TRANSITIONING FROM UMIFA TO UPMIFA: HOW THE PROMULGATION OF THE UNIFORM PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS ACT WILL AFFECT DONOR-INITIATED LAWSUITS BROUGHT AGAINST COLLEGES AND UNIVERSITIES

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INTRODUCTION

Since the establishment of America's first university in 1636 thanks to the donation of John Harvard's library and estate upon his death,[1] American colleges and universities have relied upon the generosity of donors to fund the education they provide. In the 2008 fiscal year, yearly charitable contributions to colleges and universities reached an all-time high of over $31 billion.[2]

In forty-eight states plus the District of Columbia, donations to those colleges and universities that are eleemosynary[3] in character are governed by state statutes based upon uniform laws promulgated by the Uniform Law Commission.[4] The first of the Uniform Laws governing the

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1. President and Fellows of Harvard College, The Harvard Guide: History, Lore, and More, http://www.hno.harvard.edu/guide/intro/index.html (last visited Feb. 1, 2009).

2. Press Release, Council for Aid to Education, Contributions to Colleges and Universities up 6.2 percent to $31.60 Billion (Feb. 25, 2009), *available at* http://www.cae.org/content/pdf/VSE_2008_Survey_Press_Release_with_Tables.pdf. From 1998 to 2008, charitable contributions increased 4.1% each year on average. *Id.* After reaching the all-time high of $31.60 billion during the 2008 fiscal year, contributions decreased by 11.9% in the 2009 fiscal year, the steepest decline in charitable contributions ever recorded by the Council for Aid to Education. Press Release, Council for Aid to Education, Contributions to Colleges and Universities Down 11.9 percent to $27.85 Billion: Greatest Decline Ever Recorded (Feb. 3, 2010), *available at* http://www.cae.org/content/pdf/VSE_2009_Press_Relsease.pdf.

3. Eleemosynary is defined as "[o]f, relating to, or assisted by charity; not-for-profit." BLACK'S LAW DICTIONARY (8th ed. 2004).

4. The Uniform Law Commission, also called the National Conference of

investment and management of donations to non-profit organizations, the Uniform Management of Institutional Funds Act ("UMIFA"), was promulgated in 1972.[5] Its successor, the Uniform Prudent Management of Institutional Funds Act[6] ("UPMIFA"), was recommended to the states in 2006 in order to update the management and investment rules first created by UMIFA.[7]

Commissioners on Uniform State Laws, "provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of the law." Uniform Law Commission, http://www.nccusl.org/Update/ (Feb. 3, 2010).

5. UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT (Nat'l Conference of Comm'rs on Unif. State Laws 1972).

6. UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT (Nat'l Conference of Comm'rs on Unif. State Laws 2006).

7. The following forty-six states have adopted the UPMIFA as a state statute: Alabama (ALA. CODE § 19-3C-1 *et seq.* (2009)); Alaska (ALASKA STAT. § 13.70.010 (2009)); Arizona (ARIZ. REV. STAT. ANN. § 10-11801 *et seq.* (2009)); Arkansas (ARK. CODE ANN. § 28-69-801 *et seq.* (West 2009)); California (CAL. PROB. CODE § 18501 *et seq.* (West 2009)); Colorado (COLO. REV. STAT. § 15-1-1101 *et seq.* (2009)); Connecticut (CONN. GEN. STAT. § 45a-535 *et seq.* (2009)); Delaware (DEL. CODE ANN. tit. 12, § 4701 *et seq.* (2009)); Georgia (GA. CODE ANN. § 44-15-1 *et seq.* (2009)); Hawaii (HAW. REV. STAT. § 518E-1 *et seq.* (2009)); Idaho (IDAHO CODE ANN. § 33-5001 *et seq.* (2009)); Illinois (760 ILL. COMP. STAT. ANN. 51/1 *et seq.* (West 2009)); Indiana (IND. CODE ANN. § 30-2-12-1 *et seq.* (West 2009)); Iowa (IOWA CODE § 540A.101 *et seq.* (2009)); Kansas (KAN. STAT. ANN. § 58-3611 *et seq.* (2009)); Kentucky (KY. REV. STAT. ANN. § 273.600 *et seq.* (West 2010), Louisiana (LA. REV. STAT. ANN. § 2337:1 (2009)); Maine (ME. REV. STAT. ANN. tit. 13, § 5101 *et seq.* (2009)); Maryland (MD. CODE ANN., EST. & TRUSTS § 15-401 *et seq.* (West 2009)); Massachusetts (MASS. GEN. LAWS ch. 180A § 1 *et seq.* (2009)); Michigan (MICH. COMP. LAWS § 451.921 *et seq.* (2009)); Minnesota (MINN. STAT. § 309.73 *et seq.* (2009)); Missouri (MO. REV. STAT. § 402.130 *et seq.* (2009)); Montana (MON. CODE ANN. § 72-30-101 *et seq.* (2009)); Nebraska (NEB. REV. STAT. § 58-610 *et seq.* (2009)); Nevada (NEV. REV. STAT. § 164-640 *et seq.* (2009)); New Hampshire (N.H. REV. STAT. ANN. § 292-B:1 *et seq.* (2009)); New Jersey (N.J. STAT. ANN. § 15:18-25 *et seq.* (West 2009)); New Mexico (N.M. STAT. § 46-9A-1 *et seq.* (2009)); North Carolina (N.C. GEN. STAT. ANN. § 36E-1 *et seq.* (West 2009)); North Dakota (N.D. CENT. CODE 59-21-01 *et seq.* (2009)); Ohio (OHIO REV. CODE ANN. § 1715.51 *et seq.* (West 2009)); Oklahoma (OKLA. STAT. tit. 60, § 300.11 *et seq.* (2009)); Oregon (OR. REV. STAT. § 128.305 *et seq.* (2009)); Rhode Island (R.I. GEN. LAWS § 18-12.1-1 *et seq.* (2009)); South Carolina (S.C. CODE ANN. § 34-6-10 *et seq.* (2009)); South Dakota (S.D. CODIFIED LAWS § 55-14A-1 *et seq.* (2009)); Tennessee (TENN. CODE ANN. § 35-10-201 *et seq.* (2009)); Texas (TEX. PROP. CODE ANN. § 163.001 *et seq.* (Vernon 2009)); Utah (UTAH CODE ANN. § 51-8-101 *et seq.* (2009)); Vermont (VT. STAT. ANN. tit. 14, § 3411 *et seq.* (2009)); Virginia (VA. CODE ANN. § 55-268.11 *et seq.* (2009)); Washington (WASH. REV. CODE § 24.55.005 *et seq.* (2009)); West Virginia (W. VA. CODE § 44-6A-1 *et seq.* (2009)); Wisconsin (WIS. STAT. ANN. § 112.11 *et seq.* (West 2009)); Wyoming (WYO. STAT. ANN. § 17-7-301 *et seq.* (2009)). The District of Columbia has also adopted UPMIFA as statute. D.C. CODE § 44-1631 *et seq.* (2009). *See also* Uniform Law Commission, Enactment Status Map (Dec. 31, 2009), *available at* http://upmifa.org/DesktopDefault.aspx?tabindex=5&tabid=68. The UMIFA is still in effect in five of the forty-seven states that originally enacted it as statute: Florida (FLA. STAT. § 1010.10 *et seq.* (2009)); Kentucky (KY. REV. STAT. ANN. § 273.510 *et seq.* (West 2009)); Louisiana (LA. REV. STAT. ANN. § 9:2337.1 *et seq.* (2009)); Mississippi (MISS. CODE ANN. § 79-11-601 *et seq.* (2009)); and New York (N.Y. NOT-FOR-PROFIT

In theory, the changes made in updating UMIFA could have a substantial impact on the ability of donors to enforce restrictions or conditions placed upon the gifts that they make to colleges and universities.[8] This Note argues, however, that very few changes will in fact take place on that front in states that adopt UPMIFA. Part I, below, will lay out the main goals of both of the Uniform Laws[9] and highlight the major changes made by UPMIFA. Part II will provide an overview of the most important lawsuits brought under UMIFA, especially focusing on the most recent lawsuit, brought by donors against Princeton University in 2002. Finally, Part III will explain why the adoption of UPMIFA is likely to have a minimal impact on colleges and universities when they are involved in litigation with dissatisfied donors.

I. THE UNIFORM LAWS: REGULATING CHARITABLE DONATIONS

Prior to the enactment of the first Uniform Law by the Uniform Law Commission in 1972, there was no clearly defined body of law to govern the use, management, and investment of funds given to charitable organizations.[10] UMIFA established, for the first time ever, "uniform and fundamental rules for the investment of funds held by charitable institutions and the expenditure of funds donated as 'endowments' to those institutions."[11] Its rules governed the management of all funds held by a charitable institution "for its exclusive use, benefit, or purposes,"[12] but placed special emphasis on endowment funds and other funds accompanied by donor intent.

A. The General Purpose of UMIFA

The overarching aim of UMIFA was to meet the needs of charitable institutions by creating for them a distinct set of uniform laws well-tailored to the unique problems generated by charitable donations. Courts hearing cases involving charitable organizations and attorneys offering advice to charities often turned to trust law, corporate law, and contract law, but no one type of law was applied consistently, and none was a good fit for

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CORP. §§ 102, 512, 514, 522 (McKinney 2009)). As of June 14, 2010, UPMIFA had been introduced but not yet passed in Mississippi and New York.

8. Approximately half of all charitable contributions to colleges and universities are explicitly given for a "capital purpose" and cannot be used simply to support the current operations of the institution. Council for Aid to Education, *supra* note 2.

9. I will use the phrase Uniform Laws to refer to the UMIFA and UPMIFA together.

10. UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT prefatory note at 1 (Nat'l Conference of Comm'rs on Unif. State Laws 1972).

11. Uniform Law Commission, History of UPMIFA and UMIFA, http://upmifa.org/DesktopDefault.aspx?tabindex=2&tabid=69 (Feb. 1, 2009).

12. UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT § 1(2) (Nat'l Conference of Comm'rs on Unif. State Laws 1972).

charitable organizations. The lack of a pertinent body of uniform law governing charitable donations had proven to be disadvantageous for both the donors and the charitable institutions receiving their gifts.

1. The State of Charitable Institutions Pre-UMIFA

Only a few years before the Uniform Law Commission would promulgate UMIFA, Professors William Cary and Craig Bright published their landmark study on endowment funds.[13] Through a review of cases involving nonprofit corporations, they found that "[t]rust principles or corporate principles are applied if they happen to be of assistance in reaching the desired conclusion . . . ."[14] Even more disconcerting to charitable institutions than this mix of trust law and corporate law was the fact that the courts showed "no undue concern . . . for the niceties of logic and consistency in choosing between the two."[15]

In addition to this general uncertainty surrounding charities, they also faced specific legal problems because there was no uniform body of law governing charitable institutions. In 1972, the Uniform Law Commission noted that there was "substantial concern about the potential liability of the managers of the institutional funds" among eleemosynary institutions.[16] Despite the increasing number of charitable organizations, "virtually no statutory law regarding trustees or governing boards of eleemosynary institutions" existed.[17] When disputes did arise about the liability of management, courts were forced to turn either to trust law or corporate law. The problem was that trustees and governing boards were held to different standards under trust law than in corporate law.[18] They enjoyed greater freedom under the corporate standard, but were held to a very strict standard in trust law.[19] For all practical purposes, uncertainty as to which standard applied meant that a case brought against a charity's trustees or its

13. *Id.* prefatory note at 1.

14. WILLIAM L. CARY AND CRAIG B. BRIGHT, THE LAW AND THE LORE OF ENDOWMENT FUNDS 18 (1969).

15. *Id.*

16. UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT prefatory note at 1 (Nat'l Conference of Comm'rs on Unif. State Laws 1972).

17. *Id.*

18. In trust law as it existed in 1972, those with fiduciary duties were held to a strict duty of care, under which simple negligence was the threshold for liability. This duty of care was often expressed as the "prudent man rule"—the duty "to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property." Douglas M. Salaway, *UMIFA and a Model For Endowment Investing*, 22 J.C. & U.L. 1045, 1064 (1996). On the other hand, in corporate law, the duty of care was more lenient, requiring only "the care an ordinarily prudent person in a like position would exercise under similar circumstances." More than simple negligence was required to impose liability under this standard. *Id.* at 1064-65. *See also* Iris J. Goodwin, *Donor Standing to Enforce Charitable Gifts: Civil Society vs. Donor Empowerment*, 58 VAND. L. REV. 1093, 1129 (2005) [hereinafter Goodwin 1].

