

[First Reprint]
SENATE, No. 1092

STATE OF NEW JERSEY

INTRODUCED MAY 9, 1996

By Senator INVERSO

1 AN ACT concerning the standards for prudent investing by fiduciaries
2 of certain trust estates and of certain funds by the Director of the
3 Division of Investment and revising parts of the statutory law.

4
5 **BE IT ENACTED** by the Senate and General Assembly of the State
6 of New Jersey:

7
8 1. (New section) Sections 1 through 12 of this 1996 amendatory
9 and supplementary act shall be known and may be cited as the
10 "Prudent Investor Act."

11
12 2. (New section) a. Except as provided in subsection b. of this
13 section, a fiduciary who invests and manages trust assets owes a duty
14 to the beneficiaries of the trust to comply with the prudent investor
15 rule, as set forth in this act.

16 b. The prudent investor rule is a default rule that may be expanded,
17 restricted, eliminated, or otherwise altered by express provisions of the
18 trust instrument. A fiduciary is not liable to a beneficiary to the extent
19 that the fiduciary acted in reasonable reliance on those express
20 provisions. Nothing herein shall affect the jurisdiction of the Superior
21 Court to order or authorize a fiduciary to deviate from the express
22 terms or provisions of a trust instrument for the causes, in the manner,
23 and to the extent otherwise provided by law.

24
25 3. (New section) a. A fiduciary shall invest and manage trust
26 assets as a prudent investor would, by considering the purposes, terms,
27 distribution requirements, and other circumstances of the trust. In
28 satisfying this standard, the fiduciary shall exercise reasonable care,
29 skill, and caution.

30 b. A fiduciary's investment and management decisions respecting
31 individual assets shall not be evaluated in isolation, but in the context

EXPLANATION - Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and intended to be omitted in the law.

Matter underlined thus is new matter.

Matter enclosed in superscript numerals has been adopted as follows:

¹ Senate SSM committee amendments adopted June 6, 1996.

1 of the trust portfolio as a whole and as a part of an overall investment
2 strategy having risk and return objectives reasonably suited to the
3 trust.

4 c. Subject to the standards established in this act, a fiduciary may
5 invest in any kind of property or type of investment. No specific
6 investment or course of action is inherently imprudent.

7 d. Among the circumstances that the fiduciary shall consider in
8 investing and managing trust assets are those of the following as are
9 relevant to the trust and its beneficiaries:

10 (1) general economic conditions;

11 (2) the possible effect of inflation or deflation;

12 (3) the expected tax consequences of investment decisions or
13 strategies;

14 (4) the role that each investment or course of action plays
15 within the overall trust portfolio;

16 (5) the expected total return from income and the appreciation
17 of capital;

18 (6) other resources of the beneficiaries;

19 (7) the need for liquidity, for regularity of income, and for
20 preservation or appreciation of capital; and

21 (8) an asset's special relationship or special value, if any, to the
22 purposes of the trust or to one or more of the beneficiaries as, for
23 example, an interest in a closely-held enterprise, tangible and
24 intangible personalty, or real estate.

25 e. The fiduciary shall take reasonable steps to verify facts relevant
26 to the investment and management of trust assets and may rely and be
27 fully protected in relying upon statistical, financial, corporate or other
28 information as to a particular investment, and upon ratings or other
29 opinion as to the financial or other status thereof, contained in or
30 offered by any financial, statistical, investment, rating or other
31 publication or service published for the use of and accepted as reliable
32 by investors in like investments or upon a copy of the prospectus
33 prepared and filed with the Securities and Exchange Commission in
34 connection with a new issue.

35 f. A fiduciary who has special skills or expertise, or is named
36 fiduciary in reliance upon representations of special skills or expertise,
37 has a duty to use those special skills or expertise.

38

39 4. (New section) A fiduciary shall diversify the investments of the
40 trust unless the fiduciary reasonably determines that, because of
41 special circumstances, the purposes of the trust are better served
42 without diversifying.

43

44 5. (New section) A fiduciary shall invest and manage the trust
45 assets solely in the interest of the beneficiaries.

