

**HANDLING AND DISPOSITION OF
FIDUCIARY BOND CLAIMS:
TYPES OF CLAIMS AND DAMAGES**

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I. INTRODUCTION

When a guardian, conservator, estate representative (administrator or executor) or trustee is appointed, typically a bond is required. The form of bond is relatively straightforward, and the bond is conditioned upon the faithful performance of the fiduciary's duties. When an allegation is made that the representative has breached his or her fiduciary duties, a claim is usually made on the bond. This outline is limited to a discussion of the types of claims that arise, and the damages for which the surety may become liable. It will not discuss how to take a bond claim through trial. Its focus is to identify issues which may assist counsel and the surety to achieve an early and favorable resolution of claims. It will discuss issues common to fiduciary bond claims without focusing on the specific requirements for a particular jurisdiction because probate practice is highly localized.

II. OVERVIEW

Probate is a creature of statute. The trial court sitting in probate is generally considered to be a court of limited jurisdiction, as set forth in the statutory scheme of the particular jurisdiction.¹ Probate is an *in rem* proceeding.² The probate court generally has exclusive jurisdiction over the administration of a conservatorship or guardianship, a decedent's estate, or the internal affairs of a trust. Whether to suspend, remove or surcharge a fiduciary is

¹ Rinehart v. Bank One Columbus, N.A. (1998) 125 Ohio App.3d 719, 709 N.E.2d 559; Bank of America v. Superior Court (1986) 181 Cal.App.3d 305, 266 Cal.Rptr. 685; Estate of Lagios (1981) 118 Cal.App.3d 459, 173 Cal.Rptr. 506; Ramsdel v. Union Trust Co. (1987) 202 Conn. 57, 519 A2d 1185.

² Witkin, SUMMARY OF CALIFORNIA LAW (9th Ed. 1990), § 329.

exclusively within the probate court's jurisdiction.³ Once a matter is properly before the probate court, however, the court can render any relief authorized by statute.⁴

Administration is the process of transferring the decedent's assets to the persons or institutions entitled to receive them. In this process, the three main functions are:

- (1) Collection of assets: To protect the interests of those who may have a claim against the estate by providing for systematic collection by the representative of the decedent's real and personal property, as well as debts due him or her;
- (2) Payment of debts and taxes: To require creditors to present their claims within a prescribed period, so that liabilities of the estate are promptly determined with relative certainty. Creditors may assert their rights, and claims may be rejected by the representative or the court. Probate likewise provides a method of determining state and federal taxes due because of death;

³ Green v. Jaffee (1988) 172 Mich.App. 298, 431 N.W.2d 492; Saks v. Daimon Raike (1992) 7 Cal.App.4th 419, 8 Cal.Rptr.2d 869; Bank of America v. Superior Court (1986) 181 Cal.App.3d 705, 226 Cal.Rptr. 685.

⁴ California Probate Code §§ 800, 7050, 17000.

- (3) Distribution of the estate: To provide a means of determining the persons entitled to receive the decedent's property.⁵

A. FIDUCIARY DUTIES AND RESPONSIBILITIES

The duties and responsibilities of fiduciaries such as a guardian, conservator, estate representative, or trustee are consistent throughout the various jurisdictions.⁶ Attached to the Appendix is a California Judicial Council form regarding duties of a conservator. A guardian/conservator has the duty to manage and control the estate assets; and in controlling the estate assets, it is required to use ordinary care and diligence. The guardian/conservator is required to exercise its power to the extent that ordinary care and diligence requires that the power be exercised. The debts and obligations incurred by the guardian/conservator for the necessities of life may be paid. Expenditures made without prior court approval are made at the fiduciary's own peril.⁷ A petition for instructions or approval may be filed where there is doubt over whether a particular debt should be paid. Prior court approval will typically insulate a fiduciary from liability.⁸

⁵ CEB CALIFORNIA DECEDENTS ESTATE PRACTICE § 2.16; Estate of Estes (1982) 134 Ariz. 70; 654 P.2d 4.

