, Inc. v. Serio*, 431 So. 2d 454,466-467 (Miss. 1983) (citing *Aetna Casualty & Surety Co. v. Steele*, 373 So. 2d 797, 801 (Miss. 1979)): "Punitive damages may be imposed for breach of contract where such breach is attended by intentional wrong, insult, abuse, or such gross negligence as amounts an independent tort."

Missouri: RSMo.456.7-706.4. "Pending a final decision on a request to remove a trustee, or in lieu of or in addition to removing a trustee, the court may order such appropriate relief under subsection 2 of section 456.10-1001 as may be necessary to protect the trust property or the interests of the beneficiaries."; RSMo.456.10-1001; *Gould v. Starr*, 558 S.W.2d 755 (Mo. Ct. App. 1977). Missouri circuit courts have the authority to award punitive damages against the trustees.

Montana: Montana specifically permits recovery of punitive damages in a variety of statutorily defined contexts, though no statutes explicitly allow punitive damages for breach of trust claims. Nor has there been case law on punitive damages for breach of trust claims.
Mont. Code Ann. § 27-1-221 provides for award of punitive damages where “actual fraud” or “actual malice” are found. Mont. Code Ann. § 27-1-220(2) explicitly prohibits punitive damages in contract or breach of contract claims.

**Nebraska:** Under Nebraska law, punitive damages are not available in suits between private parties. (*Riewe v. McCormick*, 11 Neb. 261 (1881)).


**New Hampshire:** *In re Guardianship of Dorson*, 934 A.2d 545, 549 (N.H. 2007) (“In addition to direct damages, courts may order consequential damages and punitive damages where malice or fraud is involved.”).


**New Mexico:** *Dicta: Torrance County Mental Health Program, Inc. v. New Mexico Health and Env’t Dept.*, 1992-NMSC-026, 113 NM 593, 830 P.2d 145—quoted with apparent approval from *Brown v. Coates*, 253 F.2d 36 (DC Circ.) “Where a breach of contract merges with, and assumes the character of, a willful tort, calculated rather than inadvertent, flagrant and in disregard of obligations of trust, punitive damages may be assessed”; see also *Madrid v. Marquez*, 2001-NMCA-087, 131 NM 132, 33 P.3d 683 punitive damage award approved in dispute over interest in real estate).

**New York:** In New York, punitive damages may be awarded at the court’s discretion. *Matter of Birnbaum v. Birnbaum*, 157 A.D.2d 177, 192 (4th Dep’t. 1990) (holding that the Surrogate did not abuse his discretion in refusing to award punitive damages even though the executor’s conduct amounted to actual fraud).

**North Carolina:** N.C.G.S.A. § 36C-10-1001, official cmt. (noting that punitive damages were not traditionally allowed in breach of trust claims, but the “Uniform Trust Code does not preclude the possibility that a particular enacting jurisdiction might” allow punitive damages). *Babb v. Graham*, 660 S.E.2d 626, 635–36 (N.C. App. 2008) (holding that evidence of former trustee’s intent, fraud, malice and willful and wanton conduct was
sufficient to submit issue of amount of punitive damages in trust beneficiaries’ action against former trustee for breach of fiduciary duty and fraud to the jury).

**North Dakota:** NDCC § 32-03.2-11 (When the court or jury may give exemplary damages)(“In any action for the breach of an obligation not arising from contract, when the defendant has been guilty by clear and convincing evidence of oppression, fraud, or actual malice, the court or jury, in addition to the actual damages, may give damages for the sake of example and by way of punishing the defendant.”)

An award of punitive damages for breach of fiduciary duties is not precluded by North Dakota statute, now section N.D. Cent.Code § 32-03.2-11, limiting punitive damages to actions for breach of an obligation not arising from contract. *Froemming v. Gate City Fed. Sav. & Loan Ass'n*, 822 F.2d 723, 733 (8th Cir. 1987)

*Powers v. Martinson*, 313 N.W.2d 720, 727–28 (N.D.1981) (jury properly awarded punitive damages for breach of statutory obligation of real estate vendor not to make fraudulent representations to vendee despite fact that the parties' underlying relationship was contractual).

**Ohio:** Ohio Rev. Code Ann. § 5810.01, official cmt. (noting that punitive damages were not traditionally allowed in breach of trust claims, but the "Uniform Trust Code does not preclude the possibility that a particular enacting jurisdiction might” allow punitive damages).


*Kemp v. Kemp*, 831 N.E.2d 1038, 1045 (Ohio Ct. App. 2005) (noting in a probate dispute that "[t]he decision whether to award punitive damages is within the trial court's discretion and, absent an abuse of discretion, the court's ruling will be upheld").


**Oregon:** O.R.S. § 31.730 (Standard of recovery for punitive damages) (“Punitive damages are not recoverable in a civil action unless it is proven by clear and convincing evidence that
the party against whom punitive damages are sought has acted with malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety and welfare of others.


**Pennsylvania:** Pennsylvania appellate courts have not spoken on the issue of whether punitive damages are available in surcharge actions. Recent Orphans’ Courts opinions have acknowledged that punitive damages should be available in trust and estate disputes where fiduciary conduct meets the existing standard is toward permitting such remedies where warranted by the circumstances. See _McFadden Trusts_, 2 Fiduc. Rep.3d 41, 122-24 (O.C. Phila. 2012) (analyzing case law and holding that punitive damages are permitted in Pennsylvania surcharge actions, but denying relief because there was no willful misconduct by any fiduciary); _Lemke Trust_, 13 Fid. Rep. 2d 328, 329 (O.C. Daup. 1993) (permitting a complaining beneficiary to add a claim for punitive damages to objections to an accounting).


**South Carolina:** S.C. Code Ann. § 62-7-1001, official cmt. (noting that punitive damages for breach of trust exclusively equitable, and as such, punitive damages were not available).

**South Dakota:** SDCL § 21-1-4 (Exemplary or penal damages only as provided)
SDCL § 21-3-2 (Punitive Damages in discretion of jury) (In any action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, actual or presumed, or in any case of wrongful injury to animals, being subjects of property, committed intentionally or by willful and wanton misconduct, in disregard of humanity, the jury, in addition to the actual damage, may give damages for the sake of example, and by way of punishing the defendant.)

_Ward v. Lange_, 1996 S.D. 113, ¶ 28, 553 N.W.2d 246, 253 (Punitive damages awarded for breach of fiduciary duty, conversion, fraud and deceit); See also _Davis v. Merrill Lynch, Pierce, Fenner & Smith, Inc._, 1990, 906 F.2d 1206.

