Computing Market Adjusted Damages in Fiduciary Surcharge Cases Using Modern Portfolio Theory

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Editor's Note: Modern Portfolio Theory has become a customary tool used by investment professionals and, as such, constitutes an industry standard prudent fiduciaries cannot ignore. Further, the Prudent Investor Rule and Modern Portfolio Theory are inextricably intertwined. We have elected to publish four articles in consecutive editions of ACTEC Journal *in order to provide our readership with an understanding of Modern Portfolio Theory, demonstrate the necessity of applying this theoretical construct in accordance with the Prudent Investor Rule and apply this theory to other pertinent issues surrounding the administration and litigation of portfolios managed by fiduciaries. Sequential publication eliminates the need to redevelop Modern Portfolio Theory and other concepts in each article.* ACTEC Journal *readers will have the option of reviewing earlier articles to clarify any points of interest in subsequent articles.*

The first article, "Modern Portfolio Theory and the Prudent Investor Act," appeared in the ACTEC Journal, *Vol. 30, No. 3 (2004) and provided a foundation for understanding the underpinnings of Modern Portfolio Theory and how it should be applied under the Prudent Investor Rule. The second article, "Using a Trust's Investment Policy Statement to Develop the Portfolio's Appropriate Risk Level," appeared in the* ACTEC Journal *Vol. 30, No. 4 (2005), and emphasized the importance of developing an individualized Investment Policy Statement and how it can be used to develop an appropriate risk tolerance for the trust portfolio. The final article in this series to follow the current article is "The Appropriate Withdrawal Rate: Comparing a Total Return Trust to a Principal and Income Trust."*

TABLE OF CONTENTS

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I. Introduction

Fiduciaries cannot avoid the possibility of litigation associated with the management of a portfolio entrusted to their care. Regardless of the merits, beneficiaries can always institute a lawsuit related to portfolio management. As indicated in the second article (Article 2) a fiduciary can reduce litigation probability by developing and following faithfully a well-considered investment policy statement (IPS) formulated using precepts of Modern Portfolio Theory (MPT) and maintaining a frequent dialogue with the beneficiaries.[1] Even these precautionary efforts do not preclude possibility of a damage claim. Appropriate management of a trust's assets as required under the Prudent Investor Rule (Rule) does, however, reduce the likelihood of damages being assessed against the fiduciary.

Our first article (Article 1) established the relationship between the Rule, the Uniform Prudent Investor Act (Act), and MPT. It concluded: "The relationship between the Act and MPT implies that fiduciaries ignoring the tenets of MPT are potentially inconsistent with the Act and the Rule and may put themselves at risk."[2] Articles 1 and 2 were prescriptive in that we set forth the elements and approaches a fiduciary should consider for effective portfolio formulation and management of a trust. In this article, we examine an appropriate methodology for calculating market-adjusted damages in those cases in which the fiduciary has failed to "invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust."[3]

Section II of this article will briefly examine the evolution of damage cases decided by the courts. Section III will describe the necessary characteristics of a market-adjusted damages model that is fair to both the plaintiff and defendant in a case involving investment suitability. Section IV illustrates a market-adjusted damages model based on MPT where the fiduciary-managed portfolio is at the appropriate risk level but its asset composition is deemed unsuitable. Section V describes the process for measuring market-adjusted damages. Section VI discusses a case where the portfolio's composition and risk level are inappropriate. Section VII illustrates why courts will probably increasingly adopt the market-adjusted model in assessing damages and points out the perils faced by fiduciaries who ignore the tenets of these MPT-based models.

II. The Evolution of Market-Adjusted Damages Cases Decided by the Courts[4]

A. The Challenges of Fairness. When fiduciaries made unsuitable investments courts historically have struggled with various methodologies in their attempt to recompense beneficiaries.[5] They relied necessarily upon the state of knowledge at the time such decisions were rendered. Replacing the original amount lost has generally been considered inadequate. In most cases, courts attempted to place the trust in, as nearly as practicable, the position where it would have been had the unsuitable investment not been made. This effort at fairness has caused much debate around practical issues like: What effect should be given to taxes? Should taxes on gains be deducted or included? What about assets that might or might not have been sold during the period in question? What about commissions? Should those commissions paid to effect transactions be deducted? Should the fiduciary be permitted fees if unsuitable investments had been made?

