9-1-2007

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THE TRUSTEE'S DUTY TO INFORM*

T.P. GALLANIS**

This Article examines an aspect of trust fiduciary law historically ignored in the law reviews: the trustee's duty to provide information to the trust's beneficiaries about the trust and its administration. The time is ripe for analysis because the scope of the duty to inform provoked contentious debate during the drafting of the recently promulgated Uniform Trust Code ("UTC"), and all twenty of the enacting jurisdictions, including North Carolina, have substantially modified the UTC's provisions. Part I lays the descriptive foundation, explaining the requirements of the duty to inform under the UTC, under North Carolina's version of the UTC, and in the other nineteen enacting jurisdictions. Part II contains the normative analysis, addressing the central questions about the duty to inform: should trust law contain a duty to inform and, if so, should the duty be mandatory or should it be a mere default? To answer the first question, the Article draws on two interdisciplinary perspectives: legal history and law and economics. These perspectives reveal that the duty to inform has a distinguished pedigree within the history of Anglo-American law reaching back nearly two centuries and that the duty performs a vital function today. Establishing the duty's normative basis, the Article then considers whether the duty should be mandatory at least in part, as in the UTC, or wholly default law, as in North Carolina. To answer this question, the Article enters into and extends the ongoing debate over whether trusts are primarily contracts or property arrangements. Rejecting the strong contractarian approach as inconsistent with the direction of the modern law of fiduciary administration and drawing attention to the beneficiaries' unique position and incentives to supervise and enforce the trustee's fiduciary obligations, the Article concludes that

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the beneficiaries must have the information needed to exercise their supervisory and enforcement powers, irrespective of the wishes of the settlor. The duty to inform can be default law at the margins but must maintain a mandatory core.

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INTRODUCTION

This Article examines an aspect of trust fiduciary law historically ignored in the law reviews1: the trustee’s duty to provide information to the trust’s beneficiaries about the trust and its administration. Academic writing has concentrated on the other fiduciary duties, such as loyalty, prudence, and impartiality. The duty to inform is due for scholarly treatment. The time is ripe. The rules of trust law, including those governing the duty to inform, have assumed a special interest since

the year 2000, when the National Conference of Commissioners on Uniform State Laws ("NCCUSL") promulgated the Uniform Trust Code ("UTC") for state legislatures to consider for enactment. As legislatures evaluate whether the provisions of the UTC are appropriate for their states, the opportunity arises to consider what trust law is (the descriptive question) and should be (the normative question).

The descriptive and normative questions are especially relevant for the duty to inform. To date, twenty jurisdictions have enacted portions of the UTC, but the UTC’s provisions on the duty to inform have never been adopted verbatim. Rather, the enacting states have modified them in various ways, with the result that no two states’ provisions on the duty to inform are precisely the same. It is, therefore, a particularly important time for persons subject to trust law—including settlors, beneficiaries, and trustees—to understand what is the governing law and for scholars and policymakers to analyze what it should be.

Part I of this Article lays the descriptive foundation, explaining the requirements of the duty to inform. Part I is divided into three. The duty to inform under the UTC is considered first. Next is the duty to inform under the law of North Carolina, a fitting selection because of this journal but also, and more significant, because the North Carolina version of the UTC is among the most recent: it became effective on January 1, 2006. This will be the first Article addressing the duty under North Carolina law, a duty important both to the state’s growing population and to the trust departments in the


7. See Sam Roberts, Arizona Displaces Nevada as Fastest-Growing State, N.Y. TIMES, Dec. 22, 2006, at A24 (observing that from July 1, 2005 to July 1, 2006, North Carolina was the seventh fastest growing state and is now among the ten most populous).
state's thriving banking industry. The third part is a brief overview, necessarily general, of how the UTC's provisions on the duty to inform have been modified in the other nineteen enacting jurisdictions.

Part II of the Article contains the normative analysis. It addresses the central questions about the duty to inform: should trust law contain a duty to inform and, if so, should the duty be mandatory or should it be a mere default, waivable by the settlor? To answer the first question, the Article draws on two interdisciplinary perspectives: legal history and law and economics. These perspectives reveal that the duty to inform has a distinguished pedigree within the history of Anglo-American law reaching back nearly two centuries and that the duty performs a vital function today. Establishing the duty's normative basis, the Article then considers whether the duty should be mandatory at least in part, as in the UTC, or wholly default law, as in North Carolina. To answer this question, the Article enters into and extends the ongoing debate over whether trusts are primarily contracts or property arrangements. Rejecting the strong contractarian approach as inconsistent with the direction of the modern law of fiduciary administration and drawing attention to the beneficiaries' unique position and incentives to supervise and enforce the trustee's fiduciary obligations, the Article concludes that the beneficiaries must have the information needed to exercise their supervisory and enforcement powers, irrespective of the wishes of the settlor. The duty to inform can be default law at the margins but must maintain a mandatory core.

I. THE DESCRIPTIVE FOUNDATION

Part I of the Article lays the descriptive foundation, examining the requirements and contours of the duty to inform under the UTC, the law of North Carolina, and the laws of the other nineteen enacting jurisdictions.

A. The Duty to Inform Under the Uniform Trust Code

The UTC's provisions on the duty to inform provide answers to four crucial questions.

The first question is: To which beneficiaries does the trustee owe the duty? Under the UTC, the duty to inform is owed to some extent

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to all of the trust’s beneficiaries, whether they hold present interests or future interests, vested or contingent, in the trust, but the extent of the duty varies with the proximity (or, conversely, remoteness) of the beneficiary’s interest. For this purpose, the UTC divides beneficiaries into three categories. Category 1 comprises beneficiaries who are, on the relevant date, distributees or permissible distributees of trust income or principal. To see this definition in operation, consider the following example.

Example 1. G creates a trust providing for income to A for life, then remainder in corpus to B.

During A’s lifetime, A is a Category 1 beneficiary, but B is not. A is a distributee, whereas distributions to B can be made only after A’s death.

Category 2 comprises all “qualified beneficiaries,” a term that, as defined in UTC section 103(13), is broader than Category 1 and includes a beneficiary

who, on the date the beneficiary’s qualification is determined: (A) is a distributee or permissible distributee of trust income or principal; (B) would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in subparagraph (A) terminated on that date without causing the trust to terminate; or (C) would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

In Example 1 during A’s lifetime, both A and B are Category 2 beneficiaries, though A is also a Category 1 beneficiary. A is a

9. “[T]he trustee [must] promptly respond to the request of any beneficiary . . . for information related to the administration of the trust. Performance is excused only if compliance is unreasonable under the circumstances.” UNIF. TRUST CODE § 813 cmt. (2005) (emphasis added).
10. The UTC provides:

Due to the difficulty of identifying beneficiaries whose interests are remote and contingent, and because such beneficiaries are not likely to have much interest in the day-to-day affairs of the trust, the Uniform Trust Code uses the concept of “qualified beneficiary” . . . to limit the class of beneficiaries to whom certain notices must be given or consents received.

Id. § 103 cmt.
11. See id. § 813(c).
12. Id. § 103(13). For the use of this term in the context of the duty to inform, see id. § 813(a), (b)(2)−(4), (c).
13. Id. § 103(13).
“distributee ... of trust income,”\textsuperscript{14} and B “would be a distributee ... of trust ... principal if the trust terminated ....”\textsuperscript{15} The most likely reason for termination would be the death of the income beneficiary, A.

Consider a second example.

Example 2. G’s will creates a trust providing for income to G’s surviving spouse, S, for life, then income to such of G’s children who survive S for their respective lives, and at the death of G’s last surviving child, remainder in corpus to G’s then-living descendants, by representation.\textsuperscript{16}

G has one child, A. A has two children (G’s grandchildren), J and K. J and K each have one child (G’s great-grandchildren): J’s child, X, and K’s child, Y.

At the relevant date, the living members of the family are S, A, J, X, and Y.

In Example 2, S is a Category 1 beneficiary because S is currently a distributee of trust income. The Category 2 or “qualified” beneficiaries are S, A, J, and Y. S is a “distributee ... of trust income”;\textsuperscript{17} A “would be ... a distributee ... of trust income ... if the interest[] of [S] ... terminated ...”;\textsuperscript{18} and J and Y “would be ... distributee[s] ... of trust ... principal if the trust terminated ....”\textsuperscript{19}

The most likely reason for trust termination would be the death of S and A.

The UTC also has a Category 3, comprising beneficiaries not in Categories 1 or 2. In Example 2, X would be in Category 3.

Again it is important to state that each category of beneficiaries—1, 2, or 3—is entitled at least to some information.