**Tennessee:** Tenn. Code Ann. § 35-15-1001 (comments below) does not provide for punitive damages.

Traditionally, remedies for breach of trust at law were limited to suits to enforce unconditional obligations to pay money or deliver chattels. _See_ Restatement (Second) of
Trusts § 198 (1959). Otherwise, remedies for breach of trust were exclusively equitable, and as such, punitive damages were not available and findings of fact were made by the judge and not a jury. See Restatement (Second) of Trusts § 197 (1959).

**Texas:** See *Brosseau v. Ranzau*, 81 S.W.3d 381, 396 (Tex. App. – Beaumont 2002, pet. denied): “A defendants’ intentional breach of fiduciary duty is a tort for which a plaintiff may recover punitive damages. …. The “intent” issue concerning exemplary damages for breach of fiduciary duty is whether the one with a fiduciary duty intended to gain an additional unwarranted benefit.”

See also *Adam v. Harris*, 564 S.W.2d 152 (Tex. Civ. App. – Houston [14th Dist.] 1978, *writ ref'd n.r.e.*) (To recover exemplary damages in action for equitable relief, there must be some actual loss or injury).

**Utah:** “Punitive damages are the exception rather than the rule and should be imposed cautiously.” *Von Hake v. Thomas*, 705 P.2d 766, 771 (Utah 1985). “Our cases have generally held that punitive damages may be awarded only on proof of ‘willful and malicious,’ conduct, or on proof of conduct which manifests a knowing and reckless indifference toward, and disregard of, the rights of others, especially where compensatory damages may be simply absorbed as a cost of business.” *Behrens v. Raleigh Hills Hosp.*, 675 P.2d 1179, 1186 (Utah 1983) (internal citations omitted).

**Vermont:** There does not appear to be a Vermont statute addressing punitive damages. However, case law provides guidance on the general standard for punitive damages: “In a claim for punitive damages it is not enough to show that defendant's acts are wrongful or unlawful—there must be proof of defendant's “bad spirit and wrong intention.” *(Cooper v. Cooper* (2001) 173 Vt. 1, 14-15 [internal citations omitted].) “[N]o direct evidence of the defendant's mental state is required; instead, the nature of his conduct and the surrounding circumstances can establish his motive and his state of mind. Thus, a showing of “conduct manifesting personal ill will or carried out under circumstances evidencing insult or oppression, or ... a reckless or wanton disregard of one's rights” will suffice. *(Coty v. Ramsey Associates, Inc.* (1988) 149 Vt. 451, 464-465 [internal citations omitted].)

“Consistent with the view that punitive damages are to be applied to deter and to punish truly reprehensible conduct, Vermont has long required a plaintiff to demonstrate that a defendant acted with malice in order to recover punitive damages.” *(Brueckner v. Norwich Univ.* (1999) 169 Vt. 118, 129.)
Virginia: “Punitive damages are by definition legal relief, not equitable, and they are unavailable here.” *Makel v. Tredegar Trust Co.*, 69 Va. Cir. 204 (2005).

Washington: Punitive damages are not awarded in Washington.

West Virginia: No cases found awarding punitive damages in breach of trust action. “Generally, absent an independent, intentional tort committed by the defendant, punitive damages are not available in an action for breach of contract.” *Berry v. Nationwide Mut. Fire Ins. Co.* (1989) 181 W.Va. 168, 175. Further, punitive damages are available where there has been willful or malicious conduct, which presumably could apply in breach of trust context. *See C.W. Development, Inc. v. Structures, Inc. of West Virginia* (1991) 185 W.Va. 462, 466 (“Punitive or exemplary damages are such as, in a proper case, a jury may allow against the defendant by way of punishment for wilfulness, wantonness, malice, or other like aggravation of his wrong to the plaintiff, over and above full compensation for all injuries directly or indirectly resulting from such wrong.”).

Wisconsin: Punitive damages are not expressly addressed under the Wisconsin Trust Code, but Wis. Stat. § 701.1001(2)(j) provides: "To remedy a breach of trust that has occurred or may occur, a court may do any of the following: . . . (j) Order any other appropriate relief, whether provided elsewhere in this chapter, available at common law, or under equity principles." Though not involving a trust but rather an attorney’s breach of his fiduciary duty of loyalty to his clients, in *Groshek v. Trewin*, 325 Wis.2d 250, 784 N.W.2d 163 (2010), the Wisconsin Supreme Court considered whether the trial court’s award of punitive damages in an action for rescission was proper. Affirming the court of appeals’ reversal of the trial court’s award of punitive damages because there was no award of compensatory damages, the court expressly declined to consider whether, in an equitable action where a court awards compensatory damages, the fact that the action is an equitable action would then bar recovery of punitive damages. 784 N.W.2d at 175. In *Pro-Pac, Inc. v. WOW Logistics Co.*, 721 F.3d 781, 788 (7th Cir. 2013), The Court of Appeals for the Seventh Circuit, applying Wisconsin law in an action to recover damages for aiding and abetting a breach of fiduciary duty, stated “Regardless of whether the bankruptcy court awards damages premised on gain to [defendant] (i.e., restitutionary damages) or loss to [plaintiff] (i.e., compensatory damages), punitive damages are also available, if otherwise appropriate.” Id. at 788.

Wyoming: Exemplary damages are proper only in cases where wanton and willful misconduct is alleged, where the award is a jury determination, and where the award is not excessive. *Danculovich v. Brown*, 593 P.2d 187 (Wyo. 1979); *see also Verschoor v. Mountain W. Farm Bureau Mut. Ins. Co.*, 907 P.2d 1293, 1301 (Wyo. 1995).
24) **DOUBLE DAMAGES.** “In addition to any other damages for which the personal representative is liable, if the personal representative fraudulently sells real property of the estate contrary to or otherwise than under the provisions of this chapter, the person having an estate of inheritance in the real property may recover from the personal representative, as liquidated damages, an amount equal to double the fair market value of the real property sold on the date of sale.” Cal. Prob. C. § 10381 (West); see also Cal. Prob. C. § 859 (West); Kan. Stat. Ann. §58a-1002(a)(3) (West); Mich. Comp. Laws Ann. § 700.7813 (West); Nev. Rev. Stat. Ann. § 148.310 (West); Vt. Stat. Ann. tit. 14, § 1553 (West); Estate of Kraus (2010) 184 Cal. App.4th 103.

**Alabama:** See ALA. CODE § 19-3B-1002 (1975).

**Alaska:** No authority found.

**Arizona:** “If on examination or from other evidence adduced at the hearing it appears that a person has concealed, embezzled, conveyed or disposed of any property of a decedent, or possesses or has knowledge of deeds, bonds, contracts or other writings tending to disclose the right, interest or claim of a decedent to any property, or the will of a decedent, […] a judgment shall be for double the value of the property, or for return of the property and damages in addition to the property equal to the value of the property.” Ariz. Rev. Stat. Ann. § 14-3709; In re Estate of Newman (Ariz. Ct. App. 2008) 219 Ariz. 260, 267-9, as amended (July 17, 2008).