19. Salaway, *supra* note 18, at 1064.

governing board could be won or lost solely based on the determination of the applicable law. Considering that courts did not agree on which standard to apply, case law on the matter was nothing more than "a series of seemingly disjointed cases that made it difficult for governing boards and their attorneys to predict judicial judgment."[20]

When it came to the investment of charitable funds, many charities assumed that they were bound by trust law,[21] and their legal counsel often gave advice based on analogy to trust law.[22] However, trust law was not a perfect fit for charitable institutions. The investment standards and accounting principles of trust law placed strict restrictions on the ability of charities to invest, hindering the production of adequate income.[23] This often resulted in an erosion of principal that "left the charity in worse shape overall than if the charity could have taken a more balanced approach to its investments."[24]

Additionally, without uniform laws specifically tailored to the problems of charitable institutions, the legally binding nature of donor-imposed restrictions[25] had the potential to "imperi[l] the effective management of the fund," especially as these restrictions became old and obsolete.[26] There was always the danger that charitable institutions would end up with no way to escape burdensome restrictions imposed upon them by long-dead donors. Take for example the case of *In re Weaver's Trust*,[27] involving a donation given to Gettysburg College to provide scholarships to white, Protestant males. Despite the College's objection to the racial restriction at the time of the donation, and despite the existence of college and church policy[28] against racial discrimination, the court refused to release the

20. *Id*. at 1065.

21. *See* Susan N. Gary, *Charities, Endowments, and Donor Intent: The Uniform Prudent Management of Institutional Funds Act*, 41 GA. L. REV. 1277, 1283 (2007) [hereinafter Gary 1]; Salaway, *supra* note 18, at 1050-51.

22. UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT prefatory note at 1 (Nat'l Conference of Comm'rs on Unif. State Laws 1972).

23. *See* Gary 1, *supra* note 21, at 1283, 1296; Susan Gary, *UMIFA Becomes UPMIFA*, p. 4, http://www.nccusl.org/Update/Docs/UMIFA Becomes UPMIFA.pdf [hereinafter Gary 2].

24. Gary 1, *supra* note 21, at 1283.

25. In one way or another, all donations to charitable organizations are governed by restrictions. Some donations are restricted only to the extent that they are given to and are to be spent by a specific institution. A donor may, however, make his donation conditional upon certain restrictions being accepted by the charity. If an organization accepts a conditional gift, it becomes legally bound to abide by any restrictions attached to it. *See, e.g.*, Evelyn Brody, *From the Dead Hand to the Living Dead: The Conundrum of Charitable-Donor Standing*, 41 GA. L. REV. 1183, 1187 (2007); Goodwin 1, *supra* note 18, at 1107.

26. UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT prefatory note at 5 (Nat'l Conference of Comm'rs on Unif. State Laws 1972).

27. In re Weaver's Trust, 43 Pa. D. & C.2d 245 (Pa. Orph. Ct. 1967).

28. At the time, Gettysburg College was under the influence of the Lutheran Church. *Id*. at 248-49.

College from the racial restriction.[29] The court's reasoning for continuing to hold Gettysburg College to the donor-imposed restriction to accept only white males was that "the eligibility criterion 'white', is clearly and unmistakably declared and can be literally and lawfully carried out."[30] The fact that the College could not comply with the racial criterion was dismissed as a problem of the trustee—here, Gettysburg College—and not the gift.[31]

2. The State of Donors Before UMIFA

Donors also faced potential problems if institutions chose not to follow donor-imposed restrictions. Donors who made conditional gifts to charitable organizations often found themselves in difficult legal situations because the charities were legally bound by the restrictions and conditions placed on gifts, but the donors were unable to enforce these restrictions.[32] Because restricted gifts are not traditionally seen as contracts, donors could not turn to contract law for enforcement.[33] Additionally, donors did not have, and still do not have, standing to sue a charity for non-compliance with donor-imposed restrictions.[34] Consequently, donors could do very little to ensure that their donations were spent in accordance with their intent. Nevertheless, donors still occasionally turned to the courts in an attempt to have restrictions on charitable donations enforced. Most courts dismissed these cases due to a lack of standing.[35] On the rare occasion that a donor's case was heard on the merits, donors were not recognized as having much power vis-à-vis the charitable organizations. For example, in a 1970 case brought against Dartmouth College, the court refused to enforce donor-imposed restrictions that were clearly intended to be mandatory by the donor.[36] Another court, also in 1970, went so far as to hold that a college's violation of the terms of the charitable trust "[did] not entitle the settlor or his successor to enforce" the terms of the gift instrument.[37]

29. *Id.* at 254.
30. *Id.*
31. *Id.*
32. *See* Brody, *supra* note 25, at 1187; Gary 2, *supra* note 23, at 4, 6.
33. Brody, *supra* note 25, at 1225.
34. *Id.* at 1187.
35. *See, e.g.*, Amundson v. Kletzing-McLaughlin Mem'l Found. Coll., 73 N.W.2d 114 (Iowa 1955) (dismissing the action because the donor's widow and children had no "reservation or condition which amounts of a property interest" in the property donated to the college); Penn v. Keller, 16 S.E.2d 331 (Va. Ct. App. 1941) (holding that the donor had no standing to have the trust enforced once there was "a complete dedication" to the recipient college).
36. Trs. of Dartmouth Coll. v. Quincy, 258 N.E.2d 745, 753 (Mass. 1970).
37. Wilbur v. Univ. of Vt., 270 A.2d 889 (Vt. 1970).

3. Meeting These Needs with the Uniform Laws

In drafting UMIFA and later UPMIFA, the Uniform Law Commission attempted to balance the interests of the institutions with those of the donors when dealing with donor-imposed restrictions. To specifically address one of the problems raised by donor-imposed restrictions for charities—namely, the perpetuity of even the most ridiculous restrictions—both UMIFA and UPMIFA allow for the release of restrictions.[38] On the other hand, to protect donors and donor intent, many provisions of both UMIFA and UPMIFA are restricted by, or can be overridden by, a written agreement between the donors and the charity.[39] On a more general level, both UMIFA and UPMIFA establish the goal of ensuring that funds held by charitable institutions are managed and used prudently and according to the donor's intentions without deterring the operation of the charity or unduly restricting its ability to respond to changes in the world.

B. How UPMIFA Differs from its Predecessor

While both Uniform Laws serve the same general purposes, UPMIFA approaches these goals by a path distinct from that of UMIFA. UPMIFA was written in 2006 with the goal of "balancing protection of donor intent with the flexibility that will enable charities to cope with economic upturns and downturns."[40] To achieve this goal, UPMIFA modernizes and updates the rules governing endowment funds and donor-imposed restrictions.[41]

To accomplish this modernization of the Uniform Laws, the Uniform Law Commission made many changes to UMIFA. Three of these changes are especially noteworthy: the deletion of "historic dollar value," the updating of the prudence standard, and the liberalization of conditions under which donor-imposed restrictions can be modified. It is these modifications that seem most likely to impact the nature of lawsuits brought against colleges and universities under the Uniform Laws. These changes also are likely to have a significant impact on the manner in which

38. UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT § 7 (Nat'l Conference of Comm'rs on Unif. State Laws 1972); UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 6 (Nat'l Conference of Comm'rs on Unif. State Laws 2006).

39. *See, e.g.*, UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT §§ 3, 4, 5 (Nat'l Conference of Comm'rs on Unif. State Laws 1972); UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT §§ 3(a), 3(e), 4(a), 4(b) (Nat'l Conference of Comm'rs on Unif. State Laws 2006). The UMIFA considered any writing that "establishes the terms of the gift" to be an authoritative "gift instrument." UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT § 1 cmt. (Nat'l Conference of Comm'rs on Unif. State Laws 1972). Under the UPMIFA, any "writing" that expresses the intent of both the donor and the charity at the time of the donation serves as a "gift instrument." UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 2 cmt. (Nat'l Conference of Comm'rs on Unif. State Laws 2006).

40. Gary 1, *supra* note 21, at 1332-33.

41. UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT prefatory note at 1-2 (Nat'l Conference of Comm'rs on Unif. State Laws 2006).

endowment funds are invested and maintained by colleges and universities.

1. The Maintenance of Endowment Funds

Both UMIFA and UPMIFA focus a great deal on the maintenance of endowment funds. An endowment fund is a specific kind of conditional gift, one in which the most basic restriction is on how much of the fund can be spent.[42] The two Uniform Laws define an endowment fund in slightly different ways, but the concept is the same: an endowment fund, by its very nature, cannot be spent in its entirety; a portion of the fund's value must be preserved and maintained for continued and future use.[43]

While UPMIFA does not change the way in which an endowment fund is defined, it does change the way in which these funds are maintained. It does so mainly by eliminating UMIFA's limitation of historic dollar value, but it also includes an optional rebuttable presumption of imprudence.[44]

a. Elimination of Historic Dollar Value

UMIFA used the historic-dollar-value calculation in order to achieve the goal of making sure that endowment funds were properly maintained.[45] This provision was meant to provide a monetary limit to institutions for the spending of funds held in endowment. The historic-dollar-value calculation consisted of the "value of the fund expressed in dollars at the time of the original contribution to the fund plus the dollar value of any subsequent gifts to the fund."[46] By way of example, if a donor gave a principle donation of $50,000 to his college alma mater in 1975 and gave an additional $10,000 fifteen years later, the historic dollar value of the fund would be $50,000 until 1990 and $60,000 thereafter. Historic dollar value remained constant as the initial donation generated income. Therefore, if the college to which our donor made his contribution was able to triple the value of the donation by 2000 through investing, the historic dollar value of the fund would still be $60,000. Charitable institutions

42. The basic intent of any donor placing a gift in endowment is that a portion of the gift will be preserved and maintained for continual and future use. Endowment funds can be and often are subject to further restrictions on purpose and use.

43. UMIFA defined an endowment fund as one requiring "the continued maintenance of all or a specific portion of the original gift." UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT § 1 cmt. (Nat'l Conference of Comm'rs on Unif. State Laws 1972). UPMIFA focused on the expendability of the fund when defining an endowment fund, identifying an endowment fund as one "not wholly expendable by the institution on a current basis." UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 2(2) (Nat'l Conference of Comm'rs on Unif. State Laws 2006).

44. UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 4(d) (Nat'l Conference of Comm'rs on Unif. State Laws 2006).

45. UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT § 1(5) (Nat'l Conference of Comm'rs on Unif. State Laws 1972).

46. *Id.* § 1 cmt.

under the jurisdiction of UMIFA were forbidden from making any expenditure that took the value of the endowment fund below its historic dollar value.[47] Only funds above the historic dollar value could be spent,[48] and even then only if the proposed expenditure met the prudence standard set forth in UMIFA.[49] In our example above, any expenditure from this specific donor's contribution would have been capped at $120,000—the maximum amount that could be spent while still leaving $60,000 in the fund.

In order to provide greater ability for institutions to cope with fluctuations in the value of endowment funds, UPMIFA eliminates the historic-dollar-value calculation.[50] The Uniform Law Commission believed that endowment funds could be protected and maintained even without the existence of the historic-dollar-value limitation due to the better-defined prudence standard of UPMIFA,[51] discussed below.

b. The Optional Rebuttable Presumption of Imprudence

To further provide protection to endowment funds, the Uniform Law Commission added an optional rebuttable presumption of imprudence to UPMIFA.[52] No such rebuttable presumption existed in UMIFA. Under the presumption of imprudence, any expenditure of greater than seven percent of the value of an endowment fund is considered imprudent.[53] It is meant to provide institutions with a spending guideline that will prevent charities from spending endowments too quickly.[54] The drafters of UPMIFA believed that the rebuttable presumption of imprudence was not necessary to provide sufficient protection for endowment funds because of the updated prudence standard.[55] They also had doubts about the effectiveness of defining imprudence with a flat percentage rate instead of basing it upon the value of the original gift. They feared the standard might not fit the range of charities covered by the Act, allowing some to spend in a manner that is actually imprudent, and preventing others from efficiently using appreciated funds.[56] Given these reservations, the Uniform Law Commission chose to make the rebuttable presumption of imprudence an

47. *Id.* § 2.
48. *Id.*
49. *Id.* § 6.
50. UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT prefatory note at 3-4 (Nat'l Conference of Comm'rs on Unif. State Laws 2006). For a list of specific problems with the UMIFA's historic dollar value, see *id.*
51. *Id.* prefatory note at 4.
52. *Id.* § 4(d).
53. *Id.*
54. *Id.* § 4 cmt.
55. *Id.* prefatory note at 4
56. UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 4 cmt. (Nat'l Conference of Comm'rs on Unif. State Laws 2006).

optional provision of UPMIFA as a way to indicate that some states might find it necessary while others would not.