B. Time Value of Money. Some courts thought such restoration to be too speculative and not susceptible to reasonably accurate calculation.[6] Others who

[1] The content and importance of developing an appropriately formulated IPS is developed in the second article in this series, Edward A. Moses, J. Clay Singleton and Stewart A. Marshall, "Using a Trust's Investment Policy Statement to Develop the Portfolio's Appropriate Risk Level," *ACTEC Journal*, Vol. 30, No. 4, (2005) p. 251-260.

[2] Edward A. Moses, J. Clay Singleton and Stewart A. Marshall, "Modern Portfolio Theory and the Prudent Investor Act," *ACTEC Journal*, Vol. 30, No. 3, (2004) p. 168.

[3] Uniform Prudent Investor Act, § 2(a). We do not address in this article the measures of damages associated with activities such as "churning" or punitive damages associated with self-dealing and fraud.

[4] The authors would like to acknowledge Nora L. Miller, an associate in the Orlando, Florida office of Akerman Senterfitt, and Michele M. Bernard, a student at the Florida Agriculture and Mechanical University Law School in Orlando, Florida, for their research assistance in developing this section.

[5] For a detailed discussion of cases related to measures of damages see "Fiduciary Risk and Litigation: A National Perspective" by Dominic J. Campisi, presented to The Florida Bar Continuing Legal Education Committee, February–March, 2003.

[6] *See e.g.*, *Hinrichs v. Gifford*, WL 34138090 (2001), *James Wood Gen. Trading Establishment v. Coe*, 297 F.2d 651, 658 (2d Cir.1961) and *Gillespie v. Seattle-First Nat. Bank*, 855 P.2d 680 (Wash.App. 1993).

have employed the time value of money have had to confront the question of an appropriate metric: simple interest, compound interest, or some market standard? Historically, where interest on the initial damage amount was applied, it was simple interest unless the fiduciary's conduct was more blameworthy, in which case it was compounded.[7] In situations involving egregious fiduciary conduct, courts have permitted punitive (exemplary) damages based typically on some measure of the initial damage calculation.[8]

C. A Market Standard. More recently, courts have begun to explore a market standard approach. Many cases have attempted to measure damages against a single benchmark such as the S&P 500, Dow Jones Industrial Averages, or similar indexes.[9] Still others have begun to consider, as a benchmark, performance of a properly managed portfolio over the given period.[10]

D. Comparison to a Properly Managed Portfolio. Using a single index is rarely appropriate because most properly constructed portfolios will not be composed of one asset class and a single index is most likely to be inconsistent with the appropriate risk-return requirements of the trust. Comparison to a properly managed portfolio is a movement in the right direction. Moreover, it begins to comport with concepts agreeable with principles enunciated under MPT—which as we have shown in Article 1 is embedded in the Act. However, without more definitive direction, it leaves open the question of exactly what is a "properly managed portfolio." Litigators will not find it surprising that, with any given set of facts, there are likely to be as many "properly managed portfolios" as there are experts to opine on a particular fact pattern.

E. Using a Market Standard Criteria. Why has there been a paucity of damage estimates using the market standard criteria? As the Reporter's note to Restatement (Third) of Trusts §211 points out:

> This approach can be carried out by referring the performance of all or a relevant portion of the proper investments of the trust in question, to the performance of all or part of the portfolios of comparable trusts, or to the performance of some suitable securities index or other benchmark portfolio.

The Reporter's note opens the door for the use of a market standard assessment of damages. While the reason for not pursuing this approach by plaintiffs may be as simple as the lack of sophistication on the part of litigators in suitability cases, we believe the scarcity of damage estimates using a market standard criteria stems from the lack of a comprehensive, market-adjusted damage model that is fair to both the plaintiff and the defendant in a case involving suitability of investments. Fair in this sense means the market-adjusted damage model portfolio must be consistent with the criteria of meeting the requirement imposed on the fiduciary to "invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust." Without such a model portfolio, the courts may be unwilling to consider the assessment of market-adjusted damages. The methodology for creating such a model portfolio and the use of the model portfolio in the measurement of damages is the subject matter for the remainder of this article.