**Arkansas:** Arkansas has no similar statute, and no similar case holdings.

**California:** “If a court finds that a person has in bad faith wrongfully taken, concealed, or disposed of property belonging to a conservatee, a minor, an elder, a dependent adult, a trust, or the estate of a decedent, or has taken, concealed, or disposed of the property by the use of undue influence in bad faith or through the commission of elder or dependent adult financial abuse, as defined in Section 15610.30 of the Welfare and Institutions Code, the person shall be liable for twice the value of the property recovered by an action under this part… The remedies provided in this section shall be in addition to any other remedies available in law to a person authorized to bring an action pursuant to this part.” Cal. Prob. C. § 859.

**Colorado:** A former statute authorized double damages. See Vick Roy v. Morgan, 62 Colo. 122 (1916) (Colo. Rev. Stat. § 7253 (1908)).

**Connecticut:**
Delaware: No, the Delaware Court of Chancery does not generally award double damages. The Court of Chancery is a court of equity and, consequently, it awards damages only to make aggrieved parties whole.

Florida: Florida recognizes the tort of civil theft. The statutory remedy for this tort is treble damages. A trustee who commits civil theft may be held liable for treble damages, § 772.11 Fla.Stat. and that claim will survive and may be enforced against the estate of that trustee. The tort of civil theft involves theft of funds from another with criminal intent and the elements must be proved civilly with clear and convincing evidence. A personal representative is subject to the same standards of care which apply to trustees. See Fla. Stat. §733.602(1). A personal representative is liable to “interested persons for damage or loss resulting from the breach of this duty. In all actions for breach of fiduciary duties or challenging the exercise of or failure to exercise a personal representative’s powers, the court shall award taxable costs as in chancery actions, including attorney’s fees.” Fla. Stat. §733.609. See also Fla. Stat. §768.73(b) & (c): b) “Where the fact finder determines that the wrongful conduct . . . was motivated solely by unreasonable financial gain and determines that the unreasonably dangerous nature of the conduct, together with the likelihood of injury resulting from the conduct was actually known by the . . . agent . . . it may award an amount of punitive damages not to exceed the greater of:” four times the compensatory damages to each claimant or two million dollars; (c) If it was found there was specific intent to harm and the conduct did harm the claimant there is no cap on punitive damages.

Georgia: Unable to find authority on this issue.

Hawaii: 

Idaho: No authority found.

Illinois: The research has not found any Illinois case or secondary authority on point. We would like to note that double damage might be governed by the case law on punitive damages, see question 23. Additionally, Delaware does not award double damages, and an Illinois court might find the Delaware practice persuasive.

Indiana: No authority found.

Iowa: No authority found.

Kansas: KSA 58a-1002(a)(3) provides for double damages for breach of trust: “if the trustee embezzles or knowingly converts to the trustee's own use any of the personal property
of the trust, the trustee shall be liable for double the value of the property so embezzled or converted.” KSA 59-1704 also provides for double damages for the conversion of property belonging to a decedent or conservatee: “If any person embezzles or converts to his or her own use any of the personal property of a decedent or conservatee, such person shall be liable for double the value of the property so embezzled or converted.”

Kentucky: No authority found.

Louisiana: Louisiana law has no corresponding or analogous provision.

Maine: No authority found.

Maryland: Maryland has not adopted a double damages rule, either by statute or in case law.

Massachusetts: No, but see response to Question 23 above re treble damages and unfair business practices.

Michigan: MCL 700. 7813(4) states, "If a person embezzles or wrongfully converts trust property, or refuses without colorable claim of right, to transfer possession of trust property to the current trustee, or the beneficiary of the trust for the benefit of the trust, for double the value of any property embezzled, converted, or wrongfully withheld from the current trustee."

Minnesota: Minnesota has not adopted a double damages rule, either by statute or in case law.

Mississippi: No relevant authorities found.

Missouri:

Montana: There is no general provision under Montana law for double damages in the context of breaches of trust. Double damages were authorized under a former statute where a finder of lost property knowingly sold it to a third party. Narum v. City of Billings (1983) 207 Mont. 322, 328 [673 P.2d 1253, 1256], applying former Mont. Code Ann. § 70-5-209. Double damages have also been available in limited contexts, such as under Laws 1919, c. 104, which provided for honorably discharged World War I soldiers to recover double damages for wrongful foreclosure of their mortgages. See Austby v. Yellowstone Valley Mortg. Co. (1922) 63 Mont. 444 [207 P. 631, 631].
Nebraska: Nebraska law does not provide for double damages for breach of trust.


New Hampshire: No authority found.

New Jersey:

New Mexico: This is probably covered by the Miller opinion discussed above.

New York:

North Carolina: No authority found.

North Dakota: N/A

Ohio: Ohio Rev. Code Ann. § 2113.34 (regarding probate matters "[i]f an executor or administrator neglects to sell personal property that is required to be sold, and retains, consumes, or disposes of it for the executor's or administrator's own benefit, the executor or administrator shall be charged with the personal property at double the value affixed to the property by the appraisers.").

Oklahoma: “Any executor or administrator who fraudulently sells any real estate of a decedent, contrary to or otherwise than under the provisions of this chapter, is liable in double the value of the land sold, as liquidated damages, to be recovered in action by the person having an estate of inheritance therein.” 58 Okla. Stat. § 492. “If any person, before the granting of letters testamentary or of administration, embezzles or alienates any of the monies, goods, chattel or effects of a decedent, the person is chargeable therewith, and liable to an action by the executor or administrator of the estate, for double the value of the property so embezzled or alienated, to be recovered for the benefit of the estate.” 58 Okla. Stat. § 292(A).

Oregon: N/A

Pennsylvania: Double damages are not provided for under the Pennsylvania Probate, Estates and Fiduciaries Code or common law.
Rhode Island:

South Carolina: No authority found.

South Dakota: N/A

Tennessee: Tennessee does not provide for double damages. See Tenn. Code Ann. § 35-15-1002. “(a) Except as otherwise provided in § 35-3-117(a)-(d) with regard to investment of trust funds or elsewhere in this chapter, a trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of: (1) The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or (2) The profit the trustee made by reason of the breach. (b) Except as otherwise provided in this subsection (b), if more than one (1) trustee is liable to the beneficiaries for a breach of trust, a trustee is entitled to contribution from the other trustee or trustees. A trustee is not entitled to contribution if the trustee was substantially more at fault than another trustee or if the trustee committed the breach of trust in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries. A trustee who received a benefit from the breach of trust is not entitled to contribution from another trustee to the extent of the benefit received.”

