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HOW TO MANAGE LIABILITY UNDER THE PRUDENT INVESTOR RULE

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1) **GENERAL RULE.** Florida's Prudent Investor Rule ("Florida's Prudent Investor Act or PIA," F.S. § 518.11) requires a "fiduciary" to invest prudently considering the purposes, terms, distribution requirements, and other circumstances of the trust.

2) SCOPE AND APPLICATION OF FLORIDA'S PIA.

a) **Fiduciary.** The term "fiduciary" is broadly defined and references not only customary fiduciaries, such as an executor and trustee, but also any other person, whether individual or corporate, who agree in writing to invest other people's money (for convenience, a "trustee").

i) Includes agent under power of attorney.

b) **Prudence.** Modern Portfolio Theory is the basis for Florida's PIA and it allowed Florida's PIA to shift the focus under the Prudent Man Rule from capital preservation and risk avoidance to return, assessing risk tolerance and managing risk through diversification and correlation of assets. Consequently, Florida's PIA provides that:

i) reasonable care and caution must be applied in the context of the entire investment portfolio, and

ii) reasonable care and caution must be applied as a part of an overall investment strategy that incorporates risk and return objectives reasonably suitable to the trust.

c) **Standard**.

i) A trustee may invest in all types of assets and no specific investment, taken alone, is prudent or imprudent.

ii) The trustee is measured by his or her reasonable business judgment.

iii) The test of whether the trustee has breached his or her duty to invest prudently is one of conduct rather than performance.

iv) Performance is judged by the portfolio as a whole and not as to any particular asset.

v) If the trustee has, or has represented that the trustee has, special skills, the trustee is under a duty to use those skills.

d) **Circumstances.** Florida's PIA requires consideration of purposes, terms (including distribution requirements, termination, taxes, beneficiaries other resources) in setting total portfolio strategy based on risk tolerance.

i) The trust may expand, restrict, eliminate or otherwise alter Florida's PIA.

ii) The trustee must consider the interests of both current beneficiaries and remainder beneficiaries.

iii) The fiduciary may consider related trusts.

iv) The fiduciary may consider other resources available to a beneficiary.

v) Florida's PIA requires an examination of the propriety of an investment decision based on facts and circumstances prevailing at the time of the decision. The fiduciary may consider:

(1) general economic conditions,

(2) possible effect of inflation,

(3) expected tax consequences of investment decisions,

(4) role of each investment within the portfolio,

(5) expected total return, and

(6) duty to incur only reasonable and appropriate costs.

vi) The attorney's role is to interpret the purposes, terms and distribution requirements of the trust, as well as advise the trustee regarding the application of Florida's PIA.

3) COMPLYING WITH FLORIDA'S PIA.

a) Duties.

i) The trustee has a duty to diversify investments unless he or she reasonably believes that under the circumstances it is in the beneficiaries' interests, and furthers the purposes of the trust, not to diversify.

ii) The fiduciary must review investment portfolio within a reasonable time after acceptance of trust.

iii) The fiduciary must promptly implement investment decisions.

iv) The fiduciary may retain trust assets if there is a special relationship or value to the purposes of the trust or to the beneficiaries.

v) The fiduciary must pursue an investment strategy that considers the reasonable production of income and safety of capital. The strategy must be consistent with the fiduciary's duty of impartiality and purposes of the trust.

b) Investment Policy Statement.

i) The Investment Policy Statement cannot be generic.

ii) Consider special assets, such as small business interests, real estate holdings and unusual investments.

iii) Settlor's purpose.

iv) Distribution requirements.

v) Consideration of beneficiary's other resources, if applicable.

vi) Risk v. reward.

vii) Effect on meeting purposes, terms, distribution requirements of trust.

viii) Quantitative analysis.

c) Investment Changes.

i) objectives for adding the investment

ii) effect on the overall portfolio

d) **Periodic Review**.

i) The trustee should monitor the portfolio's performance at reasonable intervals.

ii) The trustee should measure investment selections by objective standards, such as a benchmark indexes.

iii) check the overall performance against the portfolio's risk tolerance (i.e., volatility)

e) **Delegation.**

i) Florida's PIA applies to all fiduciaries regardless of skill. Therefore, there may be a duty to delegate investment responsibility if the trustee does not have the requisite skills.

ii) A trustee may delegate investment functions that a comparable investor might delegate to an agent if the trustee exercises reasonable care, judgment, and caution:

(1) in selecting the investment agent,

(2) in establishing the scope and specific terms of any delegation, and

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

iii) In the case of a trust or estate, the delegating trustee must, give written notice to all beneficiaries within 30 days, unless such notice is waived.

f) Exoneration.

i) A fiduciary is not liable for reasonably relying on the expense provisions of a trust.

ii) Under Florida law, it is unknown whether a trustee may still have liability under Florida's PIA in the event a trust provision waives Florida's PIA or allows the retention of assets originally contributed by the settlor.

iii) Even if the trust directs the retention of certain assets, a court may permit the trustee to deviate from the trust's terms.

4) **ILIT TRUSTEE LIABILITY.**

a) **General Rule.** The Florida legislature enacted section 736.0902, effective July 1, 2010. This statute limits the duties and liabilities of the Trustee of an ILIT.

b) **Insurable Interest.** Section 736.0902 relieves the Trustee of the duty to determine if the contract was procured or effected by a person with an insurable interest in the policy if:

i) the ILIT owns insurance on a qualified person;

ii) the ILIT does not specifically opt out of section 736.0902(1)(a);

iii) the insurance was not purchased from an affiliate of the Trustee and the Trustee did not receive commission on the sale of the insurance (unless duties have been delegated to another person);

iv) the Trustee did not have knowledge that the beneficiaries did not have an insurable interest when the policy was issued; and

v) the Trustee did not have knowledge that the contract was obtained, directly or indirectly, by a person who did not have an insurance interest at the inception of such contract and that there was an agreement to sell the policy to a third person.

c) **Prudent Investor Rule.** In addition, section 736.0902 makes the prudent investor rule inapplicable to the contract and the Trustee will have no liability for any loss on the insurance policy if:

i) the ILIT does not specifically opt out of section 736.0902;

ii) the ILIT specifically states that 736.0902 will apply OR the Trustee provides notice to the qualified beneficiaries that 736.0902 will apply to the ILIT; and

iii) the insurance was not purchased from an affiliate of the Trustee and the Trustee did not receive commission on the sale of the insurance (unless duties have been delegated to another person).

d) **Notice.** If the Trustee provides notice to the qualified beneficiaries that section 736.0902 will apply to the ILIT, the beneficiaries can object in writing to the application of the statute, and the statute will not apply until the objection is withdrawn.

e) **Qualified Person.** Section 736.0902 only applies if the insurance is held by the ILIT on a "qualified person." A "qualified person" is defined as an insured or proposed insured, or the spouse of that person, who has provided the trustee with the funds used to acquire or pay the premiums on the policy. Thus, this section will not apply to ILITs where the funds are provided by a third party, such as an employer or family business.

f) **Compensation.** If section 736.0902 applies to an ILIT, the Trustee is precluded from charging a fee for performing the services for which the duty has been removed.

