

15-5-1008. Exculpation of trustee.

(A) A TERM OF A TRUST RELIEVING A TRUSTEE OF LIABILITY FOR BREACH OF TRUST IS UNENFORCEABLE TO THE EXTENT THAT IT:

- (1) RELIEVES THE TRUSTEE OF LIABILITY FOR BREACH OF TRUST COMMITTED IN BAD FAITH OR WITH RECKLESS INDIFFERENCE TO THE PURPOSES OF THE TRUST OR THE INTERESTS OF THE BENEFICIARIES; OR
- (2) WAS INSERTED AS THE RESULT OF AN ABUSE BY THE TRUSTEE OF A FIDUCIARY OR CONFIDENTIAL RELATIONSHIP TO THE SETTLOR.

(B) AN EXCULPATORY TERM DRAFTED OR CAUSED TO BE DRAFTED BY THE TRUSTEE IS INVALID AS AN ABUSE OF A FIDUCIARY OR CONFIDENTIAL RELATIONSHIP UNLESS THE TRUSTEE PROVES THAT THE EXCULPATORY TERM IS FAIR UNDER THE CIRCUMSTANCES AND THAT ITS EXISTENCE AND CONTENTS WERE ADEQUATELY COMMUNICATED TO THE SETTLOR.

From the NCCUSL comments:

- Subsection (a) is consistent with the [good faith] standards expressed in sections 105 and 814(a)
- This section is also similar to Section 222 of the Restatement (Second) of Trusts, except that this Code, unlike the Restatement, allows a settlor to exculpate a trustee for a profit that the trustee made from the trust.
- Subsection (b) disapproves of cases such as *Marsman v. Nasca*, 573 N.E.2d 1025 (Mass. App. Ct. 1991), which held that an exculpatory clause in a trust instrument *drafted by the trustee* was valid because the beneficiary could not prove that the clause was inserted as a result of an abuse of a fiduciary relationship. See also *Rutanan v. Ballard*, 678 N.E.2d 133 (Mass. 1997). . . To overcome the presumption of abuse in subsection

(b), the trustee must establish that the clause was fair and that its existence and contents were adequately communicated to the settlor.

- Factors in determining whether the clause was fair: 1) the extent of the prior relationship between settlor and trustee; 2) whether the settlor received independent advice; 3) the sophistication of the settlor with respect to business and fiduciary matters; 4) the trustee's reasons for inserting the clause; and 5) the scope of the particular provision inserted. See R2d Trusts 222 cmt. d.
- Requirements of subsection (b) are satisfied if the settlor was represented by independent counsel.

2005 UTC Colorado comments:

- Subsection (a) tracks Section 222 of R2d Trusts. There is a minimum standard of conduct to which a trustee must adhere, whether stated as a negation of a duty or in the form of an exculpatory provision.
- They found no Colorado case law or CO statutory provisions governing exculpation of a trustee
- They recommended adopting 1008 as is, "to the extent that it is consistent with Colorado law"

Current CO law

- 15-1-509: "In the exercise of any of the powers granted in this part 5, a fiduciary has a duty to act reasonably and equitably with due regard for his obligations and responsibilities toward the interests of beneficiaries and creditors and the estate or trust involved and the purposes thereof and with due regard for the manner in which men of prudence, discretion, and intelligence would act in the management of the property of another."
- 15-1.1-101(b): "A trustee is not liable to a beneficiary to the extent that the trustee acted in reasonable reliance on the provisions of the trust."
- Found no new CO cases specifically citing R2d Trusts 222
- See 2013 EP Retreat materials on exculpatory clauses from Dennis
 - o Includes Restatement 2d Trusts §222
 - o Rippey v. Denver United States National Bank, 273 F.Supp. 718 (D. Colo. 1967) deals with exculpatory clauses – they didn't protect the bank because it acted 'recklessly'