1 6. (New section) If a trust has two or more beneficiaries, the
2 fiduciary shall act impartially in investing and managing the trust
3 assets, taking into account any differing interests of the beneficiaries.

4
5 7. (New section) Within ¹[a reasonable time] six months¹ after
6 accepting trust assets, the fiduciary shall review the trust assets and
7 shall make and implement decisions concerning the retention and
8 disposition of assets received at the inception of the trust, in order to
9 bring the trust portfolio into compliance with the provisions of the
10 trust instrument or with the requirements of this act.

11
12 8. (New section) In investing and managing trust assets, a
13 fiduciary may only incur costs that are appropriate and reasonable in
14 relation to the assets, the purposes of the trust, and the skills of the
15 fiduciary. A fiduciary who delegates investment and management
16 functions pursuant to section 10 of P.L. , c. (C.)(pending
17 before the Legislature as this bill) shall control the overall costs of the
18 delegation, including making a reduction in the amount of corpus
19 commissions otherwise allowable to the fiduciary with respect to the
20 trust assets for which investment responsibility has been delegated,
21 which reduction shall take account of the duties and responsibilities
22 retained by the fiduciary with respect to such assets.

23
24 9. (New section) The prudent investor rule expresses a standard
25 of conduct, not outcome. Compliance with the rule is determined in
26 light of the facts and circumstances existing at the time of the
27 fiduciary's decision or action.

28
29 10. (New section) a. A fiduciary may delegate investment and
30 management functions that a prudent fiduciary of comparable skills
31 could properly delegate under the circumstances. The fiduciary shall
32 exercise reasonable care, skill, and caution in:

33 (1) selecting an agent with special investment skills and expertise
34 and of sound financial standing;

35 (2) establishing the scope and terms of the delegation consistent
36 with the purpose and terms of the trust instrument; and

37 (3) periodically reviewing the agent's actions in order to monitor
38 the agent's performance and compliance with the scope and terms of
39 the delegation.

40 b. In performing a delegated function, the agent shall owe to the
41 trustee and the beneficiaries the same duties as the fiduciary and shall
42 be held to the same standards as the fiduciary.

43 c. The fiduciary who complies with the requirements of subsection
44 a. of this section shall not be liable to the beneficiaries or to the trust
45 for the decisions or actions of the agent to whom the function was
46 delegated.

1 d. By accepting the delegation of a trust function from the
2 fiduciary of a trust that is subject to the law of New Jersey, the agent
3 submits to the jurisdiction of the courts of New Jersey, even if the
4 delegation agreement provides otherwise.

5 e. If there are two or more fiduciaries serving, only one of whom
6 has special investment and management skills or expertise or has been
7 named in reliance upon representations of such special skills or
8 expertise, then the fiduciary or fiduciaries not possessed of such
9 special skills or expertise may, pursuant to this section, delegate
10 investment and management functions to the other fiduciary as if such
11 other fiduciary were an agent selected in accordance with this section
12 and subject to the provisions of this section.

13 f. A fiduciary shall provide reasonable advance written notice on
14 each occasion upon which the fiduciary intends to delegate investment
15 and management functions pursuant to this section, including the
16 identity of the agent, to the beneficiary or beneficiaries eligible to
17 receive income from the trust on the date of the intended delegation.
18 Upon providing such notice, the fiduciary shall be authorized to
19 delegate investment and management functions pursuant to this
20 section.

21
22 11. (New section) The following terms or comparable language in
23 a trust instrument, unless otherwise limited or modified by that
24 instrument, shall be construed as authorizing any investment or
25 strategy permitted under this act: "investments permissible by law for
26 investment of trust funds," "legal investment," "authorized
27 investments," "using the judgement and care under the circumstances
28 then prevailing that persons of prudence, discretion, and intelligence
29 exercise in the management of their own affairs, not in regard to
30 speculation but in regard to the permanent disposition of their funds,
31 considering the probable income as well as the probable safety of their
32 capital," "prudent man rule," "prudent trustee rule," "prudent person
33 rule," and "prudent investor rule."