Texas: Texas Trust Code § 111.005 provides that: “If the law codified in this subtitle repealed a statute that abrogated or restated a common law rule, that common law rule is reestablished, except as the contents of the rule are changed by this subtitle.”

Texas Trust Code § 113.051 provides that: “The trustee shall administer the trust in good faith according to its terms and this subtitle. In the absence of any contrary terms in the trust instrument or contrary provisions in this subtitle, in administering the trust the trustee shall perform all of the duties imposed on trustees by the common law.”

Utah: Double damages were authorized under a former statute where administratrix of husband’s estate misused mortgage loan on estate property. Shibata v. Bear River State Bank, 115 Utah 395 (1949); see also Hector, Inc. v. United Sav. & Loan Ass’n, 741 P.2d 542 (Utah 1987). But these statutes have been repealed. Utah Code Ann. § 57-1-33 (1986); Utah Code Ann. § 78-3-8 (1943). Double damages do apply to certain criminal conduct. Utah Code Ann. § 76-10-1605.

Vermont: Vermont has not adopted a double damages rule in the trusts and estates context, either by statute or in case law.
Virginia:

Washington: Double damages are not available for civil actions in Washington except in cases of an employer’s willful failure to pay employees. See RCW 49.52.070.

West Virginia: Double damages generally unavailable in West Virginia.

Wisconsin: There is no statutory or case law authority for awarding double damages for breach of trust or breach of fiduciary duty.

Wyoming: “If any person, before the granting of letters embezzles or alienates any of the monies, goods, chattels or effects of a decedent he is chargeable therewith and liable to an action by the personal representative of the estate for double the value of the property embezzled or alienated, for the benefit of the estate.” Wyo. Stat. § 2-7-411; see also Wyo. Stat. § 2-7-413. Where defendants purchased mortgaged property of deceased in good faith before administration, resulting in reduction of mortgage in excess of value of property, they were not liable for double damages. *Delfelder v. Poston*, 42 Wyo. 176 (1931).
25) COMMON LAW AS DEFAULT OR SUPPLEMENT. “The Code is supplemented by the common law of trusts, including principles of equity. To determine the common law and principles of equity in a particular state, a court should look first to prior case law in the state and then to more general sources, such as the Restatement of Trusts, Restatement (Third) of Property: Wills and Other Donative Transfers, and the Restatement of Restitution.” U.T.C. § 106, Com.; see also U.P.C. § 1-103; Cal. Civ. C. § 22.2 (West); Li v. Yellow Cab (1975) 13 Cal. 4th 804, 814; Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc. (1985) 472 U.S. 559, 570; Standard Oil Co. v. Oil, Chem. Etc. Internat. Union (1972) 23 Cal.App.3d 585, 589.


Alaska: Alaska has not implemented the UPC or the UTC. However, the Alaska civil code provides that “[s]o much of the common law not inconsistent with the Constitution of the State of Alaska or the Constitution of the United States or with any law passed by the legislature of the State of Alaska is the rule of decision in this state.” Alaska Stat. Ann. § 01.10.010 (West)

Arizona: “A. The common law of trusts and principles of equity supplement this chapter, except to the extent modified by this chapter or another statute of this state. B. The court shall look to the restatement (second) of trusts for interpretation of the common law and not to subsequent restatements of trusts to determine: 1. The rights and powers of creditors of beneficiaries; 2. The duties of trustees to distribute to those to whom a beneficiary owes any duties; 3. Whether public policy may affect enforceability and effectiveness of the terms of the trust; 4. And effectuate the settlor's intent.” Ariz. Rev. Stat. Ann. § 14-10106; Ariz Rev. Stat. Ann. § 1-201.

Arkansas: Arkansas has enacted this section of the UTC as Ark. Code Ann. § 28-73-106. In a case of first impression, this case held that the interests of beneficiaries who predeceased surviving settlor of inter vivos trust did not lapse upon death of beneficiaries. The court cited this section, noting that the Trust Code was silent on the issue, before it turned to the common law of trusts to answer the question. Tait v. Community. First Trust Co., 2012 Ark. 455, 4, 425 S.W.3d 684, 686 (2012).

California: “The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this State, is the rule of decision in all the courts of this State.” Cal. Civ. Code, § 22.2

Colorado: “Unless displaced by the particular provisions of this code, the principles of law and equity supplement its provisions.” C.R.S. 15-10-103 (Colorado Probate Code); see also
Connecticut:

Delaware: Yes, the Delaware courts would look first to prior case law in the state, and then, we believe, to Scott and Ascher on Trusts (5th ed. 2007), the Restatements, etc.

Florida: § 736.0106 Fla.Stat. provides that “The common law of trusts and principles of equity supplement this code, except to the extent modified by this code or another law of this state.”

Georgia: Unable to find authority on this issue.

Hawaii:

Idaho: Idaho civil code provides that “[t]he common law of England, so far as it is not repugnant to, or inconsistent with, the constitution or laws of the United States, in all cases not provided for in these compiled laws, is the rule of decision in all courts of this state.” Id. Code Ann. § 73-116 (West).

Illinois: Yes. Illinois’s statutory Trust and Trustee Act implicitly incorporates the common law while stating that the statute should be liberally construed. That is, the court is under no obligation to construe the statute strictly so as to avoid clashing with the common law. “This Act shall be liberally construed and the rule that statutes in derogation of the common law shall be strictly construed does not apply. The invalidity of any provision of this Act shall not affect the remainder of the Act.” (760 ILCS 5/18) (from Ch. 17, par. 1688)

Indiana: By implication, yes. See, e.g., Burns Ind. Code Ann. § 30-4-3-36(g) (2016) ("This section [governing decanting] may not be construed to abridge the right of any trustee who has a power of invasion to appoint property in further trust that arises under the terms of the first trust, under any other provision of this article or any other statute, or under common law."). See also, Burns Ind. Code Ann. § 1-1-2-1 (2016) "The law governing this state is declared to be: First. The Constitution of the United States and of this state. Second. All statutes of general assembly of the state in force, and not inconsistent with such constitutions. Third. All statutes of the United States, in force, and relating to subjects over which congress has power to legislate for the states, and not inconsistent with the Constitution of the United States. Fourth. The common law of England, and statutes of the British Parliament made in aid thereof prior to the fourth year of the reign of James the First (except the second section
of the sixth chapter of forty-third Elizabeth, the eighth chapter of thirteenth Elizabeth, and the
ninth chapter of thirty-seventh Henry the Eighth), and which are of a general nature, not local
to that kingdom, and not inconsistent with the first, second and third specifications of this
section.

Iowa: “Except to the extent that this chapter modifies the common law governing trusts, the
common law of trusts shall supplement this trust code.” Iowa Code Ann. § 633A.1104 (West).

