Second Supplement to Memorandum 86-16

Subject: Study L-640 - Probate Code (Trust Law--AB 2652)

Attached to this supplement as Exhibit 1 is letter from Paulette E. Leahy on behalf of the California Bankers Association commenting on the proposed trust law, AB 2652. The staff has the following responses to the points raised by CBA; the numbers refer to the corresponding numbered paragraph in the CBA letter:

1. Codification of doctrines of laches, ratification, and release

CBA suggests that AB 2652 should codify doctrines of laches, ratification, and release "consistent with the Commission's approach in codifying the common law."

CBA does not identify any particular need to codify these doctrines; the argument seems to be based on the notion of consistency with the approach of codifying the common law. However, the Commission has not adopted an overall policy of codifying the common law. In fact, the text of the *Recommendation Proposing the Trust Law* states that the Commission "has not attempted to codify all relevant rules relating to trusts that apply under the common law."

Nevertheless, there is some benefit either in noting these doctrines in a statutory comment or codifying generally accepted statements of some of them in Restatement terms. (For your information, Sections 217-219 of the Restatement (Second) of Trusts, which relate to these subjects, are attached to this supplement as Exhibit 2.) The statutory provisions governing consent (Section 16463), bar (Section 16460), and exculpation (Section 16461), along with the provision preserving the common law except as modified by statute (Section 15002) should provide adequate protections for trustees. However, it would be useful, in answer to CBA's objection, to add a statement to the Comment to Section 16460 (bar by adjudication, consent, limitation, or otherwise) that specifically

recognizes these common law doctrines. This comment might read as follows:

> The reference to claims "otherwise" barred in the introductory clause of subdivision (a) includes principles such as estoppel, laches, release, and subsequent affirmance that apply under the common law. See Section 15002 (common law as law of state); see also Restatement (Second) of Trusts §§ 217 (discharge of liability by release or contract), 218 (discharge of liability by subsequent affirmance), 219 (laches).

This approach involves a minimal change in the statutory language of AB 2652.

The staff recommends codification, but to a lesser degree than proposed by CBA. This approach would involve enacting statutes based on Restatement Sections 217 and 218 governing release and subsequent affirmance. Section 16463 in AB 2652 governs consent obtained before or at the time of an act or omission. Codifying release and affirmance would provide statutory guidance in situations where the act or omission has already occurred. The staff would not codify the doctrine of laches; rather we would note it in the Comment to Section 16460 as proposed above.

The following provisions would accomplish the codification of the doctrines of release and subsequent affirmance:

> § 16464. Discharge of trustee's liability by release or contract
>
> 16464. (a) Except as provided in subdivision (b), a beneficiary may be precluded from holding the trustee liable for a breach of trust by the beneficiary's release or contract effective to discharge the trustee's liability to the beneficiary for that breach.
>
> (b) A release or contract is not effective to discharge the trustee's liability for a breach of trust in any of the following circumstances:
>
> (1) Where the beneficiary was under an incapacity at the time of making the release or contract.
>
> (2) Where the beneficiary did not know of his or her rights and of the material facts that the trustee knew or should have known and that the trustee did not reasonably believe that the beneficiary knew.
>
> (3) Where the release or contract of the beneficiary was induced by improper conduct of the trustee.
>
> (4) Where the transaction involved a bargain with the trustee that was not fair and reasonable.

Comment. Section 16464 is a new provision that is the same in substance as Section 217 of the Restatement (Second) of Trusts (1957). Section 16464 supersedes former Civil Code Section 2230 to the extent that section governed release.

§ 16465. Discharge of trustee's liability by subsequent affirmance

16465. (a) Except as provided in subdivision (b), if the trustee in breach of trust enters into a transaction that the beneficiary can at his or her option reject or affirm, and the beneficiary affirms the transaction, the beneficiary cannot thereafter reject it and hold the trustee liable for any loss occurring after the trustee entered into the transaction.

(b) The affirmance of a transaction by the beneficiary does not preclude the beneficiary from holding the trustee liable for a breach of trust if, at the time of the affirmance, any of the following circumstances existed:

(1) The beneficiary was under an incapacity.

(2) The beneficiary did not know of his or her rights and of the material facts that the trustee knew or should have known and that the trustee did not reasonably believe that the beneficiary knew.

(3) The affirmance was induced by improper conduct of the trustee.

(4) The transaction involved a bargain with the trustee that was not fair and reasonable.

Comment. Section 16465 is a new provision that is the same in substance as Section 218 of the Restatement (Second) of Trusts (1957).

2. Sections 16300-16313. Revised Uniform Principal and Income Act

CBA notes that changes have been proposed in the RUPIA by both the CBA and the State Bar, and suggests that additional changes may be proposed in the future. The staff is unaware of any serious areas of disagreement that remain in this area. We thought that a consensus had been reached on the RUPIA. In any event, we await any suggestions that CBA or the State Bar wish to propose.

CBA does raise one new substantive point. It is suggested that "securities listed on a national securities exchange or traded in over the counter" be exempted from Section 16311 dealing with underproductive property. CBA argues that otherwise this section would be in conflict with the portfolio theory of investments embodied in Section 16040(b). CBA suggests the New York statute as a model, presumably Estates, Powers, and Trusts Law Section 11-2.1(k)(1) (McKinney 1967).

This suggestion is acceptable to the staff. It appears that Hawaii also has made this variation in the RUPIA. (Some other states have omitted the underproductive property section altogether.) To implement this suggestion, a subdivision should be added to Section 16311 reading as follows: "This section does not apply to securities listed on a national securities exchange or traded over the counter." The comment would be revised to note that this subdivision is drawn from statutes in other states, citing New York and Hawaii law, and that it is intended to avoid a conflict with the portfolio theory of investments. The comment should also state that the allocation of principal and income with regard to securities is governed by Section 16302 (due regard for interests of income beneficiaries and remainder beneficiaries).

3. Section 15643. Filling vacancies in office of trustee

CBA suggests that Section 15643 should make clear that a vacancy in the office of a cotrustee need not be filled unless the trust so requires.