34
35 12. (New section) This act shall apply to and govern trusts
36 existing on and created after its effective date. As applied to trusts
37 existing on its effective date, this act governs only actions or omissions
38 occurring after that date.

39
40 13. N.J.S.3B:20-1 is amended to read as follows:

41 3B:20-1. Definitions. As used in this chapter:

42 a. "Trust instrument" means and includes a will, deed, agreement,
43 court order or other instrument pursuant to which money or other
44 property is entrusted to a fiduciary;

45 b. "Fiduciary" means an individual or corporation that is authorized
46 to act as or acts as a trustee, personal representative, conservator,

1 guardian, and every other [person] individual or corporation charged
2 with the duty of administering a trust estate;

3 c. "Trust estate" or "trust assets" means money or other property
4 entrusted to a fiduciary [pursuant to a trust instrument, will, estate of
5 an intestate decedent or the estate of a minor or mentally incompetent
6 person being administered by a guardian];

7 d. ["Investments" means and includes property of every nature,
8 real, personal and mixed, tangible and intangible, and specifically
9 includes, solely by way of description and not by way of limitation,
10 bonds, debentures and other corporate obligations, direct and indirect
11 investment in equity real estate mortgages and other direct or indirect
12 interests in real estate or investments secured by real estate, capital
13 stocks, common stocks, preferred stocks, diversified pools of venture
14 capital which otherwise could be made consistently with the standard
15 of care required by N.J.S.3B:20-13, common trust funds as defined in
16 and regulated by article 9, "Common Trust Funds," P.L.1948, c.67
17 (C.17:9A-36 et seq.), repurchase agreements, securities loan
18 transactions secured by cash, securities issued by the United States
19 government or its agencies, irrevocable bank letters of credit, whether
20 directly or through a bank or similar financial institution acting as
21 agent or trustee, mutual funds, and any other security issued by an
22 investment company or investment trust, whether managed or not by
23 third parties, registered under the "Investment Company Act of 1940,"
24 15 U.S.C.{800-1 et seq., as from time to time amended. No
25 investment that is otherwise permissible under this subsection shall be
26 considered to be unlawful solely because the investment is made
27 indirectly through a partnership, trust, or other legal entity.](Deleted
28 by amendment, P.L. . . . , c. . . .)

29 e. "Beneficiary" means an individual or corporation for whose
30 benefit a fiduciary acts or is authorized to act.

31 (cf: P.L.1995, c.48, s.1.)

32

33 14. N.J.S.3B:20-7 is amended to read as follows:

34 3B:20-7. Directions of court concerning the sale, conversion or
35 retention of investments. When securities or other property come into
36 possession of a fiduciary as part of the assets of the trust estate [he]
37 the fiduciary is to administer or manage, the fiduciary may apply to the
38 court for direction as to the sale, conversion or retention of the
39 securities or property.

40 The court shall make an order as it shall deem most advantageous
41 to the trust estate[, or the trust fund] and the interests of persons
42 entitled to share therein.

43 (cf: N.J.S.3B:20-7)

44

45 15. N.J.S.3B:20-8 is amended to read as follows:

46 3B:20-8. Protection afforded fiduciary continuing investments

1 under court order. A fiduciary [continuing to hold securities or other
2 property as investments in accordance with an order of court pursuant
3 to N.J.S.3B:20-7] shall not be held accountable for any loss by reason
4 of continuing to hold the [securities or other property] trust assets in
5 accordance with an order pursuant to N.J.S.3B:20-7.

6 (cf: N.J.S.3B:20-8)

7

8 16. N.J.S.3B:20-9 is amended to read as follows:

9 3B:20-9. Application to court upon change in conditions. If, as a
10 result of a change in conditions which occurs or which may be
11 reasonably foreseen, the objects of [a] the trust [created by a will,
12 other instrument or order of court] estate may be defeated in whole or
13 in part by the investment or retention of investments of the trust estate
14 in [securities or other] property to which the fiduciary is limited by the
15 [will, other] trust instrument [or court order creating the trust], the
16 fiduciary or any beneficiary of the trust may apply to the court to
17 secure authority permitting or directing the fiduciary to invest all or
18 any part of the trust estate in [other investments] accordance with the
19 provisions of N.J.S.3B:20-1 et seq.