The second question is: To what information is a beneficiary entitled? Under the UTC, Category 3 beneficiaries are entitled to five types of information, though only upon request; the information need not be furnished automatically. The trustee must (1) furnish “upon request ... a copy of the trust instrument,”\textsuperscript{20} meaning (as the

\textsuperscript{14.} \textit{Id.} § 103(13)(A).
\textsuperscript{15.} \textit{Id.} § 103(13)(C).
\textsuperscript{16.} This example is valid under the Rule Against Perpetuities. Each of G’s children validates his or her own contingent remainder for life, and the last survivor of G’s children validates the contingent remainder in G’s then-living descendants. For the classic summary of the Rule, see W. Barton Leach, \textit{Perpetuities in a Nutshell}, 51 \textsc{Harv. L. Rev.} 638 (1938).
\textsuperscript{17.} \textsc{Unif.Trust Code} § 103(13)(A).
\textsuperscript{18.} \textit{Id.} § 103(13)(B).
\textsuperscript{19.} \textit{Id.} § 103(13)(C).
\textsuperscript{20.} \textit{Id.} § 813(b)(1).
UTC comment explains) “a complete copy of the trust instrument and not merely . . . those portions the trustee deems relevant to the beneficiary’s interest;”21 (2) furnish upon request “at least annually and at the termination of the trust . . . a report of the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee’s compensation, a listing of the trust assets, and, if feasible, their respective market values”22 (referred to in this Article as a “UTC Trust Report”); (3) upon request,23 provide notice “within 60 days after accepting a trusteeship . . . of the acceptance and of the trustee’s name, address, and telephone number;”24 (4) upon request,25 provide notice within 60 days after the date the trustee acquires knowledge of the creation of an irrevocable trust, or the date the trustee acquires knowledge that a formerly revocable trust has become irrevocable . . . , of the trust’s existence, of the identity of the settlor or settlors, of the right to request a copy of the trust instrument, and of the right to a . . . [UTC Trust Report],26 and (5) upon request,27 provide notice “in advance of any change in the method or rate of the trustee’s compensation.”28 In addition to these five categories of information, the UTC provides that the trustee should “promptly respond” to the request of a Category 3 beneficiary for other information “related to the administration of the trust” unless the request is “unreasonable under the circumstances.”29

Category 2 beneficiaries (in the UTC’s parlance, “qualified beneficiaries”30) are entitled to the rights of Category 3 beneficiaries and considerably more. The trustee “shall” keep them “reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests.”31 In addition to performing this general duty, the trustee must (1) provide the notices discussed above for Category 3 beneficiaries whether or not the

21. Id. § 813 cmt. For discussion of the beneficiary’s access to the entire instrument or merely to portions affecting his interest, see Foster, supra note 1, at 716 n.18.
22. UNIF. TRUST CODE § 813(c).
23. See id. § 110(a).
24. Id. § 813(b)(2).
25. See id. § 110(a).
26. Id. § 813(b)(3).
27. See id. § 110(a).
28. Id. § 813(b)(4).
29. Id. § 813(a).
30. Id. § 103(13). For additional uses of the term, see id. § 813(a), (b)(2)–(3), (c).
31. Id. § 813(a).
Category 2 beneficiary has made a request for notice;\(^\text{32}\) (2) send to Category 2 beneficiaries, “at least annually and at the termination of the trust,” the UTC Trust Report if the beneficiary has requested it;\(^\text{33}\) and (3) send to Category 2 beneficiaries a UTC Trust Report if there is a “vacancy in the trusteeship, unless a co-trustee remains in office.”\(^\text{34}\)

Category 1 beneficiaries (distributees or permissible distributees of trust income or principal) are entitled to all of the rights of Category 2 beneficiaries, plus one: they are entitled to receive a UTC Trust Report “at least annually and at the termination of the trust” whether or not they have requested it.\(^\text{35}\)

The official comment to the UTC explains that the duty to inform is focused primarily on beneficiaries with current or proximate interests, and less on beneficiaries with remote interests, for two reasons. First, trustees may have “difficulty ... identifying beneficiaries whose interests are remote and contingent.”\(^\text{36}\) Second, such beneficiaries “are not likely to have much interest in the day-to-day affairs of the trust.”\(^\text{37}\)

The third question answered by the UTC is: To which trusts does the duty to inform the beneficiaries apply?\(^\text{38}\) As with the UTC’s other fiduciary duties owed to beneficiaries, the duty to inform them applies only to trusts that are or have become irrevocable.\(^\text{39}\) If a trust is revocable,\(^\text{40}\) the UTC provides that the trustee’s fiduciary duties are

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\(^{32}\) See id. § 813(b). Note that a beneficiary may “waive the right” to receive the UTC Trust Report “or other information” and “with respect to future reports and other information, may withdraw a waiver previously given.” Id. § 813(d).

\(^{33}\) Id. § 813(c).

\(^{34}\) Id.

\(^{35}\) Id. The right of waiver is still applicable. See supra note 32.

\(^{36}\) UNIF. TRUST CODE § 103 cmt.

\(^{37}\) Id.

\(^{38}\) In considering which trusts are governed by the duty to inform, we must also note that the UTC contains a transition rule. In general, the UTC applies to trusts “created before, on, or after” the UTC’s effective date. Id. § 1106(a)(1). There is an exception, however, with respect to two aspects of the duty to inform: the notices normally required after accepting a trusteeship or after obtaining knowledge of an irrevocable trust are not required if the trustee accepts the trusteeship or if the trust is or becomes irrevocable prior to the UTC’s effective date. See id. § 813(e).

\(^{39}\) See English, supra note 1, at 188.

\(^{40}\) UTC section 603(a) originally provided that fiduciary duties are owed to the settlor, not to the beneficiaries, while the trust is revocable and the settlor has capacity to revoke the trust. Section 603(a) was amended in 2004 to place the capacity requirement in brackets, indicating that “uniformity among the states on this issue is not essential . . . .” UNIF. TRUST CODE § 603 cmt.
owed to the settlor, not to the beneficiaries. This is an application of the maxim "the greater power includes the lesser." The settlor's greater power to revoke a revocable trust includes the lesser power to control the revocable trust's administration. If a trust is or becomes irrevocable, the UTC provides that the trustee's fiduciary obligations run to the beneficiaries, and these obligations include the duty to inform.

The fourth and last question is: To what extent may the terms of an irrevocable trust eliminate or lessen the duty to inform?

We may pause to ask: Why would a settlor want to do this? A well-intentioned settlor might be protecting young beneficiaries who are unprepared for significant wealth. From Andrew Carnegie to Warren Buffett, perceptive members of the ultra-rich have rightly worried about the dangers of inheriting too much wealth, at least without any supervision or strings attached. An egoistic settlor, on the other (dead) hand, might be hiding information in order to foist his quirks and cronies onto subsequent generations. For an illustration of the dangers of trust privacy, consider the allegations of secrecy and mismanagement that surfaced in the recent disputes, subsequently settled for multimillions, over the Pritzker family trusts in Chicago. As experienced practitioners can attest, settlors good and bad are in ample supply.

41. See id. § 603(a). The official comment is explicit that this rule applies to the duty to inform: "Pursuant to this section, the duty under section 813 to inform and report to beneficiaries is owed to the settlor of a revocable trust as long as the settlor has capacity." Id. § 603 cmt.

42. Regarding the maxim, see, for example, United States v. Vega Figueroa, 984 F. Supp. 71, 78 n.16 (D.P.R. 1997).

43. Cf. Farkas v. Williams, 125 N.E.2d 600 (Ill. 1955) (wherein the Illinois Supreme Court tried unconvincingly to identify a fiduciary duty owed by the trustee to the beneficiary of four revocable declarations of trust).

44. For further discussion, see Joshua C. Tate, Conditional Love: Incentive Trusts and the Inflexibility Problem, 41 REAL PROP. PROB. & TR. J. 445, 446-48 (2006).

45. See Susan Chandler & Kathy Bergen, Lawsuit Threat Led to Pritzker Split, CHI. TRIB., Sept. 9, 2005, at B2; Susan Chandler & Kathy Bergen, Inside the Pritzker Family Feud, CHI. TRIB., June 12, 2005, at C1 (quoting an unnamed source that the settlement led to "more transparency" in the management of family assets); William Neuman, Big Deal: A New Condo for a Hotel Heiress (No, Not That One), N.Y. TIMES, May 15, 2005, § 11, at
Many rules of trust law are default rules; they yield to the terms of the trust as expressed by the settlor. However, UTC section 105(b) lists fourteen points of trust law that cannot be overridden by the settlor. Two of these concern the trustee’s duty to inform. First, section 105(b)(8) provides that, with respect to “qualified beneficiaries of an irrevocable trust who have attained twenty-five years of age,” the settlor cannot narrow or eliminate the duty to provide the notices normally required after the trustee accepts the trusteeship or after the trustee obtains knowledge that the trust is or has become irrevocable. These notices concern the existence of the trust, the identity of the trustee, and the beneficiary’s right to UTC Trust Reports.

Second, section 105(b)(9) provides that the settlor cannot restrict or waive the trustee’s duty to respond to the request of a beneficiary of an irrevocable trust for UTC Trust Reports and “other information reasonably related” to the trust’s administration.

The effect of the first of these provisions is to link the mandatory right to information to the age of the qualified beneficiary. Qualified beneficiaries twenty-five years and older have greater rights to information than qualified beneficiaries younger than twenty-five. As the UTC comment explains, the provisions are designed to “respond[] to the desire of some settlors that younger beneficiaries not know of the trust’s bounty until they have reached an age of maturity and self-sufficiency.” The comment also reveals that the UTC drafting committee considered but rejected a proposal to use the remoteness of the beneficiary’s interest, rather than the beneficiary’s age, as the relevant criterion for determining whether the right to information should be mandatory or default law.