This matter is covered in Section 15660 which provides the rule suggested by CBA. The purpose of Section 15643 is to list the situations in which a vacancy occurs, whereas Section 15660 governs the appointment of a trustee to fill a vacancy. The Comment to Section 15643 should contain a cross-reference to Section 15660. The Comment to Section 15660 discusses this subject in greater detail and reads as follows:

> Comment. Section 15660 supersedes former Civil Code Sections 2287 and 2289 and former Probate Code Sections 1125, 1126, and 1138.9. For a provision governing the occurrence of vacancies in the office of trustee, see Section 15643. Subdivision (a) makes clear that the vacancy in the office of a cotrustee must be filled only if the trust so requires. If the vacancy in the office of cotrustee is not filled, the remaining cotrustees may continue to administer the trust under Section 15621, unless the trust instrument provides otherwise. The provision in subdivision (b) relating to a "practical" method of appointing a trustee continues language found in former Civil Code Section 2287 and supersedes part of former Probate Code Section 1138.9.
>
> The authority of the court to appoint the same or a lesser number of trustees in subdivision (c) continues the

second sentence of former Civil Code Section 2289 without substantive change. The provision requiring the court to give consideration to the wishes of the beneficiaries in subdivision (c) supersedes the second sentence of former Civil Code Section 2287. See Restatement (Second) of Trusts § 108 comment i (1957). Subdivision (c) gives the court discretion to fill a vacancy in a case where the trust does not name a successor who is willing to accept the trust, where the trust does not provide a practical method of appointment, or where the trust does not require the vacancy to be filled. For a limitation on the rights of certain beneficiaries of revocable trusts, see Section 15800. For the procedure applicable to judicial proceedings, see Section 17200 et seq. See also Section 17200(b)(10) (petition to appoint trustee).

4. Section 15644. Powers of resigning trustee

CBA suggests that Section 15644 provide that a former trustee should be able to exercise all of the trustee's powers until the trust property is delivered to the successor.

The staff assumes that the reason for this suggestion is that the former trustee will be held responsible for the trust property and so must have the powers needed to fulfill that responsibility. The staff is concerned that this suggestion goes too far. Rather than make an affirmative grant of all powers, the staff would prefer to add language to the effect that the trustee "has the powers needed to preserve the trust property until it is delivered to the successor trustee and to perform actions necessary to complete the resigning trustee's administration of the trust."

5. Section 16012. Delegation to agents

CBA states that the trustee must be allowed to delegate certain duties to agents and proposes that Section 16012 be revised to bar the delegation of the supervision of agents.

Parts of the comments to Section 171 of the Restatement (Second) of Trusts are relevant to this question:

> d. . . . A trustee can properly delegate the performance of acts which it is unreasonable to require him personally to perform. There is not a clear-cut line dividing the acts which a trustee can properly delegate from those which he cannot properly delegate. In considering what acts a trustee

> can properly delegate the following circumstances, among others, may be of importance: (1) the amount of discretion involved; (2) the value and character of the property involved; (3) whether the property is principal or income; (4) the proximity or remoteness of the subject matter of the trust; (5) the character of the act as one involving professional skill or facilities possessed or not possessed by the trustee himself.
>
> e. Corporate trustees. Although a corporate trustee cannot properly delegate the administration of the trust, it can properly administer the trust through its proper officers. . . .
>
> k. Duty of supervision. In matters which a trustee has properly delegated to agents or co-trustees or other persons, he is under a duty to the beneficiary to exercise a general supervision over their conduct.

We could add something to the Comment to Section 16012, such as by citing the comment to Restatement Section 171 and noting that the duty not to delegate does not preclude employment of an agent in a proper case and making clear that a trust company may delegate matters to affiliates.

Language should also be added to the section in the form of a new subdivision (b): "In a case where a trustee has properly delegated a matter to an agent, cotrustee, or other person, the trustee has a duty to exercise general supervision over the person performing the delegated matter."

6. Section 16014. Duty to use special skills

CBA objects to this section codifying a duty to use special skills. CBA notes that in *Coberly* the court referred to the trustee's duty "to apply the full extent of his skills" and CBA would replace Section 16014 with this standard. (The Commission is also referred to a background memorandum on this issue which is attached to the CBA letter in Exhibit 1.)

Apparently, CBA would prefer the language cited from *Coberly* to the language of the proposed Section 16014. A comparison of the Coberly statement and Section 16014 suggests that CBA is objecting to the part of Section 16014 imposing on the trustee a duty to use special skills where the settlor has relied on the trustee's representation of having special skills. The staff has nothing

further to add to the discussion of this question other than note the following language which also appears in *Coberly*:

> It ill behooves a professional trustee, holding itself out during the solicitation of business as a repository of special competence and expertise, to claim on an accounting it need not answer the charge of neglect of duty. A banker, a doctor, a lawyer, may not gain business as a specialist and defend mistakes as a layman.

In order to facilitate a resolution of this issue, the staff proposes to revise Section 16014 as follows:

> 16014. ~~If the~~ (a) The trustee has ~~special~~ a duty to apply the full extent of the trustee's skills ~~of the~~ .
>
> (b) If the settlor has relied on the trustee's representation of having special skills in selecting the trustee, the trustee ~~has a duty to use the~~ is held to the standard of the skills represented.

The comment would read as follows:

> Comment. Subdivision (a) of Section 16014 codifies a duty set forth in Coberly v. Superior Court, 231 Cal. App. 2d 685, 689, 42 Cal. Rptr. 64 (1965).
>
> Subdivision (b) is similar to the last part of Section 7-302 of the Uniform Probate Code (1977) and the last part of Section 174 of the Restatement (Second) of Trusts (1957).
>
> For a provision permitting beneficiaries to consent to acts of the trustee and thereby relieve the trustee from liability for breach of trust, see Section 16463. See also Sections 16000 (duties subject to control by trust instrument), 16040 (trustee's standard of care in performing duties).

7. Section 16040. Comment language relating to standard of care

CBA objects to language in the Comment to Section 16040, presumably the following:

> . . . . A higher standard of care is required of experts as recognized in California cases. See Estate of Collins, 72 Cal. App. 3d 663, 673, 139 Cal. Rptr. 644 (1977) (dictum); Coberly v. Superior Court, 231 Cal. App. 2d 685, 689, 42 Cal. Rptr. 64 (1965); *cf.* Estate of Beach, 15 Cal. 3d 623, 635, 542 P.2d 994, 125 Cal. Rptr. 570 (1975) (bank as executor). See also the Comment to Section 2401 (higher standard of care

> applicable to professional guardian or conservator of estate), and the Comment to Section 3912 (higher standard of care applicable to professional fiduciary acting as custodian under Uniform Transfers to Minors Act). . . .

You should read Mr. Norman's remarks on pages 3 and 4 of his letter which is attached to Exhibit 1.