20 (cf: N.J.S.3B:20-9)

21

22 17. N.J.S.3B:20-10 is amended to read as follows:

23 3B:20-10. Investments by court order upon change in conditions.
24 If the court finds that by reason of a change in conditions which has
25 occurred since the creation of the trust or which may be reasonably
26 foreseen, the objects of the trust estate may be defeated in whole or in
27 part by the investment or retention of the trust estate in [securities or
28 other] property to which the fiduciary is limited by the trust instrument
29 [or court order creating the trust estate] and that the objects of the
30 trust estate and those interested in it would be promoted by the
31 investment of all or part of the trust estate otherwise, the court shall
32 authorize or direct the fiduciary to invest the whole of the trust estate
33 or that part of it as shall be designated, in [any securities or other
34 property which in its judgment will promote the objects of the trust
35 and those interested in it] accordance with the provisions of
36 N.J.S.3B:20-1 et seq.

37 (cf: N.J.S.3B:20-10)

38

39 18. N.J.S.3B:20-18 is amended to read as follows:

40 3B:20-18. Authority to exchange or convert securities. Except as
41 otherwise provided in [a will, deed of trust, other] the trust instrument
42 [or court order], a fiduciary who holds securities in a trust estate
43 issued by a corporation which has been recapitalized or reorganized,
44 or which has been a party to a merger or consolidation, may exchange
45 or convert the securities so held for or into other securities issued by
46 the corporation as an incident of its recapitalization, reorganization,

1 merger or consolidation, or issued by the corporation's successor
2 corporation as an incident of the merger or consolidation.

3 (cf: N.J.S.3B:20-18)

4

5 19. N.J.S.3B:20-19 is amended to read as follows:

6 3B:20-19. Fiduciary as issuing corporation. An exchange or
7 conversion of securities may be made pursuant to this article
8 notwithstanding that the fiduciary which holds the securities in a trust
9 estate is the same corporation which issued the securities.

10 (cf: N.J.S.3B:20-19)

11

12 20. N.J.S.3B:20-23 is amended to read as follows:

13 3B:20-23. Banking institution acting as fiduciary. An exchange or
14 conversion of shares may be made pursuant to this article
15 notwithstanding that the fiduciary which holds the shares in the trust
16 estate is the banking institution which issued them.

17 (cf: N.J.S.3B:20-23)

18

19 21. N.J.S.3B:20-25 is amended to read as follows:

20 3B:20-25. Application of article. This article shall not apply where
21 a [will, deed of trust or other] trust instrument contains provisions
22 inconsistent with or contrary to the provisions of this article.

23 (cf: N.J.S.3B:20-25)

24

25 22. N.J.S.3B:20-27 is amended to read as follows:

26 3B:20-27. Definitions. As used in this article:

27 a. ["Fiduciary" includes an individual or corporation authorized to
28 act as a custodian under the "New Jersey Uniform Gifts to Minors
29 Act," P.L.1963, c.177 (C.46:38-13 et seq.);]~~(Deleted by amendment,~~
30 P.L. , c.)

31 b. "Securities" means instruments which are commonly dealt with
32 on securities exchanges or markets or commonly recognized in any
33 area in which they are issued or dealt with as a medium for investment,
34 and which are subject to the provisions of chapter 8, "Uniform
35 Commercial Code-Investment Securities" (chapter 8, Title 12A of the
36 New Jersey Statutes);

37 c. "Clearing corporation" means a corporation as defined in
38 N.J.S.12A:8-102.