Kansas: KSA 58a-106 states: “The common law of trusts and principles of equity
supplement this code, except to the extent modified by this code or another statute of this
state.” The UTC Comments further provide (just as above): “The Uniform Trust Code
codifies those portions of the law of express trusts that are most amenable to codification.
The Code is supplemented by the common law of trusts, including principles of equity. To
determine the common law and principles of equity in a particular state, a court should look
first to prior case law in the state and then to more general sources, such as the Restatement
of Trusts, Restatement (Third) of Property: Wills and Other Donative Transfers, and the
Restatement of Restitution. The common law of trusts is not static but includes the
contemporary and evolving rules of decision developed by the courts in exercise of their
power to adapt the law to new situations and changing conditions. It also includes the
traditional and broad equitable jurisdiction of the court, which the Code in no way restricts.”

Kentucky: Yes. KRS 386B.1-040.

Louisiana: The Louisiana Trust Code is supplemented by the Louisiana Civil Code when
the Trust Code contains no specific applicable provision. The Louisiana Civil Code, in turn,
Code. The provisions of this Code shall be accorded a liberal construction in favor of
freedom of disposition. Whenever this Code is silent, resort shall be had to the Civil Code or
other laws, but neither the Civil Code nor any other law shall be invoked to defeat a
disposition sanctioned expressly or impliedly by this Code. La. Civ. Code art. 4. Absence of
legislation or custom. When no rule for a particular situation can be derived from
legislation or custom, the court is bound to proceed according to equity. To decide equitably,
resort is made to justice, reason, and prevailing usages.

Maine: 18-B M.R.S.A. § 106 (“The common law of trusts and principles of equity
supplement this Code, except to the extent modified by this Code or another statute of this
State.”). 18-B M.R.S.A. § 106, official cmt. (“The common law of trusts is not static but
includes the contemporary and evolving rules of decision developed by the courts in exercise
of their power to adapt the law to new situations and changing conditions. It also includes the traditional and broad equitable jurisdiction of the court, which the Code in no way restricts.

**Maryland:** Section 14.5-106 of the MD Code, Estates and Trusts states that “[t]he common law of trusts and principles of equity supplement this title, except to the extent modified by this title or another statute of this State.”

**Massachusetts:**

**Michigan:** MCL 700.1203(1) states, "Unless displaced by the particular provisions of this act, general principles of law and equity supplement this act's provisions."

**Minnesota:** Section 106 of the Minnesota UTC states that “[t]he common law of trusts and principles of equity supplement this chapter, except to the extent modified by this chapter or another law of this state.

**Mississippi:** No relevant authorities found.

**Missouri:** RSMo.456.1-106. "The common law of trusts and principles of equity supplement sections 456.1-101 to 456.11-11 06, except to the extent modified by sections 456.1-101 to 456.11-1106 or another statute of this state."

**Montana:** Mont. Code Ann. § 72-38-106 (“The common law of trusts and principles of equity supplement this chapter except to the extent modified by this chapter or another statute of this state.”)

**Nebraska:** Under Neb. Rev. St. § 30-3806 (UTC 106) “[t]he common law of trusts and principles of equity supplement the Nebraska Uniform Trust Code, except to the extent modified by the code or another statute of this state.”

**Nevada:** “The common law of England, so far as it is not repugnant to or in conflict with the Constitution and laws of the United States, or the Constitution and laws of this State, shall be the rule of decision in all the courts of this State.” Nev. Rev. Stat. Ann. § 1.030 (West).

**New Hampshire:** N.H. Rev. Stat. Ann. § 564-B:1-106 ("The common law of trusts and principles of equity supplement this chapter, except to the extent modified by this chapter or another statute of this state.").

New Mexico: Find no direct authority. Assume this is what a New Mexico Court would do it issue were to arise.

New York:

North Carolina: N.C.G.S.A. § 36C-1-106 (“The common law of trusts and principles of equity supplement this Chapter, except to the extent modified by this Chapter or another statute of this State”); N.C.G.S.A. § 36C-1-106, official cmt. (“To determine the common law and principles of equity in a particular state, a court should look first to prior case law in the state and then to more general sources, such as the Restatement of Trusts, Restatement (Third) of Property: Wills and Other Donative Transfers, and the Restatement of Restitution.”).


Ohio: Ohio Rev. Code Ann. § 5801.05 ("The common law of trusts and principles of equity continue to apply in this state, except to the extent modified by Chapters 580 I. to 5811. or another section of the Revised Code.").

Ohio Rev. Code Ann. § 5801.05, official cmt. ("To determine the common law and principles of equity in a particular state, a court should look first to prior case law in the state and then to more general sources, such as the Restatement of Trusts, Restatement (Third) of Property: Wills and Other Donative Transfers, and the Restatement of Restitution.").

Wills v. Kolis, No. 93900, 2010 Ohio App. LEXIS 3674, at *10 (Ohio Ct. App. Sept. 16, 2010) (quoting Ohio Rev. Code Ann. § 5810.01, official cmt.) ("[t]he availability of a remedy in a particular circumstance will be determined not only by this Code but also by the common law of trusts and principles of equity.").

Thus, in addition to the instrument creating the trust, the authority of a trustee is limited by statutory and common law.

Damas v. Damas, No. L-IO-1125, 2011 Ohio App. LEXIS 5180, at *9 (Ohio Ct. App. Dec. 9, 2011) (“Nevertheless, we are not persuaded that the principle set forth in R.C. 5808.02 and the official comment to the Uniform Commercial Code does not apply equally as a matter of common law to distribution of trust assets to beneficiaries of a trust.”).

Cundall v. U.S. Bank, 882 N.E.2d 481, 490 (Ohio Ct. App. 2007) (“Even if we were to disregard the statutory laws of Ohio, the common law would still apply, and a fiduciary duty still would exist.”), rev'd on other grounds.

Oklahoma: “The common law, as modified by constitutional and statutory law, judicial decisions and the condition and wants of the people, shall remain in force in aid of the general statutes of Oklahoma; but the rule of the common law, that statutes in derogation thereof, shall be strictly construed, shall not be applicable to any general statute of Oklahoma; but all such statutes shall be liberally construed to promote their object.” 12 Okla. Stat. § 2. Common law regarding powers of appointment is specifically adopted except as modified by statute. 60 Okla. Stat. § 299.1. Oklahoma’s version of the Uniform Trust Act provides for common law to fill gaps left by repeal of any provision. “The repeal of any section of the statutory law of this state by this act, which section abrogated or restated the common-law rule, shall operate to reinstate and reestablish the common-law rule applicable thereto, except as the subject matter thereof may be changed by the provisions of this act.” 60 Okla. Stat. § 175.50. The common law rule against perpetuities does not apply to trusts in Oklahoma except as provided in 60 Okla. Stat. § 175.47(C).