In order to resolve this disagreement, the staff proposes to revise this part of the comment to read as follows:

> . . . . An expert trustee is held to the standard of care of other experts. See the discussions in Estate of Collins, 72 Cal. App. 3d 663, 673, 139 Cal. Rptr. 644 (1977); Coberly v. Superior Court, 231 Cal. App. 2d 685, 689, 42 Cal. Rptr. 64 (1965); Estate of Beach, 15 Cal. 3d 623, 635, 542 P.2d 994, 125 Cal. Rptr. 570 (1975) (bank as executor); see also the Comment to Section 2401 (standard of care applicable to professional guardian or conservator of estate) and the Comment to Section 3912 (standard of care applicable to professional fiduciary acting as custodian under Uniform Transfers to Minors Act). . . .

8. Section 16062. Types of accounting statements

CBA argues that banks should be able to give "a *uniform statement* to all trust beneficiaries," saying that having to give two or three different types of statements imposes an exorbitant cost.

The problem apparently arises under Section 16062(b) which excuses the duty to account annually as to trusts created before the operative date of the new law. As noted in the Comment to Section 16062, the new rule does not affect any requirement to account that existed under prior law. Existing law specifies the contents of an accounting under a trust that has been removed from continuing court jurisdiction. See Prob. Code § 1120.1a(c). This special type of accounting would continue to apply to cases where the new statute does not apply. In the proposed law, the only provision for the contents of an accounting is Section 16063, which is drawn in part from Probate Code Section 1120.1a(c), as noted in the Comment to Section 16063.

To deal with CBA's problem, we could revise Section 16062(b) to read as follows:

(b) A trustee of a living trust created by an instrument executed before July 1, 1987, or of a trust created by a will executed before July 1, 1987, and not incorporated by reference in a will on or after July 1, 1987, is not subject to the duty to account provided in this section, but the requirement of an accoumt pursuant to former Probate Code Section 1120.1a may be satisfied by furnishing an account that satisfies the requirements of Section 16063.

It is also possible that a special type of accounting might be required by a trust instrument. Presumably the trustee would have to comply with any special disclosure rules. The staff assumes that this is not a significant problem and that CBA is not suggesting that a statutory accounting statement should supplant a different requirement in the trust.

9. *Section 16401. Trustee's liability for acts of agent*

CBA argues that the trustee's liability for the act or omission of an agent employed by the trustee should be limited to situations where the trustee employed the agent in exercise of the trustee's discretion. CBA is concerned that the trustee would be held liable for acts of an agent that the trustee is directed to hire by the settlor of a revocable trust or by the trust instrument.

The staff opposes this suggested change. The section as it stands in the bill was worked out at a prior meeting with the approval of the representatives from CBA in attendance. The proposed change is unnecessary since a close reading of the specific situations covered by Section 16401(b) shows that in each case the trustee either must have some authority over the agent or must have failed to take proper steps to remedy an agent's wrongful act. It does not appear to the staff that a trustee would be unfairly held liable even in a case where the agent was not initially selected by the trustee. The problem with the language suggested by CBA is that it could excuse liability for acts of an agent directed to be hired by the trust or settlor where the trustee conceals or acquiesces in acts of the agent, neglects to take reasonable steps to compel the agent to redress the wrong, or in other situations arising under the language of Section 16401(b). These duties should apply whether or not the agent was hired in the exercise of the trustee's discretion.

In order to resolve a question raised by CBA, the comment to this section should contain the following cross-reference: "In the case of a revocable trust, the trustee is not liable, with regard to hiring agents, for following the written directions of the person holding the power to revoke. See Section 16462."

10. Sections 16402-16403. Application of liability rules

CBA suggests that the sections governing the trustee's liability for acts of cotrustees and predecessor trustees should not apply to pre-operative date trusts.

The staff agrees with this suggestion. Section 16401 relating to liability for acts of agents is limited to post-operative date trusts. To implement this suggestion, the following should be added to Section 16402: "(c) The liability of a trustee for a breach of trust committed by a cotrustee that occurred before July 1, 1987, is governed by prior law and not by this section." Similarly, the following should be added to Section 16403: "(c) The liability of a trustee for a breach of trust committed by a predecessor trustee that occurred before July 1, 1987, is governed by prior law and not by this section."

11. Section 16403. Trustee's liability for acts of predecessor

CBA would augment Section 16403 to (1) provide that beneficiaries can consent to a breach by a former trustee and (2) avoid forcing the trustee to pursue a former trustee where the costs of doing so would exceed the potential recovery.

The staff thinks these changes are unneeded. The question of consent is governed adequately by Section 16463. The matter of release and subsequent affirmance is covered by the common law, or perhaps will be covered in general terms as discussed under item 1 *supra*. It is not a good idea to start inserting miscellaneous consent provisions in particular statutes as long as the general section is adequate. We can, however, add cross-references to consent and other relevant provisions to the Comment to Section 16403.

As to the question of uneconomical actions, Section 16403(b)(3) makes the trustee liable for not taking proper steps to redress the

breach. In addition, Section 16010 imposes a general duty to take reasonable steps to enforce claims. The Comment to Section 16010 states that "it may not be reasonable to enforce a claim depending upon the likelihood of recovery and the cost of suit and enforcement." We should add similar language to the Comment to Section 16403. It would also be an improvement to amend Section 16403 to change "proper" to "reasonable" so that these provisions are consistent.

12. Section 17000(b)(3). Concurrent jurisdiction

CBA would revise this provision describing concurrent jurisdiction to read: "Other actions and proceedings involving trusts or trustees and third persons to which no beneficiary is a party." Apparently, the purpose of this suggested change is to emphasize that proceedings between trustees and beneficiaries are within the exclusive jurisdiction of the superior court having jurisdiction over the trust.

The staff does not think that this change is needed and may cause more confusion than it would resolve. Subdivision (a) is clear that internal affairs of trusts are the exclusive concern of the court having jurisdiction of the trust as determined pursuant to the provisions of the Trust Law.

The staff does think that Section 17000 is difficult to understand if one is not familiar with its origin. At one time this section referred to the "superior court sitting in probate." When it was revised to read as it now does, it lost clarity. Accordingly, the staff would revise Section 17000 as follows:

> 17000. (a) The superior court having jurisdiction over the trust pursuant to this part has exclusive jurisdiction of proceedings concerning the internal affairs of trusts.
>
> (b) The superior court having jurisdiction over the trust pursuant to this part has concurrent jurisdiction of the following:
>
> (1) Actions and proceedings to determine the existence of trusts.
>
> (2) Actions and proceedings by or against creditors or debtors of trusts.
>
> (3) Other actions and proceedings involving trustees and third persons.

