

15-5-1002. Damages for breach of trust. (a) A TRUSTEE WHO COMMITS A BREACH OF TRUST IS LIABLE TO THE BENEFICIARIES AFFECTED FOR THE GREATER OF:

(1) THE AMOUNT REQUIRED TO RESTORE THE VALUE OF THE TRUST PROPERTY AND TRUST DISTRIBUTIONS TO WHAT THEY WOULD HAVE BEEN HAD THE BREACH NOT OCCURRED; OR

(2) THE PROFIT THE TRUSTEE MADE BY REASON OF THE BREACH.

(b) EXCEPT AS OTHERWISE PROVIDED IN THIS SUBSECTION (b), IF MORE THAN ONE TRUSTEE IS LIABLE TO THE BENEFICIARIES FOR A BREACH OF TRUST, A TRUSTEE IS ENTITLED TO CONTRIBUTION FROM THE OTHER TRUSTEE OR TRUSTEES. A TRUSTEE IS NOT ENTITLED TO CONTRIBUTION IF THE TRUSTEE WAS SUBSTANTIALLY MORE AT FAULT THAN ANOTHER TRUSTEE OR IF THE TRUSTEE COMMITTED THE BREACH OF TRUST IN BAD FAITH OR WITH RECKLESS INDIFFERENCE TO THE PURPOSES OF THE TRUST OR THE INTERESTS OF THE BENEFICIARIES. A TRUSTEE WHO RECEIVED A BENEFIT FROM THE BREACH OF TRUST IS NOT ENTITLED TO CONTRIBUTION FROM ANOTHER TRUSTEE TO THE EXTENT OF THE BENEFIT RECEIVED.

The 2005 UTC Colorado comments recommended adopting 1002 as is.

SUBSECTION (a)

Subsection (a) is based on R3d Trusts, Prudent Investor Rule §205. Compare the language of R2d Trusts §205 – same concept but a little different wording:

A trustee who commits a breach of trust is

- (a) Accountable for any profit accruing to the trust through the breach of trust; or
- (b) Chargeable with the amount required to restore the values of the trust estate and trust distributions to what they would have been if the trust had been properly administered.

In addition, the trustee is subject to such liability as necessary to prevent the trustee from benefiting personally from the breach of trust (see §206).

Differences:

- R2d 205 does not specify “the greater of” the two; R3d does.
- R2d 205 mentions restoring values to what they would have been “if the trust had been properly administered” where R3d uses “what they would have been had the breach not occurred.”
- Both R2d and R3d use “or,” not “and” – see commentary below.

R3d comments:

Comment:

a. Alternatives available to the beneficiaries. If a trustee commits a breach of trust, the beneficiaries may affirm the transaction and accept the results of the trustee's improper conduct. In such a case the trustee is accountable for any profits accruing to the trust as a result of the breach. If the breach of trust causes a loss, including any failure to realize income, capital gain, or appreciation that would have resulted from proper administration, the beneficiaries may surcharge the trustee for the amount necessary to compensate fully for the consequences of the breach. Thus, the recovery for an improper investment by a trustee would ordinarily be the difference between (1) the value of the investment and its income and other product at the time of surcharge and (2) the amount of the funds expended in making the investment, increased (or decreased) by the amount of the total return (or negative total return) that would have accrued to the trust and its beneficiaries if the funds had been properly invested. Similarly, if a breach of trust involved accepting too low a price in an otherwise proper sale of trust property, the trustee's liability would be the amount by which the sale price was inadequate and a compounded return on that amount to the date of surcharge. In most cases appropriate return rates might be based on total return experience (positive or negative) for other investments of the trust in question, or possibly that of portfolios of other trusts having comparable objectives and circumstances. See generally § 211, Comment *e*, and Reporter's Note thereto. On total return, see § 227, Comment *e*. In some cases, especially involving breaches of short duration, it may be appropriate simply to charge the trustee with interest rather than looking to total return. See § 209, Comment *b*, and § 211. The beneficiaries' decision to accept or to hold the trustee liable for the results of a breach of trust ordinarily does not relieve the trustee of the duty thereafter to administer the trust properly (requiring, for example, that the trustee dispose of the improper investment and reinvest the proceeds). Nor does it preclude a court from granting other remedies available for fiduciary misconduct, such as denial of fees or removal from office (see § 107), when appropriate to the circumstances involved. On the further possibility of recovering gains realized by the trustee personally from a breach of trust involving violation of the duty of loyalty, see § 206.

NCCUSL comments:

- If a trustee commits a breach, the beneficiaries may either affirm the transaction or, if a loss has occurred, hold the trustee liable for the amount necessary to compensate fully for the consequences of the breach, including recovery of lost income, capital gain, or appreciation that would have resulted from proper administration.
- Even if a loss has not occurred, the trustee may not benefit from the improper action and is accountable for any profit the trustee made by reason of the breach.
- For purposes of 1002 and 1003, “profit” does not include the trustee’s compensation. A Trustee who has committed a breach of trust is entitled to reasonable compensation for administering the trust unless the court reduces or denies the trustee compensation pursuant to Section 1001(b)(8).