Oregon: O.R.S. § 130.025 (Common law of trusts)(“ The common law of trusts and principles of equity supplement this chapter, except to the extent modified by this chapter or other law.”)

White v. Pub. Employees Ret. Bd., 351 Or 426, 434, 268 P3d 600, 606 (2011) (“ Trusts are to be administered in accordance with the trust instrument, and trusts created by statute, like the trust that establishes the fund here, “are administered as express trusts, the terms of which are either set forth in statute or are supplied by the default rules of general trust law.” Restatement (Third) of Trusts § 4 comment g (2003).)

Pennsylvania: 20 Pa. C.S. § 7706 (“The common law of trusts and principles of equity supplement this chapter, except to the extent modified by this chapter or another statute of this Commonwealth.”). See also Vincent J. Fumo Irrevocable Children’s Trust, 104 A.3 535
(Pa. Super. 2014) (“The Orphans' Court, however, is a court of equity. . . . In its exercise of equitable powers, the Orphans' Court may decline to enforce express provisions of a trust when the party seeking enforcement has unclean hands.”)


**South Carolina:** S.C. Code 1976 § 62-7-106 (“The common law of trusts and principles of equity supplement this article, except to the extent modified by this article or another statute of this State.”).

S.C. Code 1976 § 62-7-106, official cmt. (“The common law of trusts is not static but includes the contemporary and evolving rules of decision developed by the courts in exercise of their power to adapt the law to new situations and changing conditions. It also includes the traditional and broad equitable jurisdiction of the court, which the Code in no way restricts.”).

**South Dakota:** SDCL § 55-1A-1 (Powers enumerated in chapter apply to any trust unless specifically excluded--Powers as additional to common law powers) ( No provision of §§ 55-2-15 to 55-2-20, inclusive, may be construed to abridge the right of any trustee who has power to distribute income or principal in further trust which arises under statute, common law, or the terms of the first trust.)

**Tennessee:** T.C.A. § 35-15-106. Section Comment.
(a) The common law of trusts and principles of equity supplement this chapter, except to the extent modified by this chapter or another statute of this state.
(b) Notwithstanding subsection (a):
(1) No provision in a trust directing or authorizing accumulation of trust income shall be invalid; and
(2) The traditional common law distinction between a discretionary trust and a support trust and the dual judicial review standards related to this distinction shall be maintained. *Unless specifically provided otherwise in this chapter, courts shall not consult, rely on or give any persuasive value to the Restatement (Third) of Trusts §§ 50, 56, 58, 59 or 60, nor any of the comments under such sections or related thereto, none of which have any force or effect relative to trusts governed by the laws of this state.* (Emphasis added.)
Texas: Texas Trust Code § 111.005 provides that: “If the law codified in this subtitle repealed a statute that abrogated or restated a common law rule, that common law rule is reestablished, except as the contents of the rule are changed by this subtitle.”

Texas Trust Code § 113.051 provides that: “The trustee shall administer the trust in good faith according to its terms and this subtitle. In the absence of any contrary terms in the trust instrument or contrary provisions in this subtitle, in administering the trust the trustee shall perform all of the duties imposed on trustees by the common law.”

Utah: “The common law of trusts and principles of equity supplement this chapter, except to the extent modified by this chapter or laws of this state.” Utah Code Ann. § 75-7-106 (Uniform Trust Code).

Vermont: 14A V.S.A. § 106 provides that “[t]he common law of trusts and principles of equity supplement this title, except to the extent modified by this title or another statute of this state.”

Virginia: “The common law of trusts and principles of equity supplement this chapter, except to the extent modified by this chapter or another statute of the Commonwealth.” Va. Code § 64.2-704 (2012).

Washington: No Washington case stating whether the common law is considered a default or a supplement in Washington trust law. However, statutes in derogation of the common law are to be strictly construed. See *Estate of Hastings v. Seattle Trust Bank*, 88 Wn.2d 788, 796, 567 P.2d 200 (1977).

West Virginia: W. Va. Code Ann. § 44D-1-106 (West) “The common law of trusts and principles of equity supplement this chapter, except to the extent modified by this chapter or another statute of this state.”

Wisconsin: Wis. Stat. § 701.0106 provides: “The common law of trusts and principles of equity supplement this chapter, except to the extent modified by this chapter or another statute of this state.”

Wyoming: “The common law of trusts and principles of equity supplement this act, except to the extent modified by this act or another statute of this state. When interpreting article 5 of this act, the court shall first use the law of this state, then general common law.” Wyo. Stat. § 4-10-106 (Uniform Trust Code).
26) **Uniformity in Applying and Construing Uniform Acts.** “In applying and construing this Uniform Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among States that enact it.”

U.T.C. § 1101; U.P.C. § 1-102; Mo. Ann. Stat. § 456.11-1101 (West); “Sections 732.216-732.228 are to be so applied and construed as to effectuate their general purpose to make uniform the law with respect to the subject of these sections among those states which enact them.” Fla. Stat. Ann. § 732.228 (West); “(b) A provision of this code, insofar as it is the same in substance as a provision of a uniform act, shall be so construed as to effectuate the general purpose to make uniform the law in those states which enact that provision.” Cal. Prob. C. § 2 (West). Carl J. Herzog Foundation Inc v University of Bridgeport (CN, 1997) 699 A.2d 995, 1000.

**Alabama:** See ALA. CODE § 19-3B-1201 (1975) (Uniformity of application and construction.): In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

**Alaska:** Alaska has not incorporated the UPC or UTC into state law. However, uniform codes that have been incorporated (e.g. Uniform Transfers to Minors Act, Uniform Disposition of Community Property Rights at Death, etc.) include uniformity provisions.

**Arizona:** To the extent Arizona has enacted the U.P.C. and U.T.C, it has not explicitly included uniformity provisions referencing those uniform codes. However, Article 14 does include a general uniformity provision as well as numerous similar provisions applicable to specific uniform codes. “The underlying purposes and policies of this title are: […] 5. To make uniform the law among the various jurisdictions.” Ariz. Rev. Stat. Ann. § 14-1102; “This article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.” Ariz. Rev. Stat. Ann. § 14-7511 (in reference to Uniform Fiduciaries Act); Ariz. Rev. Stat. Ann. § 14-12501 (Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act); Ariz. Rev. Stat. Ann. § 14-10018 (Uniform Disclaimer of Property Interests Act).

**Arkansas:** Arkansas has elected this section of the UTC. Ark Code Ann. § 28-73-1101. No appellate decisions cite it.

**California:** “(b) A provision of this code, insofar as it is the same in substance as a provision of a uniform act, shall be so construed as to effectuate the general purpose to make uniform the law in those states which enact that provision.” Cal. Prob. C. § 2 (West)
Colorado: “This article shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this article among the states enacting it.” C.R.S. 15-1.1-112 (Colorado Uniform Prudent Investor Act); see also C.R.S. 15-1.5-120 (Colorado Uniform Custodial Trust Act); C.R.S. 15-1-1110 (Uniform Prudent Management of Institutional Funds Act); C.R.S. 15-11-1107 (Uniform Statutory Rule Against Perpetuities Act).


