

## PART 10

### LIABILITY OF TRUSTEES AND RIGHTS OF PERSONS DEALING WITH TRUSTEES

**15-5-1009. Beneficiary's consent, release, or ratification.** (a) A TRUSTEE IS NOT LIABLE TO A BENEFICIARY FOR BREACH OF TRUST IF THE BENEFICIARY CONSENTED TO THE CONDUCT CONSTITUTING THE BREACH, RELEASED THE TRUSTEE FROM LIABILITY FOR THE BREACH, OR RATIFIED THE TRANSACTION CONSTITUTING THE BREACH, UNLESS:

(1) THE CONSENT, RELEASE, OR RATIFICATION OF THE BENEFICIARY WAS INDUCED BY IMPROPER CONDUCT OF THE TRUSTEE; OR

(2) AT THE TIME OF THE CONSENT, RELEASE, OR RATIFICATION, THE BENEFICIARY DID NOT KNOW OF THE BENEFICIARY'S RIGHTS OR OF THE MATERIAL FACTS RELATING TO THE BREACH.

#### **NCCUSL COMMENTS**

This section is based on Sections 216 through 218 of the Restatement (Second) of Trusts (1959). A consent, release, or affirmance under this section may occur either before or after the approved conduct. This section requires an affirmative act by the beneficiary. A failure to object is not sufficient. *See* Restatement (Second) of Trusts § 216 cmt. a (1959). A consent is binding on a consenting beneficiary although other beneficiaries have not consented. *See* Restatement (Second) of Trusts § 216 cmt. g (1959). To constitute a valid consent, the beneficiary must know of the beneficiary's rights and of the material facts relating to the breach. *See* Restatement (Second) of Trusts § 216 cmt. k (1959). If the beneficiary's approval involves a self-dealing transaction, the approval is binding only if the transaction was fair and reasonable. *See* Restatement (Second) of Trusts §§ 170(2), 216(3) and cmt. n (1959).

An approval by the settlor of a revocable trust or by the holder of a presently exercisable power of withdrawal binds all the beneficiaries. *See* Section 603. A beneficiary is also bound to the extent an approval is given by a person authorized to represent the beneficiary as provided in Article 3.

**2001 Amendment.** By a 2001 amendment, the limitation of this section to beneficiaries “having capacity” was deleted. This limitation was included by mistake. As indicated in the second paragraph of the comment, the drafting committee did not intend to prohibit the use of the representation provisions of Article 3, several of which address representation of and the giving of a binding consent on behalf of an incapacitated beneficiary.

### **Colorado Comments**

The Colorado Court of Appeals has consistently held that where beneficiaries of a trust, after full disclosure, consented to actions of the trustee, they cannot later bring a claim for surcharge. The Colorado Court of Appeals held *In Trust for Julius F. Seeman*, 841 P.2d 403 (Colo. App. 1992), that the silence of co-trustees constituted consent to the actions of the sole trustee and that the co-trustees could not later complain concerning the actions of the sole trustee which benefitted the trust. In the case of *Beyer v. First National Bank*, 843 P.2d 53 (Colo. App. 1992), adult beneficiaries, after full disclosure of investments of the bank, consented to those investments. The Colorado Court of Appeals, in affirming the trial, held that the ratification of the investments of the bank by the beneficiaries precluded recovery of damages for loss resulting in poor investments.

### **Colorado UTC 2016 Comments/Recommendation**

1. Section 1009 is referenced in 15-5-802(b)(4).
2. *Seeman* and *Beyer* are still good law (as of 6/21/2016).
3. Recommend:
  - a. Keeping UTC language, and
  - b. Adding Colorado Comments above.

### **REFERENCE MATERIAL**

Restatement (Second) of Trusts §§ 216, 217, 218  
*Beyer v. First National Bank*, 843 P.2d 53 (Colo.App. 1992)