⁶ Harper v. Harper (1986) 491 So.2d 189; Estate of Lindberg (1981) 98 Ill.App.3d 212, 424 N.E.2d 1161; Estate of Tessier (1983) 468 A.2d 590; Estate of Gerber (1977) 73 Cal.App.3d 96, 140 Cal.Rptr. 577; Estate of Kugler (1984) 117 Wis.2d 314; 344 N.W.2d 160; Estate of Lash (2000) 329 N.J. Super. 249, 747 A.2d 327; California Probate Code §§ 2400, 2401, 9600, 9601.

⁷ Estate of Massaglia (1974) 38 Cal.App.3d 767, 113 Cal.Rptr. 751; Estate of Anderson (1988) Phila. Cty. Rptr. LEXIS 17; Estate of Gilfillan (1978) 79 Cal.App.3d 429, 144 Cal.Rptr. 682.

⁸ Harper v. Harper (1986) 491 So.2d 189.

The duty of an estate fiduciary is to collect estate assets in good faith and preserve them until distribution. The estate fiduciary is accountable for all of the estate assets that come into his or her possession and is chargeable with losses resulting from his or her default or neglect. Attached to the Appendix is a California Judicial Council form regarding duties of personal representatives. A professional fiduciary is held to a higher standard than a non-professional fiduciary.⁹ A trustee has a duty not only to marshal and preserve assets, but to invest the assets in accordance with the trust instrument and as allowed by law. This includes the duty to diversify the trust portfolio.¹⁰ An estate fiduciary is liable to reimburse the estate for any legally compensable losses proximately resulting from the failure to exercise the requisite duty of care. If the fiduciary does not reimburse the estate, the surety is obligated to do so.

B. SURCHARGE CLAIMS

Surcharge claims arise most often when objections are filed to an accounting or in response to other petitions for relief filed by an estate representative. At times, petitions for surcharge may be filed separately, in the absence of an accounting. Petitions for a surcharge are commonly joined with petitions to compel an accounting, for suspension of powers and removal. In some jurisdictions, a claimant is required to obtain a final order of surcharge against the fiduciary before the surety becomes obligated to satisfy the debt.¹¹ In other jurisdictions, the

⁹ Estate of Estes (1982) 134 Ariz. 70, 654 P.2d 4; Estate of Gerber (1977) 73 Cal.App.3d 96, 140 Cal.Rptr. 577.

¹⁰ Estate of Janes (1997) 90 N.Y.2d 41, 688 N.E.2d 332; Estate of Rowe (2000) 274 A.D.3d 87, 712 N.Y.S.2d 662; Estate of Beach (1975) 15 Cal.3d 623, 125 Cal.Rptr. 570, 542 P.2d 994.

¹¹ Estate of Dwyer (1959) 168 Cal.App.2d 264; California Code of Civil Procedure § 996.440.

surety may become obligated to pay when the liability of the fiduciary becomes reasonably clear.¹²

Bond claimants and/or the principal should give notice to the surety. In many instances, however, they do not.¹³ Notice to the surety is important because of due process concerns. Notice to the surety results in the surety being bound by the decision, regardless of whether the surety participates in the surcharge litigation.¹⁴ Notice to the surety is also important because oftentimes the defaulting fiduciary does not oppose or defend on the merits. Absent the surety's participation, the surcharge litigation is analogous to a default prove-up. The parties may also stipulate to a surcharge which may be binding on the surety.

Once notice is received by the surety, a determination must be made whether and to what extent to participate in the surcharge litigation. For example, if the surety is satisfied that the loss exceeds the bond penalty, the surety may deposit or interplead the funds.¹⁵ Alternatively, the surety may proceed ex parte to suspend powers and freeze assets. Prompt action by the surety may preserve assets and limit the amount of any loss. Additionally, the surety may file a *bill quia timet* to compel the principal to satisfy the obligation before the surety is compelled to do so.¹⁶ On the other hand, the surety must secure the cooperation of the prin-

¹² Old Republic Surety Co. v. Reischmann (1998) 713 So.2d 434, 23 Fla. Law Wd. 1359.

¹³ California Probate Code § 1213 requires notice to the surety.

¹⁴ Conservatorship of O'Connor (1996) 48 Cal.App.4th 1076, 56 Cal.Rptr.2d 386.