The provisions making aspects of the duty to inform mandatory have proven controversial. NCCUSL responded in 2004 to the

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2 (reporting that Liesel Pritzker received a $450 million settlement after suing her father, Robert Pritzker, for allegedly “loot[ing] her trust funds”).


47. UNIF. TRUST CODE § 105(b)(8).

48. Id.

49. Id. § 105(b)(9).

50. Id. § 105 cmt.

51. Id. (“During the drafting of the Uniform Trust Code, the drafting committee discussed and rejected a proposal that the ability of the settlor to waive required notice be based on the nature of the beneficiaries’ interest and not on the beneficiaries’ age.”).

52. Id. (“Sections 105(b)(8) and 105(b)(9) address the extent to which a settlor may waive trustee notices and other disclosures to beneficiaries that would otherwise be
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controversy by amending section 105, putting subsections (b)(8) and (b)(9) in brackets, thereby “signal[ing] that uniformity is not expected.”

B. An Example of Non-Uniformity: The North Carolina Trust Code

The North Carolina version of the UTC ("NCTC") departs from the UTC’s duty to inform in significant respects. In particular, the first, second, and fourth questions addressed in Part I.A yield noticeably different answers under the NCTC. We again consider each of the questions in turn.

The first question is: To which beneficiaries does the trustee owe a duty to inform? Under the NCTC, there is no duty to inform beneficiaries in Category 3. The duty to inform runs only to beneficiaries in Categories 1 and 2. Put differently: the NCTC limits the duty to “qualified beneficiaries,” a term defined the same as in the UTC, hence encompassing the beneficiaries in Categories 1 and 2. The comment to the North Carolina statute recognizes, but does not explain, the exclusion of Category 3 beneficiaries. It may be that this was done to enhance the trust’s privacy with respect to remote beneficiaries and/or to reduce the burden on the trustee.

The second question is: To which information is a beneficiary entitled? Here, the NCTC differs from the UTC in five respects. First, there is no distinction made between beneficiaries in Category 1 versus those in Category 2. Instead, all “qualified beneficiaries” are treated alike for purposes of the duty to inform. Second, the qualified beneficiaries are entitled to receive information only “upon request.” There is no duty to send information to a qualified beneficiary who has not requested it. Third, if a qualified beneficiary has made a request, the information that must be provided is as follows: the qualified beneficiary is entitled “at reasonable times [to] required under the Code. These subsections have generated more discussion in jurisdictions considering enactment of the UTC than have any other provisions of the Code.”). For a sense of the debate, compare Donald D. Kozusko, In Defense of Quiet Trusts, 143 TR. & EST. 20 (2004), with Robert Whitman, Full Disclosure is Best, 143 TR. & EST. 59 (2004).

53. UNIF. TRUST CODE § 105 cmt.
55. See id. § 36C-103(15); UNIF. TRUST CODE § 103(13). Note that the option under UTC section 110(a) for a nonqualified beneficiary to request to receive notices as if the beneficiary were a qualified beneficiary has been deleted from section 36C-1-110 of the General Statutes of North Carolina. See N.C. GEN. STAT. § 36C-1-110.
56. N.C. GEN. STAT. § 36C-8-813 N.C. cmt.
57. Id. § 36C-8-813(a).
complete and accurate information as to the nature and amount of trust property and . . . to inspect the subject matter of the trust and the accounts and other documents relating to the trust." 58 The comment to the North Carolina statute explains that the UTC's language was rejected as "too general" and that the NCTC text is drawn from section 173 of the *Restatement (Second) of Trusts.* 59

Fourth, the NCTC provides a safe harbor for trustees. The duty to inform is "considered to have [been] discharged" if the trustee sends a report "at least annually and at termination of the trust to the beneficiary that describes the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation, and lists the trust assets and their respective market values, including estimated values of assets with uncertain values" (referred to in this Article as a "North Carolina Trust Report"). 60 The NCTC emphasizes, however, that the duty to inform does not necessarily require this much information: "No presumption shall arise that a trustee who [does not provide this annual report] . . . failed to discharge the trustee's duty . . ." 61 Fifth, the duty to inform a qualified beneficiary of a transaction attaches only after the transaction has been made. No beneficiary is entitled to information "in advance of transactions relating to the trust property." 62 This differs from the UTC, which requires qualified beneficiaries to be notified "in advance of any change in the method or rate of the

58. *Id.* Note, for example, that the NCTC has deleted the duty under UTC section 813(b)(2) to inform qualified beneficiaries of the trustee's name, address, and telephone number within sixty days after accepting a trusteeship. Similarly, the NCTC has deleted the duty under UTC section 813(b)(3) to inform qualified beneficiaries within sixty days after the trustee knows of the creation of an irrevocable trust or knows that a formerly revocable trust has become irrevocable "of the trust's existence, of the right to request a copy of the trust instrument, and of the right to a trustee's report . . ." See *id.* § 36C-8-813. The comment to the North Carolina statute explains that these UTC provisions were not adopted because they would "impose new and unnecessary burdens on the trustee not previously recognized in North Carolina." *Id.* § 36C-8-813 N.C. cmt.

59. See *id.* § 36C-8-813 N.C. cmt. The *Restatement (Second) of Trusts* provides:

> The trustee is under a duty to the beneficiary to give him upon his request at reasonable times complete and accurate information as to the nature and amount of the trust property, and to permit him to inspect the subject matter of the trust and the accounts and vouchers and other documents relating to the trust.

*Restatement (Second) of Trusts* § 173 (1959).

60. N.C. GEN. STAT. § 36C-8-813(b)(2).

61. *Id.* Note that the report is also unnecessary if there is a change in trusteeship; North Carolina did not adopt the second sentence of UTC section 813(c). See *id.* § 36C-8-813 N.C. cmt.

62. *Id.* § 36C-8-813(b)(1).
trustee’s compensation.”63 As in some other instances that we have already observed, the comment to the North Carolina statute notes, but does not explain, the departure from the UTC.64

The third question is: To which trusts does the duty to inform the beneficiaries apply? Here, the NCTC tracks the UTC in limiting this duty to trusts that are or have become irrevocable. As long as the trust is revocable, the trustee’s fiduciary duties, including the duty to inform, are owed to the settlor, not to the beneficiaries.65

The fourth and last question is: To what extent may the settlor of an irrevocable trust waive or modify the duty to inform? Unlike the UTC, the NCTC provides that no aspect of the duty to inform is mandatory.66 The settlor of the trust has “the right to override any duty to provide information.”67 This rule reflects language found in, but is arguably broader than the holding of, North Carolina’s one reported judicial decision on the duty to inform68: the 1997 case of Taylor v. NationsBank Corporation.69 The case concerned an action by the beneficiaries of a trust against the trustees in order to obtain a copy of the trust instrument and all documents relating to the trust.

63. UNIF. TRUST CODE § 813(b)(4).
64. See N.C. GEN. STAT. § 36C-8-813 N.C. cmt.
65. See id. § 36C-6-603. Note that the NCTC has a slightly different transition rule from the UTC. The basic rule is the same: the NCTC, like the UTC, applies to “any express trust . . . wherever and however created.” Id. § 36C-1-102; see UNIF. TRUST CODE § 102. There is an exception for two provisions of the NCTC relating to the duty to inform: first, the provision in section 36C-8-813(b)(1) that the duty does not include providing information in advance of transactions; and second, the provision in section 36C-8-813(b)(2) that a trustee is deemed to have fulfilled the duty to inform with a North Carolina Trust Report (but that the failure to send such a report does not create a presumption of a breach of the duty). These provisions apply “only to a trust created under a trust instrument executed on or after” the NCTC’s effective date of January 1, 2006. N.C. GEN. STAT. § 36C-8-813(d).
66. See N.C. GEN. STAT. § 36C-1-105. Note that UTC section 105(b)(8) and section 105(b)(9) have been deleted. See id.
67. Id. § 36C-1-105 N.C. cmt. Note, however, that North Carolina has adopted the UTC’s mandatory rule that a “trust and its terms must be for the benefit of the beneficiaries.” UNIF. TRUST CODE §§ 105(b)(3), 404; N.C. GEN. STAT. §§ 36C-1-105(b)(3), 36C-4-404. For discussion of this benefit-the-beneficiaries requirement, see Langbein, supra note 46, at 1112.
68. The case treats the issue as one of first impression. Lexis and Westlaw searches, and research in West’s North Carolina Digest 2d, failed to locate any other North Carolina cases on the duty to inform. The one treatise on North Carolina trust law in the law library at the University of North Carolina at Chapel Hill is a typewritten book, authored and privately published and sold by a former dean of the law school at Wake Forest University. See ROBERT E. LEE, NORTH CAROLINA LAW OF TRUSTS (6th ed. 1977). This treatise addresses the duty to inform only in passing, by quoting section 173 of the Restatement (Second) of Trusts; it mentions no statutes or cases from North Carolina. See id. at 114.
The settlor, during his lifetime, had orally instructed the trustees to keep the trusts confidential. The Court of Appeals of North Carolina held that any override of the duty to inform must appear in the language of the trust itself:

We hold that absent an explicit provision in the trust to the contrary, plaintiffs as trust beneficiaries are entitled to view the trust instrument from which their interest is derived.... The wish[] of the settlor to keep certain terms of the trust secret is understandable; however, absent an explicit provision in the trust instrument to the contrary, the trustee has a duty to reveal the terms of the trust to the beneficiaries.70

The court also stated that the beneficiaries were entitled to information “reasonably necessary to enable [them] to enforce [their] rights under the trust or to prevent or redress a breach of trust”; this gave them the right to see the then-current version of the trust instrument but not to view earlier versions no longer operative.71

C. Non-Uniformity in Other UTC Jurisdictions

North Carolina is not alone in making significant modifications to the UTC’s duty to inform. Of the other states (and the District of Columbia) adopting enough of the UTC to be counted as “UTC jurisdictions,”72 all have amended the UTC’s provisions on the duty to inform.73 Addressing each state’s amendments, some of which are unique, is beyond the scope of this Article. Doing so is also unnecessary because the Uniform Law Commission maintains a Web site with charts describing the specific variations in each state’s version of the UTC.74 Still, the general observation can be made that the amendments to the duty take four principal forms.