The purpose of this section is twofold. It makes clear that only the court where jurisdiction over the trust is properly invoked pursuant to the Trust Law (informally the "probate court") has jurisdiction over internal affairs, e.g., matters between trustees and beneficiaries. It also is intended to make clear that this court has concurrent jurisdiction of other matters involving trusts so that questions between trusts and trust parties on the one hand and third persons on the other hand can be determined by the "probate court" in appropriate cases. Of course, the "probate court" must obtain jurisdiction over the third person in such a case. Thus this section is intended to avoid a multiplicity of actions by permitting the "probate court" to consider all questions arising in a controversy rather than requiring certain questions to be considered by the "nonprobate" civil courts.

13. Section 18000. Contract liability of trustee

CBA argues that the trust should not have to be identified in a contract in order for the trustee to avoid liability and that liability should be avoided if the trustee reveals its representative capacity. CBA argues that requiring identification of the trust could violate financial secrecy provisions and lead to a breach of trust.

The staff has also taken this position in past discussions of this issue, but for a different reason. It seems unfair to make the trustee personally liable where the representative capacity is clear from either revelation of that capacity or identification of the trust, but both requirements are not satisfied. The point is that the person contracted with is put on notice that the trustee is not personally liable if either requirement is satisfied. Should a dispute arise, the third person can sue the trustee in its representative capacity.

On the other hand, the policy of Section 18000 is the same as the Uniform Probate Code. It should also be noted that if a trustee does not want to identify the trust, the trustee can still be excused from personal liability by a provision to that effect in the contract.

14. Section 18102. Protection of third person dealing with former trustee

CBA would revise this section to read as follows:

> 18102. If a third person acting in good faith and for a valuable consideration enters into a transaction with a former trustee without knowledge that the ~~trustee is/office is~~ the former trustee no longer acts, the third person is fully protected just as if the former trustee were still a trustee.

No reason is given for this suggested change. It should also be noted that Civil Code Section 2281, the source of this provision, is drafted in terms of a vacancy occurring. The staff is also concerned that "no longer acts" is not very precise since it is not clear whether or not a trustee who "no longer acts" is no longer a trustee, i.e., that a vacancy has occurred. Although the staff thinks the existing section is clear, if it would be helpful, this section could be revised to read as follows:

> 181002. If a third person acting in good faith and for a valuable consideration enters into a transaction with a former trustee without knowledge that ~~the trustee's office is~~ the person is no longer a trustee, the third person is fully protected just as if the former trustee were still a trustee.

15. Creditors' claims procedure

CBA suggests the codification of a creditors' claims procedure and outlines several elements of such a procedure that CBA would favor.

The Commission has decided to proceed with the Trust Law at this time without a procedure. The consensus has been that Sections 18200 and 18201, which state the substantive right of creditors to reach trusts to the same extent as powers of appointment, are desirable even though no procedure has yet been developed. The Commission has also expressed its intention to develop an appropriate procedure as time permits, perhaps in conjunction with the procedure governing creditors claims in probate administration. The staff has done some preliminary work on such a procedure and understands that the State

Bar also intends to work on developing a procedure. The comments of CBA on this subject will be useful in this process.

Respectfully submitted,

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February 5, 1986

Mr. John DeMoully
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: AB 2652: Trust Law

Dear Mr. DeMoully:

The CBA Trust State Governmental Relations Committee has reviewed AB 2652 and offers the following comments and specific proposed changes. These issues must be addressed before the Committee can recommend approval of this bill by the California Bankers' Association.

1. As a general observation, the Law Revision Commission has attempted to codify common law. Many of the heretofor uncodified provisions of common law have been added to the proposed statute, such as Powers and Duties of Trustees and Remedies of Beneficiaries. The Code should also specifically codify protections of the Trustee, such as latches, ratification and release by the Trustors or beneficiaries. This is consistent with the Commission's approach in codifying the common law. Additionally, some protections have been codified, and the remaining protections should be codified as well.

2. The California Bankers Association and the State Bar have proposed several amendments to the Principal and Income Act, found at §§16300, et. seq. of the proposed Trust Law. One needed change is an exemption from the under-productive property provisions of "securities listed on a national securities exchange or traded in over the counter". This could be done with language similar to the New York statute. If such securities are not exempted, there is a direct conflict between the Principal and Income Act and Civil Code §2261 (a), the prudent person investment standard. The portfolio theory of investments is very difficult to utilize if the proceeds of securities which do not yield dividends must be allocated between principal and income upon sale.

I understand that the State Bar will also be forwarding proposed changes to the Principal and Income Law in the near future. The California Bankers Association will work closely with them in order to formulate appropriate amendments to the Act.

3. **§15643** should be clarified to indicate that, in the situation of multiple Trustees, when one Trustee no longer acts, and there is a vacancy, that a new Trustee does not necessarily need to fill the vacancy. Whether an additional Trustee must be appointed depends upon the terms of the Trust document.

4. **§15644** should be augmented to allow a resigning Trustee to continue exercising all Trustee's powers, until Trust property has been delivered. The resigning or removed Trustee must continue to be able to act, in order to preserve Trust property while it is still in his/her hands. The section should state:

> "When a vacancy has occurred in the office of Trustee, the former Trustee who holds property of the Trust shall deliver the Trust property to the successor Trustee or a person appointed by the Court to receive the property and remains responsible for the Trust property until it is delivered, and can exercise all of the Trustee's powers until such delivery occurs."

5. **§16012:** The Trustee must be allowed to delegate certain duties to agents, such as the preparation of income tax returns, custody of assets, etc. Additionally, the Trustee should be allowed to use affiliates. This section seems to preclude such delegation to outside service providers. In order to clarify that the Trustee may delegate certain duties to agents, the section should be amended to read:

> "The Trustee has a duty not to delegate to others the performance of acts that the Trustee can reasonably be required personally to perform nor may the Trustee delegate supervision of agents, and may not transfer the office of Trustee to another person nor delegate the entire administration of the Trust to a co-Trustee or other person."

The comment to this section must allow delegation of duties to agents, subject to the supervision of the Trustee.

