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AUTHOR: Sacks, Robert N.

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COMMITTEE: Section Program: Litigation and Controversy Group

Robert N. Sacks
Sacks, Glazier, Franklin & Lodise LLP
350 South Grand Avenue, Suite 3500
Los Angeles, CA 90071
(213) 617-7360
rsacks@TrustLitigation.LA

MEASURING DAMAGES IN FIDUCIARY LITIGATION - - A REVIEW OF DECISIONS AND TRENDS

I. THE CALIFORNIA STATUTORY APPROACH

A. Introduction

Undoubtedly due to its large population and high degree of personal wealth, California sees more than its share of fiduciary litigation. Because California has a well-developed framework for measuring damages in breach of duty lawsuits against fiduciaries, its various approaches for measuring such damages are worth reviewing and seem to be consistent with measures in other jurisdictions.

As discussed in detail below, there are various, alternative measures of damages in breach of fiduciary duty lawsuits in California. One clear goal in measuring such damages is to make the trust whole by assessing damages in an amount that covers any loss to the trust resulting from the breach of duty, plus interest. But in situations where the fiduciary has used trust property to personal advantage, another measure of damages would force the trustee to disgorge all profits she made through the breach to the trust. In addition, there are other ways to enhance damages in California, including double damages, punitive damages, and awards that force the fiduciary to return all fees taken or to pay legal fees and costs for itself and/or the other side.

B. The Statutory Framework Provides an Array of Damages Measures

The key statute governing the measure of damages in breach of fiduciary duty claims against trustees is California Probate Code Section 16440[1], which is titled, "Breach of trust; liability; good faith actions." This statute states:

> (a) If the trustee commits a breach of trust, the trustee is chargeable with any of the following that is appropriate under the circumstances:
>
> (1) Any loss or depreciation in value of the trust estate resulting from the breach of trust, with interest.
>
> (2) Any profit made by the trustee through the breach of trust, with interest
>
> (3) Any profit that would have accrued to the trust estate if the loss of profit is the result of the breach of trust
>
> (b) If the trustee has acted reasonably and in good faith under the circumstances as known to the trustee, the court, in its discretion, may excuse the trustee in whole or in part from liability under subdivision (a) if it would be equitable to do so.

Section 16440 thus provides for a variety of ways to measure damages if the trustee has been found in breach of her fiduciary duty. If the breach resulted in a decline in value of trust property, the trustee may be held liable for the entire decline, plus interest. However, in some cases the trustee will have benefitted personally through the breach of duty, such as cases involving self-dealing in its many forms, including acquiring trust property for less than fair value or outright conversion. In such matters, the trustee may be held liable for the profit she made through her breach, with interest.

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[1] All statutory references will be to the California Probate Code, unless otherwise indicated.

In other situations, the trustee's breach may have led to the trust losing out on potential profits from an investment, and in such cases the trustee may be held liable for any loss of profit to the trust resulting from the breach of duty.

Section 16441 provides that when a trustee is found liable for interest under Section 16440, the trustee is liable for the greater of the amount of interest actually received or interest at the legal rate on judgments during the applicable time period. As with Section 16440 (b), the court may excuse such interest payment by the trustee if that would be equitable in the court's view. Section 16441 (b).

Having these alternate measures of damages not only provides for ways to measure damages tailored to specific types of breaches of duty, but also gives the suing party a range of options to investigate and alternatives to present to the trier of fact. And if these options are not enough, Section 16442 states that the trust damages statutes " . . . do not prevent resort to any other remedy available under the statutory or common law." But it should also be noted that under California law, "The remedies of a beneficiary against the trustee are exclusively in equity." Section 16421.

Because most fiduciary litigation presently seems to involve trusts, these materials focus on situations involving trusts and trustees. However, it is worth noting that the measures of damages under Section 16440 for trust matters are restated virtually identically in the Cal. Probate Code for breach of fiduciary duty claims involving executors, administrators or other personal representatives (Section 9601) and in matters involving guardianships and conservatorships (Section 2401.3).

Often, breach of duty claims involving trusts arise where a trustee has failed to account properly or in connection with objections to an accounting. It is common in California (and elsewhere) for objections to an accounting by a beneficiary to be accompanied by requests for damages or surcharge against the trustee. Under Section

17211, if a beneficiary contests a trustee's accounting and if either sides' position "was without reasonable cause and in bad faith" the prevailing party may be awarded their legal fees and costs incurred in the action. Thus, a trustee may be held personally liable for the beneficiary's fees and costs in some situations.

In situations where the fiduciary has engaged in egregious misconduct, which generally would involve self-dealing, California law prohibits enhanced damages in addition to the measures of damages set forth above. Section 859 states, in relevant part, "If a court finds that a person has in bad faith wrongfully taken, concealed, or disposed of property belonging to the estate of a decedent, conservatee, minor or trust, the person shall be liable for twice the value of the property recovered by an action under this part." Accordingly, if a trustee is found to have engaged in such bad faith conduct, double damages may be awarded. And punitive damages may also be awarded in breach of fiduciary duty cases in California. See Cal. Civil Code Section 3294.

In addition, courts in California have broad equitable powers in addressing issues such as the fiduciary's fees and attorneys' fees. Upon finding a breach of fiduciary duty, the court can reduce the fiduciary's requested compensation, and can even force the fiduciary to disgorge compensation previously received. The same holds true for the fiduciary's legal fees -- the court can rule that the fiduciary must personally pay its own legal fees and costs, and can order that a complaining beneficiary's legal fees and costs be paid from the trust, or even by the fiduciary itself.

It is thus apparent that the statutory framework in California provides a broad arsenal of ways to measure damages in breach of fiduciary duty cases. Depending upon the nature of the breach of duty, damages claims may be tailored to seek restitution to the trust, or lost profits due to the bridge, together with interest. There are also ways to enhance these damages based upon particular, wrongful conduct by the fiduciary. Finally, it should be noted that, aside from ordering the payment of money and the other measures of damages set forth above, the court has other ways to punish the trustee, such as suspending and/or removing her from her fiduciary position or imposing injunctive relief, among others. See Section 16420.

For this program, selected trial and appellate court decisions will be discussed in order to demonstrate how the statutory framework has been applied in specific situations. Given the panoply of damages measures available, it is safe to say that every breach of fiduciary duty case will have at least one, and often more than one, approaches when a litigant seeks redress against a fiduciary.

ROBERT N. SACKS
SACKS, GLAZIER, FRANKLIN & LODISE LLP
350 South Grand Avenue, Suite 3500
Los Angeles, California 90071
Tel: (213) 617-7360
Fax: (213) 617-9350
E-mail: rsacks@TrustLitigation.LA

Robert N. Sacks is a 1986 graduate of the University of California at Los Angeles School of Law and a 1981 graduate (With Distinction) of the University of Wisconsin. Bob's practice focuses on estate and trust litigation, and he writes and lectures on related topics for organizations such as the Los Angeles County, Beverly Hills and American Bar Associations and for programs sponsored by the California Institute of Technology, Stanford University, the University of Miami and the University of Southern California. Bob currently serves as Group Vice Chair overseeing the Litigation and Controversy committees of the American Bar Association's Real Property, Probate and Trust Law Section. He has also been elected a Fellow of the American College of Trust and Estate Counsel, and is a member of its Fiduciary Litigation Committee.