Delaware:

Florida: § 732.228 Fla.Stat. provides: “Uniformity of application and construction.—Sections 732.216-732.228 are to be so applied and construed as to effectuate their general purpose to make uniform the law with respect to the subject of these sections among those states which enact them;” however, this statute is applicable only to the “Florida Uniform Disposition of Community Property Rights at Death Act” which it is a part of. Also See Fla. Stat. §738.802 regarding the Florida Income and Principal Act. “In applying and construing this act, consideration shall be given to the need to promote uniformity of the law with respect to the act’s subject matter among states that enact such act.”

Georgia: Unable to find authority on this issue.

Hawaii: See HRS § 1-24 (“All provisions of uniform acts adopted by the State shall be so interpreted and construed as to effectuate their general purpose to make uniform the laws of the states and territories which enact them.”).

Idaho: Some of the uniform codes incorporated into Iowa law include explicit uniformity provisions. Others do not.

Illinois: Illinois has not adopted the Uniform Probate Code. For a list of the states that have adopted the Uniform Probate Code, see https://www.law.cornell.edu/uniform/probate. 

Indiana: No authority found.

Iowa: Some of the uniform codes incorporated into Iowa law include explicit uniformity provisions. Others do not.
**Kansas:** KSA 58a-1101 is consistent with the above; it provides: “In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.”

**Kentucky:** Yes KRS 386B.11-010.

**Louisiana:** Louisiana law contains no such rule. The Louisiana Trust Code was enacted in 1964 and drafted over the product of years of study and consideration of civilian considerations and principles of American trust law, as explained in the Uniform Trust Code, the Restatement (First) and Restatement (Second) of Trusts, Bogart on Trusts, Scott on Trust, and others. As such, it is a unique amalgam of various sources that are persuasive, but Louisiana law is not applied and interpreted with a view to uniformity.

**Maine:** 19-A M.R.S.A. § 3401 (“In applying and construing this Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.”). 22 M.R.S.A. § 2812 (“This Act shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this Act among states enacting it.”).

**Maryland:** “The Maryland Uniform Fiduciaries Act [MD Code, Estates and Trusts, § 15-201, et seq.] shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which adopt it.” (MD Code, Estates and Trusts, § 15-210.). Similar provisions exist for the following Uniform Acts, all of which appear in the Estates and Trusts section of the MD Code: the Uniform Transfer to Minors Act; the Uniform Transfer-On-Death (TOD) Security Registration Act; the Uniform Principal and Income Act; the Uniform Disclaimer of Property Interests Act; the Uniform Act for the Simplification of Fiduciary Security Transfer Act; the Uniform Prudent Management of Institutional Funds Act; and, the Uniform Anatomical Gift Act. However, no such provision regarding uniformity appears in the MTA.

**Massachusetts:**

**Michigan:** MCL 700.1203(1) states, "Unless displaced by the particular provisions of this act, general principles of law and equity supplement this act's provisions."

**Minnesota:** Section 1301 of the Minnesota UTC states that “[i]n applying and construing sections 501C.0101 to 501C.1014, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.”
Mississippi: No relevant authorities found. Mississippi case law regarding trustee's duties in general: In re Estate of Carter, 912 So. 2d 138, 144-45 (Miss. 2005) (quoting Bogert, Law of Trusts. § 93 (5th ed. 1973)): "Trustees are bound in the management of all the matters of the trust to act in good faith and employ such vigilance, sagacity, diligence and prudence as in general prudent [persons] of discretion and intelligence in like matters employ in their own affairs ... "; In re Estate of Carter, 912 So. 2d 138, 147 (Miss. 2005): "Mississippi law provides a chancellor with broad equitable powers and encourages the imposition of regulatory measures which insure that an estate and the will of its owner are protected from fraud. It is therefore the distinct duty of the chancellor to hold those serving in positions of trust accountable for their administrative actions and, in this way, hold a fiduciary fully accountable for the property with which the fiduciary has been entrusted."; 8 MS Prac. Encyclopedia MS Law § 73:17, MSPRAC-ENC § 73:17 (citing Ellzey v. Fyr-Pruf, Inc., 376 So. 2d 1328 (Miss. 1979)): "Under ordinary circumstances, the trustee always has the burden of proving the fairness of his or her dealings with trust property."); 8 MS Prac. Encyclopedia MS Law § 73:17 (citing Hewitt v. Phelps, 105 U.S. 393 (1881)): "Moreover, one who is designated as an agent of the trustee, with authority to manage and control the trust assets, is personally bound for any contract made in the agent's position as independent trustee of the estate."

Missouri: RSMo.456.11-1101. "In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it."

Montana: Mont. Code Ann. § 72-38-1101 (“In applying and construing this chapter, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.”)

Nebraska: Neb. Rev. St. § 30-38, 108 (UTC 1101) is consistent with the above; it provides: “In applying and construing the Nebraska Uniform Trust Code, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.”

Nevada: Nevada has not incorporated the UPC or UTC into state law. However, uniform codes that have been incorporated (e.g. Simultaneous Death (Uniform Act)) include uniformity provisions.

New Hampshire: N.H. Rev. Stat. Ann. § 564-B: 11-1101 ("In applying and construing this chapter, primary consideration shall be given to the preservation of the settlor's intent as expressed in the terms of the trust. Secondary consideration shall be given to the following objectives, in no order of priority among them: (1) the protection of the interests of the
beneficiaries consistent with the settlor's intent as expressed in the terms of the trust; (2) the promotion of certainty concerning the duties and liabilities of trustees, trust advisors, and trust protectors, including the division of those duties and liabilities among trustees, trust advisors, and trust protectors; and (3) the promotion of the efficient administration of a trust. Tertiary consideration may be given to the promotion of uniformity of the law with respect to its subject matter among states that enact the uniform act upon which this chapter is based.

New Jersey:


New York: In Southern Industries, Inc. v. Jeremias, 66 A.D.2d 178 (2nd Dep’t. 1978) the New York Appellate Court held that when “construing a provision of the Uniform Act we should, whenever possible, respect the decisions of the courts of other jurisdictions where it is in force, with a view to ensuring harmonious national interpretation” Id., at 949 (discussing the Uniform Fraudulent Conveyance Act). In Southern Industries, Jeremias was an officer, director and major stockholder of Mazel Knitting Mills. He had loaned the company in excess of $200k. When the company ceased doing business, it sold its furniture, equipment, inventory, etc. to Jeremias as satisfaction of the debt. Petitioner, Southern Industries, was a yarn supplier that held an open account with Mazel Knitting Mills. It brought this action due to the outstanding debts owed to the company. Since New York had adopted the relevant uniform act, the court looked to case law from another state for guidance in interpreting a certain phrase in the statute’s language.