5) UPMIFA IN FLORIDA – NEW LAW (Fla. Stat. Sec. 617.2104)

a) **Status.** Florida Uniform Prudent Management of Institutional Funds Act ("UPMIFA") effective July 1, 2012.

b) Definitions.

i) "Endowment Fund": "an institutional fund or part thereof that, under the terms of a gift instrument, is not wholly expendable by the institution on a current basis. The term does not include assets that an institution designates as an endowment fund for its own use."

ii) "Gift instrument" is a record of information, and includes an institutional solicitation.

iii) "Institutional fund" does not include program-related assets (i.e., held to accomplish a charitable purpose and not primarily for investment).

c) Standard of Conduct in Managing and Investing Funds.

i) subject to donor intent, consider charitable purposes.

ii) comply with duty of loyalty (state law) and use good faith and with care of ordinarily prudent person.

iii) incur only reasonable costs, make a reasonable effort to verify facts.

iv) consider factors – economic conditions, tax consequences, investment portfolio.

v) have and follow investment strategy, diversify.

vi) person with special skills or expertise must use.

vii) organization may delegate management and investment functions (good faith, prudent).

d) Use of Endowment Funds.

i) subject to donor intent, spend or accumulate as prudent.

ii) use factors to determine whether to appropriate or accumulate.

iii) gift instrument must specifically state any limitations; designation of gift as an "endowment" or authorization to use only "income" do not limit organization's authority to appropriate.

e) Release/Modification on Restrictions.

i) with donor consent.

ii) by governing board (donor unavailable; $100,000 fund; restriction unlawful, impracticable, impossible, or wasteful)

iii) by institution (restriction unlawful, impracticable, impossible, wasteful; notice to Attorney General; $100,000 to $200,000 fund; 20 years after fund established; use consistent with charitable purpose in gift instrument)

iv) by court (restriction on management/investment, if impracticable or wasteful, changed circumstances; per donor's probable intention)

v) by court (restriction on use, if unlawful, impracticable, impossible, wasteful; consistent with charitable purpose in gift instrument)

f) **Effective Date (July 1, 2012).** Florida UPMIFA will apply to institutional funds existing on or established after the effective date of the section; for existing funds, section governs decisions made or actions taken on or after effective date.

6) DAMAGES.

a) **Measure of Damages.** The measure of damages for a breach under Florida's PIA is total return, as opposed to simple interest.

b) **Anti-Netting Rule.** A loss from a breach cannot be offset with gains from other breaches of trust (anti-netting rule). However, if the two breaches are not distinct, they can be netted.

7) FLORIDA CASE LAW.

a) Parker *v. Shullman*, 983 So. 2d 643 (Fla. 4th DCA 2008).

i) Background. Barbara Katz Silberman ("Decedent") was the mother of one of the Plaintiffs, Lauri Parker, and the Grandmother of the other Plaintiff, Cassie Parker (collectively, "Plaintiffs"). Decedent owned and operated a successful sportswear business. Steven J. Shullman ("Defendant") was the accountant for Decedent's company for over twenty years prior to Decedent's unexpected death in 2000. Prior to her death, Decedent created the Barbara Katz Silberman Revocable Trust as well as a trust for her husband called the Paul Silberman Marital Trust (collectively, "Trusts"). Each of these Trusts had sub-trusts for her daughter Lauri and granddaughter Cassie. Decedent designated Defendant as the successor trustee of all of the Trusts. She also named Defendant as personal representative of her Estate. When Decedent died, Defendant became trustee of the Trusts.

In addition to her company, Decedent also owned her house, an IRA and a trust account consisting of marketable securities at Charles Schwab ("Schwab") at the time of her death. After Defendant met with a Schwab representative, he interviewed several investment advisors and financial planners. In December 2000 he retained Comerica Bank ("Comerica") to advise him. The IRA and securities eventually lost a significant amount of money.

ii) The lawsuit. In early 2001, Plaintiffs filed suit against Defendant, seeking an accounting and to have Defendant removed as trustee, in what would become a very lengthy litigation. Defendant filed accountings for the years 2001 – 2003. Plaintiffs filed numerous objections to these accountings and in April of 2003, Plaintiffs filed a Complaint based upon these objections. Plaintiffs' Complaint alleged that, among other things, Defendant violated his duty under the Prudent Investor Rule.

iii) The Trial. At trial, the trial court determined that the testimony and evidence supported the finding that Defendant's conduct with respect to the Trusts' complete portfolio of assets satisfied the Prudent Investor Rule and that Plaintiffs' objections were heavily based on hindsight rather than in the context of the existing facts and circumstances at the time. The trial court found that Defendant relied upon the advice of Comerica in managing the securities. Defendant testified at length about the steps he took following the Decedent's death to interview and eventually retain an investment adviser and scheduled meetings with them to advise them of the trust requirements, and that he followed their advice. The Fourth District Court of Appeal upheld the trial court's decision on this issue.

iv) The Two Rules. The *Parker* case highlights two important rules regarding the Prudent Investor Rule:

(1) First, a trustee (or other fiduciary) should be judged by actions taken (or not taken) at that time, not later by the results of those actions; and

(2) **Second, a trustee may effectively delegate both his/her authority and his/her potential liability to a third party as long as he/she does so in accordance with the provisions of Fla. Stat. § 518.112.** ***See*** Exhibit "A."