6. **§16014.** The proposed codification of a duty to use special skills is not the law in California. The Coberly case (231 C.A.2d 685, 689) says "the Trustee has a duty to apply the full extent of his skills." The expansion of this statement of the duty is inappropriate, as all other cases dealing with duties of Trustees have only spoken to the issue in dictum. See copy of

Bruce Norman's letter to the Commission dated September 12, 1985 for further case law analysis. This language should be amended to conform to California Law, stating:

> "The Trustee has a duty to apply the full extent of his skills."

7. **§16040.** The comments to this section should reflect the resolution of the problems raised by Bruce Norman in his letter to the Commission dated: September 12, 1985, a copy of which is attached. If the comments are not revised, they are contradictory of the scope and purpose of the section.

8. **§16062.** Banks should be able to give a uniform statement to all Trust beneficiaries. If two or three types of statements are required, the systems cost would be exorbitant. Therefore, the section should be clarified so that the same statement format can be used for all types of Trusts, regardless of when executed or effective.

9. **§16401.** Subsection b of this section should be clarified so that the Trustee is only responsible for acts of agents which are employed by the Trustee exercising his/her own discretion. This section should make clear that the responsibility only applies if the Trustee hires the agent, and not when the Trustee is directed to do so by the Trustor of a revocable Trust, or by the Trust instrument.

Subsection b should be amended to state:

> §16401 (b). "The Trustee is liable to the beneficiary for an act or omission of an agent employed by the Trustee, exercising the Trustee's own discretion, in the administration of the Trust that would be a breach of the Trust if committed by the Trustee under any of the following circumstances:"

10. **§16402 and §16403.** These sections contain new law, and should be prospective only. The sections should each contain similar language to that found in §16401 (c), imposing liability for occurrences on or after July 1, 1987. Old laws should apply to any occurrences prior to that time.

11. **§16403 (b).** There should be a reasonableness standard in this statute for liability of successor Trustees for former Trustees acts. The section should be augmented to contain two exceptions:

A. The beneficiaries should be able to consent to a breach by a former Trustee.

B. The Trustee should not be forced to pursue an action against a former Trustee where the costs would exceed the potential recovery.

12. **§17000 (b)(3)** should state:

"Other actions and proceedings involving Trustees and third parties to which no beneficiary is a party."

If beneficiaries are parties to proceedings, such proceedings should be subject to §17000 (a).

13. **§18000.** This section should not require the identification of the trust in the contract as a condition to preclude Trustee liability. Financial Code §1582 requires financial secrecy. To require full disclosure of the name of the trust and/or of the beneficiaries of the trust could be an automatic breach of trust in some instances. The secrecy of the identity of a trust or beneficiary is often essential, and a main purpose in establishing the trust.

The section should state:

"(a) unless otherwise provided in the contract or in this chapter, a Trustee is not personally liable on a contract properly entered into in the Trustee's fiduciary capacity in the course of administration of the trust unless the Trustee fails to reveal the Trustee's representative capacity.

14. **§18102** should be amended to clarify that the Trustee no longer acts, and not simply state that there is a vacancy in the Trustee. The language should state:

"If a third person acting in good faith and for a valuable consideration enters into a transaction with a former Trustee without knowledge that that Trustee no

longer acts, the third person is fully protected just as if the former Trustee were still a Trustee."

15. A procedure to determine Creditor's Rights should be codified. A Probate Estate should not be necessary in order to determine source of payment of claims. It does not seem unreasonable that expenses should be paid first from a Probate Estate. However, if there is no Probate Estate, and all of the decedent's assets are in a trust, a Probate should not have to be opened prior to payment of claims, as the Commission's staff initially recommended. This seems to be a duplication of effort, and is exactly what most Trustors want to avoid. The added expense does not seem justified, in relation to any benefit which would be derived. However, some formally codified priority of beneficiaries would be helpful. Proposed provisions follow:

A. A transfer by the Trustee to the personal representative should absolve the Trustee from the duty to see that acutal payment of debts is made.

B. Direct payment by the Trustee should be encouraged. The Probate Estate should not be increased by sums deposited from a trust for payment of bills. This would increase Probate fees, and causes a potential conflict of interest between the Trustee and the Executor.

C. Should not all other property of the decedent's estate be subject to creditor's claims? Joint-tenancy and pay-on-death or totten-trust accounts are not discussed in the proposed trust law, however, all assets would seem reasonably to be subject to creditors' claims.

D. A "transferee liability," similar to that imposed by the Internal Revenue Code, and the California Revenue and Taxation Code, would simplify the creditor rights problem. The debts of the decedent would attached to property distributed to beneficiaries, whether from a trust or a probate estate.

E. Trust documents normally require distribution and termination of the trust on death of the Trustor. Prompt and expeditious termination and distribution is one of the main reasons trusts are established. A

"transferee liability" statute would resolve many issues.

F. Since the statutory claims period for a Probate is four months from the issuance of letters testamentary, it should be the same for a trust. The Trustee could publish notice similar to that for a Probate Estate.
G. Some formal notice by the Executor to the Trustee of claims would provide coordinated payment. However, absent specific language in the Trust document, payment of claims should be first from a Probate Estate.

These comments are forwarded for use by the staff and the commission in its final review of the preprinted bill. The comments are designed to clarify the California Bankers' Associatin's verbal and written comments over the past two years, and to point out needed changes in the statute, before it should be enacted. These issues are of major concern to the Trust State Governmental Affairs Committee, and must be addressed before this Committee can recommend approval by the CBA of AB 2652.

Sincerely,

PAULETTE E. LEAHY
Co-Chair
Trust State Government Relations Committee

PEL:ddc
cc: Members, Trust State Government Relations Committee
George Cook
Sandra Fowler
Estelle Depper
Jerald P. Lewis
George Galucci
Professor Jerry Kasner

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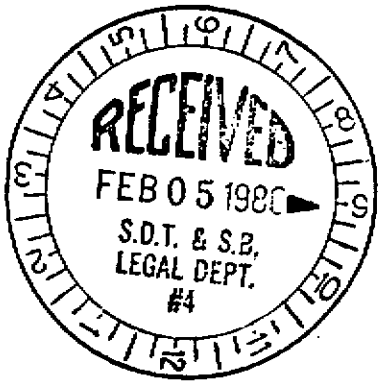
September 12, 1985



Mr. John H. DeMoully
Mr. Stanley G. Ulrich
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303

Dear John and Stan:

You are both to be complimented for the generally excellent results of your most recent efforts in further modifying the proposed comprehensive trust law to reflect the input of the May and June working group meetings.