III. Necessary Characteristics of a Market-Adjusted Damages Model Portfolio

A. Overall Criteria. A market-adjusted damage model portfolio (model portfolio) must meet the same criteria as required by Section 2 of the Act, "Standard of Care; Portfolio Strategy; Risk and Return Objectives." To do less results in an unequal playing field for plaintiffs and defendants.

B. Model Portfolio Construction. The model portfolio should be consistent with the objectives set out in a well-constructed IPS and reflect all specific requirements of the trust (e.g., income distribution requirements). The model portfolio should also be consistent with the established risk tolerance of the beneficiaries. Further, the construction of the model portfolio should have an underlying logic. Based on the relationship between the Rule, the Act and MPT (see Article 1), the construction of the model portfolio should follow the precepts of MPT. As will be shown in Sections IV and VI, we do not reject the importance of business judgment in formulating the model portfolio. Business judgment should be employed when the fiduciary considers alternative portfolios after the efficient portfolio at the trust's appropriate risk level has been identified on the Efficient Frontier.[11]

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[7] *See e.g., In the Matter of Reveson,* 86 A.D.2d 872, 447 N.Y.S.2d 297, 302 (N.Y.App.Div.1982) and *Weiss v. Weiss,* 984 F.Supp. 675 (S.D.N.Y. 1997)

[8] *See e.g., Rivero v. Thomas,* 194 P.2d 533 (1948), *Ward v. Taggart,* 336 P.2d 534 (1959) and *Gillespie v. Seymour,* 877 P.2d 409 (1994).

[9] *See e.g., Rolf v. Blyth, Eastman Dillon & Co., Inc.,* 570 F. 2d 38, 48-50 (2d Cir. 1978), *Rolf v. Blyth, Eastman Dillon & Co., Inc.,* 637 F. 2d 77 (2d Cir. 1980), *Miley v. Oppenheimer & Co., Inc.,* 637 F. 2d 327 (5th Cir. 1981) and *Marion Beirne Spragins III v. First Alabama Bank of Huntsville, N.A.,* 475 So.2d 512 (Ala. 1985).

[10] *Estate of Wilde,* 708 A.2d 273 (Me. 1998)

[11] Alternative portfolios are discussed in Article 1. This approach is illustrated further in section IV.D below.

C. Asset Selection. Assets selected for consideration and inclusion in the model portfolio should reflect assets available for investment by a fiduciary. As discussed in Article 1, these assets represent the feasible set. For example, if an asset class is selected as one of the investment opportunities in the feasible set, a reasonable index and its investment equivalent should be available to the fiduciary. This requirement is not restrictive given the variety of index mutual funds and exchange traded funds (ETFs) available.

D. Model Portfolio Value Estimates. The value of the model portfolio should reflect the "real world." That is, consideration should be given to such expenses as taxes associated with security turnover and trust income, fees associated with trades and trust administration, and withdrawals and additions to the trust in determining the model portfolio's value at various points in time. If these elements are not considered in tracking the value of the model portfolio, the values of the actual trust portfolio, which necessarily reflects these elements, and the model portfolio cannot be compared fairly and market-adjusted damages cannot be computed.

IV. Illustration 1: The Model Damages Portfolio Based on MPT Compared to the Actual Portfolio with Both at the Appropriate Risk Level[12]

This illustration follows the discussion in Article 1. Here we expand the asset classes by dividing the original large and small capitalization stocks into their growth and value components. These additional asset classes, along with the original asset classes, present a realistic feasible set and provide a quick refresher on the approach to developing a suitable portfolio presented in Article 1. We assume in this section that the existing trust portfolio has the appropriate level of risk. Finally, the section is written from the perspective of an expert consultant (expert) engaged to assess potential market-adjusted damages associated with an existing, fiduciary-managed trust portfolio.

A. Asset Classes. Based on the trust provisions and circumstances we will assume the expert determines the feasible set contains the nine asset classes shown in Chart IV.1.