EXHIBIT A

CHAPTER 518
INVESTMENT OF FIDUCIARY FUNDS

518.01 Investments of funds received from United States Department of Veterans Affairs.—Subject to the conditions herein contained, and except as otherwise authorized by law, guardians holding funds received from, or currently in receipt of funds from, the United States Department of Veterans Affairs, to the extent of those funds alone, may invest such funds only in the following:

(1) UNITED STATES GOVERNMENT OBLIGATIONS.—In bonds or other obligations, either bearing interest or sold on a discount basis, of the United States, or the United States Treasury, or those for the payment of the principal and interest of which the faith and credit of the United States is pledged, including such bonds or obligations of the District of Columbia.

(2) BONDS AND OBLIGATIONS OF STATES AND TERRITORIES.—In bonds or other interest-bearing obligations of any state of the United States, or the Territory of Puerto Rico; provided such state or territory has not, within 10 years previous to the date of making such investment, defaulted for more than 90 days in the payment of any part of the principal or interest of any of its bonded indebtedness.

(3) BONDS AND OTHER OBLIGATIONS OF POLITICAL SUBDIVISIONS WITHIN THE STATE OF FLORIDA.—In bonds or other interest-bearing obligations of any incorporated county, city, town, school district, or road and bridge district located within the state and which has according to the federal census next preceding the date of making the investment, a population of not less than 2,000 inhabitants and for which the full faith and credit of such political subdivision has been pledged; provided, that such political subdivision or its successor through merger, consolidation, or otherwise, has not within 5 years previous to the making of such investment, defaulted for more than 6 months in the payment of any part of the principal or interest of its bonded indebtedness.

(4) BONDS AND OBLIGATIONS OF POLITICAL SUBDIVISIONS LOCATED OUTSIDE THE STATE OF FLORIDA.—In bonds or other interest-bearing obligations of any incorporated county, city, or town located outside of the state, but within another state of the United States, which county, city, or town has, according to the federal census next preceding the date of making the investment a population of not less than 40,000 inhabitants and the indebtedness of which does not exceed 7 percent of the last preceding valuation of property for the purposes of taxation; provided, that the full faith and credit of such political subdivision shall have been pledged for the payment of the principal and interest of such bonds or obligations, and provided further, that such political subdivision or its successor, through merger, consolidation, or otherwise, has not within 15 years previous to the making of such investment, defaulted for more than 90 days in the payment of any part of the principal or interest of its bonded indebtedness.

(5) BONDS OR OBLIGATIONS OF FEDERAL LAND BANKS AND FARM CREDIT INSTITUTIONS.—In the bonds or other interest-bearing obligations of any federal land bank organized under any Act of Congress enacted prior to June 14, 1937, provided such bank is not in default in the payment of principal or interest on any of its obligations at the time of making the investment; and on any notes, bonds, debentures, or other similar obligations, consolidated or otherwise, issued by farm credit institutions pursuant to the Farm Credit Act of 1971, Pub. L. No. 92-181.

(6) BONDS OF RAILROAD COMPANIES.—

(a) Bonds bearing a fixed rate of interest secured by first mortgage, general mortgage, refunding mortgage, or consolidated mortgage which is a lien on real estate, rights or interest therein, leaseholds, right-of-way, trackage, or other fixed assets; provided, that such bonds have been issued or assumed by a qualified railroad company or guaranteed as to principal and interest by indorsement by a qualified railroad company or guaranteed as to principal and interest by indorsement, which guaranty has been assumed by a qualified railroad company.

(b)In bonds secured by first mortgage upon terminal, depot, or tunnel property, including buildings and appurtenances used in the service or transportation by one or more qualified railroad companies; provided that such bonds have been issued or assumed by a qualified railroad company or guaranteed as to principal and interest by indorsement by a qualified railroad company, or guaranteed as to principal and interest by indorsement, which guaranty has been assumed by a qualified railroad company.

(c)As used in this subsection, the words "qualified railroad company" means a railroad corporation other than a street railroad corporation which, at the date of the investment by the fiduciary, meets the following requirements:

1. It shall be a railroad corporation incorporated under the laws of the United States or of any state or commonwealth thereof or of the District of Columbia.

2. It shall own and operate within the United States not less than 500 miles of standard gauge railroad lines, exclusive of sidings.

3. Its railroad operating revenues derived from the operation of all railroad lines operated by it, including leased lines and lines owned or leased by a subsidiary corporation, all of the voting stock of which, except directors' qualifying shares, is owned by it, for its fiscal year next preceding the date of the investment, shall have been not less than $10 million.

4. At no time during its fiscal year in which the investment is made, and its 5 fiscal years immediately prior thereto, shall it have been in default in the payment of any part of the principal or interest owing by it upon any part of its funded indebtedness.

5. In at least 4 of its 5 fiscal years immediately preceding the date of investment, its net income available for fixed charges shall have been at least equal to its fixed charges, and in its fiscal year immediately preceding the date of investment, its net income available for fixed charges shall have been not less than 11/4 times its fixed charges.

(d) As used in this subsection, the words "income available for fixed charges" mean the amount obtained by deducting from gross income all items deductible in ascertaining the net income other than contingent income interest and those constituting fixed charges as used in the accounting reports of common carriers as prescribed by the accounting regulations of the [1]Interstate Commerce Commission.

(e) As used in this subsection, the words "fixed charges" mean rent for leased roads, miscellaneous rents, funded debt interest, and amortization of discount on funded debt.

(7) BONDS OF GAS, WATER, OR ELECTRIC COMPANIES.—In bonds issued by, or guaranteed as to principal and interest by, or assumed by, any gas, water, or electric company, subject to the following conditions:

(a) Gas, water, or electric companies by which such bonds are issued, guaranteed, or assumed, shall be incorporated under the laws of the United States or any state or commonwealth thereof or of the District of Columbia.

(b) The company shall be an operating company transacting the business of supplying water, electrical energy, artificial gas, or natural gas for light, heat, power, and other purposes, and provided that at least 75 percent of its gross operating revenue shall be derived from such business and not more than 15 percent of its gross operating revenues shall be derived from any other one kind of business.

(c) The company shall be subject to regulation by a public service commission, a public utility commission, or any other similar regulatory body duly established by the laws of the United States or any state or commonwealth or of the District of Columbia in which such company operates.