2. Updating the Prudence Standard

For colleges and universities governed by the Uniform Laws, the most imposing and perhaps bothersome provision of UMIFA and UPMIFA is the spending restriction placed on charitable donations held as endowments.[57] Under this restriction, funds from an endowment fund can be expended only when the expenditure is "prudent."[58] UPMIFA does not change the underlying standard of prudence that existed in UMIFA, but "simply updates the statutory language to provide good direction about the role of prudence in investment and management."[59] This updated standard is the result of changes to both the articulation of the standard and the factors to be considered in making decisions regarding the investment and expenditure of charitable donations.

a. Articulation of the Standard

When drafting UPMIFA, the Uniform Law Commission first updated the articulation of the standard to comport with the modern notion of prudence.[60] The prudence standard as articulated in UMIFA was "ordinary business care and prudence,"[61] with the added requirement that the

57. A donation is governed by the spending restriction only when the fund qualifies as an endowment fund under the applicable Uniform Law. Not all charitable donations are considered endowment funds. For a discussion of the definitions of "endowment fund" under UMIFA and UPMIFA, see *supra* Part I.B.1. More generally, gifts with no restriction beyond the designation for expenditure by a specific institution do not fall within the purview of the UPMIFA. *See* UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT §§ 2(5) (Nat'l Conference of Comm'rs on Unif. State Laws 2006) (requiring funds to be held "exclusively for charitable purposes" in order to be considered an institutional fund under the UPMIFA). *See also id.* § 2(7); § 2 cmt. (excluding from coverage funds that are considered program-related assets used to conduct general "charitable activities"). This was a distinction not made in the UMIFA. *See* UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT § 1(2) (Nat'l Conference of Comm'rs on Unif. State Laws 1972) (failing to exclude program-related assets or to require that funds are held only for charitable purposes, but instead bringing any funds "held by an institution for its exclusive use, benefit, or purposes" under the purview of the UMIFA). However, even if a donor does not attach to the donation specific conditions or restrictions, preventing the Uniform Laws from applying, the gift must still be used according to the purposes of the charity. Goodwin 1, *supra* note 18, at 1106.

58. *See* UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT § 6 (Nat'l Conference of Comm'rs on Unif. State Laws 1972); UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 3 (Nat'l Conference of Comm'rs on Unif. State Laws 2006).

59. Gary 2, *supra* note 23, at 2.

60. Susan Gary describes the concept of prudence as "the 'industry' standard for similarly situated investors." It continues to evolve. Gary 1, *supra* note 21, at 1299.

61. UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT § 6 (Nat'l Conference of Comm'rs on Unif. State Laws 1972).

governing board also consider the charitable purposes of the organization.[62] UPMIFA built upon this business standard, drawing language from the updated version of the standard as articulated in the Revised Model Nonprofit Corporation Act:[63] charitable donations are to be managed and invested "in good faith and with the care an ordinarily prudent person in a like position would exercise under similar circumstances."[64]

In addition, the UPMIFA standard of conduct incorporates some of the "common standards of prudent investing" from trust law, as found in the Uniform Prudent Investor Act.[65] The trusts standards incorporated into the UPMIFA standard can be found in Sections 3(c), 3(d), and 3(e) of the Act.[66] These provisions include the duty to minimize costs, the duty to investigate facts relevant to management and investment of the fund, and the factors to consider when making investment decisions.[67]

Thus, the language of UPMIFA "reflects the merging of the trust and corporate standards," [68] combining the overall duty to act as a prudent person would in a similar situation with the stricter, more specific rules and guidelines of trust law. Due to this restatement and merging of standards, UPMIFA's articulation of the prudence standard alone provides greater guidance to the charities under the jurisdiction of the Uniform Laws than UMIFA did.[69]

b. Factors to be Considered

In addition to the general statement of the prudence standard, the Uniform Laws give charitable institutions a list of factors to be considered when making decisions about what is prudent. UMIFA provided only a short list of factors focused on the characteristics and needs of the charity: the "long and short term needs of the institution . . . , "its present and anticipated financial requirements, expected total return on its investments, price level trends, and general economic conditions."[70] UPMIFA, however, provides a much longer list of factors to be considered, including "the role that each investment or course of action plays within the overall investment portfolio of the fund," "the duration and preservation of the

62. Gary 1, *supra* note 21, at 1299.

63. UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 3 cmt. (Nat'l Conference of Comm'rs on Unif. State Laws 2006).

64. *Id.* § 3(b).

65. *Id.* §3 cmt.

66. *Id.*

67. *Id.* §§ 3(c)(1)-(2), (e).

68. Gary 2, *supra* note 23, at 2.

69. Susan Gary described the prudence standard under the UPMIFA as being "more carefully articulated" than the UMIFA. *Id.* at 3.

70. UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT § 6 (Nat'l Conference of Comm'rs on Unif. State Laws 1972).

endowment fund," and "the investment policy of the institution."[71] These factors come from the Uniform Prudent Investor Act and represent the incorporation of trust law into UPMIFA.[72] Due to this incorporation of various elements of trust law, UPMIFA lists factors that focus on the purpose of the fund in question instead of the charity as a whole, as was the case in UMIFA.[73]

These factors play a greater role in UPMIFA than they did in UMIFA. In addition to more clearly listing a greater number of factors to be considered, UPMIFA also places greater emphasis on the prudence standard by eliminating the historic-dollar-value limitation. Whereas only spending above the historic dollar value was subject to the prudence standard under UMIFA, all spending must pass the prudence standard of UPMIFA.[74] Additionally, consideration of the factors listed is mandatory under UPMIFA's duty of care.[75]

By listing more factors and making them mandatory, UPMIFA provides better guidance to institutions in making the determination of what is prudent. It is important to remember, however, that even the prudence standard and the factors are applicable only if the donor did not set forth different rules in the gift instrument.[76] It is the donor intent in the gift instrument that controls decision-making by charities under UPMIFA.

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71. UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT §§ 3, 4 (Nat'l Conference of Comm'rs on Unif. State Laws 2006). The complete list of factors includes those in § 3(e)(1):

> (A) general economic conditions; (B) the possible effect of inflation or deflation; (C) the expected tax consequences, if any, of investment decisions or strategies; (D) the role that each investment or course of action plays within the overall investment portfolio of the fund; (E) the expected total return from income and the appreciation of investments; (F) other resources of the institution; (G) the needs of the institution and the fund to make distributions and to preserve capital; and (H) an asset's special relationship or special value, if any, to the charitable purposes of the institution

and those in § 4(a):

> (1) the duration and preservation of the endowment fund; (2) the purposes of the institution and the endowment fund; (3) general economic conditions; (4) the possible effect of inflation or deflation; (5) the expected total return from income and the appreciation of investments; (6) other resources of the institution; and (7) the investment policy of the institution.

Id.

72. *Id.* §3 cmt.

73. *See* Gary 2, *supra* note 23, at 3; Gary 1, *supra* note 21, at 1310. Since UPMIFA deals mostly with endowment funds, many of the factors in § 3(e) focus on the permanent nature of charitable fund. UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT prefatory note at 4 (Nat'l Conference of Comm'rs on Unif. State Laws 2006).

74. *Id.* §§ 3(b), 4(a).

75. *Id.* § 3(e)(1).

76. *See, e.g.*, *id.* § 4(a) (stating that the rules of construction are "[s]ubject to the intent of a donor expressed in the gift instrument"); *id.* § 3 cmt.; *id.* § 4 cmt.; Gary 1, *supra* note 21, at 1311.

Indeed, all default rules set forth by UPMIFA, save the generally prescribed duty of care, can be overridden by specific donor intent.[77] It is only when this intent is not clear that the default rules of UPMIFA take effect in order to approximate what the donor intent would have been. The revisions of UPMIFA are meant to "remind[] charities that donor intent remains paramount"[78] and to better enable them to determine donor intent when it is not clear.

3. Liberalization of the Conditions Under Which Restrictions can be Modified

As noted above, donor-imposed restrictions play a huge role in the area of charitable gifts and become binding once a charity accepts the gift to which the restrictions are attached.[79] It is unsurprising, then, that the Uniform Laws address these donor-imposed restrictions. Under both Uniform Laws, modifying or releasing a restriction can be as simple as obtaining donor consent.[80] The reality is, however, that obtaining donor consent can be impossible, at worst, or extremely burdensome, at least.[81] The Uniform Laws focus on these situations when consent cannot be obtained.

Even though the drafters of UMIFA intended to provide "an expeditious way to make necessary adjustments when the restrictions no longer serve the original purpose,"[82] UMIFA allowed for only a limited release of restrictions. Charities could apply to courts for the release of a restriction if written consent of the donor could not be obtained, [83] but such relief was available only if written consent from the donor could not be obtained due to "death, disability, unavailability, or impossibility of identification" of the donor.[84] Even when application to court was allowed, the only option for relief was release. UMIFA did not allow charitable organizations to apply to courts for the modification of donor-imposed restrictions.[85]

For example, imagine that a donor had endowed $500,000 to his alma mater in 1971, the yearly interest from which was to be distributed among thirty students at the college to cover their tuition payments. At the time of

77. UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 3 cmt. (Nat'l Conference of Comm'rs on Unif. State Laws 2006).

78. Gary 1, *supra* note 21, at 1331.

79. *See, e.g.*, Brody, *supra* note 25, at 1187; Goodwin 1, *supra* note 18, at 1107.

80. UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT § 7(a). (Nat'l Conference of Comm'rs on Unif. State Laws 1972); UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 6(a) (Nat'l Conference of Comm'rs on Unif. State Laws 2006).

81. *See, e.g., id.* §6 cmt.; Gary 1, *supra* note 21, at 1328.

82. UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT § 7 cmt. (Nat'l Conference of Comm'rs on Unif. State Laws 1972).

83. *Id.* § 7(b).

84. *Id.*

85. Gary 1, *supra* note 21, at 1326.

the donor's initial gift, when tuition was only $376 per student per year,[86] providing tuition for thirty students with the interest from the fund would be an extremely feasible and manageable task.[87] However, as the cost of tuition dramatically increased over the years, paying for the tuition of thirty students out of the interest would become increasingly difficult and ultimately impossible.[88] Under UMIFA, the college in this hypothetical could apply to a court to be completely released from this restriction, assuming donor consent could not be obtained. If the release was granted, the college no longer would be required to use the interest to cover the tuition payments of thirty students. The college would have been free to use the principal gift and the yearly interest in any way it wished. This college would not, however, have been able to ask the court to be allowed to pay the tuition for only as many students as was feasible. Such modifications were not allowed, leaving courts with "an all-or-nothing choice"[89] when faced with a donor-imposed restriction: restriction or no restriction.

In revising the Uniform Laws, the Uniform Law Commission wanted to liberalize the conditions under which donor-imposed restrictions could be modified. This liberalization manifests itself in UPMIFA in the incorporation of the trust doctrines of cy pres and equitable deviation[90] and the ability to modify small funds without going to court.[91] UMIFA explicitly stated that it "[did] not limit the application of the doctrine of cy pres."[92] It was never clear, however, what exactly this statement meant.[93] By incorporating the doctrines of cy pres and equitable deviation, UPMIFA not only makes clear the interplay between these trust doctrines and the Uniform Laws, but also expands the scope of judicial relief from donor-imposed restrictions to allow for modification as well as release from the entire restriction.

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86. THE COLLEGE BOARD, TRENDS IN COLLEGE PRICING Table 5: Average Tuition & Feeds, 1971-21 to 1998-99 (1998), *available at* http://www.trends-collegeboard.com/college_pricing/archive/CP_1998.pdf.