Chart IV.1
Annual Historical Returns on Nine Indexes
All Statistics in %
1972-2003*

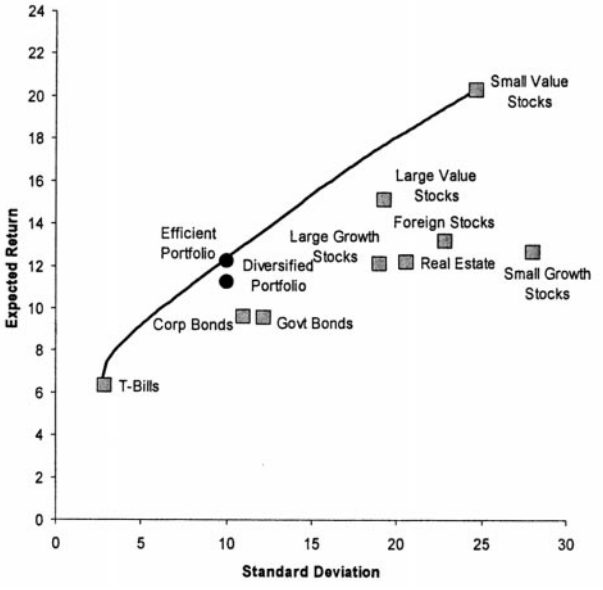
	Average Return	Standard Deviation
Small Growth Stocks	12.65	28.04
Small Value Stocks	20.30	24.67
Foreign Stocks	13.20	22.85
Large Growth Stocks	12.12	19.80
Large Value Stocks	15.14	19.29
Real Estate	12.19	20.59
Corp Bonds	9.62	11.21
Govt Bonds	9.56	12.11
T-bills	6.35	2.90

*Note: 1972-2003 was chosen due to data availability and to maintain comparability with Article 1.

The expert assumes further the historical experience with these asset class indexes shown in Chart IV. is a reasonable estimate of the asset classes' expected future performance.[13]

B. Efficient Frontier. The Efficient Frontier is that set of portfolios that produces the highest level of expected return for each level of expected risk. The Efficient Frontier was computed mathematically and is shown in Chart IV.2.

Chart IV.2
Attainable Set of Indexes and Their Efficient Frontier

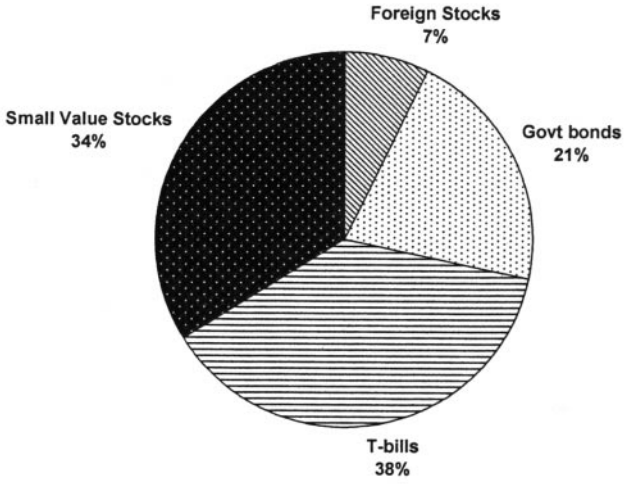


[12] In Section VI we consider the more likely possibility the fiduciary has constructed a portfolio where both the expected risk and return are inappropriate.

[13] The asset classes and corresponding indexes are represented throughout the remainder of this article as follows: small growth stocks (Russell 2000 Growth), small value stocks (Russell 2000 Value), foreign stocks (MSCI EAFE), large growth stocks (S&P/BARRA 500 Growth), large value stocks (S&P/BARRA 500 Value), real estate (NAREIT Real Estate Investment Trusts), corporate bonds (Ibbotson Associates Long-term Corporate Bond Index), government bonds (Ibbotson Associates Government Bond Index), and treasury bills (Ibbotson Associates 30-day Treasury Bill Index).