I'm sure it came as no big surprise that the California Bankers Association has yet more comments on this recent draft. Paulette Leahy submitted these comments to you under separate cover (September 6, 1985).

While also referenced in the California Bankers Association official comments, I continue to be troubled by the LRC's treatment of Section 16014 and the Comment to Section 16040 as the law of California is being misstated; and new law will be made which seriously prejudices corporate fiduciaries' ability to defend their actions.

So, at the risk of appearing as some modern Don Quixote jousting with windmills in the mistaken belief they are giants, please indulge me by considering the following points.

A. Section 16014.

1. As the Comment concedes, this "duty" is taken from the last part of Uniform Probate Code Section 7-302. The Comment correctly cites no California case or statutory authority because there is no authority to cite (see paragraph A 2 below). If the proposed language of Section 16014 isn't California law, then it must be recognized as common law to justify inclusion in the listing of trustee "duties". However, the Uniform Probate Code language extends the concept beyond what is an accurate statement of the common law (see paragraph A 3 below).

The conclusion: Either delete Section 16014 entirely or amend it to conform with the common law (see paragraph A 4 below).

2. There is no statutory authority and no case authority in California to suppport Section 16014 that I am aware of, only case dictum. Coberly v. Superior Court (1965) 231 C.A.2d 685, 689 ("Trustees are bound to use such talents as they possess."); but the holding of Coberly is correctly summarized in a Civil Code Section 2269 annotation (at page 350) which states that even absolute discretion conferred by a trust instrument "does not relieve trustee from performance of its duties and exercise of its judgment, or give trustee immunity from tort liability in administration of trust or permit it to escape its responsibility of justifying its actions in court...". Manchester Band of Pomo Indians, Inc. v. United States (D.C. Calif. 1973) 363 F. Supp. 1238, 1245 ("While the normal standard of care and skill required of a trustee is that of a man of ordinary prudence in dealing with his own property, if the particular trustee has a greater degree of skill than that of a man of ordinary prudence, he will be held liable for any loss resulting from the failure to use such skill as he has"); but after enumerating several additional fiduciary "principles" (the one in question being taken from a portion of the Restatement (Second) of Trusts, Section 174 comment), the court found the United States' investment performance wanting without regard to the degree of skill possessed by the defendant as trustee.

3. That portion of proposed Section 16014 dealing with representations ("...or is named as a trustee on the basis of special skills...") has no basis in California law, nor are there any cases "squarely holding that this principle is applicable to trustees" according to Professor Scott (Section 174 at page 1411). The concept is taken from the law of agency, endorsed philosophically by Scott (Section 174 at page 1411) and Bogert (Section 541 at page 171); was thereafter incorporated into the Restatement (Second) of Trusts, Section 174, and later into the Uniform Probate Code. It is, of course, well understood that the Restatement and Uniform Probate Code are to be viewed as guides to law, but not a binding statement of applicable law unless specifically adopted. The inescapable conclusion must be that representations of trustee skills are not a common law "duty".

4. I am convinced what follows more closely resembles the probable "law" on the subject (California as well as common law); and would therefore commend to the Commission's consideration this revision of proposed Section 16014:

"Section 16014. Duty to use skills

16014. The trustee has a duty to use all the skills actually possessed by the trustee.

Comment. Section 16014 is consistent with the common law. See Coberly v. Superior Court, 231 Cal. App.2d 685, 689, 42 Cal. Rptr. 64 (1965) (dictum); and Manchester Band of Pomo Indians, Inc. v. United States, 363 F. Supp. 1238 (D.C. Calif. 1973) (dictum). See also Sections 16000 (duties subject to control by trust instrument), 16040 (trustee's standard of care in performing duties)."

B. Section 16040.

1. The proposed statute now reads well, but the Comment in part continues to muddle prevailing law in California.

2. The Comment says: "A higher standard of care is required of experts as recognized in California cases." In truth, there is no case authority for the proposition that "a higher standard of care is required of experts" when applied to trustees. The citation to Collins is admitted to be dictum; and the citation to Coberly is just plain inapplicable (see discussion of Coberly in Section 16014 above), as well as dictum. Beach is cited only for comparison purposes because the fiduciary was an executor, not a trustee; but even the oft-quoted language of Beach ("Those undertaking to render expert services in the practice of a profession or trade are required to have and apply the skill, knowledge and competence ordinarily possessed by their fellow practitioners under similar circumstances, and failure to do so subjects them to liability for negligence.") is only dictum because the standard of care by which the defendant bank was to be judged was not in issue--the bank stipulated that its liability would "be determined by more stringent standards than would the liability of a lay executor."

Even if one were to assume that the California Supreme Court would apply the logic of Beach to professional trustees were the issue brought before it today (and I am not offering any opinion in that regard), the fact remains that the Comment language in question and purported case authority are misleading and may by unfortunate repetition (see paragraph B 3 below) make new law on the subject. As an aside, the most recent dictum attributable to Beach was not annotated in your Comment. Estate of Pitzer (1984) 155 Cal. App.3d 979, 995 ("A bank engaged in the business of acting as a fiduciary for

estates and trusts must exercise that skill and knowledge ordinarily possessed by such professional fiduciaries").

3. The Comment continues by citing to the (1979) comment to Section 2401 and (1984) comment to Section 3912 which refer to professionals--and trust companys and bank trust departments are singled out--as being held to a greater standard of care than lay fiduciaries based on their presumed expertise. Authority offered for this proposition is Beach, but the quote actually comes from Collins dictum interpreting broadly the above-quoted language of Beach.

4. Besides the technical inaccuracies of the Comment as described in paragraphs B 2 and B 3 above, the attempt to focus attention upon a bifurcated standard of care seems to miss what Section 16040 requires. Section 16040 and its predecessor Civil Code Section 2261 make no distinction in terms of the standard of care between individuals and corporate fiduciaries. The standard compares the conduct of the trustee in question with another, knowledgeable trustee. If the former has applied the full extent of his, her or its skills, there is no breach of duty under my proposed version of Section 16014, but there may be liability imposed for failure to meet the requisite standard of care if the latter trustee and others similarly situated possessed and would have applied appreciably greater skills. This result fosters a fiduciary obligation environment emphasizing the best rather than the least qualified. Exceptions to the standard of care should only be made by explicit language contained in the trust instrument (Section 16000). For a more scholarly treatment of the intended impact of AB 630, I would recommend reading William P. Wade's "The New California Prudent Investor Rule: A statutory Interpretive Analysis", American Bar Association Real Property and Trust Journal (Spring, 1985).