39 (cf: N.J.S.3B:20-27)

40

41 23. N.J.S.3B:20-34 is amended to read as follows:

42 3B:20-34. Application of article. This article shall apply to any
43 fiduciary holding securities in its fiduciary capacity, and to any banking
44 institution holding securities as a custodian, managing agent or
45 custodian for a fiduciary, acting on January 2, 1974, or who thereafter
46 may act regardless of the date of the [agreement,] trust instrument [or

1 court order] by which the fiduciary is appointed and regardless of
2 whether or not the fiduciary[,]or the banking institution acting as
3 custodian, managing agent or custodian for a fiduciary owns capital
4 stock of the clearing corporation.

5 (cf: N.J.S.3B:20-34)

6

7 24. Section 38 of P.L.1948, c.67 (C.17:9A-38) is amended to read
8 as follows:

9 38. Effect of trust instruments.

10 A. Except as otherwise provided by subsection B of this section,
11 where the trust instrument defines, limits, or specifies the investments
12 which may be made of a trust estate, any common trust fund in which
13 all or any part of such trust estate is invested shall consist only of the
14 investments defined, limited, or specified in such trust instrument.

15 B. Where the trust instrument makes no provision governing the
16 investments which may be made of a trust estate, or where the trust
17 instrument directs that an estate be invested in "legal investments" or
18 in "investments in which a fiduciary may by law invest" or in "legal
19 investments for trustees," or uses words of similar import, investment
20 of such trust estate may be made, in whole or in part, in a common
21 trust fund, consisting of property [of every nature, real, personal, and
22 mixed, tangible and intangible, and further including, solely by way of
23 description and not by way of limitation, bonds, debentures, and other
24 corporate obligations, capital stocks, common stocks, preferred
25 stocks, investments as authorized by article 1 of chapter 15 of Title 3A
26 of the New Jersey Statutes, and shares of any open-end or closed-end
27 management type investment company or investment trust registered
28 pursuant to the Federal Investment Company Act of 1940, as from
29 time to time amended] in which fiduciaries of trust estates in this State
30 may invest pursuant to chapter 20 of Title 3B of the New Jersey
31 Statutes.

32 C. (Deleted by amendment.)

33 D. In making investments as provided in this section a bank shall
34 exercise [care and judgment under the circumstances then prevailing,
35 which persons of ordinary prudence and reasonable discretion exercise
36 in the management of and dealing with the property and affairs of
37 another, considering the probable income as well as the probable
38 safety of capital, and, if the bank has special skills or is named as the
39 fiduciary on the basis of representations of special skills or expertise,
40 it is under a duty to exercise those skills] the standard of care required
41 of a fiduciary of trust assets in New Jersey pursuant to chapter 20 of
42 Title 3B of the New Jersey Statutes.

43 (cf: P.L.1975, c.338, s.2)

1 25. Section 1 of P.L.1959, c.17 (C.52:18A-88.1) is amended to
2 read as follows:

3 1. The Director of the Division of Investment, in addition to other
4 investments, presently or from time to time hereafter authorized by
5 law, shall have authority to invest and reinvest the moneys in, and to
6 acquire for or on behalf of the funds of the following enumerated
7 agencies:

8 The Consolidated Police and Firemen's Pension Fund Commission;

9 The Police and Firemen's Retirement System of New Jersey;

10 The Prison Officers' Pension [Fund] Commission;

11 The Public Employees' Retirement System of New Jersey;

12 The State Police Retirement System;

13 The Teachers' Pension and Annuity Fund;

14 ¹[The 1837 Surplus Revenue Fund; and] The Judicial Retirement
15 System of New Jersey;¹

16 The Trustees for the Support of Public Schools;

17 ¹and all other funds in the custody of the State Treasurer, unless
18 otherwise provided by law;¹

19 such investments which shall be authorized or approved for
20 investment by regulation of the State Investment Council [and in
21 which fiduciaries of trust estates in this State may legally invest and
22 subject to the limitations and conditions applicable thereto].