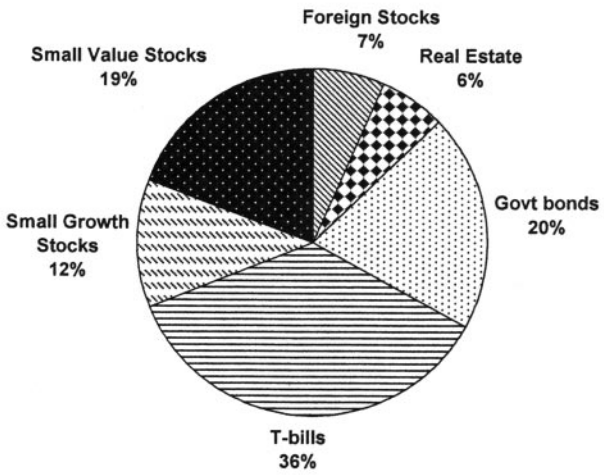
C. An Efficient Portfolio. In Chart IV.2, the line represents the Efficient Frontier. Asset classes in the feasible set are shown as squares. Assume the expert reviews the IPS and selects initially a portfolio with an expected risk of 10% (annual standard deviation of return) providing an expected return of 12.25%.[14] This portfolio is labeled in Chart IV.2 as the "Efficient Portfolio." The asset allocation of this portfolio is shown in Chart IV.3.

Chart IV.3
Efficient Portfolio
Annual Expected Return = 12.25%
Expected Standard Deviation = 10.00%



D. A More Diversified Portfolio. As discussed in Article 1, the expert, like the fiduciary, has the flexibility to select a better diversified portfolio that might be more suitable. To be consistent with our example in this section we assume this portfolio has the same risk as the Efficient Portfolio but slightly less expected return. This portfolio is labeled "Diversified Portfolio" in Chart IV.2. This portfolio's asset allocation is shown in Chart IV.4. The expert selects this portfolio as appropriate because it is nearly efficient, giving up returns of only 1.0% per year for more diversification. This Diversified Portfolio is the model portfolio the expert will use to estimate the market-adjusted damages. The asset classes shown can be replicated as actual investments in a trust portfolio through a combination of index mutual funds, ETFs and REITs.

Chart IV.4
Diversified Portfolio
Annual Expected Return = 11.25%
Expected Standard Deviation = 10.00%



E. The Fiduciary's Actual Trust Portfolio. Liability can arise when the fiduciary selects an inappropriate portfolio without considering the efficient or nearly efficient portfolios at the risk level appropriate for the trust beneficiaries. Assume the fiduciary constructs a portfolio that correctly matches the appropriate risk level but with a smaller expected return than the more diversified portfolio described earlier. This portfolio can be considered inappropriate. When fiduciaries use heuristic methods, rules of thumb, or other approaches that do not reflect the principles of MPT and the Act, they often arrive at portfolios that, *ex ante*, are inefficient in a MPT sense. In this case, the *a priori* conduct of the fiduciary can be deemed to be imprudent and subject to a damages assessment.

Chart IV.5 shows just such a portfolio labeled "Actual Portfolio."[15] Following the example in this section this portfolio has the requisite amount of risk (standard deviation of 10% per year) but an expected return of only 8%. The expected return and risk for any portfolio can be determined by applying its asset allocation to the expected returns, risks, and correlations for its constituent asset classes.[16] The asset allocation of the Actual Portfolio is not shown because we

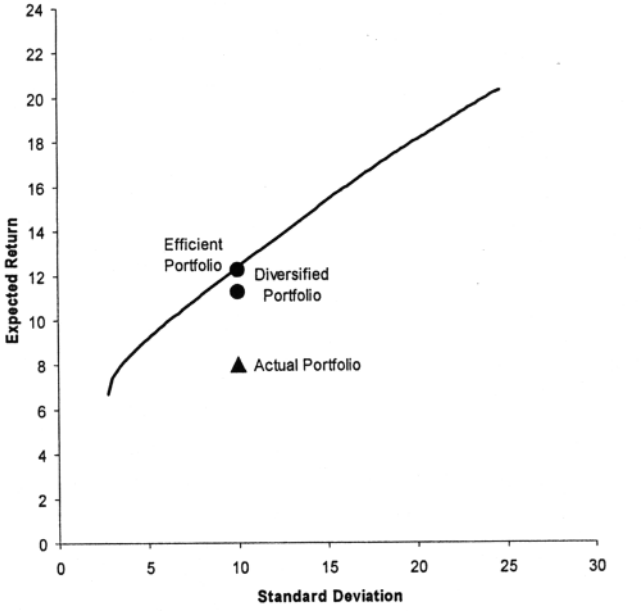
[14] With the expanded feasible set presented here, a portfolio with the same risk as the portfolio in Article 1 has an expected return of 12.25% as opposed to the original expected return of 11.8%. This difference is due to the diversification provided by the additional stock asset classes.