5. To avoid misleading conclusions, it is recommended that the Comment language beginning "A higher standard of care..." through "...under Uniform Transfers to Minors Act)." be omitted.

Very truly yours,

L. Bruce Norman
Vice President and
Trust Counsel

LBN:gk
0040L

EXHIBIT 2

§ 217. Discharge of Liability by Release or Contract

(1) A beneficiary may preclude himself from holding the trustee liable for a breach of trust by a release or contract effective to discharge the trustee's liability to him for that breach.

(2) A release or contract is not effective to discharge the trustee's liability for a breach of trust, if

(a) the beneficiary was under an incapacity at the time of making such release or contract; or

(b) the beneficiary did not know of his rights and of the material facts which the trustee knew or should have known and which the trustee did not reasonably believe that the beneficiary knew; or

(c) the release or contract of the beneficiary was induced by improper conduct of the trustee; or

(d) the transaction involved a bargain with the trustee which was not fair and reasonable.

Comment:

a. Consent distinguished from release or contract. The situation considered in this Section differs from that considered in § 216 in that in the situation covered by that Section the beneficiary had consented to the act or omission of the trustee prior to or at the time of the act or omission, whereas in the situation covered by this Section the act or omission of the trustee was not consented to by the beneficiary but he subsequently agreed to discharge the trustee from liability for breach of trust in previously acting or omitting to act.

Comment on Subsection (1):

b. Release or contract. Subject to the rule stated in Subsection (2), the rules governing the effect of a release or contract by the beneficiary upon the liability of the trustee for breach of trust are similar to the rules governing the effect of a release or contract made by the promisee of a contract upon the duty of the promisor to make compensation for breach of a contractual duty. Compare Restatement of Contracts, §§ 385–453.

Comment on Subsection (2):

c. When release or contract not effective. Rules similar to those stated in the Comment to Subsections (2) and (3) of § 216 in respect to consent by the beneficiary to a deviation from the terms of the trust are applicable to a release or contract by the beneficiary to discharge the trustee from liability for a breach of trust previously committed. Compare Restatement of Contracts, § 498.

When the trustee has incurred a liability to the beneficiary for breach of trust, he necessarily deals on his own account with the beneficiary in obtaining a discharge therefrom. Accordingly, if the transaction involves a bargain between them, a release or contract by the beneficiary to give such a discharge is not effective unless the bargain is a reasonable one and fair to the beneficiary, within the rule stated in § 170(2).

d. Spendthrift trust. The effect of a release or contract by the beneficiary of a spendthrift trust is similar to the effect of consent by the beneficiary of a spendthrift trust. See § 216, Comment *e*.

e. Cross reference. As to the effect upon his interest in the trust property of a release by the beneficiary, see § 343.

§ 218. Discharge of Liability by Subsequent Affirmance

(1) Except as stated in Subsection (2), if the trustee in breach of trust enters into a transaction which the beneficiary can at his option reject or affirm, and the beneficiary affirms the transaction, he cannot thereafter reject it and hold the trustee liable for any loss occurring after the trustee entered into the transaction.

(2) The affirmance of a transaction by the beneficiary does not preclude him from holding the trustee liable for a breach of trust, if at the time of the affirmance

(a) the beneficiary was under an incapacity; or

(b) the beneficiary did not know of his rights and of the material facts which the trustee knew or should have known and which the trustee did not reasonably believe that the beneficiary knew; or

(c) the affirmance was induced by improper conduct of the trustee; or

(d) the transaction involved a bargain with the trustee which was not fair and reasonable.

Comment on Subsection (1):

a. Where beneficiary has option of rejecting or affirming. If the trustee has purchased with trust funds property which it was his duty not to purchase, the beneficiary can at his election reject the purchase or affirm it. See § 210.

If the only breach of trust was in purchasing property which the trustee should not have purchased, and the beneficiary affirms the purchase, he cannot thereafter reject it and hold the

trustee liable for making the purchase, except under the circumstances stated in Subsection (2).

In the following Illustrations in the Comment to Subsection (1) it is assumed that none of the facts stated in Subsection (2) is present.

Illustration:

1. A is trustee of $100,000 for B. By the terms of the trust A is directed to invest only in bonds. A invests part of the money in shares of stock. A subsequently informs B of the investment. At that time the shares have gone up in value. B approves of the investment. The shares subsequently fall in value. B cannot hold A liable for the loss.

If the beneficiary subsequently withdraws his consent, the trustee is not privileged to retain the property. So also, if there is a change of circumstances making the retention of the property imprudent, the trustee will be under a duty to dispose of the property, unless the beneficiary consents to its retention under those circumstances.

If the trustee makes an improper purchase of property which appreciates in value, the beneficiary can affirm the purchase but compel the trustee to sell the property.

The beneficiary may affirm the transaction not only by expressing to the trustee his approval of it but also by receiving a benefit from the transaction with knowledge of all the facts and of his rights without objecting to the transaction.

Illustration:

2. The facts are as stated in Illustration 1, except that instead of expressing approval of the investment B receives from the trustee dividends accruing thereon without objecting to the investment. B cannot hold A liable for the loss.

If the trustee has purchased with trust funds property which it was his duty not to purchase and the trustee did not pay an excessive price for the property and the beneficiary affirms the purchase, he cannot hold the trustee liable for a loss, although the loss had already occurred at the time when the beneficiary affirmed the purchase, except under the circumstances stated in Subsection (2).

Illustration:

3. A is trustee of $100,000 for B. By the terms of the trust A is directed to invest only in bonds. A invests part of the money in shares of stock. A subsequently informs B of the investment. At that time the shares of stock have fallen slightly in value. B, knowing all the facts, approves of the investment. B cannot hold A liable for the difference between the purchase price paid by A and the value of the shares at the time when B approved the purchase.

If, however, in addition to purchasing property which he should not have purchased, the trustee committed a breach of trust in paying more than the property was worth, the beneficiary can affirm the purchase itself, but nevertheless hold the trustee liable for the amount by which the purchase price exceeded what the trustee should have paid. The loss in this case occurred not after but at the time the trustee entered into the transaction.

Illustration:

4. A is trustee of $100,000 for B. By the terms of the trust A is directed to invest only in bonds. A invests $10,000 in shares of stock which were worth only $8000. B can approve of the purchase and hold the trustee liable for $2000.