87. Assuming a five-percent interest rate, the fund would generate $25,000 in interest in 1971. Tuition for all thirty students would only be $11,280.

88. Assuming a five-percent average interest rate, after only ten years the interest on our donor's contribution would be insufficient to pay for the cost of tuition for thirty students. In 1981, the average tuition was $909, COLLEGE BOARD, *supra* note 86, Table 5, making the cost of tuition for the requisite thirty students a little over $27,000.

89. Gary 1, *supra* note 21, at 1326.

90. UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT §§ 6(b), 6(c) (Nat'l Conference of Comm'rs on Unif. State Laws 2006).

91. *Id.* § 6(d).

92. UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT § 7(d) (Nat'l Conference of Comm'rs on Unif. State Laws 1972).

93. UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 6 cmt. (Nat'l Conference of Comm'rs on Unif. State Laws 2006).

a. Cy Pres and Equitable Deviation

The doctrines of cy pres and equitable deviation are taken from trust law and, as adopted in UPMIFA, "tak[e] an approach that favors modification over release to protect donor intent."[94] Under the doctrine of cy pres, a court can modify the purpose of a fund or a restriction on the use of the fund when it has become "unlawful, impracticable, impossible to achieve, or wasteful."[95] In the example of our $500,000 endowment fund above, cy pres could be used to change in some way the donor's instruction that the fund be used to pay for the tuition of thirty students each year. A court is limited in making modifications using cy pres, however, because any modification made must be consistent with the charitable purpose as expressed in the gift instrument.[96] Due to this restriction, cy pres has been described as "a narrow doctrine providing only a modest remedy."[97]

In trust law, the decision whether or not to apply cy pres depends upon the ability of the charity to prove three things: [98] (1) that the gift was given "to a charitable organization for a charitable purpose";[99] (2) that it is "impossible, impractical or illegal to carry out the donor's stated charitable purpose";[100] and (3) "that the donor had general charitable intent."[101] UPMIFA requires that the same three elements be proven, although it updates the second requirement. Cy pres can be used only if the restriction "becomes unlawful, impracticable, impossible to achieve, *or wasteful*", [102] a standard which should be easier to satisfy due to the addition of the "wasteful" component.

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94. Gary 1, *supra* note 21, at 1328.

95. UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 6(c) (Nat'l Conference of Comm'rs on Unif. State Laws 2006).

96. *Id.*

97. Goodwin 1, *supra* note 18, at 1108.

98. JOEL C. DOBRIS ET AL., ESTATES AND TRUSTS: CASES AND MATERIALS 701 (3d ed., Foundation Press 2007) (1998).

99. *Id*. For an example of a case in which failure to prove charitable purpose prevented the application of cy pres, see *Shenandoah Valley Nat'l Bank of Winchester v. Taylor*, 63 S.E.2d 786 (Ct. App. Va. 1951) (denying the application of cy pres because the trust involved was a private trust).

100. DOBRIS, *supra* note 98, at 701. For an example of a case in which the impossibility of the restriction was the determining factor, see *Conn. Coll. v. United States*, 276 F.2d 491 (D.C. Ct. App. 1959) (denying modification of the restriction because "the performance of [the testatrix's] plan for a separate building has not become impossible or impracticable merely because the bequest may not be large enough to cover the cost of the sort of building the Government would be willing to construct").

101. DOBRIS, *supra* note 98, at 701. For an example of a case in which the existence of general charitable intent was in issue, see *Estate of Crawshaw*, 819 P.2d 613 (Kan. 1991) (allowing for the appointment of a new trustee because the original trustee was "an agent to effect his general charitable intent of furthering higher education").

102. UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 6(c) (Nat'l Conference of Comm'rs on Unif. State Laws 2006) (emphasis added).

Equitable deviation applies under virtually the same circumstances as cy pres, except that it applies not to the purpose of a fund but to the means used to carry out that purpose[103] and other aspects of administration.[104] As Susan Gary of the Uniform Law Commission described it: "[U]sing deviation, a court makes changes to the way a charity manages a fund, rather than changes to the purpose for which the donor created the fund."[105] For this reason, equitable deviation can be used not only when a restriction becomes impracticable or wasteful, but also "if it impairs the management or investment of the fund, or if, because of circumstances not anticipated by the donor, a modification of a restriction will further the purposes of the fund."[106] When used,[107] it allows for modifications that actually "enable a charity to carry out the purposes of the fund more efficiently."[108] Returning to our hypothetical $500,000 endowment fund, if the college were to merge with a larger university that had a well staffed donor-relations office, the college could apply to a court for permission to transfer management of the fund to the larger university's donor-relations office. In doing so, the college would have to request a change under the doctrine of equitable deviation, not cy pres, because a change in the administration of the fund relates to the management of the fund and does not alter its overall charitable purpose.

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103. UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 6 cmt. (Nat'l Conference of Comm'rs on Unif. State Laws 2006).

104. Goodwin 1, *supra* note 18, at 1135.

105. Gary 1, *supra* note 21, at 1328.

106. UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 6(b) (Nat'l Conference of Comm'rs on Unif. State Laws 2006).

107. For cases in which the doctrine of equitable deviation has been applied at the request of a college or university, see *Sendak v. Trs. of Purdue Univ*., 279 N.E.2d 840 (Ind. Ct. App. 1972) (holding that the trustees of the gift can "deviate from the mechanical means of administration of the trust where circumstances not known or foreseen by the testator have come about, and where such change in circumstances in combination with the administrative means provided in the trust would defeat or substantially impair the accomplishment of the intended trust purpose."); and *Furman Univ. v. McLeod*, 120 S.E.2d 865 (S.C. 1961) (holding that the University had "produced ample proof of the need to deviate from the strict terms of the trust . . . in order to accomplish and fulfill the intent and purposes of the conveyance by [the donor] to The Greenville Academies and from The Greenville Academies to Furman University."). For cases in which the doctrine of equitable deviation has been denied, see *Moore v. City and County of Denver*, 292 P.2d 986 (Colo. 1956) (en banc) (refusing to allow modification of a restriction imposed on a college for orphans because "[p]etitioners have not shown the impracticability of executing the express provisions of the trust."); *Nat'l City Bank of Mich./Ill. v. N. Ill. Univ*., 818 N.E. 2d 453 (Ill. App. Ct. 2004) (denying the application of equitable deviation or cy pres because "no impediment hinders the administration of the Scholarship Trust or the accomplishment of its charitable objective.").

108. Gary 1, *supra* note 21, at 1328.

b. Modification of Restrictions on Small Funds

In order to take advantage of the doctrines of both cy pres and equitable deviation, an institution must apply to a court for the modification to be made.[109] As the cost of going to court to ask for the release of a restriction can be high, UPMIFA adds a provision that allows for the modification of restrictions on old, small funds without going to court.[110] One caveat to this option is that the fund must be used "in a manner consistent with the charitable purposes expressed in the gift instrument" even after the modification of the restriction.[111] As society's representative of funds held in charity,[112] it is up to the Attorney General to take action if this requirement is not met, although as a practical matter it is unlikely that Attorneys General will take note of or act upon such violations.[113]

The remaining requirements for application of this provision are up to the specific state adopting UPMIFA. Even so, the Uniform Law Commission suggests that this provision apply only to funds over twenty years old and with a value of less than $25,000.[114] The length of twenty years was chosen as a safeguard to donor intent and the amount of $25,000 to reflect the cost/benefit calculation of a judicial proceeding to obtain a modification of a restriction. In this way, the provision was meant to cover funds for which "the cost of a judicial proceeding will be out of proportion to its protective purpose."[115]

Some of the changes made when updating UMIFA are considerable enough that they have the potential to change significantly the nature of legal fights over restricted donations. Before we can determine if such a change will in fact take place, however, it is important to understand the lawsuits that have been brought under UMIFA. Part II provides an overview of some of the lawsuits brought under UMIFA so that we can make this determination in Part III, below.

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109. UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT §§ 7(b), 7(c) (Nat'l Conference of Comm'rs on Unif. State Laws 2006).

110. *Id.* § 6(d).

111. *Id.* § 6(d)(3).

112. The state Attorney General has limited power and standing to enforce donor-imposed restrictions and is generally responsible for "protect[ing] the public's interest in funds held by charities and protect[ing] the intent of donors who contribute to those charities." Gary 1, *supra* note 21, at 1332-33. If a charitable institution wishes to modify the restrictions placed on a gift without donor consent, it is required under the Uniform Laws to notify the Attorney General, who "must be given an opportunity to be heard." UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT § 7(b) (Nat'l Conference of Comm'rs on Unif. State Laws 1972); UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT §§ 6(b), (c), (d) (Nat'l Conference of Comm'rs on Unif. State Laws 2006).

113. *See* UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 6(d), § 6 cmt. (Nat'l Conference of Comm'rs on Unif. State Laws 2006).

114. *Id.* §6 cmt.

115. *Id.*

II. LITIGATING WITH THE UNIFORM LAWS: LAWSUITS INVOLVING COLLEGES AND UNIVERSITIES

While there have been many lawsuits brought against colleges and universities for the alleged misuse of donor funds or the violation of donor-imposed restrictions, the parties in these cases rarely used the Uniform Laws to make their claims or raise a defense. Of the five cases in which UMIFA has been invoked,[116] three are particularly instructive of how UMIFA has been interpreted and applied by colleges and universities, donors, and judges. *Yale University v. Blumenthal* illustrates how a college or university goes about bringing suit under UMIFA to request release from donor-imposed restrictions. Rice University has brought two similar lawsuits, but the opinions issued do not provide any insight into the judge's attitudes or reasoning. *Carl J. Herzog Foundation, Inc. v. University of Bridgeport* established that donors do not have standing under UMIFA to enforce donor-imposed restrictions. Lastly, *Robertson v. Princeton* gives us a more thorough understanding of how courts respond to the use of UMIFA by either party to the litigation.

A. *Yale University v. Blumenthal*[117]

Yale University v. Blumenthal was the earliest case to deal with UMIFA. In this case, Yale employed UMIFA-based arguments in an attempt to change one of the donor-imposed restrictions by which it was bound. Yale had been named the beneficiary of a testamentary trust created by the will of alumnus Thomas Smallman many years ago. His will indicated that the donation was "to be used for the building of a wing for the Yale Medical School to be known as the Jane Smallman Wing, for the treatment of sick poor."[118] When Yale gained access to the trust in 1987, the amount donated proved to be insufficient for the construction of the wing mentioned in the donor's will,[119] so Yale approached the Attorney General of Connecticut, who was and still is considered the protector of donors,[120]

116. My search revealed only five cases involving colleges and universities that include UMIFA- or UPMIFA-based arguments: Yale University v. Blumenthal, 621 A.2d 1304 (Conn. 1993); Carl J. Herzog Foundation, Inc. v. University of Bridgeport, 699 A.2d 995 (Conn. 1997); Princeton University, Excerpts from the University's Motions Seeking Summary Judgment, http://www.princeton.edu/robertson/statements/viewstory.xml?storypath=/main/news/archive/S13/68/44I11/index.xml (last visited Feb. 1, 2010), In re Garbrecht, 2000 WL 35501605, No. 2000-15658 (Dist. Ct. Tex. 2000), and In re Harry Carothers, 2000 WL 34584345, No. 2000-35712 (Dist. Ct. Tex. 2000).

117. 621 A.2d 1304 (Conn. 1993).

118. *Id.* at 1305 (quoting the will of donor Thomas F. Smallman).