70. Id. at 521–22, 481 S.E.2d at 362.
71. Id. at 521, 481 S.E.2d at 362.
72. The list of enacting jurisdictions is available on the NCCUSL Web site. Uniform Law Commissioners, http://www.nccusl.org (last visited Aug. 10, 2007). A description of the non-uniform amendments made by the first ten states to enact the UTC can be found in Millard, supra note 1, at 384–91.
73. The article by Kevin Millard states that “Nebraska and New Mexico adopted section 813 ... without change.” Millard, supra note 1, at 384. This is no longer correct. New Mexico has not adopted UTC section 813(e), and Nebraska has added a new subsection (e) and codified UTC section 813(e) as subsection (f). See Neb. Rev. Stat. § 30-3878 (Supp. 2006); N.M. Stat. § 46A-8-813 (2003).
DUTY TO INFORM

The first and most common amendment is that the treatment of the duty to inform as a mandatory rule has been modified or eliminated in all but one of the UTC jurisdictions. This amendment renders more or all of the duty a default rule that can be waived by the settlor if the settlor so provides in the trust instrument.

Second, some of the states narrow the beneficiaries to whom the duty is owed. This is typically done by limiting the duty to “qualified beneficiaries.” It must also be noted that some states define this term more narrowly than does the UTC.

Third, some of the states limit the information owed to the beneficiary. This is sometimes, though not always, done by requiring the beneficiary’s request for information to be narrowed to a single trust.

75. See ALA. CODE § 19-3B-105(b)(8) (Supp. 2006); D.C. CODE § 19-1301.05 (Supp. 2006); FLA. STAT. § 736.0105 (Supp. 2007); ME. REV. STAT. ANN. tit. 18-B, § 105 (Supp. 2006); MO. ANN. STAT. § 456.1-105 (West Supp. 2007); NEB. REV. STAT. § 30-3805(b)(8) (Supp. 2006); OHIO REV. CODE ANN. § 5801.04 (LexisNexis 2006); OR. REV. STAT. § 130.020 (2005). Pennsylvania has modified the duty, see 20 PA. CONS. CODE ANN. § 7780.3 (Supp. 2006), but the duty is mandatory. Id. § 7705(b)(8).


77. The one state retaining UTC section 105(b)(8)-(9) is New Mexico. See N.M. STAT. § 46A-1-105 (2003).

78. See, e.g., FLA. STAT. §§ 736.0110, 736.0813 (Supp. 2007); KAN. STAT. ANN. §§ 58a-110, -813 (Supp. 2006) (note also the limitation of the duty to the surviving spouse if the conditions in section 58a-813(d) are met); ME. REV. STAT. ANN. tit. 18-B, §§ 110, 813 (Supp. 2006) (except for the right to request a copy of the trust instrument); OR. REV. STAT. §§ 130.040, 130.710 (2005) (focusing duty on qualified beneficiaries but providing that trustee “may” respond to a nonqualified beneficiary if the request is “reasonable under the circumstances”; note also the limitation of the duty to the surviving spouse if the conditions in section 130.710(8) are met); UTAH CODE ANN. § 75-7-811 (Supp. 2006) (note also that Utah has not codified section 110 of the UTC); WYO. STAT. ANN. § 4-10-110 (2005) (allowing nonqualified beneficiary to be treated as qualified “before the death of the settlor” only with “the written consent of the settler”; after the settlor’s death, written request for notice suffices “unless the terms of the trust specify otherwise”); id. § 4-10-813.

79. See, e.g., KAN. STAT. ANN. § 58a-103(12) (Supp. 2006) (excluding from the definition permissible distributees); ME. REV. STAT. ANN. tit. 18-B, § 103(12) (Supp. 2006) (requiring that a qualified beneficiary be “living” and excluding from the definition any “contingent distributee ... or a contingent permissible distributee of trust income or principal whose interest in the trust is not reasonably expected to vest”); WYO. STAT. ANN. § 4-10-103(a)(xv) (2005) (limiting the definition to beneficiaries “currently entitled to distributions of income or principal from the trust or [having] a vested remainder interest in the residuary of the trust which is not subject to divestment”).

80. See, e.g., MO. ANN. STAT. § 456.8-813(6) (West Supp. 2007) (“The request of any beneficiary for information under any provision of this section shall be with respect to a
Fourth and last, some jurisdictions permit the settlor to name a substitute entitled to information in lieu of the beneficiaries. I shall have more to say about this device, and whether it is a truly adequate alternative, in Part II below.

II. NORMATIVE EXPLORATIONS

This second part of the Article moves from descriptive to normative analysis. The analysis focuses on the central questions: should there be a duty to inform and, if so, should it be mandatory or default law?

A. A Duty to Inform?: Interdisciplinary Perspectives

Should trust law contain a duty to inform? This question can usefully be answered by bringing to bear the insights from two interdisciplinary perspectives: legal history and law and economics. The history of English and American law reveals that the duty to inform has a venerable pedigree dating back nearly two centuries. The economic analysis of law demonstrates that the duty to inform continues to serve a crucial function within the law of trusts.

1. Legal History

The duty to inform has been a part of the Anglo-American law of trusts at least from the first half of the nineteenth century. As English barrister John Walpole Willis observed in his 1827 *A Practical Treatise on the Duties and Responsibilities of Trustees*, it is "the especial duty of a trustee, to obtain, and afford accurate information to his [beneficiary] of the disposition of the trust property." The single trust that is sufficiently identified to enable the trustee to locate the records of the trust.

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81. See D.C. CODE § 19-1301.05(c) (Supp. 2006); FLA. STAT. §§ 736.0306, 736.0813(3) (Supp. 2007); ME. REV. STAT. ANN. tit. 18-B, § 105(3) (Supp. 2006); MO. ANN. STAT. § 456.1-105(3) (West Supp. 2007); OHIO REV. CODE ANN. § 5801.04(C) (LexisNexis 2006); OR. REV. STAT. § 130.020(3) (2005).

82. JOHN WALPOLE WILLIS, A PRACTICAL TREATISE ON THE DUTIES AND RESPONSIBILITIES OF TRUSTEES 125 (1827).
same point was made by James Hill, barrister and fellow of New College, Oxford, who stated in his 1845 *A Practical Treatise on the Law Relating to Trustees* that it is “the duty of trustees to give their [beneficiaries] full information as to the disposition and investment of the trust property.”

To support these propositions, Willis and Hill each cited one case: *Walker v. Symonds*, an 1818 decision of the Court of Chancery. *Walker* appears to have become a leading case on this point of law. The facts of *Walker* are as follows. Two co-trustees, Symonds and Griffith, allowed their third co-trustee, Donnythorne, to manage the investment of the trust assets. Donnythorne told them that he would invest in bills of the East India Company. He did so, but in bills payable to himself. When the bills came due, the Company paid Donnythorne. Soon thereafter, Donnythorne died insolvent. The beneficiaries sued the co-trustees for breach of trust. During the litigation, the court learned that Symonds and Griffith had made no attempts over a period of more than four years to find out how Donnythorne had invested the assets. Lord Chancellor Eldon held the co-trustees responsible for the loss. In the course of his opinion, Eldon made the following statement:

> It is the duty of trustees to afford to their [beneficiaries] accurate information of the disposition of the trust-fund; all the information of which they are, or ought to be, in possession: a trustee may involve himself in serious difficulty, by want of the information which it was his duty to obtain.