(d) The company shall have all the franchises necessary to operate in the territory in which at least 75 percent of its gross revenues are obtained, which franchises shall either be indeterminate permits of, or agreements with, or subject to the jurisdiction of, a public service commission or other duly constituted regulatory body, or shall extend at least 5 years beyond the maturity of the bonds.

(e) The company shall have been in existence for a period of not less than 8 fiscal years, and at no time within the period of 8 fiscal years immediately preceding the date of such investment shall such company have failed to pay punctually and regularly the matured principal and interest of all its indebtedness, direct, assumed, or guaranteed, but the period of life of the company, together with the period of life of any predecessor company, or company from which a major portion of its property was acquired by consolidation, merger, or purchase, shall be considered together in determining such required period.

(f) For a period of 5 fiscal years immediately preceding the date of the investment, net earnings shall have averaged per year not less than 2 times the average annual interest charges on its entire funded debt, applicable to that period and for the last fiscal year preceding the date of investment, such net earnings shall have been not less than 2 times such interest charges for that year.

(g) The bonds of any such company must be part of an issue of not less than $1 million and must be mortgage bonds secured by a first or refunding mortgage upon property owned and operated by the company issuing or assuming them or must be underlying mortgage bonds secured by property owned and operated by the companies issuing or assuming them. The aggregate principal amount of bonds secured by such first or refunding mortgage, plus the principal amount of all the underlying outstanding bonds, shall not exceed 60 percent of the value of the physical property owned, which shall be book value less such reserves for depreciation or retirement, as the company may have established, and subject to the lien of such mortgage or mortgages securing the total mortgage debt. If such mortgage is a refunding mortgage, it must provide for the retirement on or before the date of maturity of all bonds secured by prior liens on the property.

(h) As used in this subsection, the words “gross operating revenues and expenses” mean, respectively, the total amount earned from the operation of, and the total expenses of maintaining and operating, all property owned and operated by, or leased and operated by, such companies, as determined by the system of accounts prescribed by the Public Service Commission or other similar regulatory body having jurisdiction.

(i) As used in this subsection, the words “net earnings” mean the balance obtained by deducting from its gross operating revenues, its operating and maintenance expenses, taxes, other than federal and state income taxes, rentals, and provisions for depreciation, renewals and retirements of the physical assets of the company, and by adding to such balance its income from securities and miscellaneous sources, but not, however, exceeding 15 percent of such balance.

(8) BONDS OF TELEPHONE COMPANIES.—In bonds issued by, or guaranteed as to principal and interest by, or assumed by, any telephone company, subject to the following conditions:

(a) The telephone company by which such bonds are issued shall be incorporated under the laws of the United States or of any state or commonwealth thereof or of the District of Columbia and shall be engaged in the business of supplying telephone service in the United States and shall be subject to regulations by the Federal Communications Commission, a public service commission, a public utility commission, or any similar regulatory body duly established by the laws of the United States or of any state or commonwealth or of the District of Columbia in which such company operates.

(b) The company by which such bonds are issued, guaranteed, or assumed shall have been in existence for a period of not less than 8 fiscal years, and at no time within the period of 8 fiscal years immediately preceding the date of such investment shall such company have failed to pay punctually and regularly the matured principal and interest of all its indebtedness, direct, assumed, or guaranteed, but the period of life of the company, together with the period of life of any predecessor company, or company from which a major portion of its property was acquired by consolidation, merger, or purchase, shall be considered together in determining such required period. The company shall file with the Federal Communications Commission, or a public service commission or similar regulatory body having jurisdiction over it, and make public in each year a statement and a report giving the income account covering the previous fiscal year, and a balance sheet showing in reasonable detail the assets and liabilities at the end of the year.

(c) For a period of 5 fiscal years immediately preceding the investment, the net earnings of such telephone company shall have averaged per year not less than twice the average annual interest charges on its outstanding obligations applicable to that period, and for the last fiscal year preceding such investment, such net earnings shall have been not less than twice such interest charges for that year.

(d) The bonds must be part of an issue of not less than $5 million and must be mortgage bonds secured by a first or refunding mortgage upon property owned and operated by the company issuing or assuming them, or must be underlying mortgage bonds similarly secured. As of the close of the fiscal year preceding the date of the investment by the fiduciary, the aggregate principal amount of bonds secured by such first or refunding mortgage, plus the principal amount of all the underlying outstanding bonds, shall not exceed 60 percent of the value of the real estate and tangible personal property owned absolutely, which value shall be book value less such reserves for depreciation or retirement as the company may have established, and subject to the lien of such mortgage, or mortgages, securing the total mortgage debt. If such mortgage is a refunding mortgage, it must provide for the retirement, on or before the date of their maturity, of all bonds secured by prior liens on the property.

(e) As used in this subsection, the words “gross operating revenues and expenses” mean, respectively, the total amount earned from the operation of, and the total expenses of maintaining and operating all property owned and operated by, or leased and operated by, such company as determined by the system of accounts prescribed by the Federal Communications Commission, or any other similar federal or state regulatory body having jurisdiction in the matter.

(f) As used in this subsection, the words “net earnings” mean the balance obtained by deducting from the telephone company’s gross operating revenues its operating and maintenance expenses, provision for depreciation of the physical assets of the company, taxes, other than federal and state income taxes, rentals, and miscellaneous charges, and by adding to such balance its income from securities and miscellaneous sources but not, however, to exceed 15 percent of such balance.

(9) FIRST MORTGAGES.—In mortgages signed by one or more individuals or corporations, subject to the following conditions:

(a) If the taking of the mortgages as an investment for any particular trust, estate, or guardianship will not result in more than 40 percent of the then value of the principal of such trust, estate, or guardianship being invested in mortgages.

(b) Within 30 days preceding the taking of a mortgage as an investment, the property encumbered or to be encumbered thereby shall be appraised by two or more reputable persons especially familiar with real estate values. The fair market value of the property as disclosed by the appraisal of such persons shall be set forth in a writing dated and signed by them and in such writing they shall certify that their valuation of the property was made after an inspection of the same, including all buildings and other improvements.

(c) The mortgage shall encumber improved real estate located in the state and in or within 5 miles of the corporate limits of a city or town having a population of 2,000 or more, according to the federal census next preceding the date of making any such investment.

(d) The mortgage shall be or become, through the recordation of documents simultaneously filed for record, a first lien upon the property described therein prior to all other liens, except taxes previously levied or assessed but not due and payable at the time the mortgage is taken as an investment.