“For extensive commentary on the determination of damages, traditionally known as trustee surcharge, with numerous specific applications, see Restatement (Third) of Trusts: Prudent Investor Rule §§ 205-213 (1992). For the use of benchmark portfolios to determine damages, see Restatement (Third) of

Trusts: Prudent Investor Rule Reporter's Notes to §§ 205 172 and 208-211 (1992). On the authority of a court of equity to reduce or excuse damages for breach of trust, see Restatement (Second) of Trusts § 205 cmt. g (1959).

For purposes of this section and Section 1003, "profit" does not include the trustee's compensation. A trustee who has committed a breach of trust is entitled to reasonable compensation for administering the trust unless the court reduces or denies the trustee compensation pursuant to Section 1001(b)(8)."

Colorado cases:

Beyer v. First National Bank, 843 P.2d 53 (Colo. App. 1992). Beneficiaries signed Consent and Release forms relieving the first bank trustee from any liability for any loss incurred in connection with the trust's purchase of two limited partnership interests. Successor bank trustee FNB had beneficiaries sign similar consent and indemnification forms before they took over as trustee. Held, no breach.

"[B]eneficiaries, acting with knowledge of the facts and of their legal rights, may direct the trustee's performance and, if losses are sustained thereby, they cannot be heard to complain" (citing Bogert §941, Scott on Trusts §216). The court quoted Restatement (Second) of Trusts §216 in its entirety, which states that a beneficiary cannot hold a trustee liable for a breach of trust if the beneficiary has consented to the act or omission by the trustee.

Heller v. First National Bank of Denver, 657 P.2d 992 (1982). Heller signed a relinquishment of her control over investments in favor of the trustee. Trustee then invested in its own common trust funds, one of which suffered a substantial decline. The court held like in *Beyer* that "where a beneficiary, with full capacity and full knowledge of the facts, consents to an action by the trustee, the beneficiary may not thereafter contend that the act was a breach of trust," although the Court still found 1) that the bank had breached its duty to provide clear and accurate accountings, 2) that the trial court "permissibly concluded that the bank did not exercise proper discretion in its consideration of trust distributions" and 3) that the bank had thus "not properly performed the services for which compensation is given." The court stated that when "a trustee has been guilty of a serious breach of trust, it is within the discretion of the court to deny it all compensation, or to reduce its commissions below the sum which otherwise would be granted." Bank was ordered to 1) pay back ½ of its compensation from inception to the filing of the action, plus simple interest at the legal rate; 2) restore to the trust \$5500 plus simple interest at the legal rate to replace improperly made distributions; 3) pay Heller \$12000 to reimburse her for her reasonable accountant and attorney fees.

SUBSECTION (b)

NCCUSL comments

Subsection (b) is based on Restatement (Second) of Trusts § 258 (1959). Cotrustees are jointly and severally liable for a breach of trust if there was joint participation in the breach. Joint and several liability also is imposed on a nonparticipating cotrustee who, as provided in Section 703(g), failed to exercise reasonable care (1) to prevent a cotrustee from committing a serious breach of trust, or (2) to compel a cotrustee to redress a serious breach of trust. Joint and several liability normally carries with it a right in any trustee to seek contribution from a cotrustee to the extent the trustee has paid more than the trustee's proportionate share of the liability. Subsection (b), consistent with Restatement (Second) of Trusts § 258 (1959), creates an exception. A trustee who was substantially more at fault or committed the breach of trust in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries is not entitled to contribution from the other trustees. Determining degrees of comparative fault is a question of fact. The fact that one trustee was more culpable or more active than another does not necessarily establish that this trustee was substantially more at fault. Nor is a trustee substantially less at fault because the trustee did not actively participate in the breach. See Restatement (Second) of Trusts § 258 cmt. e (195). Among the factors to consider: (1) Did the trustee fraudulently induce the other trustee to join in the breach? (2) Did the trustee commit the breach intentionally while the other trustee was at most negligent? (3) Did the trustee, because of greater experience or expertise, control the actions of the other trustee? (4) Did the trustee alone commit the breach with liability imposed on the other trustee only because of an improper delegation or failure to properly monitor the actions of the cotrustee? See Restatement (Second) of Trusts § 258 cmt. d (1959).

Colorado 2005 comments: None.

Cases found:

Estate of Foiles, 338 P.3d 1098 (Colo. App. Div. 3 2014): Larry Foiles was both a co-trustee and a beneficiary. Court found that Bank co-trustee's ratification of a transaction by Larry as individual co-trustee did not preclude a breach of fiduciary duty claim, where the trust instrument contained language that "no individual trustee shall exercise or join in the exercise of such powers for his or her own benefit, directly or indirectly. Whenever . . . the participation in income or principal of a beneficiary who is also a trustee is being considered or may be affected by other action under consideration, all decisions shall be made exclusively and solely by [the Bank]." Only the consent of all beneficiaries could ratify an action that was in violation of the trust terms. Remanded.