119. *Id.* Yale received $312,086 from the trust in 1987. *Id.*

120. *See, e.g.*, Brody, *supra* note 25, at 1187 ("[D]espite the fact that the organization is legally bound by specific terms of the gift, legally it is not the donor's concern. It is society's concern, to be pursued (or not) by society's representative, the attorney general."); UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT prefatory

"in an attempt to achieve an agreement concerning an acceptable alternative use of Smallman's bequest."[121] When no acceptable alternative could be agreed upon, Yale brought this suit against Connecticut's Attorney General.[122]

Yale relied upon the UMIFA provision allowing a court to release an institution from any restriction that is "obsolete, inappropriate or impracticable."[123] Ultimately, the Connecticut courts did not consider any of the issues governed by this provision. The courts focused instead solely upon whether UMIFA was even applicable to the fund in question by asking whether it was an "institutional fund" as defined in UMIFA.[124] The Superior Court of Connecticut heard the case initially, and held that Smallman's donation was not an institutional fund because it "was not held for Yale's 'exclusive use, benefit or purposes,' and also that the bequest was one 'in which a beneficiary that is not an institution has an interest.'"[125]

On appeal, the Supreme Court of Connecticut reversed the decision of the lower court, holding that Yale could apply for relief under UMIFA.[126] Relying upon the Uniform Law Commission's comments to UMIFA, the court decided that "a fund to provide scholarships for students or medical care for indigent patients is held by the school or hospital for the institution's purposes."[127] Additionally, the fact that a fund benefits various patients through the hospital does not make those patients non-institutional beneficiaries of the fund or "take the bequest outside the definition of an institutional fund."[128] Indeed, the court believed that these types of situations were "explicitly anticipated" by the drafters of UMIFA and the Connecticut legislature.[129] Therefore, the Smallman bequest was

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note at 4 (Nat'l Conference of Comm'rs on Unif. State Laws 2006) (stating that the "attorney general continues to be the protector both of the donor's intent and of the public's interest in charitable funds.").

121. *Yale*, 621 A.2d at 1305.

122. *Id.*

123. Connecticut Uniform Management of Institutional Funds Act, CONN. GEN. STAT. § 45a-533 (repealed 2008).

124. Yale Univ. v. Blumenthal, 621 A.2d 1304, 1306 (Conn. 1993). The applicable definition is found in the Connecticut Uniform Management of Institutional Funds Act, General Statutes § 45a-527(2)(b):

> (2) 'Institutional fund' means a fund held by an institution for its exclusive use, benefit or purposes, but does not include […] (B) a fund in which a beneficiary that is not an institution has an interest, other than possible rights that could arise upon violation or failure of the purposes of the fund.

Connecticut adopted the definition of an "institutional fund" exactly as it appeared in UMIFA § 1(2). *Yale*, 621 A.2d at 1307.

125. *Id.* at 1306 (discussing the decision of the trial court).

126. *Id.* at 1308.

127. *Id.* at 1307 (quoting the comments to UMIFA).

128. *Id.* at 1308.

129. *Id.*

an "institutional fund" under UMIFA. Although the ruling opened the door for Yale to continue with its claim under UMIFA, the parties settled without further litigation.[130]

B. *Carl J. Herzog Foundation, Inc. v. University of Bridgeport*[131]

The issue of donor standing under UMIFA was decided by *Carl J. Herzog Foundation, Inc. v. University of Bridgeport*. In 1997, a donor brought suit against the University of Bridgeport for commingling the donated funds with the general funds of the university and for using the money for purposes other than that described in the gift instrument.[132] Although the suit was brought under UMIFA, it was not considered past the issue of "whether the Connecticut Uniform Management of Institutional Funds Act . . . establishes statutory standing for a donor to bring an action to enforce the terms of a completed charitable gift."[133] The Supreme Court of Connecticut ultimately decided that "the drafters of UMIFA did not intend to confer donor standing in the matter of the release of gift restrictions . . . ."[134] Due to the plaintiff's lack of standing, this case went no further in the courts than did *Yale University v. Blumenthal*.

C. *Robertson v. Princeton*

The most extensive treatment of UMIFA by a court was in *Robertson v. Princeton*. In this case, the donors relied upon UMIFA in making their claims, but Princeton University also employed UMIFA as a key part of its defense.[135] The *Robertson v. Princeton* litigation remains, to date, the only true example we have of how UMIFA plays out when used in litigation against a college or university.

1. History of *Robertson v. Princeton*

The litigation against Princeton was initiated in 2002 by several descendants of Charles and Marie Robertson,[136] who had donated

130. Ultimately, the parties were able to agree upon a new use for the fund that was acceptable to Yale yet also in line with the purpose of the original donation. The Connecticut Superior Court to which the case had been remanded approved the parties' settlement, thereby giving Yale permission to use the fund to support a lead paint removal program at the university. E-mail from David Ormstedt, former Assistant Attorney General of Connecticut, to author (Jan. 20, 2010) (on file with author).

131. 699 A.2d 995 (Conn. 1997).

132. *Id.* at 996.

133. *Id.*

134. *Id.* at 1000.

135. *See* Princeton University, Excerpts from the University's Motions Seeking Summary Judgment, http://www.princeton.edu/robertson/statements/viewstory.xml?storypath=/main/news/archive/S13/68/44I11/index.xml (last visited Feb. 1, 2010).

136. Princeton University, Key Issues,

approximately $35 million worth of Great Atlantic & Pacific Tea Company shares to the University in 1960.[137] By 2002, the value of the gift was $600 million.[138] The Robertson Foundation was created at the time of the donation to handle its management and investment.[139] This lawsuit was brought against both Princeton University and the Robertson Foundation for betraying the family's trust and confidence in the then recent investment and expenditure of parts of the donation.[140]

a. The Robertson Foundation and the Robertsons' Intent

The Robertson Foundation was incorporated in Delaware in 1961, at which time the purposes and objectives of the gift to Princeton were laid out in writing.[141] The objective of the Robertson Foundation and of the money placed in its care was "to strengthen the Government of the United States and increase its ability and determination to defend and extend freedom throughout the world by improving the facilities for the training and education of men and women for government service . . . ."[142] To accomplish this broad objective, the Foundation was allowed to utilize the donation for several specific uses.

The first of these uses was the establishment and support of the Woodrow Wilson Graduate School at Princeton University. This school was to educate and prepare individuals "for careers in government service, with particular emphasis on the education of such persons for careers in those areas of the Federal Government that are concerned with international relations and affairs."[143] Secondly, the Robertson Foundation was allowed to use the donation "to establish and maintain scholarships or fellowships" for students attending this graduate school.[144] Finally, the Robertson Foundation was "to provide collateral and auxiliary services, plans and programs in furtherance of the object and purpose above set

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http://www.princeton.edu/robertson/about/issues/ (last visited Nov. 28, 2010).

137. Princeton University, Background, http://www.princeton.edu/robertson/about/background/ (last visited Nov. 28, 2010).

138. Verified First Amended Complaint of Plaintiffs at ¶ 3, *Robertson v. Princeton Univ.* (N.J. Super. Ct. Ch. Div. 2007) (No. C-99-02).

139. The Robertson Foundation is classified as a Type 1 supporting organization under the U.S. Tax Code. Princeton University, Foundation Tax Structure, http://www.princeton.edu/robertson/about/tax_status/ (last visited Apr. 23, 2009). This means that the Robertson Foundation is "organized, and at all times thereafter is operated, exclusively for the benefit of" Princeton University, the recipient of the Robertsons' donation. 26 U.S.C.A. § 509(a)(3)(A) (West 2009).

140. Verified First Amended Complaint of Plaintiffs at ¶4, *Robertson v. Princeton Univ.* (N.J. Super. Ct. Ch. Div. 2007) (No. C-99-02).

141. *See generally id.* at Ex. A: Composite Certificate of Incorporation of The Robertson Foundation.

142. *Id.* at Ex. A, ¶ 3.

143. *Id.* at Ex. A, ¶ 3(a).

144. *Id.* at Ex. A, ¶ 3(b).

forth."[145]

b. "Princeton's Betrayal"[146]

The Robertson family brought this suit against Princeton University and the Robertson Foundation because it believed that the funds originally donated by the Robertsons were not being used in accordance with their intent or with the restrictions set forth at the time of the donation in the Certificate of Incorporation.[147] Generally speaking, the plaintiffs believed that the funds were being used "as if they belong[ed] to the University and [we]re available for uses that are not part of the Robertson Foundation's mission."[148] They also claimed that the university misused more than $200 million of Robertson Foundation funds.[149]

In fleshing out this general complaint of non-compliance with donor intent, the plaintiffs also pointed to more specific instances in which the University violated the intent of the Robertsons. For purposes of this note, the most important specific violation alleged was the spending of realized gains in contravention of paragraph 11(c) of the Certificate of Incorporation,[150] which contained a spending restriction that limited expenditures to income or accumulated income.[151] The plaintiffs believed the capital gains from certain of the University's activities to be outside the definition of "income" under paragraph 11(c).

c. The Summary Judgment Stage

Before the *Robertson v. Princeton* case settled in 2008, several issues

145. *Id.* at Ex. A, ¶ 3(c).

146. *Id.* at ¶ 40.

147. Verified First Amended Complaint of Plaintiffs at ¶ 5, *Robertson v. Princeton Univ.* (N.J. Super. Ct. Ch. Div. 2007) (No. C-99-02).

148. *Id.* at ¶ 4.

149. Erin Strout, *Princeton Returns $782,000 Donation*, CHRON. OF HIGHER EDUC., Mar. 23, 2007, at A27.

150. Verified First Amended Complaint of Plaintiffs at ¶ 116(b), Robertson v. Princeton Univ. (N.J. Super. Ct. Ch. Div. 2008) (No. C-99-02).

151. The Certificate of Incorporation for the Robertson Foundation was attached to the Plaintiffs' Verified First Amended Complaint as Exhibit A. Paragraph 11(c) reads as follows:

> Funds or property of the corporation which do not constitute income or accumulated income as defined in Treasury Department Regulations 1.504-1(c), or its then equivalent, shall not be disbursed or paid out unless (1) income of the corporation sufficient to cover the proposed expenditure is not available, and (2) at the time such funds or property is disbursed or paid out, provision is made for repayment out of future income. Payments of principal or capital shall not exceed 5% of the total market value of the corporation's principal or capital assets in any fiscal year computed at the time of such payment.

Verified First Amended Complaint of Plaintiffs at Ex. A, *Robertson v. Princeton Univ.* (N.J. Super. Ct. Ch. Div. 2008) (No. C-99-02).

of the case were considered by a New Jersey Superior Court in six different motions for partial summary judgment.[152] In 2006, Judge Neil Shuster issued opinions as he ruled on all six motions. Summary judgment was denied in the majority of the motions because Judge Shuster determined that issues of material fact remained.[153] A trial date was set for January 2009.[154] However, because the case was settled, no trial was held. The summary-judgment opinions were the only decisions issued in the case.

d. The Outcome of the Robertson v. Princeton *Litigation*

The parties to *Robertson v. Princeton* settled on December 9, 2008.[155] While the details of the settlement have not been circulated widely, it appears that the main import of the settlement is that the Robertson Foundation has been or soon will be dissolved.[156] Following the dissolution of the Robertson Foundation, any assets remaining will be given to Princeton University.[157] Over the next seven years, $50 million of these funds are to be transferred into a new foundation "for the restricted use of preparing students for careers in government service."[158] It thus seems that the basic intent of the Robertsons will be continued.

The remaining aspects of the settlement involve attorneys' fees and litigation costs. The Robertson Foundation had used funds from another

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152. Princeton University, Litigation Status, www.princeton.edu/Robertson/about/status/ (last visited Jan. 31, 2009).

153. Summary judgment was denied in regard to fiduciary duties, the PRINCO, and the sole beneficiary issue. Partial Summary Judgment Decision Regarding "Fiduciary Duties" and "Business Judgment Rule," *Robertson v. Princeton Univ.* (N.J. Super. Ct. Ch. Div. 2007) (No. C-99-02); Partial Summary Judgment Decision on the "Sole Beneficiary" Issue, *Robertson v. Princeton Univ.* (N.J. Super. Ct. Ch. Div. 2007) (No. C-99-02); Partial Summary Judgment Decision on the "PRINCO" Issue, *Robertson v. Princeton Univ.* (N.J. Super. Ct. Ch. Div. 2007) (No. C-99-02). Summary judgment was granted in regards to the Article 11(c) issue. Partial Summary Judgment Decision on Article 11(c), *Robertson v. Princeton Univ.* (N.J. Super. Ct. Ch. Div. 2007) (No. C-99-02). Summary judgment was denied in part and granted in part with regard to the laches and limitations, and overcharges and offset summary issues. Partial Summary Judgment Decision on Claims Falling Outside the Applicable Statue of Limitations or Laches Period, *Robertson v. Princeton Univ.* (N.J. Super. Ct. Ch. Div. 2007) (No. C-99-02); Partial Summary Judgment Decision Regarding Defendants' Admitted Overcharges and Offset Defense, *Robertson v. Princeton Univ.* (N.J. Super. Ct. Ch. Div. 2007) (No. C-99-02). PDFs of all the partial-summary-judgment decisions are available at www.princeton.edu/robertson/documents/summaryjudgment/ (last accessed Jan. 31, 2009).