(e) The mortgage shall secure no indebtedness other than that owing to the executor, administrator, trustee, or guardian taking the same as an investment.

(f) The amount of the indebtedness secured by the mortgage shall not exceed 60 percent of the fair market value, as determined in accordance with the provisions of paragraph (b), of the property encumbered or to be encumbered by said mortgage.

(g) If the amount of the indebtedness secured by the mortgage is in excess of 50 percent of the fair market value, as determined in accordance with the provisions of paragraph (b), of the property encumbered or to be encumbered by said mortgage, then the mortgage shall require principal payments, at annual or more frequent intervals, sufficient to reduce by or before the expiration of 3 years from the date the mortgage is taken as an investment, the unpaid principal balance secured thereby to an amount not in excess of 50 percent of the fair market value of said property, as determined in accordance with the provisions of paragraph (b).

(h) The mortgage shall contain a covenant of the mortgagor to keep insured at all times the improvements on the real estate encumbered by said mortgage, with loss payable to the mortgagee, against loss and damage by fire, in an amount not less than the unpaid principal secured by said mortgage.

(i) Provided, however, that the foregoing limitations and requirements shall not apply to notes or bonds secured by mortgage or trust deed insured by the Federal Housing Administrator, and that notes or bonds secured by mortgage or trust deed insured by the Federal Housing Administrator are declared to be eligible for investment under the provisions of this chapter.

(10) LIFE INSURANCE.—Annuity or endowment contracts with any life insurance company which is qualified to do business in the state under the laws thereof.

(11) SAVINGS AND LOAN ASSOCIATIONS.—In savings share or investment share accounts of any federal savings and loan association chartered under the laws of the United States, and doing business in this state, and in the shares of any Florida building and loan association which is a member of the Federal Home Loan Bank System.

(12) SAVINGS ACCOUNTS, CERTIFICATES OF DEPOSIT; STATE AND NATIONAL BANKS.—In savings accounts and certificates of deposit in any bank chartered under the laws of the United States and doing business in this state, and in savings accounts and certificates of deposit in any bank chartered under the laws of this state.

(13) SAVINGS SHARE ACCOUNTS, CREDIT UNIONS.—In savings share accounts of any credit union chartered under the laws of the United States and doing business in this state, and savings share accounts of any credit union chartered under the laws of this state, provided the credit union is insured under the federal share insurance program or an approved state share insurance program.

In determining the qualification of investments under the requirements of this section, published statements of corporations or statements of reliable companies engaged in the business of furnishing statistical information on bonds may be used.

History.—s. 1, ch. 17949, 1937; CGL 1940 Supp. 7100(9); s. 1, ch. 28154, 1953; s. 1, ch. 63-111; s. 1, ch. 73-41; s. 2, ch. 74-92; s. 24, ch. 93-268.

[1]**Note.**—Abolished by s. 101, Pub. L. No. 104-88.

518.06 Investment of fiduciary funds in loans insured by Federal Housing Administrator.—Banks, savings banks, trust companies, building and loan associations, insurance companies, and guardians holding funds received from or currently in receipt of funds from the United States Department of Veterans Affairs to the extent of those funds alone, may:

(1) Make such loans and advances of credit, and purchases of obligations representing loans and advances of credit, as are insured by the Federal Housing Administrator, and obtain such insurance;

(2) Make such loans secured by real property or leasehold as the Federal Housing Administrator insures or makes a commitment to insure, and obtain such insurance.

History.—s. 1, ch. 17130, 1935; CGL 1936 Supp. 7100(1); s. 1, ch. 17980, 1937; s. 2, ch. 28154, 1953; s. 25, ch. 93-268.

518.07 Investment of fiduciary funds in bonds, etc., issued by Federal Housing Administrator.—

(1) Banks, savings banks, trust companies, building and loan associations, insurance companies, guardians holding funds received from or currently in receipt of funds from the United States Department of Veterans Affairs to the extent of those funds alone, the state and its political subdivisions, all institutions and agencies thereof, with the approval of the officials or boards having supervision or management of same, may invest their funds and moneys in their custody or possession, eligible for investment, in notes or bonds secured by mortgage or trust deed insured by the Federal Housing Administrator, in debentures issued by the Federal Housing Administrator, and in securities issued by national mortgage associations.

(2) Such notes, bonds, debentures, and securities made eligible for investment may be used wherever, by statute of this state, collateral is required as security for the deposit of public or other funds; or deposits are required to be made with any public official or departments, or an investment of capital or surplus, or a reserve or other fund, is required to be maintained consisting of designated securities.

History.—s. 2, ch. 17130, 1935; CGL 1936 Supp. 7100(2); s. 2, ch. 17980, 1937; s. 3, ch. 28154, 1953; s. 26, ch. 93-268.

518.08 Applicability of laws requiring security, etc.—No law of this state requiring security upon which loans or investments may be made, prescribing the nature, amount, or form of such security, prescribing or limiting interest rates upon loans or investments, limiting investments of capital or deposits, or prescribing or limiting the period for which loans or investments may be made, shall be deemed to apply to loans or investments made pursuant to ss. 518.06 and 518.07.

History.—s. 3, ch. 17130, 1935; CGL 1936 Supp. 7100(3).

518.09 Housing bonds legal investments and security.—The state and all public officers, municipal corporations, political subdivisions, and public bodies, all banks, bankers, trust companies, savings banks and institutions, building and loan associations, savings and loan associations, investment companies, all insurance companies, insurance associations, and other persons carrying on an insurance business, and guardians holding funds received from or currently in receipt of funds from the United States Department of Veterans Affairs to the extent of those funds alone may legally invest any sinking funds, moneys, or other funds belonging to them or within their control in any bonds or other obligations issued by a housing authority pursuant to the Housing Authorities Law of this state (chapter 421), or issued by any public housing authority or agency in the United States, when such bonds or other obligations are secured by a pledge of annual contributions to be paid by the United States Government or any agency thereof, and such bonds and other obligations shall be authorized security for all public deposits; it being the purpose of this section to authorize any person, associations, political subdivisions, bodies, and officers, public or private, to use any funds owned or controlled by them, including, but not limited to, sinking, insurance, investment, retirement, compensation, pension, and trust funds, and funds held on deposit, for the purchase of any bonds or other obligations; provided, however, that nothing contained in this section shall be construed as relieving any person from any duty of exercising reasonable care in selecting securities.