[15] In Chart IV.5 we have omitted identifying the asset classes in the feasible set for simplicity. This Efficient Frontier is the same as Chart IV.2.

[16] Consult the Appendix to Article 1 for an example of these calculations.

use it only to illustrate our point. Because the Actual Portfolio is significantly below both the Efficient Frontier and the Diversified Portfolio, a case can be made that the fiduciary has displayed imprudent conduct.

Chart IV.5
Efficient, Diversified, and Actual Portfolios
Actual Portfolio Annual Expected Return = 8.0%
Expected Standard Deviation = 10.0%



V. Estimating Market-Adjusted Damages

Market-adjusted damages are calculated as the difference between the ending value of the Diversified Portfolio (model) and the Actual Portfolio over the period in question. To make this calculation the actual returns on the appropriate asset class indexes are used as the returns on each asset class in the Diversified Portfolio.

A. Calculating the Ending Value of the Diversified Portfolio. Calculating the ending value of the Diversified Portfolio for comparison with the ending value of the Actual Portfolio requires consideration of all factors that affect, in a real-world sense, the Diversified Portfolio's ending value. These factors are estimated based on activities assumed to take place as a result of "managing" the Diversified Portfolio in parallel with the Actual Portfolio.

Calculated returns should distinguish explicitly between investment performance and any additions and withdrawals, reporting only returns due to trading decisions and market action. One possibility is the time-weighted rate of return that uses the beginning and ending market values of the portfolio each period and then weights each addition and withdrawal for the amount of time it was invested.[17] As a practical matter the returns of the asset class indexes in the Diversified Portfolio can be determined on a monthly basis.[18] The month-end values of assets in the portfolio, reflecting the monthly returns of each asset class for the month, become the beginning value for the next month. Any withdrawals or additions to the Actual Portfolio should be accounted for in the month in which they occurred and the rebalancing of the Diversified Portfolio (discussed further below) should be accounted for in the month in which these changes took place.

The activities and cost consequences associated with management of the Diversified Portfolio were introduced in Section III. D and are more fully developed in the following subsections:

1. Taxes Associated with Portfolio Rebalancing. Whenever there are significant additions or withdrawals from the Actual Portfolio, assets should be purchased or sold to maintain its original asset allocation in keeping with that of the Diversified Portfolio. The purchase of additional securities in the case of a portfolio addition will not trigger a capital gains tax. On the other hand, an allowable, significant withdrawal from the Actual Portfolio will require an assumed sale of assets in the Diversified Portfolio with possible recognition of capital gains or losses and associated tax implications.

2. Taxes Associated with Trust Income. Unless all distributable net income of the Diversified Portfolio is assumed to be paid out to the income beneficiary, the trust's liability for income taxes on its nondistributed portion must be considered.

3. Transaction Costs and Administrative Fees. Just as the Actual Portfolio incurs transaction costs and administrative fees, these costs must be recognized also in the Diversified Portfolio. Administrative fees are typically assessed as a percentage of assets or a fixed dollar amount. Making a matching adjustment to the Diversified Portfolio is usually straightforward. Transaction costs should also be recognized as an expense to the Diversified Portfolio and the charges for this cost should be related to the turnover of assets associated with the Diversified Portfolio's rebalancing or reallocation.

[17] The Chartered Financial Analysts Institute has promulgated rules for the fair presentation of investment results. These rules require the time weighted rate of return method be used to calculate total return. See *AIMR Performance Presentation Standards Handbook* as well as *Performance Reporting for Investment Managers* both published by AIMR. AIMR is the former name of the Chartered Financial Analysts Institute.