North Carolina: N.C.G.S.A. § 36C-11-1101 (“In applying and construing this Chapter, consideration may be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it”).

North Dakota: Smith v. Hall, 2005 ND 215, ¶ 17, 707 N.W.2d 247 (“In interpreting a statute derived from a uniform act, the statute “must be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.” N.D.C.C. § 1–02–13. We construe uniform laws the same way as other jurisdictions “to provide consistency and uniformity in the law.””)
Ohio: Ohio Rev. Code Ann. § 5811.01 ("In applying and construing Chapters 5801. to 5811. of the Revised Code, a court may consider the need to promote uniformity of the law with respect to the subject matter of those chapters among states that enact the uniform trust code.").

Ohio Rev. Code Ann. § 5809.08(A) ("The Ohio Uniform Prudent Investor Act shall be applied and construed to effectuate the general purpose to make uniform the law with respect to the subject of these sections among the states enacting it.").

Oklahoma: Oklahoma’s version of the Uniform Trust Act contains no provision on uniform construction. However, Oklahoma’s adoptions of other related uniform laws contain these provisions. “The Oklahoma Uniform Prudent Investor Act shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this act among the states enacting it.” 60 Okla. Stat. § 175.72. Likewise, Oklahoma’s Uniform Principal and Income Act is subject to uniformity in construction. 60 Okla. Stat. § 175.601 (“In applying and construing this Uniform Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.").

Oregon: Tripp v. Renhard, 184 Or 622, 648, 200 P2d 644, 656 (1948) (“Uniform acts should be uniformly interpreted.”)

Waggoner v. City of Woodburn, 196 Or App 715, 722, 103 P3d 648, 652 (2004) (“[W]hen this state adopts a model act, preexisting decisions of other states may be considered as part of the statute’s context.”)

Pennsylvania: 1 Pa. C.S. § 1927 (providing that statutes deriving from a uniform act “shall be interpreted and construed to effect their general purpose to make uniform the laws of the states that enact them”). In reviewing a provision in the Pennsylvania Uniform Trust Act, the Superior Court held that courts “may review how our sister states have interpreted” their laws, so long as such laws “are substantially similar to our own.” Appeal of McKinney, 67 A.3d 824, 829-30 (Pa. Super. 2013).


South Carolina: S.C. Code 1976 § 30-6-60 (“In applying and construing this Uniform Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact.”).
S.C. Code 1976 § 33-44-1201 ("This chapter shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states enacting it.").

**South Dakota:** SDCL § 55-4-35 ("This chapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.") *In re Estate of Geier*, 2012 S.D. 2, ¶ 15, 809 N.W.2d 355, 359 (Court must interpret uniform laws “to effectuate its general purpose to make uniform the law of those states which enact it.”)

**Tennessee:** Tenn. Code. Ann. 35-15-101 provides the *opposite*, that there is no need to promote uniformity of laws in construction of Tennessee Law.

Tenn. Code Ann. § 35-15-101. Comments on Controlling Law and Controlling Comments. Taken as a whole, the Tennessee trust statutes are a distinct and integrated set of trust laws. It is for this reason that the provisions of T.C.A. § 35-15-1101 reverse those of section 1101 of the Uniform Trust Code and expressly state that in applying and construing title 35 no consideration shall be given to any need to promote uniformity with respect to its subject matter among states, including relative to the laws of any foreign jurisdiction that has enacted versions of the various uniform codes, laws or acts. Moreover, T.C.A. § 35-15-1101 provides that unless specifically provided otherwise in title 35, chapters 6, 14, 15, 16 and 17, courts shall not consult or give any persuasive value to any such uniform acts or any foreign jurisdiction's acts based on or similar to them; or to the comments of any of them; none of which have any force or effect relative to trusts governed by the laws of Tennessee. Accordingly, regardless of the fact that throughout these comments references are made to other law, including various uniform acts and restatements, as well as to foreign law, *none of such are controlling to the extent they conflict with Tennessee law*. While attempts have been made throughout these comments to identify other law (e.g., by use of words such as “according to ULC--NCCUSL”), the fact that any such other law is not so identified does not alter the above. (Emphasis added.)

**Texas:** Texas has not enacted the Uniform Trust Code. It has enacted the Uniform Principal and Income Act and the Uniform Prudent Investor Act each of which are Chapters of the Texas Trust Code.

Section 116.004 of the Texas Uniform Principal and Income Act (Chapter 116 of the Texas Trust Code) provides that: “In applying and construing this Uniform Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.”
Section 117.002 of the Texas Uniform Prudent Investor Act (Chapter 117 of the Texas Trust Code) provides that: “This chapter shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among the states enacting it.”

**Utah:** “In applying and construing this chapter, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.” Utah Code Ann. § 22-3-601 (Uniform Principal and Income Act); see also Utah Code Ann. §75-7-1101 (Utah Uniform Trust Code); Utah Code Ann. § 75-2-1202 (Statutory Rule Against Perpetuities).

**Vermont:** 14A V.S.A § 1201 provides: “In applying and construing this title, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.”

**Virginia:** “This article [Uniform Prudent Investor Act] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this article among the states enacting it.” Va. Code § 64.2-791 (2012).

“In applying and construing this uniform act [Uniform Trust Code], consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.” Va. Code § 64.2-805 (2012).

**Washington:** Washington State has incorporated aspects of the Uniform Trust Code but has preserved the structure and substance of the pre-existing Washington trust statutes. “The Task Force has concluded that, although there are significant benefits to having uniform enactment among the states, following the numbering system of the original uniform act, it would be preferable to retain our current statutory scheme and fold any desirable amendments into the existing structure.” Washington State Bar Association, *Summary of 2010 Proposed Trust Bill* (2009), available at http://wsba.org/~/media/Files/Legal%20Community/Legislative%20Affairs/2011/explanatorymemotrustact.ashx.

**West Virginia:** W. Va. Code Ann. § 44D-11-1101 (West) “In applying and construing this chapter, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.”

**Wisconsin:** Wis. Stat. § 701.1203 provides: “This chapter shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states enacting it.”

**Wyoming:** “In applying and construing this act, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it. With respect to article 5 of this act, a court shall not give consideration to cases from jurisdictions that have adopted some version of the Uniform Trust Code, but have not modified article 5 of the Uniform Trust Code in a manner similar to article 5 of this act.” Wyo. Stat. § 4-10-1101. “In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.” Wyo. Stat. § 2-3-833 (Wyoming Uniform Principal and Income Act).