History.—ss. 1, 2, 3, ch. 19512, 1939; CGL 1940 Supp. 7100(3-nn); s. 4, ch. 28154, 1953; s. 27, ch. 93-268.

518.10 Fiduciary defined as used in ss. 518.11-518.14.—For the purpose of ss. 518.11-518.14, a "fiduciary" is defined as an executor, administrator, trustee, guardian (except any guardian holding funds received from or currently in receipt of funds from the United States Department of Veterans Affairs, to the extent of those funds alone), or other person, whether individual or corporate, who by reason of a written agreement, will, court order, or other instrument has the responsibility for the acquisition, investment, reinvestment, exchange, retention, sale, or management of money or property of another.

History.—s. 5, ch. 28154, 1953; s. 28, ch. 93-268.

518.11 Investments by fiduciaries; prudent investor rule.—

(1) A fiduciary has a duty to invest and manage investment assets as follows:

(a) The fiduciary has a duty to invest and manage investment assets as a prudent investor would considering the purposes, terms, distribution requirements, and other circumstances of the trust. This standard requires the exercise of reasonable care and caution and is to be applied to investments not in isolation, but in the context of the investment portfolio as a whole and as a part of an overall investment strategy that should incorporate risk and return objectives reasonably suitable to the trust, guardianship, or probate estate. If the fiduciary has special skills, or is named fiduciary on the basis of representations of special skills or expertise, the fiduciary is under a duty to use those skills.

(b) No specific investment or course of action is, taken alone, prudent or imprudent. The fiduciary may invest in every kind of property and type of investment, subject to this section. The fiduciary's investment decisions and actions are to be judged in terms of the fiduciary's reasonable business judgment regarding the anticipated effect on the investment portfolio as a whole under the facts and circumstances prevailing at the time of the decision or action. The prudent investor rule is a test of conduct and not of resulting performance.

(c) The fiduciary has a duty to diversify the investments unless, under the circumstances, the fiduciary believes reasonably it is in the interests of the beneficiaries and furthers the purposes of the trust, guardianship, or estate not to diversify.

(d) The fiduciary has a duty, within a reasonable time after acceptance of the trust, estate, or guardianship, to review the investment portfolio and to make and implement decisions concerning the retention and disposition of original preexisting investments in order to conform to the provisions of this section. The fiduciary's decision to retain or dispose of an asset may be influenced properly by the asset's special relationship or value to the purposes of the trust, estate, or guardianship, or to some or all of the beneficiaries, consistent with the trustee's duty of impartiality, or to the ward.

(e) The fiduciary has a duty to pursue an investment strategy that considers both the reasonable production of income and safety of capital, consistent with the fiduciary's duty of impartiality and the purposes of the trust, estate, or guardianship. Whether investments are underproductive or overproductive of income shall be judged by the portfolio as a whole and not as to any particular asset.

(f) The circumstances that the fiduciary may consider in making investment decisions include, without limitation, the general economic conditions, the possible effect of inflation, the expected tax consequences of investment decisions or strategies, the role each investment or course of action plays within the overall portfolio, the expected total return, including both income yield and appreciation of capital, and the duty to incur only reasonable and appropriate costs. The fiduciary may, but need not, consider related trusts, estates, and guardianships, and the income available from other sources to, and the assets of, beneficiaries when making investment decisions.

(2) The provisions of this section may be expanded, restricted, eliminated, or otherwise altered by express provisions of the governing instrument, whether the instrument was executed before or after the effective date of this section. An express provision need not refer specifically

to this statute. The fiduciary is not liable to any person for the fiduciary's reasonable reliance on those express provisions.

(3) Nothing in this section abrogates or restricts the power of an appropriate court in proper cases:

(a) To direct or permit the trustee to deviate from the terms of the governing instrument; or

(b) To direct or permit the fiduciary to take, or to restrain the fiduciary from taking, any action regarding the making or retention of investments.

(4) The following terms or comparable language in the investment powers and related provisions of a governing instrument shall be construed as authorizing any investment or strategy permitted under this section: "investments permissible by law for investment of trust funds," "legal investments," "authorized investments," "using the judgment and care under the circumstances then prevailing that persons of prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital," "prudent trustee rule," "prudent person rule," and "prudent investor rule."

(5) This section applies to all existing and future fiduciary relationships subject to this section, but only as to acts or omissions occurring after October 1, 1993.

History.—s. 6, ch. 28154, 1953; s. 2, ch. 93-257; s. 26, ch. 97-98; s. 686, ch. 97-103.

518.112 Delegation of investment functions.—

(1) A fiduciary may delegate any part or all of the investment functions, with regard to acts constituting investment functions that a prudent investor of comparable skills might delegate under the circumstances, to an investment agent as provided in subsection (3), if the fiduciary exercises reasonable care, judgment, and caution in selecting the investment agent, in establishing the scope and specific terms of any delegation, and in reviewing periodically the agent's actions in order to monitor overall performance and compliance with the scope and specific terms of the delegation.

(2)(a) The requirements of subsection (1) notwithstanding, a fiduciary that administers an insurance contract on the life or lives of one or more persons may delegate without any continuing obligation to review the agent's actions, certain investment functions with respect to any such contract as provided in subsection (3), to any one or more of the following persons as investment agents:

1. The trust's settlor if the trust is one described in s. 733.707(3);

2. Beneficiaries of the trust or estate, regardless of the beneficiary's interest therein, whether vested or contingent;

3. The spouse, ancestor, or descendant of any person described in subparagraph 1. or subparagraph 2.;

4. Any person or entity nominated by a majority of the beneficiaries entitled to receive notice under paragraph (3)(b); or

5. An investment agent if the fiduciary exercises reasonable care, judgment, and caution in selecting the investment agent and in establishing the scope and specific terms of any delegation.

(b) The delegable investment functions under this subsection include:

1. A determination of whether the insurance contract was procured or effected in compliance with s. 627.404;

2. A determination of whether any insurance contract is or remains a proper investment;

3. The investigation of the financial strength of the life insurance company;

4. A determination of whether or not to exercise any policy option available under any insurance contracts;

5. A determination of whether or not to diversify such contracts relative to one another or to other assets, if any, administered by the fiduciary; or

6. An inquiry about changes in the health or financial condition of the insured or insureds relative to any such contract.