¹⁵ Guardianship of Davison (1982) 31 Wn.App. 480, 642 P.2d 1259.

¹⁶ Escrow Agents Fidelity Corp. v. Superior Court (1992) 4 Cal.App.4th 491, 5 Cal.Rptr.2d 698.

cipal in order to defend against the surcharge. This can place the surety in a difficult situation because of internecine family relationships and the surety's desire to limit or reduce its exposure.

Surcharge claims also arise in the context of co-fiduciaries. This is a troublesome area because one of the co-fiduciaries will typically disclaim any responsibility for the loss and may in fact be innocent of any actual wrongdoing. One representative is generally not liable for loss caused by a co-representative unless the representative:

- participates in the breach of fiduciary duty,
- improperly delegates administration of the estate to the other representative,
- approves, knowingly acquiesces in, or conceals a breach of the other representative,
- through his or her own negligence, enables the other representative to commit a breach,
- knows or reasonably should have known of a breach by the other representative and fails to take steps to compel the other representative to redress the breach.¹⁷

If there is more than one representative, the court may require either that each file a separate bond (each of which is usually in the full amount) or that they file a joint bond. If separate bonds are filed, a co-representative who is innocent of any breach of duty will not be

¹⁷ Estate of Lippner (1987) 135 Misc.2d 34, 514 N.Y.S.2d 182; Estate of Chrisman (1988) 746 S.W.2d 131; In re Estate of Bartlett (1984) 680 P.2d 369, 1984 Okla. LEXIS 109 (Okla. 1984); CEB CALIFORNIA DECEDENTS ESTATE PRACTICE § 8.35.

exposed to reimburse the estate for the loss. On the other hand, the liability of co-representatives on a single bond is joint and several.¹⁸ Where only one of the co-representatives is surcharged, upon satisfaction of the obligation, the surety may seek recovery from either or both co-representatives.¹⁹ Additionally, because an express indemnity in favor of the surety is normally provided when the bond is issued, the innocent co-representative is fully exposed in a joint bond situation.

III. DAMAGES

The surety generally will be liable to reimburse the estate for any loss suffered by the estate as a result of a breach of duty or negligence attributed to the representative.²⁰ The liability of the surety is commensurate with that of the principal, and limited to the bond penalty amount.²¹ An award of costs and attorneys' fees, however, may result in a loss exceeding the bond penalty.²² Although surcharge claims arise in a variety of situations, there are certain common fact patterns.

¹⁸ California Probate Code §§ 2326, 8480(a).

¹⁹ California Probate Code §§ 2326, 8480; California Civil Code § 2847.

²⁰ See footnote 6, ante.

²¹ Guardianship of Davison (1982) 31 Wn.App. 480, 642 P.2d 1259; California Civil Code § 2809; California Code of Civil Procedure § 996.470.

²² Harris v. Northwestern National Ins. Co. (1992) 6 Cal.App.4th 1061; Estate of Snover (1996) 4 Neb.App. 533; 546 N.W.2d 341; Old Republic Surety v. Reischmann (1998) 23 Fla.Law W.D. 1359, 713 So.2d 434; California Probate Code § 11003.

A. Role of Inventory and Appraisalment

An inventory and appraisalment is required to be filed in a decedent's estate and in conservatorship proceedings. A California Judicial Council form inventory is attached to the Appendix. A formal inventory and appraisalment may not be required in a trust proceeding. However, any accounting should contain an inventory of all assets. An inventory and appraisalment is a public record which sets forth the value of the decedent's estate on the date of death or other appropriate date. The inventory and appraisalment is important in surcharge litigation because it establishes a starting point for purposes of rendering an account current or a final account. The inventory value is also used to calculate the gain or loss on sale when an asset is liquidated.