154. Princeton University, Jury Demand, http://www.princeton.edu/robertson/about/summary_judgments/jury_demand/ (last visited Feb. 2, 2010).

155. Final Judgment and Order of Dismissal, *Robertson v. Princeton Univ.* (N.J. Super. Ct. Ch. Div. 2008) (No. C-99-02).

156. Princeton University, Understanding the Robertson v. Princeton settlement, http://www.princeton.edu/robertson/about/ (last visited Jan. 31, 2009).

157. *Id.*

158. *Id.*

charitable foundation held by the Robertson family—the Banbury Fund—to pay for its expenses throughout the litigation. All amounts taken from the Banbury Fund must be reimbursed under the terms of the settlement agreement.[159] Additionally, the Robertson Foundation must reimburse Princeton University for its defense costs in the litigation.[160]

2. The Role of UMIFA in the Litigation

UMIFA made a significant appearance in the arguments of the parties in two of the summary-judgment proceedings: the sole beneficiary issue and Article 11(c) interpretation.[161] Judge Shuster ultimately found UMIFA to be inapplicable to the sole-beneficiary issue, but the law did play an important part in his decision on the interpretation of Article 11(c).

a. Sole Beneficiary Issue

The defendants filed a motion for summary judgment that argued that Princeton was intended to be the only beneficiary of the Robertsons' gift. This motion was filed in response to one of the remedies requested by the plaintiffs. In its complaint, the Robertson family asked the court to substitute "another school of public administration at another University in the place of the Woodrow Wilson School and Princeton University, which other school will conscientiously and unselfishly dedicate itself to the purposes of the Robertson Foundation."[162] During the summary-judgment proceedings, the defendants argued that this substitution could not be accomplished because "the plain language of the Foundation's Certificate of Incorporation requires that the University remain the sole tax-exempt charity supported by the Foundation."[163]

In defense of its position, the Robertson Foundation argued that this substitution could be accomplished using the doctrine of cy pres.[164] In making this argument, the plaintiffs relied upon UMIFA as adopted in Delaware, the state whose version of UMIFA was applicable to the litigation.[165] The court did not, however, agree with the plaintiffs' use of UMIFA, holding instead that their "reliance on UMIFA [was] misplaced" because it did not allow for the modification of the purpose or management

159. *Id.*

160. *Id.*

161. *See generally* Partial Summary Judgment Decision on Article 11(c), *Robertson v. Princeton Univ.* (N.J. Super. Ct. Ch. Div. 2007) (No. C-99-02); Partial Summary Judgment Decision on the "Sole Beneficiary" Issue, *Robertson v. Princeton Univ.* (N.J. Super. Ct. Ch. Div. 2007) (No. C-99-02).

162. Verified First Amended Complaint of Plaintiffs at ¶ 8, *Robertson v. Princeton Univ.* (N.J. Super. Ct. Ch. Div. 2008) (No. C-99-02).

163. Partial Summary Judgment Decision on the "Sole Beneficiary" Issue at 2, *Robertson v. Princeton Univ.* (N.J. Super. Ct. Ch. Div. 2007) (No. C-99-02).

164. *Id.* at 36.

165. *Id.* at 36-37.

of a fund,[166] which was the type of modification for which the plaintiffs had asked.

b. Article 11(c) Interpretation

Another motion for summary judgment brought by the defendants involved the interpretation of Article 11(c) of the Certificate of Incorporation. [167] This section of the Certificate of Incorporation governs the spending of funds held by the Robertson Foundation. It states that "funds or property of the corporation which do not constitute income or accumulated income as defined in Treasury Department Regulations 1.504-1(c), or its then equivalent, shall not be disbursed or paid out" unless certain exceptions are met.[168] At issue in the litigation between the Robertson family and Princeton University was whether the spending of realized or capital gains was consistent with the restrictions laid out in this article.

The defendants believed that "the plain language of the Foundation's Certificate of Incorporation permitted the spending of capital gains and appreciation as 'income' of the Foundation."[169] In order to buttress this contention, they relied upon the Delaware version of UMIFA.[170] UMIFA was adopted in Delaware to alter the "widely held view that the realized gains of endowment funds of education institutions must be treated as principal."[171] In place of this view, the Delaware UMIFA established a rule stating that realized and unrealized net appreciation can be spent unless there is clear indication of contrary donor intent.[172] Believing that the Certificate of Incorporation did not *clearly* prohibit the spending of appreciation, the defendants argued that this rule of UMIFA should apply in interpreting Article 11(c).

Judge Shuster agreed with the defendants, holding that "absent express language evidencing a donor's intent that net appreciation not be expended, UMIFA applies."[173] Although he found, after analyzing the language of Article 11(c), that "[t]he ability to spend realized gains under Article 11(c) is clear and unambiguous," thereby making the applicability of UMIFA moot, Judge Shuster nevertheless addressed the applicability of UMIFA in

166. *Id.* at 37.

167. *See* Partial Summary Judgment Decision on Article 11(c), *Robertson v. Princeton Univ.* (N.J. Super. Ct. Ch. Div. 2007) (No. C-99-02).

168. Verified First Amended Complaint of Plaintiffs at Ex. A, ¶ 11(c), *Robertson v. Princeton Univ.* (N.J. Super. Ct. Ch. Div. 2008) (No. C-99-02).

169. Partial Summary Judgment Decision on Article 11(c) at 2, *Robertson v. Princeton Univ.* (N.J. Super. Ct. Ch. Div. 2007) (No. C-99-02).

170. *Id.*

171. *Id.* at 36.

172. *Id.* at 37.

173. Partial Summary Judgment Decision on Article 11(c) at 37, *Robertson v. Princeton Univ.* (N.J. Super. Ct. Ch. Div. 2007) (No. C-99-02).

interpreting the Certificate of Incorporation.[174] Again adopting the argument put forward by the defendants, he held that "UMIFA would apply to permit the spending of realized gains because the language of Article 11(c) does not contain express language indicating that net appreciation not be expended."[175]

3. The Role of UPMIFA in the Litigation

In his decision on the sole beneficiary issue, Judge Shuster pointed out that Delaware had enacted UPMIFA to replace UMIFA during the litigation of this case.[176] He provided a few "general observations,"[177] but in the end gave no useful insight into the way in which UPMIFA would apply to the *Robertson v. Princeton* litigation.

No other courts have dealt with the application of UPMIFA to the issue of restricted donations to colleges and universities. Only one case involving a college or university has been brought under UPMIFA,[178] but it settled before the case was heard by a court.[179] Despite the lack of cases upon which to draw, in Part III, I will argue that even when these lawsuits begin to make arguments based upon UPMIFA, the outcomes in the courts will not significantly change from those seen with UMIFA.

III. UPMIFA IN ACTION: EFFECT OF UPMIFA ON DONOR-INITIATED LAWSUITS BROUGHT AGAINST COLLEGES AND UNIVERSITIES

Until UPMIFA has been tried out by various lawsuits involving colleges and universities and their donors, there is no sure way of knowing what its impact on the parties to and outcomes of such lawsuits will be. Considering that UMIFA only produced a limited number of cases

174. *Id.* at 44.

175. *Id.*

176. Partial Summary Judgment Decision on the "Sole Beneficiary" Issue at 37, *Robertson v. Princeton Univ.* (N.J. Super. Ct. Ch. Div. 2007) (No. C-99-02).

177. *Id.*

178. I searched the ALLCASES, BRIEF-ALL, MOTIONS, and PLEADINGS databases on Westlaw using the following search: upmifa "uniform prudent management of institutional funds act." The search returned five results. The only result involving a college or university was the complaint in *Northwestern Univ. v. Madigan*. *See infra*, note 178. I searched the Federal & State Cases, Combined; All Federal and State Pleadings, Combined; and All Federal and State Briefs and Motions, Combined databases on Lexis using the following search: upmifa or "uniform prudent management of institutional funds act." The search returned three results, none of which involved a college or university.

179. Last year, Northwestern University filed a complaint in state court seeking changes to an endowment fund given to Northwestern by the National Engineering Company in 1944. Verified Complaint for Relief Under the Doctrine of Cy Pres at ¶ 1, *Northwestern Univ. v. Madigan* (Ill. Cir. Ct. Cook Co. Ch. Div. 2009) (No. 09CH37676). The case was settled soon after the initiation of the suit. Docket Proceedings, *Northwestern Univ. v. Madigan* (Ill. Cir. Ct. Cook Co. Ch. Div. 2009) (No. 09CH37676).

involving colleges and universities over the past thirty-eight years, it would be imprudent to wait until lawsuits are filed under UPMIFA before assessing its effects on colleges and universities. This Part argues that the adoption of UPMIFA in forty-six states and the District of Columbia will have a very small impact on the lawsuits brought against colleges and universities by unsatisfied donors because the use of UMIFA has been minimal and because judges are reluctant to reach these issues. Furthermore, the changes made in UPMIFA do not affect the two main issues that often limited the use of UMIFA in litigation: standing and donative documents.

A. Minimal Use of UMIFA

UMIFA never has been heavily used by donors bringing suit against colleges and universities or by the institutions themselves in defending such suits. In general, disgruntled donors who actually make it to the point of bringing a lawsuit argue a variety of other matters. The most highly litigated issue seems to be whether there is donor standing to bring a lawsuit to object to the use of funds or enforce a restriction.[180] Some suits also are brought under a breach-of-contract cause of action,[181] which leads to the application of a specific set of rules governing contract interpretation. This is a different set of rules from those that are applied if the parties choose to argue under a trust-law or corporate-law framework, which has also been the case.[182] Bringing a suit on any of these grounds—contract, trust, or corporate law—precludes the use of UMIFA's principles of interpretation in any way because contract, trust, or corporate law will be applied in a manner corresponding to the parties' characterization of the case.

UMIFA's provisions regarding the release of restrictions, albeit very limited, have similarly been virtually unused by universities when litigating these suits. Yale and Rice Universities are the only colleges or universities

180. Standing was the deciding factor in the following cases: Carl J. Herzog Found., Inc. v. Univ. of Bridgeport, 699 A.2d 995 (Conn. 1997); L.B. Research and Educ. Found. v. UCLA Found., 29 Cal. Rptr. 3d 710 (Ct. App. 2005); Howard v. Adm'rs of Tulane Educ. Fund., 986 So.2d 47 (La. 2008) [hereinafter Tulane 1]; Russell v. Yale Univ., 737 A.2d 941, 946 (Conn. App. Ct. 1999); Dodge v. Trs. of Randolph-Macon Woman's Coll., 661 S.E.2d 805, 807 (Va. 2008) (referring to the decision of the circuit court).

181. *See* Glenn v. Univ. of S. Cal., No. B151776, 2002 WL 31022068 (Cal. Ct. App. Sept. 10, 2002); *UCLA*, 29 Cal. Rptr. 3d 710.

182. The *Dodge v. Randolph-Macon* case was argued under the Uniform Trust Code. *Dodge*, 661 S.E.2d at 807. Corporate-law principles were argued in the fiduciary duties and PRINCO motions for summary judgment in Robertson v. Princeton. Partial Summary Judgment Decision Regarding "Fiduciary Duties" and "Business Judgment Rule," *Robertson v. Princeton Univ.* (N.J. Super. Ct. Ch. Div. 2007) (No. C-99-02); Partial Summary Judgment Decision on the "PRINCO" Issue, *Robertson v. Princeton Univ.* (N.J. Super. Ct. Ch. Div. 2007) (No. C-99-02).

to have made use of these provisions offensively.[183] Even the use of UMIFA to defend a college or university has been tried only once, in the case of *Robertson v. Princeton*.[184]

The fact of the matter is that very few cases regarding donor intent reach the stage in which the issues governed by the Uniform Laws can be employed. If the parties do not resolve the dispute before it reaches court, it is common for them to settle or dismiss the lawsuit early in the litigation process.[185] The actual donations and restrictions involved in the disputes are only rarely directly addressed by the courts.[186] If this current trend

183. *See* Yale Univ. v. Blumenthal, 621 A.2d 1304 (Conn. 1993); In re Garbrecht, No. 2000-15658, 2000 WL 35501605 (Dist. Ct. Tex. 2000); In re Harry Carothers, No. 2000-35712, 2000 WL 34584345 (Dist. Ct. Tex. 2000).