No later than the middle of the nineteenth century, the idea was established that trustees owe beneficiaries a duty to provide information. Barrister Thomas Lewin was emphatic in the 1857 edition of his *A Practical Treatise on the Law of Trusts and Trustees*: “As an incident to the beneficial enjoyment of his interest by the [beneficiary], he has a right to call upon the trustee for accurate information as to the state of the trust.” Indeed, the duty to furnish information to the beneficiary appears in Lewin’s index under

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83. JAMES HILL, *A PRACTICAL TREATISE ON THE LAW RELATING TO TRUSTEES, THEIR POWERS, DUTIES, PRIVILEGES, AND LIABILITIES* 382 (1845).
84. See WILLIS, supra note 82, at 125 n.24; HILL, supra note 83, at 382 n.y.
85. (1818) 3 Swanst. 1, 36 Eng. Rep. 751 (Ch.).
86. The English treatise author Thomas Lewin referred to it as “a case of great importance to trustees in general.” THOMAS LEWIN, *A PRACTICAL TREATISE ON THE LAW OF TRUSTS AND TRUSTEES* 276 (1st ed. 1837).
87. A good summary can be found in LEWIN, supra note 86, at 276–79.
88. 3 Swanst. at 59, 36 Eng. Rep. at 772.
“Duties of Trustees,” along with other fiduciary responsibilities such as the duty of care, the duty of proper investment, and the duty of impartiality.

English cases were often well known to, and influential for, nineteenth-century American lawyers. Consider one of the leading American treatises on trust law in the first half of the nineteenth century, Joseph Story's *Commentaries on Equity Jurisprudence*. Citing *Walker*, Story wrote that “it is the duty of the trustee ... to afford accurate information to the [beneficiary] of the disposition of the trust-property; and if he has not all the proper information, to seek for it and if practicable to obtain it.”

In the late nineteenth century, one of the leading American treatises on trust law was Jairus Ware Perry's *Treatise on the Law of Trusts and Trustees*, published in seven editions from 1872 to 1929. Citing *Walker* among other cases, the treatise declared the beneficiary's right to information: “Where the relation of trustee[] and [beneficiary] is admitted or clearly established, the [beneficiaries], as the true owners of the fund, have the right to the production and inspection of all the documents and papers relating to it.”

Turning to the twentieth century, we consistently find the duty to inform in the leading summary of American trust law, the megatreatise on *The Law of Trusts* originally authored by Austin Wakeman Scott. The first edition, published in 1939, stated in pertinent part:

The trustee is under a duty to the beneficiaries to give them upon their request at reasonable times complete and accurate information as to the administration of the trust. The beneficiaries are entitled to know what the trust property is and how the trustee has dealt with it. They are entitled to examine the trust property and the accounts and vouchers and other

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90. See id. at 963.
91. See LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 69 (3d ed. 2005).
92. 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA 619 (Melville M. Bigelow ed., 1886). This edition restored the text and footnotes of the 1846 fourth edition, the last edition prepared by Story himself. See 1 id. at vii.
93. JAIRUS WARE PERRY, A TREATISE ON THE LAW OF TRUSTS AND TRUSTEES § 822 (George F. Choate ed., 1882).
documents relating to the trust and its administration. Where a trust is created for several beneficiaries, each of them is entitled to information as to the trust. Where the trust is created in favor of successive beneficiaries, a beneficiary who has a future interest under the trust, as well as a beneficiary who is presently entitled to receive income, is entitled to such information, whether his interest is vested or contingent.\footnote{95} The same propositions are carried forward into the most recent edition, co-authored by the late William Franklin Fratcher with supplements and a new edition in progress by Mark L. Ascher.\footnote{96}

The duty to inform is also emphasized in America’s other megatreatise on trust law, George Gleason Bogert’s \textit{The Law of Trusts and Trustees}.\footnote{97} In the Revised Second Edition, we read:

The beneficiary is the equitable owner of the trust property, in whole or in part. The trustee is a mere representative whose function is to attend to the safety of the trust property and to obtain its avails for the beneficiary in the manner provided by the trust instrument. That the settlor has created a trust and thus required that the beneficiary enjoy his property interest indirectly does not imply that the beneficiary is to be kept in ignorance of the trust, the nature of the trust property and the details of its administration. If the beneficiary is to be able to hold the trustee to proper standards of care and honesty and to obtain the benefits to which the trust instrument and doctrines of equity entitle him, he must know of what the trust property consists and how it is being managed.

From these considerations it follows that the trustee has the duty to inform the beneficiary of important matters concerning the trust and that the beneficiary is entitled to demand of the trustee all information about the trust and its execution for which he has any reasonable use.\footnote{98}

In addition to featuring prominently in treatises, the duty to inform has consistently received the imprimatur of the American Law

\footnote{95} \textit{Austin Wakeman Scott, The Law of Trusts} § 173 (1939).


\footnote{97} \textit{George Gleason Bogert & George Taylor Bogert, The Law of Trusts and Trustees} (rev. 2d ed. 1983).

\footnote{98} \textit{Id.} § 961.
Institute in its Restatements of the Law.\textsuperscript{99} The first Restatement of Trusts, promulgated in 1935, stated in pertinent part:

The trustee is under a duty to the beneficiary to give him upon his request at reasonable times complete and accurate information as to the nature and amount of the trust property, and to permit him or a person duly authorized by him to inspect the subject matter of the trust and the accounts and vouchers and other documents relating to the trust.\textsuperscript{100}

The Restatement (Second) of Trusts, promulgated in 1959,\textsuperscript{101} and the Restatement (Third) of Trusts, now nearing completion,\textsuperscript{102} each reaffirm the importance and vitality of the duty to inform.

Finally, the duty to inform has been endorsed by NCCUSL since the first promulgation of the Uniform Probate Code ("UPC") in 1969. Section 7-303 of the UPC requires the trustee to "keep the


\textsuperscript{100} \textsc{Restatement of Trusts} § 173 (1935). On the strong connection between Austin Scott's treatise and the First and Second Restatements, for which Scott served as Reporter, see Langbein, supra note 94, at 3 ("Scott's treatise on Trusts is so tightly organized around the Restatement that it even employs common section numbering.").

\textsuperscript{101} The \textsc{Restatement (Second) of Trusts} provides:

The trustee is under a duty to the beneficiary to give him upon his request and at reasonable times complete and accurate information as to the nature and amount of the trust property, and to permit him or a person duly authorized by him to inspect the subject matter of the trust and the accounts and vouchers and other documents relating to the trust.

\textsc{Restatement (Second) of Trusts} § 173 (1959).

\textsuperscript{102} The \textsc{Restatement (Third) of Trusts} provides:

(1) Except as provided in § 74 (revocable trusts) or as permissibly modified by the terms of the trust, a trustee has a duty: (a) promptly to inform fairly representative beneficiaries of the existence of the trust, of their status as beneficiaries and their right to obtain further information, and of basic information concerning the trusteeship; (b) to inform beneficiaries of significant changes in their beneficiary status; and (c) to keep fairly representative beneficiaries reasonably informed of changes involving the trusteeship and about other significant developments concerning the trust and its administration, particularly material information needed by beneficiaries for the protection of their interests.

(2) Except as provided in § 74 or as permissibly modified by the terms of the trust, a trustee also ordinarily has a duty promptly to respond to the request of any beneficiary for information concerning the trust and its administration, and to permit beneficiaries on a reasonable basis to inspect trust documents, records, and property holdings.

\textsc{Restatement (Third) of Trusts} § 82 (2007).
beneficiaries of the trust reasonably informed of the trust and its administration.”

The history of the duty to inform shows that Anglo-American trust law has regularly recognized a duty in the trustee to provide information to the trust’s beneficiaries.

2. Economic Analysis

The importance of the trustee’s duty to inform rests on more than the doctrine’s history. History is helpful, but it cannot justify a rule that has become outmoded. The insights of law and economics demonstrate why the duty to inform remains a vital aspect of modern trust law.

The essential structure of the trust, dividing ownership between one or more trustees holding legal title and one or more beneficiaries holding equitable title, presents a classic problem. The powers of trust administration are held by the trustees, who have no personal stake in the effect of their decisions on the trust corpus; conversely, the beneficiaries who do bear the risk of asset loss have no control over the trust’s administration. In the literature and language of law and economics, this is known as the problem of agency cost.

As Professor Sitkoff explained in a recent article, agency problems arise “when one party (the agent) has discretionary and unobservable decisionmaking authority that affects the wealth of another party (the

103. UNIF. PROBATE CODE § 7-303 (amended 1998), 8 U.L.A. 519 (1998 & Supp. 2006). In addition to this general duty, the UPC requires the following:

(a) Within 30 days after his acceptance of the trust, the trustee shall inform in writing the current beneficiaries and if possible, one or more persons who under section 1-403 may represent beneficiaries with future interests, of the Court in which the trust is registered and of his name and address. (b) Upon reasonable request, the trustee shall provide the beneficiary with a copy of the terms of the trust which describe or affect his interest and with relevant information about the assets of the trust and the particulars relating to the administration. (c) Upon reasonable request, a beneficiary is entitled to a statement of the accounts of the trust annually and on termination of the trust or change of the trustee.

Id.


105. “Agency” is not used here in its legal sense, requiring the agent to be subject to the principal’s control. See RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006).

The agent's incentives are not aligned with the principal's incentives because it is the principal's wealth, not the agent's, at stake, and the agent's actions are not fully transparent to the principal. The result is that the agent will not work as hard as he would do if he were also the principal—indeed, the agent may even breach his duties to the principal. The losses that result from this misalignment of incentives are known in the law and economics literature as agency costs.