As to the rights of the beneficiary where the trustee purchases property which he could properly purchase but pays an excessive price, see § 205, Comment *e*.

b. Improper sale. The rule stated in this Section is applicable where the trustee has sold trust property which it was his duty to retain. See § 208. In that situation the beneficiary can at his election charge the trustee with the value of the property at the time of the sale or at the time of the decree or require him to account for the proceeds of the sale. If the beneficiary affirms the sale and elects to require the trustee to account for the proceeds of the sale, he cannot thereafter set aside the sale and hold the trustee liable for breach of trust in making the sale.

Illustrations:

5. A is trustee of Blackacre. By the terms of the trust A is forbidden to sell Blackacre. A sells Blackacre to C who is not a bona fide purchaser. B approves of the sale.

B cannot thereafter compel A to rescind the sale or hold A liable for breach of trust in making the sale.

6. A is trustee of Blackacre for B. By the terms of the trust A is directed to sell Blackacre. A sells Blackacre to himself. B approves of the sale. B cannot thereafter set aside the sale.

c. Improper lease. The rule stated in this Section is applicable where the trustee makes an improper lease of trust property. See § 189.

d. Where no option of rejecting or affirming. The situations dealt with in this Section are confined to situations where the beneficiary has an option of rejecting or affirming the transaction. As to when such option exists, see §§ 205–212. If the trustee commits a breach of trust and the beneficiary has no option of rejecting or affirming the transaction, his mere subsequent approval of the transaction will not bar him from holding the trustee liable for breach of trust under the rule stated in this Section. This is the case where the trustee negligently loses trust property, or negligently allows it to be stolen, or negligently fails to insure it and it is destroyed, or misappropriates and dissipates it. In such cases a subsequent forgiveness by the beneficiary of the breach of trust will not bar the beneficiary from holding the trustee liable for the breach of trust under the rule stated in this Section; but he may be barred by release or contract under the rule stated in § 217; or he may be barred by laches under the rule stated in § 219.

Comment on Subsection (2):

e. When affirmance not effective. Rules similar to those stated in § 216 in respect to consent of the beneficiary are applicable to the affirmation of a transaction by the beneficiary.

§ 219. Laches of the Beneficiary

(1) The beneficiary cannot hold the trustee liable for a breach of trust if he fails to sue the trustee for the breach of trust for so long a time and under such circumstances that it would be inequitable to permit him to hold the trustee liable.

(2) The beneficiary is not barred merely by lapse of time from enforcing the trust, but if the trustee repudi-

ates the trust to the knowledge of the beneficiary, the beneficiary may be barred by laches from enforcing the trust.

See Reporter's Note.

Comment on Subsection (1):

a. What constitutes laches. In most States there is no Statute of Limitations applicable to equitable claims, but equitable claims may be barred by the laches of the claimant.

In determining whether the beneficiary of a trust is precluded by laches from holding the trustee liable for breach of trust, the court will consider among others the following factors: (1) the length of time which has elapsed between the commission of the breach of trust and the bringing of suit; (2) whether the beneficiary knew or had reason to know of the breach of trust; (3) whether the beneficiary was under an incapacity; (4) whether the beneficiary's interest was presently enjoyable or enjoyable only in the future; (5) whether the beneficiary had complained of the breach of trust; (6) the reasons for the delay of the beneficiary in suing; (7) change of position by the trustee, including loss of rights against third persons; (8) the death of witnesses or parties; (9) hardship to the beneficiary if relief is not given; (10) hardship to the trustee if relief is given.

b. Length of time necessary to bar beneficiary. The length of time necessary to bar the beneficiary from holding the trustee liable for breach of trust depends upon the circumstances. In the absence of special circumstances the beneficiary is barred if the period of the Statute of Limitations applicable to actions at law in analogous situations has run.

c. Where beneficiary has no notice of breach of trust. The beneficiary will not ordinarily be barred by laches from holding the trustee liable for a breach of trust of which the beneficiary did not know and had no reason to know.

d. Where beneficiary under incapacity. The beneficiary will not be barred by laches as long as he is under an incapacity. He will ordinarily be guilty of laches, however, if knowing of the breach of trust he does not sue within a reasonable time after the incapacity is removed.

e. Where beneficiary has future interest. A beneficiary who has an interest enjoyable only in the future is guilty of laches if knowing of the breach of trust he does not sue within

a reasonable time after his interest becomes presently enjoyable. He may be guilty of laches, however, by reason of his failure to sue before his interest becomes presently enjoyable. Thus, if a trust is created to pay the income to one beneficiary for life and on his death to pay the principal to another beneficiary and during the lifetime of the former beneficiary the trustee commits a breach of trust of which the latter beneficiary has knowledge and he delays suing for many years, he may be barred by laches although he brings suit immediately after the death of the life beneficiary.

If a trust is created for one beneficiary for life and another in remainder, and the life beneficiary but not the remainderman is barred by laches from holding the trustee liable for a loss resulting from a breach of trust, the trustee owes a duty to the remainderman to pay into the trust the amount of the loss, but the trustee is entitled to take the income during the life of the life beneficiary on the amount so repaid. Compare § 216, Comment *g*.

f. Other factors. If the beneficiary knowing of the breach of trust makes no complaint, he is ordinarily barred in a less time than that in which he would be barred if he had complained to the trustee of the breach of trust.

If the beneficiary has delayed bringing suit as a result of promises of the trustee to redress the breach of trust, he will not be barred as soon as he would be barred if he had not been induced to delay suit by such promises.

The beneficiary may be barred from suing the trustee if the trustee has changed his position, where he would not otherwise be barred.

If witnesses or parties have died between the time when the breach of trust was committed and the time of suit, the suit may be barred by laches in a less time than it would otherwise be barred, since under such circumstances it may have become difficult as a result of the delay of the beneficiary in suing to ascertain the facts and to do justice.

Comment on Subsection (2):

g. Effect of laches in terminating the trust. Although the beneficiary may be barred by laches from holding the trustee liable for breach of trust, he does not lose his interest in the trust property merely because of the lapse of time, however great; if, however, the trustee has repudiated the trust to the knowledge of the beneficiary and the beneficiary fails to bring suit, he may be barred by laches from enforcing the trust. Such repudiation need not be in specific words; it may consist of conduct on the part of the trustee inconsistent with the existence of the trust.