(c) Until the contract matures and the policy proceeds are received, a fiduciary that administers insurance contracts under this subsection is not obligated to diversify nor allocate other assets, if any, relative to such insurance contracts.

(3) A fiduciary may delegate investment functions to an investment agent under subsection (1) or subsection (2), if:

(a) In the case of a guardianship, the fiduciary has obtained court approval.

(b) In the case of a trust or estate, the fiduciary has given written notice, of its intention to begin delegating investment functions under this section, to all beneficiaries, or their legal representative, eligible to receive distributions from the trust or estate within 30 days of the delegation unless such notice is waived by the eligible beneficiaries entitled to receive such notice. This notice shall thereafter, until or unless the beneficiaries eligible to receive income from the trust or distributions from the estate at the time are notified to the contrary, authorize the trustee or legal representative to delegate investment functions pursuant to this subsection. This discretion to revoke the delegation does not imply under subsection (2) any continuing obligation to review the agent's actions.

1. Notice to beneficiaries eligible to receive distributions from the trust from the estate, or their legal representatives shall be sufficient notice to all persons who may join the eligible class of beneficiaries in the future.

2. Additionally, as used herein, legal representative includes one described in s. 731.303, without any requirement of a court order, an attorney-in-fact under a durable power of attorney sufficient to grant such authority, a legally appointed guardian, or equivalent under applicable law, any living, natural guardian of a minor child, or a guardian ad litem.

3. Written notice shall be given as provided in part III of chapter 731 as to an estate, and as provided in s. 736.0109 and part III of chapter 736 as to a trust.

(4) If all requirements of subsection (3) are satisfied, the fiduciary shall not be responsible otherwise for the investment decisions nor actions or omissions of the investment agent to which the investment functions are delegated.

(5) The investment agent shall, by virtue of acceptance of its appointment, be subject to the jurisdiction of the courts of this state.

(6) In performing a delegated function, the investment agent shall be subject to the same standards as the fiduciary.

History.—s. 3, ch. 93-257; s. 8, ch. 97-240; s. 2, ch. 2010-172.

518.115 Power of fiduciary or custodian to deposit securities in a central depository.—

(1)(a) Notwithstanding any other provision of law, any fiduciary, as defined in s. 518.10, holding securities, as defined in [1]s. 678.102(1), in its fiduciary capacity, and any bank or trust company holding securities as a custodian, managing agent, or custodian for a fiduciary, is authorized to deposit or arrange for the deposit of such securities in a clearing corporation, as defined in [1]s. 678.102(3). When such securities are so deposited, certificates representing securities of the same class of the same issuer may be merged and held in bulk in the name of the nominee of such clearing corporation with any other such securities deposited in such clearing corporation by any person, regardless of the ownership of such securities, and certificates of small denomination may be merged into one or more certificates of larger denomination.

(b) A bank or a trust company so depositing securities with a clearing corporation shall be subject to such rules and regulations with respect to the making and maintenance of such deposit as, in the case of state-chartered institutions, the Financial Services Commission and, in the case of national banking associations, the Comptroller of the Currency may from time to time issue.

(c) Notwithstanding any other provisions of law, ownership of, and other interests in, the securities credited to such account may be transferred by entries on the books of said clearing corporation without physical delivery of any securities. The records of such fiduciary and the records of such bank or trust company acting as custodian, managing agent, or custodian for a fiduciary shall at all times show the name of the party for whose account the securities are so

deposited. A bank or trust company acting as custodian for a fiduciary shall, on demand by the fiduciary, certify in writing to the fiduciary the securities so deposited by such bank or trust company in such clearing corporation for the account of such fiduciary. A fiduciary shall, on demand by any party to a judicial proceeding for the settlement of such fiduciary's account or on demand by the attorney for such party, certify in writing to such party the securities deposited by such fiduciary in such clearing corporation for its account as such fiduciary.

(2) This section shall apply to any fiduciary holding securities in its fiduciary capacity, and to any bank or trust company holding securities as a custodian, managing agent, or custodian for a fiduciary, acting on June 18, 1974, or who thereafter may act regardless of the date of the agreement, instrument, or court order by which it is appointed and regardless of whether or not such fiduciary, custodian, managing agent, or custodian for a fiduciary owns capital stock of such clearing corporation.

History.—s. 1, ch. 74-224; s. 613, ch. 2003-261.

[1]**Note.**—Repealed by s. 25, ch. 98-11.

518.116 Power of certain fiduciaries and custodians to deposit United States Government and agency securities with a Federal Reserve bank.—

(1)(a) Notwithstanding any other provision of law, any fiduciary, as defined in s. 518.10, which is a bank or trust company holding securities in its fiduciary capacity, and any bank or trust company holding securities as a custodian, managing agent, or custodian for a fiduciary, is authorized to deposit or arrange for the deposit with the Federal Reserve Bank in its district of any securities, the principal and interest of which the United States Government or any department, agency, or instrumentality thereof has agreed to pay or has guaranteed payment, to be credited to one or more accounts on the books of said Federal Reserve Bank in the name of such bank or trust company to be designated fiduciary or safekeeping accounts, to which account other similar securities may be credited.

(b) A bank or trust company so depositing securities with a Federal Reserve Bank shall be subject to such rules and regulations with respect to the making and maintenance of such deposits as, in the case of state-chartered institutions, the Financial Services Commission and, in the case of national banking associations, the Comptroller of the Currency may from time to time issue. The records of such bank or trust company shall at all times show the ownership of the securities held in such account.

(c) Notwithstanding any other provision of law, ownership of, and other interests in, the securities credited to such account may be transferred by entries on the books of said Federal Reserve Bank without physical delivery of any securities. The records of such fiduciary and the records of such bank or trust company acting as custodian, managing agent, or custodian for a fiduciary shall at all times show the name of the party for whose account the securities are so deposited. A bank or a trust company acting as custodian for a fiduciary shall, on demand by the fiduciary, certify in writing to the fiduciary the securities so deposited by such bank or trust company with such Federal Reserve Bank for the account of such fiduciary. A fiduciary shall, on demand by any party to a judicial proceeding for the settlement of such fiduciary's account or on

demand by the attorney for such party, certify in writing to such party the securities deposited by such fiduciary with such Federal Reserve bank for its account as such fiduciary.