A partial solution to the problem of agency cost is to give the agent a financial incentive to act in the interests of the principal, for example by linking the agent's compensation to the principal's gains and losses. Yet this solution is incomplete because there is still not a perfect alignment of the principal's interests with those of the agent, for two reasons. First, the agent and principal may have different tolerances for risk; in such an event, the agent's financial stake creates an incentive for the agent to act according to his own risk preferences rather than those of the principal. Second, the agent's financial stake will always be limited, with the result that the agent's interests and the principal's will never fully converge. As Professor Sitkoff rightly noted, "no compensation scheme short of transferring complete ownership of the project to the agent will solve the incentive problem in all possible scenarios when the agent's efforts are unobservable."

This last phrase is the key: when the agent's efforts are unobservable. An important additional measure to align the incentives of the agent with those of the principal is to reduce the extent to which the agent's decisions are hidden. Put differently: the more the agent's decisions are known to (or discoverable by) the principal, the more likely it is that the agent will choose to act in the principal's best interests.

This is the role of the duty to inform. It helps to align the interests of the trustee with those of the beneficiaries by shedding light on the otherwise hidden decisions made by the trustee in the course of trust administration. Providing this information is

109. Sitkoff, supra note 107, at 637.
110. For a good textbook treatment of the economic problem of hidden action by an agent, see PIERRE CAHUC & ANDRÉ ZYLBERBERG, LABOR ECONOMICS 323–28 (2004).
DUTY TO INFORM

important in order to reduce agency costs and thereby achieve trust management in the best interests of the beneficiaries. The duty to inform deters the trustee from committing a breach of fiduciary duty by giving the beneficiaries access to the information needed to monitor the trustee's performance. The duty also assists the beneficiaries in remedying a fiduciary breach after it has occurred by giving them the information needed to prove the breach. Providing the information to the beneficiaries is important because (if we return to the language of economic analysis) they are the principals; the assets at stake are theirs. The beneficiaries, and only the beneficiaries, have the full incentive to supervise and enforce the trustee's fiduciary obligations.

B. Mandatory or Default?

If we accept the insight from law and economics that trust law should continue to contain a duty to inform, the most important and contentious question is whether the duty should be framed at least to some extent as a mandatory rule, as in the UTC, or wholly as a default rule, as in North Carolina.

1. The Duty as a Mandatory Rule

The starting point for our analysis must be the fundamental principle, articulated in the Restatement (Third) of Property, that the intention of the donor controls "the meaning of a donative document . . . [and] is given effect to the maximum extent allowed by law." Rules governing a donative document must yield to the expressed intention of the donor except where necessary. This fundamental principle begins, but hardly ends, the inquiry because it does not tell us how to know whether a particular rule of trust law is necessary despite the donor's expression of contrary intention. Put differently: the presumption in the Restatement (Third) of Property in favor of

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111. This discussion is focused on a trust that is or has become irrevocable. As noted earlier, see supra notes 40-43 and accompanying text, the UTC's principle (which is subject to criticism) is that the trustee of a revocable trust owes fiduciary duties only to the settlor, not to the beneficiaries.

112. On whether the settlor of, or a third party to, an irrevocable trust can be an adequate substitute with respect to the receipt of information, see infra notes 147-66 and accompanying text.

113. English, supra note 1, at 202 ("The most discussed issue during the drafting of the UTC and subsequent to its approval is the extent to which a settlor may waive the above disclosure requirements.").

default rules does not itself tell us when a particular rule of trust law should be mandatory. This requires a theory of mandatory rules in the law of trusts.

When should a rule of trust law be mandatory? The answer to this question is connected to an ongoing debate about the very essence of the trust. The debate has been described in detail in recent scholarship, so only a brief summary is needed here. Put simply, the issue is whether trusts are primarily contractual or proprietary. Contractarians view the trust as primarily a contract between the settlor and the trustee, with the trust's beneficiaries occupying a position akin to contractual third-party beneficiaries (or in Professor Sitkoff's phrase drawn from organizational law, "residual claimants"). Proprietarian scholars characterize the trust and the role of the trustee as essentially "property-based," arising from a conveyance, not a contract. It is important to emphasize that these positions are not all-or-nothing; participants in the debate recognize that trusts combine contractual and proprietary features. Nonetheless, scholars have taken positions placing more emphasis on contract or property, respectively.

The position one takes in the debate about the predominant features of the trust seems to influence one's view about the proper role of default and mandatory rules in trust law. Contractarians tend to prefer default rules except in comparatively narrow circumstances, thereby giving the settlor maximum flexibility to structure the terms

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115. See Sitkoff, supra note 107, at 627–33.
117. See Sitkoff, supra note 107, at 646.
119. See RESTATEMENT (SECOND) OF TRUSTS § 197 cmt. b (1959); RESTATEMENT (THIRD) OF TRUSTS § 5(i) & cmt. i (2003).
120. A third view, critical of contractarianism yet perhaps not fundamentally proprietarian, has been articulated by Professor Leslie, who argues that treating fiduciary duties as default rules weakens their moral force and renders their content more difficult to discern. See Melanie B. Leslie, Trusting Trustees: Fiduciary Duties and the Limits of Default Rules, 94 GEO. L.J. 67, 89 (2005) (examining the duties of care and loyalty but not the duty to inform).
121. See Langbein, supra note 116, at 669 ("Trust is a hybrid of contract and property, and acknowledging contractarian elements does not require disregarding property components whose convenience abides."); see also Sitkoff, supra note 107, at 633 ("[T]he law of trusts, like the law of other organizations, offers a careful blending of in rem and in personam features.").
of the bargain with the trustee.\textsuperscript{122} Proprietarians tend to be more willing to use mandatory rules that impinge upon the wishes of the settlor in order to protect the property rights held by the beneficiary.\textsuperscript{123}

A comprehensive theory of mandatory rules in trust law has recently been articulated by Professor Langbein,\textsuperscript{124} who has advanced the contractarian view of the trust in other scholarship.\textsuperscript{125} According to Professor Langbein, trust rules should be mandatory only if they fit into one (or more) of three categories. First, rules of trust law should be mandatory if they “rest on self-evident principles of legal process that are broadly shared with the rest of private law” or are aimed at preventing “illegal purposes.”\textsuperscript{126} Examples include limitations on the settlor’s power to “enlarge or diminish the rights of creditors or other third parties” or to establish a trust “to overthrow the government or to sell dope or to operate a bordello.”\textsuperscript{127} Second, rules of trust law should be mandatory if needed to prevent the settlor from imposing “manifestly value-impairing restrictions on the use or disposition of the trust property.”\textsuperscript{128} Examples here include restrictions on trust investments or on the modification of trusts when circumstances change. Third and last, rules of trust law can be mandatory if they are fundamentally “intent-implementing.”\textsuperscript{129} An example is the rule that the settlor cannot waive the trustee’s duty to act in good faith.\textsuperscript{130} A settlor who has chosen to use the trust form must intend to require the trustee to act in good faith.

\textsuperscript{122} “This Article’s normative claim is that the law should minimize the agency costs inherent in locating managerial authority with the trustee (T) and the residual claim with the beneficiaries (B1 and B2), but only to the extent that doing so is consistent with the ex ante instructions of the settlor (S).” Sitkoff, supra note 107, at 624 (emphasis added); see also Langbein, supra note 46, at 1126 (“Trust law consists almost entirely of default rules. The mandatory rules barely intrude on ordinary practice.”).

\textsuperscript{123} This is particularly true of English trust law, which views the irrevocable trust as “the beneficiaries’ property, not as the settlor’s property.” JESSE DUKEMINIER, STANLEY M. JOHANSON, JAMES LINDGREN & ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES 573 (7th ed. 2005). Under English law, the duty to inform is essentially mandatory. See David Hayton, The Irreducible Core Content of Trusteeship, in TRENDS IN CONTEMPORARY TRUST LAW 47, 49–56 (A.J. Oakley ed., 1996).

\textsuperscript{124} See Langbein, supra note 46.

\textsuperscript{125} See Langbein, supra note 116, at 627 (“[T]he deal between settlor and trustee is functionally indistinguishable from the modern third-party beneficiary contract. Trusts are contracts.”).

\textsuperscript{126} Langbein, supra note 46, at 1107.

\textsuperscript{127} Id.

\textsuperscript{128} Id. at 1109.

\textsuperscript{129} Id. at 1119.

\textsuperscript{130} See id. at 1124.
Professor Langbein defends the decision of the UTC's drafters to make mandatory some aspects of the duty to inform by arguing that the duty is intent-implementing. As he explains, a mandatory duty to inform is "protective" and thus implements the settlor's true intent because a trust in which there is no duty to inform is one in which "the trustee's misuse of the trust property [is] beyond effective remedy."