23 (cf: P.L.1972, c.176, s.1)

24

25 26. Section 11 of P.L.1950, c.20 (C.52:18A-89) is amended to
26 read as follows:

27 11. a. Limitations, conditions and restrictions contained in any law
28 concerning the kind or nature of investment of any of the moneys of
29 any of the funds or accounts referred to herein shall continue in full
30 force and effect; provided, however, that subject to any acceptance
31 required, or limitation or restriction contained herein: the Director of
32 the Division of Investment shall at all times have authority to invest
33 and reinvest any such moneys in ¹[, and to acquire for or on behalf of
34 any such funds or accounts, bonds, and other evidences of
35 indebtedness of the United States of America, and such bonds, and
36 other evidences of indebtedness, which may be authorized or approved
37 for investment by regulation of the State Investment Council, in which
38 (1) savings banks in this State may legally invest; or (2) which are
39 evidences of indebtedness issued by a company incorporated within
40 and transacting business within the United States, which are not in
41 default as to either principal or interest when acquired, and which
42 have a maturity of not more than twelve months from the date of
43 purchase; or (3) which are the direct obligations of or unconditionally
44 guaranteed as to principal and interest by the government of Canada,
45 payable as to both principal and interest in United States dollars, or
46 which are the direct obligations of or unconditionally guaranteed as to

1 principal and interest by any of the provinces thereof, payable as to
2 both principal and interest in United States dollars;] investments as
3 defined in subsection c. of this section¹ and, for or on behalf of any
4 such fund or account, to sell or exchange any ¹such¹ investments ¹[or
5 securities thereof]¹.

6 b. In investing and reinvesting any and all money and property
7 committed to the director's investment discretion from any source
8 whatever, and in acquiring, retaining, selling, exchanging and
9 managing investments, the Director of the Division of Investment shall
10 exercise the care, skill, prudence and diligence under the circumstances
11 then prevailing that a prudent person acting in a like capacity and
12 familiar with such matters would use in the conduct of an enterprise
13 of a like character and with like aims. In making each investment, the
14 director may, depending on the nature and objectives of the portfolio,
15 consider the whole portfolio, provided that, in making each
16 investment, the director shall act with the reasonable expectation that
17 the return on each investment shall be commensurate with the risk
18 associated with each investment. The director shall be under a duty to
19 manage and invest the portfolio solely in the interests of the
20 beneficiaries of the portfolio and for the exclusive purpose of
21 providing financial benefits to the beneficiaries of the portfolio.

22 c. For the purposes of this section, "investments" means and
23 includes property of every nature, real, personal and mixed, tangible
24 and intangible, and specifically includes, solely by way of description
25 and not by way of limitation, bonds, debentures and other corporate
26 obligations, direct and indirect investments in equity real estate^{1,1}
27 mortgages and other direct or indirect interests in real estate or
28 investments secured by real estate, capital stocks, common stocks,
29 preferred stocks, diversified pools of venture capital which otherwise
30 could be made consistent with the standard of care required by
31 subsection b. of this section, common trust funds as defined in and
32 regulated by sections 36 through 46 of P.L.1948, c.67 (C.17:9A-36
33 through 17:9A-46), repurchase agreements, securities loan
34 transactions secured by cash, securities issued by the United States
35 government or its agencies, or irrevocable bank letters of credit,
36 whether directly or through a bank or similar financial institution
37 acting as agent or trustee, mutual funds, and any other security issued
38 by an investment company or investment trust, whether managed or
39 not by third parties, registered under the "Investment Company Act of
40 1940," 15 U.S.C. §80a-1 et seq. No investment that is otherwise
41 permissible under this subsection shall be considered to be unlawful
42 solely because the investment is made indirectly or through a
43 partnership, trust, or other legal entity.

44 (cf: P.L.1952, c.8)

1 27. The following are repealed:
2 N.J.S.3B:20-2;
3 N.J.S.3B:20-6;
4 N.J.S.3B:20-11 through N.J.S.3B:20-17 inclusive;
5 N.J.S.3B:20-20; and
6 N.J.S.3B:20-24.

7
8 28. This act shall take effect 90 days after enactment.

9

10

11

12

13 Concerns the investment and management of certain trust estates by
14 fiduciaries and of certain funds by the Director of the Division of
15 Investment.