[18] If there are no significant withdrawals or additions to the portfolio within a year, it is reasonable to use the annual returns on the assets in the Diversified Portfolio for calculating year-end values for the portfolio.

4. Portfolio Rebalancing and Reallocation. Rebalancing occurs when cash flows in or out of the portfolio or market action requires transactions to bring the portfolio back to its original asset allocation design. Furthermore, the fiduciary should review the asset allocation periodically and consider the possibility of rebalancing the portfolio. Practically, fiduciaries should review the asset allocation whenever the trust's circumstances change or when capital market conditions are materially different than when the portfolio was designed. Whenever these reviews occur, a new estimate of the Efficient Frontier must be made and the appropriate asset allocation of the Diversified Portfolio determined. This reallocation may also trigger capital gains and losses along with associated taxes.

B. Estimating Damages. Realistically, expected and actual asset class returns will not match exactly as precise expectations are realized rarely in practice. Thus, the Diversified Portfolio and the Actual Portfolio will in all likelihood have returns slightly different from their expected returns. Nevertheless, the Diversified Portfolio will have been the best *ex ante* choice for a fiduciary, because it will have been constructed to be consistent with the IPS.

After all out-of-pocket cost adjustments, additions, and withdrawals are made to the Diversified Portfolio, damages are the difference between the Diversified Portfolio's ending value and that of the Actual Portfolio. The period for estimating damages is over the time periods in which the fiduciary has misallocated the Actual Portfolio. If the fiduciary's overall performance is better than that of the Diversified Portfolio, then the fiduciary should not be liable for damages. Occasionally, even though the fiduciary did not manage appropriately the assets entrusted to his or her care actual performance, for whatever reason, was sufficient to eliminate any cause for damages.[19]

C. Multi-year Investment Periods and Annual Reviews. When the investment period extends over several years a reasonable minimum expectation is that the fiduciary will review portfolio performance at least annually.[20] Relative asset class performance will change, potentially shifting the Efficient Frontier. Reallocating the Diversified Portfolio may be necessary. More importantly, from a potential liability perspective these annual reviews give an errant fiduciary the opportunity to reallocate the Actual Portfolio to a more efficient and, therefore, more appropriate allocation. During any time period when the fiduciary did not comply with the IPS or, in its absence, the needs of the trust, damages might be claimed. In other words, any time the fiduciary selects a portfolio that *a priori* has an inappropriate amount of expected risk or return, the fiduciary could be liable for damages.

VI. Illustration 2: The Model Damages Portfolio Based on MPT and the Actual Portfolio at an Inappropriate Risk Level

To this point we have only considered the case in which the fiduciary has constructed an inefficient portfolio at the appropriate risk level. When the fiduciary ignores expected risk in a MPT context, it is likely the fiduciary will construct a portfolio where both the expected risk and return are inappropriate. These situations are depicted below.

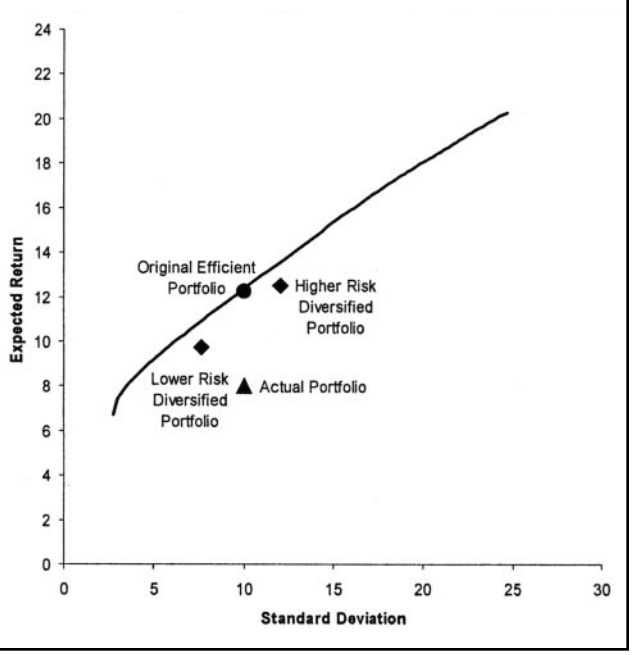
A. Actual Portfolio Has Too Much Risk. In Chart VI.1, two alternative portfolios are labeled as "Higher Risk Diversified Portfolio" and "Lower Risk Diversified Portfolio." Consider first the situation where the fiduciary has constructed the Actual Portfolio with too much risk. If we assume the IPS indicates the appropriate amount of expected risk is 7.6%, the original Efficient Portfolio and its Diversified counterpart depicted earlier are no longer relevant. Instead the Efficient Frontier indicates a portfolio with an expected risk of 7.6% would have an expected return of 10.9%. To avoid clutter this portfolio is not depicted in Chart V.1.