I agree with the conclusion that the duty to inform should be partially mandatory but disagree with the explanation that the duty is intent-effectuating. Mandatory rules are not intent-effectuating; they are intent-defeating. The terms as conventionally understood refer to the intent of the non-conforming donor. A rule may be consistent with what most donors want, but the defining question is whether a non-conforming donor is required to accept it. If a rule is mandatory, it has defeated the intention of the non-conforming donor. An example is the common-law Rule Against Perpetuities. Some, perhaps many, donors establishing contingent future interests create ones that are certain to vest or fail within a life in being plus twenty-one years. The analysis, however, focuses on the non-conforming donor. The Rule applies to him equally, not because it is intent-implementing but because there are sound reasons for it to be intent-defeating. True, some mandatory rules are more intent-defeating than others. A mandatory rule consistent with the intention of eighty percent of donors is, in a sense, less intent-defeating than one consistent with the intention of ten percent of donors. The level of popular support can be important as a political matter, when attempting to persuade a legislature to enact or retain a mandatory rule. But a mandatory rule is still intent-defeating for the non-
conforming donor, and there are settlors who wish to be non-conforming with respect to the duty to inform.

Given that the duty to inform is not intent-effectuating for non-conforming settlors, is there a rationale for it that would justify it as a mandatory rule? Or should the duty be a default rule waivable in the bargain between settlor and trustee? This Article advances the view that one does not need to frame the duty to inform as intent-implementing in order to support it as a mandatory rule. An additional basis on which a rule of trust law should be mandatory is where the rule is needed to safeguard the equitable property interests of the beneficiaries and (this is the same thing, phrased differently) to monitor the performance, and enforce the fiduciary obligations, of the trustee. The trustee has a mandatory duty to inform the beneficiaries because only they have both the financial incentive and legal authority to fulfill the monitoring and enforcement functions.

The link between the beneficiaries' interest and a mandatory rule limiting the settlor's authority over the trust's administration is fully in line with the direction of American trust law. The modern law of fiduciary administration enforces a proprietarian boundary on the settlor's contractarian power. The settlor of an irrevocable trust is given significant room to control the trustee's actions but cannot dispense with the core responsibility of the trustee to administer the trust in the interests of the beneficiaries. This is readily illustrated by examining the point of direct tension between settlors and beneficiaries on fiduciary administration, namely the application of the doctrine of administrative deviation, which governs the beneficiaries' authority to insist that the trustee deviate from the trust's administrative instructions. The traditional leading case is

136. On the legal standing of the settlor of a private irrevocable trust, see Michael R. Houston, Comment, Estate of Wall v. Commissioner: An Answer to Settlor Standing in Trust Law?, 99 NW. U. L. REV. 1723 (2005). Contractarian scholars have argued that trust law should be changed to permit settlors to sue for fiduciary breach. See, e.g., Langbein, supra note 116, at 664; see also Sitkoff, supra note 107, at 668–69 (discussing settlor standing in terms of agency costs). Settlor standing is an incomplete answer, however. As the agency cost analysis demonstrates, only the beneficiaries (as the principals, in economic language) have the full incentive to monitor and enforce the trustee's proper performance.

137. The related doctrine of equitable deviation, see RESTATEMENT (THIRD) OF TRUSTS § 66(1) (2007), which can be used to modify the trust's dispositive or administrative provisions in light of unanticipated circumstances and in accordance with the settlor's probable intention, can be useful in situations where it applies. The point of the discussion, however, is to demonstrate that trust doctrine authorizes administrative deviation irrespective of the settlor's intention in order to protect the property interests of the beneficiaries.
Matter of Pulitzer,

decided in 1931. The terms of a trust established by Joseph Pulitzer instructed the trustees not to sell the trust’s stock in the New York World newspaper. When the paper lost value, so did the stock. The court authorized the sale on the ground that the settlor, if alive, would have approved: “A man of his sagacity and business ability could not have intended that from mere vanity, the publication of the newspapers, with which his name and efforts had been associated, should be persisted in until the entire trust asset was destroyed or wrecked by bankruptcy or dissolution.”

The rationale was the imputed approval of the settlor. Under modern American law, however, the settlor’s approval, actual or imputed, is not needed. Section 412(b) of the UTC, which has been enacted in substance in all UTC jurisdictions except Florida, plus in Indiana, provides that a “court may modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust’s administration.”

The official comment emphasizes that this rule is based not on the settlor’s presumed intent that the trust remain solvent but rather on the fundamental requirement that the trust must be run for the benefit of the beneficiaries:

Although the settlor is granted considerable latitude in defining the purposes of the trust, the principle that a trust have a purpose which is for the benefit of its beneficiaries precludes unreasonable restrictions on the use of trust property. An owner’s freedom to be capricious about the use of the owner’s own property ends when the property is impressed with a trust for the benefit of others.

139. Id. at 95.
140. See ALA. CODE § 19-3B-412(b) (Supp. 2006); ARK. CODE ANN. § 28-73-412(b) (Supp. 2005); D.C. CODE § 19-1304.12(b) (Supp. 2006); KAN. STAT. ANN. § 58a-412(b) (Supp. 2006); ME. REV. STAT. ANN. tit. 18-B, § 412(2) (Supp. 2006); MO. ANN. STAT. § 456.4-412(2) (West Supp. 2007); NEB. REV. STAT. § 30-3838(b) (Supp. 2006); N.H. REV. STAT. ANN. § 564-B:4-412(b) (2007); N.M. STAT. § 46A-4-412(B) (2003); N.C. GEN. STAT. § 36C-4-412(b) (2007); N.D. CENT. CODE § 59-12-12(2) (Supp. 2007); OHIO REV. CODE ANN. § 5804.12(B) (LexisNexis 2006); OR. REV. STAT. § 130.205(2) (2005); 20 PA. CONS. STAT. § 7740.2(b) (Supp. 2006); S.C. CODE ANN. § 62-7-412(b) (Supp. 2006); TENN. CODE ANN. § 35-15-412(b) (Supp. 2006); UTAH CODE ANN. § 75-7-412(2) (Supp. 2006); VA. CODE ANN. § 55-544.12(B) (Supp. 2007); WYO. STAT. ANN. § 4-10-413(b) (2005).
141. See IND. CODE § 30-4-3-24.4(b)(2) (LexisNexis Supp. 2006).
142. UNIF. TRUST CODE § 412(b).
143. Id. § 412 cmt. (emphasis added).
The idea that a trust must be administered for the beneficiaries' benefit is more than a policy. The rule has been codified in section 404 of the UTC: “A trust and its terms must be for the benefit of its beneficiaries.”\textsuperscript{144} Eighteen of the twenty UTC jurisdictions, plus Iowa,\textsuperscript{45} have enacted this provision as a mandatory rule.\textsuperscript{146}

In order to ensure that the trust is being run for the benefit of the beneficiaries, the trustee must have a duty to provide information about the trust and its administration.

2. A Surrogate for Information?

An important question is whether the information must be provided to the beneficiaries. This raises the issue of the role of other parties, either a trust director\textsuperscript{147} (who may be the settlor\textsuperscript{148}) or a trust protector.\textsuperscript{149} American trust law recognizes the existence of trust

\textsuperscript{144}. Id. § 404.
\textsuperscript{145}. See IOWA CODE § 633A.2104(2) (2005).

147. American trust law permits the settlor to grant or retain the right to direct the actions of the trustee (a “directory power” with the holder known as a “director”). See RESTATEMENT (THIRD) OF TRUSTS § 75 (2007). Depending on the terms of the trust, the director may have authority over “distributions, investments, other aspects of property management, removal and replacement of trustees, change of the situs of administration, some questions of interpretation, modification of some trust provisions, and perhaps all of these or even unlimited matters in which the [director] might choose to intervene.” Edward C. Halbach Jr., Fiduciary and Non-Fiduciary Powers: Where are the Lines and What Are the Duties? An “Educated(?)” Guess, 2005 Nottingham Lecture at the International Trust and Tax Planning Summit 15-16 (2005) (on file with the North Carolina Law Review). In the reported cases, however, directory powers have often been “narrow,” see id. at 24, limited, for example, to approving or vetoing changes in trust assets. See Ditmars v. Camden Trust Co., 76 A.2d 280, 289 (N.J. Super. Ct. Ch. Div. 1950), modified on other grounds, 92 A.2d 12 (N.J. 1952). For discussion, see RESTATEMENT (THIRD) OF TRUSTS § 75 Rep. Note (2007).

148. If the settlor retains a directory power, he exercises the power as a director, not as the settlor.

149. Related to the idea of a director is the concept of a “trust protector”: a third-party role born in the context of offshore asset protection trusts and now authorized by some American jurisdictions. See Alexander A. Bove, The Trust Protector: Trust(y) Watchdog or Expensive Exotic Pet?, EST. PLAN., Aug. 2003, at 390 [hereinafter Bove, Trust(y)
directors and trust protectors, and this invites the question whether a settlor can (or ought to be able to) substitute some such party for the beneficiaries with respect to the duty to inform. Six of the twenty UTC jurisdictions—Florida, Maine, Missouri, Ohio, Watchdog]; Alexander A. Bove Jr., Trust Protectors, 144 TR. & EST. 28 (2005) [hereinafter Bove, Trust Protectors]; Stewart E. Sterk, Trust Protectors, Agency Costs, and Fiduciary Duty, 27 CARDOZO L. REV. 2761, 2764-70 (2006). The protector is designed to achieve the settlor’s purposes, exercising control over the trustee. See LAWRENCE W. WAGGONER, GREGORY S. ALEXANDER, MARY LOUISE FELLOWS & THOMAS P. GALLANIS, FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS AND FUTURE INTERESTS 14-33 (4th ed. 2006).