184. *See* Partial Summary Judgment Decision on the "Sole Beneficiary" Issue, *Robertson v. Princeton Univ.* (N.J. Super. Ct. Ch. Div. 2007) (No. C-99-02).

185. Disputes in which the parties resolved the issues without judicial proceedings include those between Boston University and donor David Mugar, Boston University, Joint Statement Re: David Mugar and Boston University, http://www.bu.edu/phpbin/news/releases/display.php?id=455 (Feb. 1, 2010); Harvard and donor Jane Fonda, Sara Rimer, *Harvard Is Returning Donation From Jane Fonda for New Center*, N.Y. TIMES, Feb. 4, 2003, at A14; the University of Iowa and donor Peggy Guggenheim, Scott Jaschik & Doug Lederman, *Quick Takes: Pollock Painting May Be Safe*, INSIDE HIGHER ED, Oct. 6, 2008, http://www.insidehighered.com/news/2008/10/06/qt; and Notre Dame and the family of donor Robert Hayes Gore, Sr., Charles Storch, *Family Tells Notre Dame: 'Don't diss the donors'*, THE CHICAGO TRIBUNE, Jan. 17, 2008, *available at* http://www.cehe.org/resources/ChicagoTribune.pdf.

Disputes that were resolved at some point during litigation include those involving the University of South Dakota and donor Lucy Buhler, Kathryn Masterson, *U. of South Dakota Settles Donor Lawsuit Over Naming Rights*, THE CHRONICLE OF HIGHER EDUCATION, Sept. 19, 2008, http://chronicle.com/news/article/5184/u-of-south-dakota-settles-donor-lawsuit-over-naming-rights; Dartmouth College and the Association of Alumni, Notice of Decision, *Assoc. of Alumni v. Trs. of Dartmouth Col.*, (N.H. Super. Ct. 2008) (No. 07-E-0289); the University of Southern California and donor Paul Glenn, Center for Excellence in Higher Education, Resources on Donor Intent, http://www.cehe.org/resources/ (last visited Feb. 1, 2010); Tulane University and two heirs of donor Josephine Newcomb, Tulane University, Plaintiffs Dismiss Original Newcomb Lawsuit, http://women.tulane.edu/news093008.html (last visited Feb. 1, 2010); Princeton University, Understanding the Robertson v. Princeton settlement, http://www.princeton.edu/robertson/about/ (last visited Feb. 1, 2010); UCLA and the L.B. Research Foundation, UCLA Newsroom, Statement regarding lawsuit filed by California Attorney General, http://newsroom.ucla.edu/portal/ucla/statement-regarding-lawsuit-filed-101846.aspx (last visited Feb. 1, 2010); DePauw University and donor Henry Crimmel, Zach Koch, *Faculty focus on science*, THE DEPAUW, Nov. 10, 2006, http://media.www.thedepauw.com/media/storage/paper912/news/2006/11/10/News/Faculty.Focus.On.Science-2453318.shtml; Brandeis University and donor Julius Kalman, John Hechinger, *Braindeis Settles Donor Lawsuit Over Science Building*, WALL ST. JOURNAL, Aug. 19, 2009, http://online.wsj.com/article/SB125071093826043923.html; Yale University and donor Lee Bass, *supra*, note 124; and Northwestern University and the Illinois Attorney General, *supra*, note 180.

186. My research uncovered only four cases in which the courts made a decision after examining the actual donation, any donor-imposed restrictions, and the use by the college or university. Rice University's application to a Texas State District Court for

continues with UPMIFA, the changes made in updating UMIFA will make little difference to colleges and universities as far as litigation is concerned.

B. Court Reluctance

The minimal use of UMIFA by either party in lawsuits against colleges and universities may be explained by the lack of success of UMIFA-based arguments in the few cases that have presented such issues to the court. In the cases in which UMIFA has been raised, the courts have seemed reluctant to apply UMIFA in making their decisions.

The court in *Yale University v. Blumenthal* did not even reach UMIFA issues raised by the University, arguing that "[t]he particular question posed by this appeal is extremely narrow."[187] Consequently, the court heard and decided only one issue: whether the donation in question was of such a classification that the Connecticut Uniform Management of Institutional Funds Act ("CUMIFA") would apply.[188] In understanding the issue so narrowly, the court dismissed arguments based on UMIFA made by both parties to the case. On one side, the court held that "[t]he issue of whether Yale may ultimately be entitled to a release or a modification of the restrictions in Smallman's will is not before us."[189] On the other, the Attorney General's questions regarding the constitutionality of CUMIFA were dismissed as "premature."[190] While the court's decision did not preclude Yale from continuing with its suit to "seek relief pursuant to [CUMIFA],"[191] such reluctance on the part of the court to give any consideration to both parties' UMIFA-based arguments does not provide much of an impetus for other colleges and universities to bring such claims in the hope of obtaining quick and easy relief from donor-imposed restrictions that the institution finds to be onerous. The six summary-

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the release of a restriction on the donation of donor Charles O. Garbrecht was approved. In re Garbrecht, 2000 WL 35501605, No. 2000-15658 (Tex. Dist. June 3, 2000). The New York Supreme Court considered the dispute between St. Bonaventure University and donors Paul and Irene Bogoni, and awarded the university a judgment equal to the amount promised by the donors. Steve Mayer, *University Wins Lawsuit*, THE BONA VENTURE, Oct. 23, 2009, http://media.www.thebv.org/media/storage/paper1111/news/2009/10/23/News/University.Wins.Lawsuit-3811860.shtml (Oct. 23, 2009). Most recently, a Federal District Court in Florida heard the case between Okaloosa-Walton College and the grandson of donor Mattie Kelly, and dismissed the suit, leaving the college free to sell the donated land. NWF State College, Federal Judge Dismisses Kelly Lawsuit Against OWC, http://www.owcfoundation.org/news/newsitem.cfm?NewsID=560 (last visited Feb. 1, 2010). Finally, as noted in Part II of this Note, the New Jersey Superior Court considered many different aspects of the *Robertson v. Princeton* lawsuit in issuing opinions on the various motions for partial summary judgment filed by both sides.

187. *Yale*, 621 A.2d at 1306.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.* at 1308.

judgment opinions in *Robertson v. Princeton* reveal a slightly greater acceptance of UMIFA-based arguments when made by the parties. However, there remains a reluctance to address UMIFA-based arguments, even when the court notes that the law obviously applies.

In the summary-judgment proceeding addressing the sole-beneficiary issue, the court briefly addressed the applicability of UMIFA because the Robertsons used UMIFA as a defense to Princeton's arguments.[192] After a brief analysis of the case, however, the court decided that "Plaintiffs' reliance on UMIFA is misplaced, as it only provided for modification 'on use or investment' and not the 'purpose' or management of the institutional fund."[193] This is similar to the dismissal identified in the *Yale* case. In both cases, the decision as to the applicability or inapplicability of UMIFA was based upon a technicality: in the *Princeton* case, whether the change requested was a change to "use" or "purpose"; in the *Yale* case, whether the fund was truly an "institutional" fund. However, the *Princeton* court, unlike the *Yale* court, which made no comments on UMIFA after finding it to be inapplicable, devoted several pages to introducing the parties to UPMIFA, adopted in Delaware during the course of the litigation.[194] While Judge Shuster gave no advice to the parties and, quite appropriately, provided no indication on how he would rule if an UPMIFA-based issue were brought before him,[195] he did at least acknowledge its existence and the potential of its applicability.

The *Princeton* court was again faced with UMIFA in the Article 11(c) summary judgment opinion.[196] When deciding the scope of Article 11(c) in the incorporating document, the court noted that "a determination of whether Defendants failed to exercise 'ordinary business care and prudence' under UMIFA is best suited for, and encompassed in, Plaintiff's allegations of breaches of fiduciary duties and committing ultra vires acts."[197] When directly confronted with these allegations of the plaintiffs, however, the court did not mention UMIFA and certainly did not decide the case on UMIFA-based grounds. The parties themselves had not brought up the applicability of UMIFA in the summary-judgment proceedings regarding fiduciary duties. Therefore, even though this court was more willing to address UMIFA-based arguments when made by the parties, the court was precluded from addressing UMIFA because the parties did not use UMIFA-based arguments themselves.

Unless courts start to hear and respect UMIFA-based claims, neither

192. Partial Summary Judgment Decision on the "Sole Beneficiary" Issue at 36-37, *Robertson v. Princeton Univ.* (N.J. Super. Ct. Ch. Div. 2007) (No. C-99-02).

193. *Id.* at 37.

194. *Id.* at 40.

195. *Id.*

196. Partial Summary Judgment Decision on Article 11(c) at 43-44, *Robertson v. Princeton Univ.* (N.J. Super. Ct. Ch. Div. 2007) (No. C-99-02).

197. *Id.* at 43.

donors nor colleges and universities will find it advantageous to raise such claims under either UMIFA or UPMIFA, especially when arguments based in trust, corporate, or contract law have found success over the years.[198] Given that one of the problems that led to UMIFA was the diversity of laws governing charitable donations,[199] the fact that parties continue to argue donor-initiated lawsuits on other grounds should be a sign of a weakness in both UMIFA and UPMIFA.

C. Lack of Changes Affecting the Main Litigation Issues under UMIFA

Although UMIFA has been rarely used by the parties either in bringing or defending these donor-intent suits, UPMIFA could have made certain changes in order to make it more useful to one or both of the parties involved. When drafting UPMIFA, the Uniform Law Commission in fact considered, but did not adopt, a provision establishing donor standing. Without this change, many potential lawsuits will continue to be decided long before courts reach the merits because of a lack of standing. Those cases that reach the lawsuit stage will likely be decided on the issue of standing alone, before UPMIFA can be considered. Additionally, because of the importance placed on the donative documents in cases involving donor intent, UPMIFA remains a secondary consideration in these lawsuits, coming into play as an interpretive tool only if the documents are considered unclear or ambiguous.

1. The Lack of Donor Standing

At least since 1997,[200] it has been apparent that the issue of donor standing would be as glaring a barrier to the legal enforcement of donor-imposed restrictions for potential litigants under UMIFA as under the common law.[201] Under the common law, a donor does not have standing to bring a lawsuit for the enforcement of a donor-imposed restriction unless the donor "expressly reserved the right to do so"[202] when making the original donation or had "expressly reserved a property interest in the gift."[203] *Carl J. Herzog Foundation v. University of Bridgeport*, the first major case to address standing under UMIFA, was brought in 1997 to determine whether Connecticut's version of UMIFA "establishes statutory standing for a donor to bring an action to enforce the terms of a completed

198. *See supra* note 183.

199. *See* UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT prefatory note at 1 (Nat'l Conference of Comm'rs on Unif. State Laws 1972).

200. Carl J. Herzog Found., Inc. v. Univ. of Bridgeport, 699 A.2d 995 (Conn. 1997).

201. *Id.* at 996.

202. *Id.* at 997.

203. *Id.* at 999; *see also* Brody, *supra* note 25, at 1229.

charitable gift."[204] The Connecticut Supreme Court held that the law did not create donor standing.[205]

The issue of donor standing has continued to appear in UMIFA-based cases. The Louisiana Supreme Court agreed to hear a recent case against Tulane because it wished to determine "whether *our law* recognizes a right of action of a non-legatee, would-be heir to institute suit for injunctive relief on behalf of a donor/testator to enforce a conditional donation. . . ."[206] The case was remanded for further briefing by the plaintiffs on the issue of standing.[207] The threshold issue in *L.B. Research and Education Foundation v. UCLA Foundation* was also standing.[208] The plaintiffs in that case were found to have standing, and their case was allowed to continue to trial, but many other donors wishing to challenge the use of a donation are not so lucky and their cases are dismissed early in the proceedings.[209]

A great debate continues to surround the issue of donor standing.[210] While "nearly all modern American authorities—decisions, model acts, statutes, and commentaries—deny a donor standing to enforce a restricted gift to public charity absent express retention of a reversion in the donative instrument,"[211] at one time donors possessed a "power of 'visitation' to supervise their gifts" after they had been given to charity.[212] Based in the rights of a property owner to decide how his property is used and disposed of, the power of visitation was considered "inherent in the endowing of a corporate charity."[213] Ever since Chief Justice Marshall dismissed the idea that a donor retained interest in his donation after it has been given,[214] the power of visitation has mostly disappeared[215] and donor standing has generally been denied.[216]

The reasons cited for denying standing include the protection of

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204. *Herzog*, 699 A.2d at 996.