As before, assume the expert judges this portfolio, while efficient at that risk level to lack appropriate diversification. The expert, therefore, selects the Lower Risk Diversified Portfolio depicted in Chart VI.1 which has the same 7.6% expected risk, and an expected 9.75% return. Again, experts, like fiduciaries, need to exercise their business judgment and may choose somewhat less than strictly efficient portfolios to achieve other worthy goals, like diversification. The Lower Risk Diversified Portfolio asset allocation should be used, as before, in assessing periodic portfolio returns and ending portfolio value.

[19] As indicated earlier, we do not address in this article the measures of damages associated with activities such as "churning" or punitive damages associated with self-dealing and fraud.

[20] The Center for Fiduciary Studies suggests a fiduciary review the Investment Policy Statement (and the associated asset allocation) at least annually. See *Prudent Investment Practices: A Handbook for Fiduciaries,* Foundation for Fiduciary Studies, 2004.

Chart VI.1
Efficient, Actual, and Higher and Lower Risk Portfolios



B. Actual Portfolio Has Too Little Risk. Consider the second situation where a fiduciary constructs the Actual Portfolio with too little risk. If we assume the IPS indicates the appropriate expected risk is 12%, the Efficient Frontier indicates a portfolio at this expected risk level of would have a13.56% expected return.

As before, assume the expert judges this portfolio, while efficient at that level of risk, to lack appropriate diversification. The expert, therefore, selects the Higher Risk Diversified Portfolio which has the same expected risk and a 12.50% expected return. The Higher Risk Diversified Portfolio asset allocation will be used, as before, in assessing periodic portfolio returns and ending portfolio value.

C. Estimating Damages. The process for estimating damages is the same whether the Actual Portfolio has, *ex ante,* the appropriate, too much, or too little risk. After all out-of-pocket cost adjustments, additions, and withdrawals are made to the expert's selected Diversified Portfolio, damages are the difference between the Diversified Portfolio's ending value and the Actual Portfolio ending value. Again, the period for estimating damages is over the time periods in which the fiduciary has misallocated the Actual Portfolio.

VII. Conclusions

A. The Courts and a Market-Adjusted Damages Model. In liability cases involving fiduciaries, courts appear to be receptive to a market-adjusted damages approach. The hesitancy of the courts to embrace more fully the adoption of a market-adjusted damages approach appears to be a lack of confidence in earlier approaches suggested for using market results to assess damages. In many respects the courts have been correct in their concern that proposed market-related damage models may not have been fair to the plaintiff or the defendant. To be fair and consistent with the Rule, a market-adjusted damage model must embrace principles of MPT. Additionally, application of the model to determine market value estimates must include consideration of all "real-world" inflows and outflows of the actual portfolio. If experts use the approach we suggest, the courts will justifiably have more confidence in the logic and fairness of the market-adjusted model approach for measuring damages.

B. The Case for the Market-Adjusted Damages Model Approach Using MPT. The liability model we have developed throughout this article is consistent with one of the basic principles of the Act: fiduciaries should be liable only for their conduct—not for investment results. Our focus is based completely on *a priori* conduct and finds fault only when the fiduciary ignores the guidance provided by the Act to use MPT as a tool. Once fault is determined, we have demonstrated how MPT can be used to assess damages. Because MPT is consistent with the Act and should be used, with considered judgment, in constructing a trust's portfolio, it is only logical to apply the same MPT principles to assess damages. Finally, we have demonstrated once again in trust portfolio construction that MPT can be ignored only at the fiduciary's peril.