150. See RESTATEMENT (THIRD) OF TRUSTS § 75 cmt. (2007); UNIF. TRUST CODE § 808 cmt.

151. FLA. STAT. § 736.0306(1) (Supp. 2007) (“If authorized in the trust instrument, one or more persons may be designated to represent and bind a beneficiary and receive any notice, information, accounting, or report.”); see also id. § 736.0813(1) (“The representation provisions of Part III apply with respect to all rights of a qualified beneficiary under this section.”).

152. Under Maine law, the settlor may:

 designate[e] a person or persons, any of whom may or may not be a beneficiary, to act in good faith to protect the interests of the qualified beneficiaries who are not receiving notice, information or reports and to receive any notice, information or reports required under section 813, subsection 1 or 2 in lieu of providing such notice, information or reports to the qualified beneficiaries. The person or persons designated under this paragraph are deemed to be representatives of the qualified beneficiaries bearing the notice, information or reports for the purposes of the time limitation for a beneficiary to commence an action against the trustee for breach of trust as provided in section 1005, subsection 1.

ME. REV. STAT. ANN. tit. 18-B, § 105(3) (Supp. 2006).

153. Under Missouri law, the settler may:

 designate by the terms of the trust one or more permissible distributees to receive notification of the existence of the trust and of the right to request trustee’s reports and other information reasonably related to the administration of the trust in lieu of providing the notice, information or reports to any other permissible distributee who is an ancestor or lineal descendant of the designated permissible distributee.


154. Ohio law provides:

With respect to one or more of the current beneficiaries, the settlor, in the trust instrument, may waive or modify the duties of the trustee described in divisions (B)(8) and (9) of this section. The waiver or modification may be made only by the settlor designating in the trust instrument one or more beneficiary surrogates to receive any notices, information, or reports otherwise required under those divisions to be provided to the current beneficiaries. If the settlor makes a waiver or modification pursuant to this division, the trustee shall provide the notices, information, and reports to the beneficiary surrogate or surrogates in lieu of providing them to the current beneficiaries. The beneficiary surrogate or surrogates shall act in good faith to protect the interests of the current beneficiaries for whom the notices, information, or reports are received. A waiver or modification made under this division shall be effective for so long as the
Oregon, and the District of Columbia—already do so. These jurisdictions permit the settlor to designate a surrogate to receive and request information in lieu of the beneficiaries. The statutes leave crucial questions unanswered, however, such as whether the surrogate owes fiduciary duties to the beneficiaries, what standard of care governs the surrogate’s actions or failures to act, and whether the surrogate has standing to sue the trustee for fiduciary breach. Note that these questions are also unresolved for trust directors and trust protectors generally; commentators rightly disagree about where the law stands on these issues.

For purpose of the current discussion, let us assume the legal environment most conducive to substituting another party for the beneficiaries with respect to the duty to inform: namely, that the surrogate owes full fiduciary obligations to the beneficiaries and has authority to sue the trustee for breach of trust. Should the substitution be permitted? The insights of economic analysis point to a negative answer, as does a classical education: "Sed quis custodiet

beneficiary surrogate or surrogates, or their successor or successors designated in accordance with the terms of the trust instrument, act in that capacity.

**OHIO REV. CODE ANN. § 5801.04(C) (LexisNexis 2006).**

155. Oregon law provides:

The settlor, in the trust instrument or in another writing delivered to the trustee, may waive or modify the duties of a trustee . . . to give notice, information and reports to qualified beneficiaries by: . . . (b) Designating a person or persons to act in good faith to protect the interests of qualified beneficiaries and to receive any notice, information or reports . . . in lieu of providing the notice, information or reports to the qualified beneficiaries.

**OR. REV. STAT. § 130.020(3) (2005).**

156. The law of the District of Columbia provides:

The settlor, in the trust instrument or in another writing delivered to the trustee, may waive or modify the duties of a trustee . . . to give notice, information, and reports to beneficiaries by: . . . (3) Designating a person or persons to act in good faith to protect the interests of beneficiaries, to receive any notice, information, or reports . . . in lieu of providing such notice, information, or reports to the beneficiaries.

**D.C. CODE § 19-1301.05(c) (Supp. 2006).**

157. The statutes in D.C., Florida, Maine, Ohio, and Oregon do answer this question, imposing a requirement that the surrogate act “in good faith.” D.C. CODE § 19-1301.05(c)(3) (Supp. 2006); FLA. STAT. § 736.0306(4) (Supp. 2007); ME. REV. STAT. ANN. tit. 18-B, § 105(3)(B) (Supp. 2006); OHIO REV. CODE ANN. § 5801.04(C) (LexisNexis 2006); OR. REV. STAT. § 130.020(3)(b) (2005).

158. See the criticisms of the D.C. statute in Millard, supra note 1, at 398–400.

159. See, e.g., Bove, Trust Protectors, supra note 149, at 29–30 (recognizing debate over whether trust protectors must be fiduciaries); Bove, Trust(y) Watchdog, supra note 149, at 394 (discussing circumstances in which trust protectors might have standing to sue).
The use of a surrogate adds an extra layer of fiduciary administration but does not resolve the fundamental problem of agency cost arising whenever "one party (the agent) has discretionary and unobservable decisionmaking authority that affects the wealth of another party (the principal)." The trustee's actions will be observable to the surrogate, but neither's actions will be observable to the beneficiaries. Yet, it is only the beneficiaries who have the full incentive to monitor the trustee's performance. Giving the information to another party does not solve the misalignment of incentives, so it is hard to see the surrogate as an adequate substitute.

To be sure, there are instances where a surrogate is unavoidable: for example, in the event of unborn, minor, or incapacitated beneficiaries. There may also be fact patterns where the benefits of a surrogate outweigh the costs: for instance, where the beneficiaries are adult but still relatively young (recall the UTC's treatment of beneficiaries under age twenty-five) or, to take another example, where the trust has so many beneficiaries that there is a substantial danger of collective inaction. Additionally, it may be possible to envision, at least in theory, a surrogate with such a strong reputational incentive for effective monitoring that the surrogate's interests are largely, though still not entirely, aligned with those of the beneficiaries.

But these are the exceptions. In the ordinary case, a surrogate is merely one more agent, hence not a solution to the problem of agency cost. Some rights to information must remain in the beneficiaries.


161. Sitkoff, supra note 107, at 636.

162. For agreement on this point, see Alexander, supra note 160, at 2810 ("The more power you give the trust protector, the more you simply swap one set of agency cost problems for another."); Sterk, supra note 149, at 2796–800 (analyzing the potential for breach of duty or inaction by the protector).

163. See supra notes 47–50 and accompanying text.

164. For an introduction to the economics of collective action (and inaction), see DOUGLAS G. BAIRD ET AL., GAME THEORY AND THE LAW ch. 6 (1994). I thank Robert Sitkoff for this point.


166. For agreement with this position, see RESTATEMENT (THIRD) OF TRUSTS § 82 cmt. d (2007).
3. Four Principles

What aspects of the duty to inform should remain mandatory? In this closing section of the Article, I offer four normative principles that I hope will guide the development of the law of the duty to inform. First, and centrally, the duty to inform should result in the beneficiaries having sufficient information to safeguard their interests. This means sufficient information to monitor and evaluate the trustee’s performance and, if necessary, to take action in the event of a breach of trust. Second, and related to the first, the duty to inform should not be limited to the provision of information upon request. There must be enough information provided automatically so that the beneficiaries can make an informed request. Third, the duty to inform should extend to sufficient beneficiaries to protect against a violation of the trustee’s fiduciary duty of impartiality. Impartiality means that the trustee must balance the conflicting economic interests of the trust’s multiple beneficiaries, taking into account the provisions and purposes of the trust. When the group of beneficiaries with access to information is too narrow, the danger of partiality is real and significant. Fourth and last, the settlor should not be able, as a routine matter, to designate a permanent surrogate for the receipt of information. I am open to the idea that the settlor might designate a surrogate for a limited time (for example, until a beneficiary reaches maturity) if the surrogate owes fiduciary duties to the beneficiary and is required to provide sufficient information to the beneficiary when the period of substitution expires. I am also open to the special cases discussed above where a surrogate would be the best-available alternative or where there are strong reputational reasons to believe that the surrogate will be an effective monitor. But the routine use of a permanent surrogate is dangerous, for the permanent surrogate will sustain, not solve, the fundamental agency cost problem.

Taken together, these principles give the settlor room to shape the contours of the duty to inform while preserving the beneficiaries’ essential safeguard against fiduciary breach.

CONCLUSION

The trustee’s duty to keep beneficiaries informed of the trust and its administration is a long-standing and crucial fiduciary obligation. The duty to inform has a distinguished pedigree within the history of

167. See id. § 79.
Anglo-American law and performs a vital function today, minimizing the agency costs that inevitably arise when there is a separation between the management of assets and their equitable ownership. The trust’s beneficiaries have the incentives and authority to monitor the trustee’s performance and to enforce the trustee’s fiduciary obligations. They must have the information needed to exercise their monitoring and enforcement powers. The duty to inform can be default law at the margins but must maintain a mandatory core.