

Second Supplement to Memorandum 87-97

Subject: Study L-2008 - Cleanup Bill (Fiduciary Duties of Agents)

Attached to this supplement is a letter from Amy J. Bernstein on behalf of the California Bankers Association requesting a clarifying amendment to a technical revision made in the course of enactment of the Trust Law. The problem arises in Civil Code Section 2322 which involves the authority of an agent. Before its amendment by the act that enacted the Trust Law (see 1986 Cal. Stat. ch. 820, § 9), Section 2322 provided in relevant part that an "authority expressed in general terms, however broad, does not authorize an agent . . . [t]o do any act which a trustee is forbidden to do by Article 2, Chapter 1, of the last Title." The cross reference picked up the Field Code provisions relating to general duties of trustees. In a technical change, this language was amended to read that the agent is not authorized to "[v]iolate a duty to which a trustee is subject pursuant to Chapter 1 (commencing with Section 16000) of Part 4 of Division 9 of the Probate Code."

As discussed in the letter attached as Exhibit 1, the new language is being interpreted by a CEB writer and others to mean that a drastic change in agency law has taken place so that agents are now subject to all of the duties of trustees. This was not the intent of the conforming revision, as is clear from its legislative history. However, in order to avoid misleading interpretations, the staff recommends that Section 2322 be amended as follows:

2322. An authority expressed in general terms, however broad, does not authorize an agent to do any of the following:

(a) Act in the agent's own name, unless it is the usual course of business to do so.

(b) Define the scope of the agency.

(c) Violate a duty to which a trustee is subject pursuant to ~~Chapter 1 (commencing with Section 16000) of Part 4 of Division 9~~ under Section 16002, 16004, 16005, or 16009 of the Probate Code.

Comment. Subdivision (c) of Section 2322 is amended to clarify the application of trustees' duties to agents acting under general authority. This is a nonsubstantive revision

intended to make more specific the technical revision implemented in the 1986 legislation that enacted the Trust Law. See 1986 Cal. Stat. ch. 820, § 9. The purpose of this and the earlier amendment is to provide appropriate cross-references to the law that superseded the repealed sections concerning trustees' duties. Neither amendment is intended to change the law relating to the duties of agents.

The sections referred to in subdivision (c) relate to the duty of loyalty, the duty to avoid a conflict of interest, the duty not to undertake an adverse trust, and the duty to keep trust property separate and identified. This draft will avoid the implication that agents are required to make property productive, to account annually to "beneficiaries", or apply the full extent of the agent's skills. Ms. Bernstein characterizes the effect of Section 2322 as picking up the prohibitions against self-dealing and conflicts of interest. The proposed draft is in line with this interpretation of the intent of Section 2322, but also adopts CBA's suggestion to refer to the basic duty of loyalty (Section 16002).

The draft submitted on behalf of CBA lists specific exceptions to the listed duties. These exceptions relate to the provision of services by a regulated financial institution or its affiliates in the ordinary course of business (Section 16015) and excusing liability based on consent (Section 16464), release or contract (Section 16464), or subsequent affirmance (Section 16465). The staff has not included references to these provisions in the draft because they are unnecessary and because they complicate the statute. The language in subdivision (c) is sufficient to pick up the duty and any of its qualifications, whether in these sections or elsewhere. However, appropriate language could be added to the Comment to Section 2322 if it is felt to be necessary. Consider the following: "The duties of a trustee incorporated by this section are subject to any applicable exceptions. See, e.g., Prob. Code §§ 16015 (services by regulated financial institution or its affiliates in ordinary course of business), 16463 (consent), 16464 (release or contract), 16465 (subsequent affirmance)." Another problem with applying these exceptions literally is that Section 16463 (like former Civil Code Sections 2230 and 2232) relates to consent by beneficiaries of a trust,

a term that does not translate very well to the context of agency law. In addition, who is a beneficiary in a given context is a question that depends on other provisions of the Trust Law.

The last three sentences of the comment to the proposed section are intended to flesh out its legislative history. This should provide sufficient authority to resist the extravagant interpretation being put on the amended section in some quarters.

This matter should not be disposed of without considering the scope of Civil Code Section 2322. By its terms, Section 2322 applies when the authority of an agent is expressed in general terms. We presume that David Dudley Field was attempting to provide a statutory agency agreement that would set basic protective standards when the parties failed to do so. It is impossible to know how many agencies this section applies to, but we sense that the banks are applying this section, perhaps out of a fear of litigation, to situations where it does not apply under its terms. Ideally, some appropriate law revision organization would undertake the redrafting of the agency provisions of the Field Code, but we do not anticipate any such effort in the near future.

Respectfully submitted,

Stan G. Ulrich
Staff Counsel



THE BANK OF CALIFORNIA

October 27, 1987

Stan Ulrich, Esq.
Staff Counsel
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303

Re: Civil Code §2322

Dear Stan:

I am writing to confirm the conversation you had with Paulette Leahy on behalf of the California Bankers Association regarding Civil Code §2322. As you and Paulette discussed, the revision to conform to the new trust law is overly broad in that subsection (c) now prohibits an agent from violating any of the trustee duties commencing at §16000. Prior to July 1, 1987, the cross reference to §2322 subparagraph 3 was only to the trustee self-dealing and conflict-of-interest sections in the Civil Code.

This problem came to light when Jim Bessello, an attorney for Security Pacific and I both reviewed a draft chapter from the new book, California Durable Powers of Attorney, to be published by CEB. The author went into some detail about the change in the cross reference to the trust law and its consequences. You told Paulette that this result was not intended and asked that the CBA have someone at CEB contact you to discuss this further and also that we submit a redraft of the legislation for your review. Paulette asked that I do so before I leave The Bank of California.

I spoke with Pam Jester, the editor at CEB in charge of the project and relayed the comments to her. Pam said she would get in touch with the author and have the author contact you. As you may know, draft chapters are submitted by CEB for comment without disclosure of the author. If you want to contact Pam directly, her number at CEB is 642-9417.

Stan Ulrich, Esq.
October 27, 1987
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As to redrafted language, Rich Lyon, who will be replacing me at The Bank of California, worked on this and suggests that §2322(c) state,

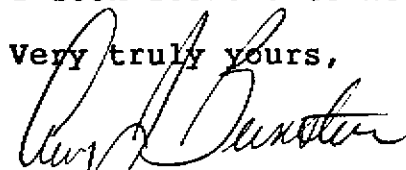
"To do any act which a trustee is forbidden to do by Probate Code Sections 16002, 16004, 16005, and 16009, subject to the exceptions contained in Sections 16015, 16463, 16464 and 16465."

From our review, these are new sections dealing with trustee self-dealing and conflicts of interest and the relevant exceptions thereto, that were carried over from Civil Code §§2228-2240. Just to avoid any confusion, I think it is better simply to list them rather than to try to generically define them.

If you have any comments on the proposal, I will be at the Bank until November 6. After than time, you can either contact Rich Lyon at my number or contact Paulette Leahy.

I look forward to hearing from you.

Very truly yours,



Amy J. Bernstein
Vice President and Counsel

cc: Paulette Leahy
Pamela Jester
Bruce Norman
Richard Lyon

AJB/vjw
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