(2) This section shall apply to any fiduciary and to any bank or trust company holding securities as custodian, managing agent, or custodian for a fiduciary, acting on June 18, 1974, or who thereafter may act regardless of the date of the instrument or court order by which it is appointed.

History.—s. 2, ch. 74-224; s. 1, ch. 77-174; s. 614, ch. 2003-261.

518.117 Permissible investments of fiduciary funds.—A fiduciary that is authorized by lawful authority to engage in trust business as defined in s. 658.12(20) may invest fiduciary funds in accordance with s. 660.417 so long as the investment otherwise complies with this chapter.

History.—s. 15, ch. 2006-217.

518.12 Instrument creating or defining powers, duties of fiduciary not affected.—Nothing contained in ss. 518.10-518.14 shall be construed as conferring a power of sale upon any fiduciary not possessing such power or as authorizing any departure from, or variation of, the express terms or limitations set forth in any will, agreement, court order, or other instrument creating or defining the fiduciary's duties and powers, but the terms "legal investment" or "authorized investment" or words of similar import, as used in any such instrument, shall be taken to mean any investment which is permitted by the terms of s. 518.11.

History.—s. 7, ch. 28154, 1953; s. 1, ch. 57-120.

518.13 Authority of court to permit deviation from terms of instrument creating trust not affected.—Nothing contained in ss. 518.10-518.14 shall be construed as restricting the power of a court of proper jurisdiction to permit a fiduciary to deviate from the terms of any will, agreement, or other instrument relating to the acquisition, investment, reinvestment, exchange, retention, sale, or management of fiduciary property.

History.—s. 8, ch. 28154, 1953.

518.14 Scope of ss. 518.10-518.13.—The provisions of ss. 518.10-518.13 shall govern fiduciaries acting under wills, agreements, court orders, and other instruments now existing or hereafter made.

History.—s. 9, ch. 28154, 1953.

518.15 Bonds or motor vehicle tax anticipation certificates, legal investments and security.—Notwithstanding any restrictions on investments contained in any law of this state, the state and all public officers, municipal corporations, political subdivisions, and public bodies, all banks, bankers, trust companies, savings banks, building and loan associations, savings and loan associations, investment companies, and all persons carrying on an insurance business, and all executors, administrators, guardians, trustees, and other fiduciaries may legally invest any sinking funds, moneys or other funds belonging to them or within their control in bonds or motor

vehicle anticipation certificates issued under authority of s. 18, Art. XII of the State Constitution of 1885 as adopted by s. 9(d) of Art. XII, 1968 revised constitution, and the additional provisions of s. 9(d), and such bonds or certificates shall be authorized security for all public deposits, including, but not restricted to, deposits as authorized in s. 17.57, it being the purpose of this act to authorize any person, firm or corporation, association, political subdivision, body, and officer, public or private, to use any funds owned or controlled by them, including, but not limited to, sinking, insurance, investment, retirement, compensation, pension, and trust funds, and funds held on deposit, for the purchase of any such bonds or anticipation certificates, up to the amount as authorized by law to be invested in any type of security, including United States Government Bonds.

History.—s. 1, ch. 27990, 1953; s. 31, ch. 69-216; s. 615, ch. 2003-261.

518.151 Higher education bonds or certificates, legal investments and security.—Notwithstanding any restrictions on investments contained in any law of this state, the state and all public officers, municipal corporations, political subdivisions, and public bodies, all banks, bankers, trust companies, savings banks, building and loan associations, savings and loan associations, investment companies, and all persons carrying on an insurance business, and all executors, administrators, guardians, trustees, and other fiduciaries may legally invest any sinking funds, moneys or other funds belonging to them or within their control in higher education bonds or certificates issued under authority of s. 19, Art. XII of the State Constitution of 1885 or of s. 9(a), Art. XII of the constitution as revised in 1968, as amended, and such bonds or certificates shall be authorized security for all public deposits, including, but not restricted to, deposits as authorized in s. 17.57, it being the purpose of this act to authorize any person, firm or corporation, association, political subdivision, body, and officer, public or private, to use any funds owned or controlled by them, including, but not limited to, sinking, insurance, investment, retirement, compensation, pension, and trust funds, and funds held on deposit, for the purchase of any such bonds or certificates, up to the amount as authorized by law to be invested in any type of security, including United States Government Bonds.

History.—s. 1, ch. 65-443; s. 140, ch. 71-355; s. 616, ch. 2003-261.

518.152 Puerto Rican bonds or obligations, legal investments and securities.—Notwithstanding any restrictions on investments contained in any law of this state, all public officers and public bodies of the state, counties, municipal corporations, and other political subdivisions; all banks, bankers, trust companies, savings banks, building and loan associations, savings and loan associations, investment companies, and other persons carrying on a banking business; all insurance companies, insurance associations and other persons carrying on an insurance business; all persons holding in trust any pension, health and welfare, and vacation funds; all administrators, executors, guardians, trustees, and other fiduciaries of any public, quasi-public, or private fund or estate; and all other persons authorized to invest in bonds or other obligations may legally invest any sinking funds, moneys, or other funds belonging to them or within their control in bonds or other obligations issued by the Commonwealth of Puerto Rico, its agencies, authorities, instrumentalities, municipalities, or political subdivisions, provided such agency, authority, instrumentality, municipality, or political subdivision has not, within 5 years prior to the making of such investment, defaulted for more than 90 days in the payment of any part of the principal or interest of its bonded indebtedness. Such bonds or obligations shall be

authorized security for all public deposits, including, but not restricted to, deposits as authorized in s. 17.57, it being the purpose of this section to authorize any person, firm, corporation, association, political subdivision, body, and officer, public or private, to use any funds owned or controlled by them, including, but not limited to, sinking, insurance, investment, retirement, compensation, pension and trust funds, and funds held on deposit, for the purchase of any such bonds or obligations up to the amount as authorized by law to be invested in any type of security, including United States Government Bonds. However, nothing contained in this section shall be construed as relieving any person from any duty of exercising reasonable care in selecting securities.

History.—s. 1, ch. 72-136; s. 617, ch. 2003-261.

518.16 Chapter cumulative.—This chapter shall be cumulative to any other law providing for investments and security for public deposits.

History.—s. 2, ch. 27990, 1953; s. 11, ch. 28154, 1953.