205. *Id.* at 1000.

206. Howard v. Adm'rs of Tulane Educ. Fund., 986 So.2d 47, 54 (La. 2008) (emphasis in original).

207. *Id.* at 61.

208. L.B. Research and Educ. Found. v. UCLA Found., 29 Cal. Rptr. 3d 710, 712 (Ct. App. 2005).

209. *See, e.g.*, Tulane 1, 986 So. 2d 47; Dodge v. Trs. of Randolph-Macon Woman's Coll., 661 S.E.2d 805 (Va. 2008).

210. For a thorough discussion of donor standing, see Goodwin 1, *supra* note 18; Gary 2, *supra* note 23; and Brody, *supra* note 25.

211. Goodwin 1, *supra* note 18, at 1145.

212. *Id.* at 1148.

213. *Id.*

214. Trs. of Dartmouth Coll. v. Woodward, 17 U.S. 518, 682 (1819).

215. Goodwin 1, *supra* note 18, at 1148.

216. Iris J. Goodwin, *Ask Not What Your Charity Can Do For You:* Robertson v. Princeton *Provides Liberal-Democratic Insights into the Dilemma of Cy Pres Reform*, 51 ARIZ. L.R. 75, 106 (2009) [hereinafter Goodwin 2].

charitable institutions from "unreasonable and vexatious litigation" by people with no real interest in the donation,[217] a fear first associated with broad donor standing by Chief Justice Marshall in 1819.[218] On the other hand, proponents of donor standing argue that protection of donor rights through the Attorney General "is more theoretical than real"[219] and that the current arrangement is nothing more than an inducement for charities to disregard donor-imposed restrictions with no consequences.[220] These proponents not only argue that donors generally would be in a better position to keep charities in check, but also that granting them standing would serve as "an inducement to a particular type of donor engagement within the charitable sector."[221] Indeed, some believe that "a liberalization of the standing rules is an important incentive to continued participation by donors."[222]

The Uniform Law Commission seriously considered a provision for donor standing during the recent drafting of UPMIFA.[223] The provision was not, however, adopted for the final version.[224] The reasons for deciding against donor standing were not clearly articulated by the Uniform Law Commission.[225] The reporter for the Drafting Committee of the

217. Goodwin 1, *supra* note 18, at 1140.

218. *Dartmouth*, 17 U.S. at 587-88 (arguing that "[i]f the entire [charter granted by the legislature to create a college] cannot be taken away, neither can it be essentially impaired" by acts of the donor, in this case the legislature).

219. Goodwin 2, *supra* note 216, at 104.

220. Goodwin 2, *supra* note 216, at 79.

221. Goodwin 1, *supra* note 18, at 1158–60.

222. *Id.* at 1098.

223. Brody, *supra* note 25, at 1217–19. Section on donor standing proposed but not adopted by UPMIFA:

> §8 Enforcement of Restricted Gifts
>
> (a) If a gift instrument restricts the use of assets transferred to an institution, then the donor may maintain a proceeding to enforce the restriction on the gift.
>
> (b) Any right held by the donor under subsection (a) may be exercised on the donor's behalf by his [or her] conservator or guardian or by the personal representative of the donor's estate.
>
> (c) A donor's right to maintain a proceeding under subsection (a) is limited to enforcing the restriction on the donor's gift and does not give a donor standing to challenge other actions by the governing board.
>
> (d) A donor may maintain a proceeding under subsection (a) only if the gift to be enforced had a value that was either (i) greater than [$500,000] at the time the donor made the gift or (ii) greater than [five percent] of the value of the assets of the institution at the time the donor begins the proceeding.
>
> (e) A donor's right to maintain a proceeding under subsection (a) ceases [30 years] after the date of the last donation that was subject to the restriction.

224. Brody, *supra* note 25, at 1219.

225. Gary 2, *supra* note 23, at 6. "UPMIFA does not change the general rule that donors do not have standing to bring a court challenge to a charity's actions. UPMIFA maintains the Attorney General's traditional role in protecting donor intent and the public's interest in charitable institutions." *Id.*

UPMIFA, Susan Gary, states in an article published outside of her role as reporter that "[t]he Committee concluded that the issue of standing . . . was an issue better left to other statutes or to the courts."[226] Although this provision, if adopted, would have created only "limited donor standing,"[227] it would have alleviated some of the uncertainty that surrounds the area of donor-initiated lawsuits under the Uniform Laws. With UPMIFA as it was adopted, standing (or rather, the lack of standing) continues to be a barrier for any donor wishing to bring a lawsuit against a college or university in order to enforce restrictions placed on a donation.

Whatever the benefits of and drawbacks to donor standing may be, until donors are able to more easily jump the hurdle of standing, UPMIFA will continue to be an avenue of argument rarely reached in these types of lawsuits as a lack of standing will prevent most donor-initiated lawsuits from advancing beyond the early stages of argument, as has been the case in the past.

2. The Continued Importance of Donative Documents

Although it is true that UPMIFA includes many improvements, including a more advanced principle of interpretation for donor intent,[228] these improvements in UPMIFA are marginalized by the fact that in UPMIFA, as in UMIFA, the language of the documents establishing the original donation must always be the first consideration.[229] Even if the gift instrument includes provisions that directly conflict with UPMIFA, so long as the gift instrument is clear, UPMIFA cannot be used to rewrite that document or even make small changes to it. On the most basic level, UPMIFA is a set of default rules that can be overridden by the gift instrument.[230] The intent of the donor, as expressed in the gift instrument, must control decision-making both at the institutional level and in any court cases that arise from disputes over donor intent.[231] Therefore, UPMIFA can be employed only if the donor's intent as expressed in the donative documents is unclear or ambiguous, or if the doctrines of cy pres or equitable deviation are applicable, in which case donor intent as expressed in the gift instrument is still a consideration.

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226. Gary 1, *supra* note 21, at 1331.

227. Brody, *supra* note 25, at 1219 (quoting Susan Gary in the cover memorandum for the October 2002 draft).

228. UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 4(c) (Nat'l Conference of Comm'rs on Unif. State Laws 2006).

229. *See, e.g.* UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT §§ 3(a), 4(a) (Nat'l Conference of Comm'rs on Unif. State Laws 2006) (stating that these sections of the statute are "[s]ubject to the intent of a donor expressed in a gift instrument"); *id.* § 4 cmt.

230. UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 3 cmt. (Nat'l Conference of Comm'rs on Unif. State Laws 2006).

231. *Id.* § 3.

Courts have paid heed to the rule that they can rely upon the Uniform Laws only after full consideration of the donative documents. This principle served as the basis for the court's decision in the early stages of the recent case against Tulane.[232] At both the district and appellate court levels, the donor's intent was found to be clearly articulated in the relevant documents.[233] Once it was determined that the language expressing the donor's intent was "clear and unambiguous,"[234] both courts were able to decide the main issues of the case.[235] While neither party argued for the application of UMIFA or UPMIFA in the *Tulane* case, the courts' treatment of the relevant documents was similar to that engaged in by other courts when considering UMIFA-based arguments. There is a similar analysis in the Article 11(c) summary judgment ruling in the *Princeton* case, where it was ultimately held that "absent express language evidencing a donor's intent . . . , UMIFA applies."[236] In the *Princeton* case, the donor's intent was found to be unclearly expressed in the documents, so UMIFA was applied. Had the court found, however, that the donor's intent was clearly and unambiguously expressed, the court in *Princeton*, like the lower *Tulane* courts, probably would not have reached any issues raised under UMIFA.

Given this emphasis on donative documents, it is no wonder that many parties have based their entire cases on principles of contract analysis.[237] An analysis of the donative documents is required under UMIFA *before* its principles of interpretation can be applied. This prerequisite has not been changed under UPMIFA. Therefore, as long as donative documents are to be considered first, there will be no need for the court to move beyond the application of the donor's intent in many cases, and UPMIFA will continue to be rarely argued and even less often applied by courts in these cases.

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232. Howard v. Adm'rs of Tulane Educ. Fund, 970 So.2d 21 (La. Ct. App. 2007) [hereinafter Tulane 2]

233. *Tulane 2*, 970 So.2d at 26; *Tulane 1*, 986 So.2d 47, 53 (La. 2008) (referencing the district court opinion).

234. *Tulane 2*, 970 So.2d at 26.

235. *Tulane 1*, 986 So.2d at 53 (quoting the district court opinion as saying that "a clear reading of Ms. Newcomb's will shows that she intended for Tulane […] to use the balance of her estate to maintain a women's higher education college"); *id*. (holding that "given the plain meaning of these words, we find that these terms bar the Nieces from interfering in Tulane's administration of Mrs. Newcomb's donations *inter vivos*.").

236. Partial Summary Judgment Decision on Article 11(c) at 37, *Robertson v. Princeton Univ.* (N.J. Super. Ct. Ch. Div. 2007) (No. C-99-02).

237. *See* Glenn v. Univ. of S. Cal., No. B151776, 2002 WL 31022068 (Cal. Ct. App. Sept. 10, 2002); L.B. Research and Educ. Found. v. UCLA Found., 29 Cal. Rptr. 3d 710 (Ct. App. 2005); Partial Summary Judgment Decision on the "Sole Beneficiary" Issue at 36-37, *Robertson v. Princeton Univ.* (N.J. Super. Ct. Ch. Div. 2007) (No. C-99-02).

IV. CONCLUSION

While it remains to be seen what the impact of the changes that UPMIFA made to UMIFA will be, the use of either statute in lawsuits brought by donors against colleges and universities has been so minimal that the changes are unlikely to be noticed, let alone taken advantage of by parties in these types of lawsuits. In addition, UPMIFA fails to change the two things that would have the biggest effect: it neither establishes donor standing nor lessens the emphasis placed on donative documents. Therefore, the adoption of UPMIFA in forty-six states and the District of Columbia will most likely have minimal impact on colleges and universities as they face lawsuits by unsatisfied donors.

Because UMIFA and UPMIFA cover more issues than just those arising from disputes with donors, the changes made by UPMIFA have already had a significant impact on colleges and universities in other ways. A 2010 survey of colleges and universities was conducted by the Association of Governing Boards, and looked at the "ways higher education boards are managing spending under the new law . . . ."[238] This study revealed that "UPMIFA has encouraged governing boards of colleges, universities, and affiliated foundations to devote increased attention to endowment spending and develop increasingly sophisticated and supple decision making practices."[239] By eliminating the historic dollar value and updating the prudence standard, UPMIFA has given colleges and universities greater liberty in choosing investment strategies for endowment funds "but has also forced them to develop new processes for making decisions regarding spending and accumulation."[240] On the other hand, colleges and universities are considering a greater number of specific factors when making investment and management decisions under UPMIFA. The 2010 study reported that "[n]early one-third (28.5%) of institutions have changed their approach to portfolio construction to focus on factors such as risk reduction, inflation protection, and liquidity . . . ."[241] While the former changes might lead to a decrease in donor-initiated litigation by making a greater number of investment strategies acceptable, the latter change has the potential to highlight problems in the decision-making processes of colleges and universities by providing a more clearly defined rubric against which investment decisions can be judged.

Ultimately, we have no way of knowing exactly what effect UPMIFA will have on colleges and universities inside the courtroom until we see how courts accept the changes made by UPMIFA and how eleemosynary

238. ASS'N OF GOVERNING BDS., SPENDING AND MANAGEMENT OF ENDOWMENTS UNDER UPMIFA 2 (Aug. 30, 2010), *available at* http://www.nacua.org/documents/UPMIFASurvey_2010.pdf.

239. *Id.*

240. *Id.*

241. *Id.* at 3.

institutions continue to adapt to the new rules.