

Third Supplement to Memorandum 88-45

Subject: Study L-3010 - Fees of Corporate Trustees (LA County Bar letter)

Attached to this supplement is a letter from Michael S. Whalen on behalf of the Executive Committee of the Probate and Trust Law Section of the Los Angeles County Bar Association. We will discuss the details of this letter at the meeting.

The Los Angeles Bar group suggests a narrow focus, i.e., a statute that is directed toward control or review of fees, rather than replacement of trustees. This position ignores the purpose of the proposals centered on replacement of one trust company with another: to make the competitive market work. Judging by the comments we received from trust companies, if there is one idea that the banks agree on, it is that fees should be set in the competitive market, rather than by statute or by the courts. Hence, while the problem we have been urged to consider is the increase in percentage and minimum fees since 1983, the remedy may take any of a variety of forms.

Respectfully submitted,

Stan G. Ulrich  
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July 7, 1988

BY FEDERAL EXPRESS

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CALIF. LAW REV. COMM'N

JUL 08 1988

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Re: Study L-3010--Fees of Corporate Trustees

Dear John:

This letter sets out the recommendation of the Executive Committee of the Los Angeles County Bar Probate and Trust Law Section as to whether the Law Revision Commission should propose legislation dealing with trustee fees charged by corporate trustees. We note that although the initial Study L-3010 undertaken by the Commission Staff was entitled "Replacement of Corporate Trustees," the title was subsequently changed to be "Fees of Corporate Trustees," thereby focusing on the real underlying concern. We point this out because we believe it is important that any legislation on this subject be narrowly directed to corporate trustees fees, and not deal with the "replacement of trustees" or affect the rules governing the removal of trustees, subjects which have not truly been part of this study.

We will begin by stating clearly that the Executive Committee has no collective view as to whether the fees currently being charged by corporate trustees pose a problem requiring immediate solution, or represent unreasonable increases since 1983 when continuing court jurisdiction over testamentary trusts was eliminated. The information gathered from corporate trustees and attorneys in the 1987 surveys conducted by the Staff obviously does not provide sufficient facts to draw a conclusion one way or the other. Our

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collective view is that the Staff's own discussion of those surveys is plainly biased against corporate trustees and does not provide a reliable basis for reaching a conclusion.

The reason we feel it necessary to take a position is that although the members of our Section have differing opinions on the subject of trustees fees, we recognize that there is a perception by members of the public and others that corporate trustees fees, especially minimum fees, are steadily increasing without control by the courts or trust beneficiaries. In such a setting as this, we believe that it would be appropriate for the Commission to propose legislation providing a statutory procedure to address this perception and the specific concern.

Members of our Executive Committee have reviewed and discussed the memoranda and the alternative proposals presented to the Commission (including the June 22, 1988 proposal of the California Bankers Association) and the criticisms of each. What is obvious from these materials is that the question of what constitutes a reasonable trustees fee is complex, varies from case to case, and cannot be resolved by statutory fee schedules or arbitrary fee thresholds. Rather, the best that can be done is to require procedures that get timely information to the beneficiaries and provide them with ready access to a judge.

The consensus of our Executive Committee is that the objectives for the legislation should be as follows:

A. Narrow Purpose. The legislation should be narrowly directed to providing control and review of corporate trustees fees. The legislation should not be a general vehicle for the replacement of one corporate trustee with another. To the extent possible, the legislation should not facilitate the replacement of corporate trustees for reasons other than the fees being charged.

B. Burden on the Trustee to Seek Judicial Review. The burden of bringing a petition to seek judicial supervision of trustee fees should be on the corporate trustee, and not on beneficiaries who may or may not understand their rights or have easy access to legal counsel.

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C. Discretion in the Court Regarding Payment of Costs of Petition. If the corporate trustee's petition is successful, the reasonable costs of bringing the petition should be paid from the trust or by the objecting beneficiary, in the court's discretion. If the petition is unsuccessful, the court should have the discretion to direct payment of the costs from the trust or from the trustee's own funds.

We would recommend, more specifically, that the legislation provide the following:

1. Notice. Corporate trustees would be required to give written notice to the trust beneficiaries prior to any increase in the rates or fixed amounts of compensation to be charged against the trust for trustee fees. The legislation would be written to permit corporate trustees to give such notice prospectively as to fees to be earned and charged during the upcoming period.

2. If No Beneficiary Objects. If, within 30 days, no beneficiary entitled to notice objects to the rates or fixed amounts of compensation described in the notice, the corporate fiduciary would be entitled to pay itself those fees for its services, subject to its actually earning them by providing trustee services.

3. If a Beneficiary Objects. If, within 30 days, a beneficiary entitled to notice objects to the fees, the trustee, in order to be permitted to increase its rates or fixed amounts of compensation, would be required to file a petition with the court seeking approval of the compensation. The corporate trustee would also have the option of deciding upon a lower compensation and giving a new notice stating that reduced compensation.

4. Costs of Petition. If the trustee seeks court approval and the court approves the increased compensation, the reasonable costs of the petition should be paid from the trust or imposed on the beneficiary who objected to the increased compensation (or charged against that beneficiary's trust share), in the court's discretion. If the court does not approve the fees, the costs of the petition should be paid from the trust or imposed on the corporate trustee, in the court's discretion.

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5. Right of Trustee to Resign. If a corporate trustee's petition for approval of its increased compensation is denied, in whole or in part, the corporate trustee should have the right to resign by giving notice to the beneficiaries and should not be liable to any person by reason of such resignation.

6. Override of Trust Provisions. These provisions should be applicable to all corporate trustees, regardless of any contrary provision in the trust instrument.

Refinements of this proposal should also address the following questions:

(1) Whether the statute should require a majority in interest of the income beneficiaries or of the remainder beneficiaries, or of both, to raise the objection that would require the corporate trustee to petition the court.

(2) Whether all beneficiaries or only current beneficiaries should have the right to receive notice and to object; and

(3) Whether these procedures should apply to individual trustees.

Our Executive Committee does not have a consensus view on these questions.

If the Commission believes that the approach described above would provide an appropriate response to the concerns being expressed about corporate trustee fees, we would be pleased to assist in drafting the language for a statute.

Sincerely,



Michael S. Whalen  
of LATHAM & WATKINS

On behalf of the Executive  
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Trust Law Section of the Los  
Angeles County Bar Association