

Resolution 12-02-2009

Surcharge and Additional Damages Recoverable from Agent Under Power of Attorney

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Probate Code section 4231 and add Probate Code section 4231.5 to read as follows:

- 1 §4231
2 (a) Except as provided in subdivisions (b) ~~and (c)~~, in dealing with property
3 of the principal, an attorney-in-fact shall observe the standard of care that would be
4 observed by a prudent person dealing with property of another and is not limited by
5 any other statute restricting investments by fiduciaries.
6 ~~(b) If an attorney in fact is not compensated, the attorney in fact is not~~
7 ~~liable for a loss to the principal's property unless the loss results from the attorney in~~
8 ~~fact's bad faith, intentional wrongdoing, or gross negligence.~~
9 (eb) An attorney-in-fact who has special skills or expertise or was designated
10 as an attorney-in-fact on the basis of representations of special skills or expertise shall
11 observe the standard of care that would be observed by others with similar skills or
12 expertise.
13
14 §4231.5
15 (a) If the attorney-in-fact breaches a fiduciary duty, the attorney-in-fact is
16 chargeable with any of the following that is appropriate under the circumstances:
17 (1) Any loss or depreciation in value of the principal's property resulting from
18 the breach of duty, with interest.
19 (2) Any profit made by the attorney-in-fact through the breach of duty, with
20 interest.
21 (3) Any profit that would have accrued to the principal if the loss of profit is
22 the result of the breach of duty.
23 (b) If the attorney-in-fact has acted reasonably and in good faith under the
24 circumstances as known to the attorney-in-fact, the court, in its discretion, may
25 excuse the attorney-in-fact in whole or in part from liability under subdivision (a) if it
26 would be equitable to do so.
27 (c) If a court finds that a person has in bad faith wrongfully taken,
28 concealed, or disposed of property belonging to a principal under a Power of
29 Attorney, the person shall be liable for twice the value of the property recovered by
30 an action to recover the property or for surcharge. The remedy provided in this
31 paragraph shall be in addition to any other remedies available in law to the principal
32 or any successor in interest of the principal.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Sacramento County Bar Association

STATEMENT OF REASONS:

Existing Law: The Probate Code does not specifically provide for the liability of an attorney-in-fact. While Probate Code section 4231 provides that if attorney-in-fact is uncompensated the attorney-in-fact is not liable for loss to the principal's property unless the loss results from the attorney-in-fact's bad faith, intentional wrongdoing, or gross negligence, the Probate Code does not provide what liability an attorney-in-fact could incur. Probate Code section 859 provides for recovery of additional damages, by estates of decedents, conservatees, minors and trusts, in an amount of double the property recovered if the court finds a person in bad faith wrongfully took, concealed, or disposed

of property belonging to either an estate of a decedent, conservatee, minor and trust, but no such provision currently exist for property a principal.

This Resolution: This resolution specifies what liability an attorney-in-fact is liable for and provides principals with the same additional damages for bad faith wrongful taking, concealing or disposing of property of the principal as are provided to estates of decedents, conservatees, minors, or trusts.

The Problem: There is no current law addressing the surcharge of people acting under a power of attorney.

IMPACT STATEMENT:

This resolution does not affect any other law, statute or rule.

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