A representative's failure to file an inventory and appraisalment is a red flag. The failure to file an inventory and appraisalment, however, does not cause a loss to the estate in and of itself. It is merely an accounting function. An inventory and appraisalment can be prepared and filed after expiration of the statutory or court-ordered deadline, showing all of the assets that have been marshaled. Moreover, any alleged loss to the estate is not dependent upon the value on the date of death. Instead, the focus is properly on the value at the time of the alleged wrongful or negligent act, and any subsequent loss sustained by the estate. The failure to file an inventory and appraisalment constitutes a breach of duty and may be grounds for suspension and removal.²³ Delay in filing oftentimes will not result in removal unless the delay was willful or

²³ CEB CALIFORNIA DECEDENTS ESTATE PRACTICE § 11.7.

negligent and caused loss to the estate. More often than not, failure to file an inventory and appraisal is a precursor to a surcharge claim.

B. Common Surcharge Issues

Marshaling Assets: The representative has a duty to marshal assets in good faith. The failure to marshal all of the estate assets will result in a surcharge. The representative may petition the court for approval to abandon a particular asset and to insulate the representative from any liability.²⁴

If the representative marshals non-estate assets, the assets must be accounted for.²⁵ Non-estate assets marshaled by the representative are basically treated as estate assets to be preserved for distribution to the rightful owner.²⁶ The representative will be liable for mishandling non-estate assets.²⁷ The representative, however, generally will not be held liable if he or she acted in good faith.²⁸ In order to satisfy the good faith requirement, however, a reasonable effort must be made to ascertain the true owner of the property. The representative must return the assets to the rightful owner when it becomes reasonably clear that the assets do not belong in the

²⁴ Estate of Barreiro (1932) 125 Cal.App. 153, 13 P.2d 1017.

²⁵ California Probate Code § 9860(a)(3).

²⁶ California Probate Code § 9651.

²⁷ In re Russell's Estate (1937) 23 Cal.App.2d 103, 72 P.2d 219; Elizalde v. Murphy (1909) 11 Cal.App. 32, 103 P. 904.

²⁸ CEB CALIFORNIA DECEDENTS ESTATE PRACTICE § 10.39; California Probate Code § 9651.

estate. This may be accomplished with a petition for instructions. Failure to return non-estate assets to their rightful owner may subject the representative to a surcharge, including interest, costs and attorney's fees incurred by the rightful owner to recover the asset.²⁹

Expenditures: Expenditures that are reasonable and necessary for the administration of the estate or conservatorship are generally allowed. If there is any question regarding the propriety of any expenditure, prior court approval should always be sought. Court approval will generally insulate a representative from any liability.³⁰ A representative who makes disbursements and incurs expenses without prior court approval does so at his or her own peril.³¹ The court must determine after the fact whether the expenditures were necessary and reasonable. Upon a satisfactory showing, the court may ratify and approve the representative's expenditures.³² In the event that the court does not approve the expenditure, however, the representative will be surcharged.³³

In some cases, disbursements are made in cash, with no receipts. The courts are openly skeptical when it comes to cash disbursements, even where the representative maintains a ledger of all such disbursements. Cash disbursements are usually subjected to greater scrutiny.

²⁹ Zimmerman v. FirstTier Bank (1998) 255 Neb. 410, 585 N.W.2d 445.

³⁰ Harper v. Harper (1986) 491 So.2d 189; Estate of Spirtos (1973) 34 Cal.App.3d 479, 109 Cal. Rptr. 919.

³¹ Estate of Massaglia (1974) 38 Cal.App.3d 767; Estate of Anderson (1988) Phila. Cty. Rptr. LEXIS 17; Estate of Bonaccorsi (1999) 69 Cal.App.4th 462, 81 Cal.Rptr.2d 604.

³² Estate of Tessier (1982) 468 A.2d 590; Estate of Gilfillan (1978) 79 Cal.App.3d 429, 144 Cal.Rptr. 862.

³³ See footnote 31

Cash disbursements will only be allowed if the expense is necessary and the dollar amount is small. Large cash disbursements generally are not approved. In order to avoid any problems, cash disbursements should be kept to a minimum.

Decline in Value/Market Fluctuations: One area of major surcharge litigation concerns depreciation of assets. Whether a representative is found liable depends upon several factors. Generally, a representative or trustee is not a guarantor that market values will not decrease.³⁴ In certain jurisdictions, the duties of an estate representative are different from a trustee, i.e., the primary duty is to marshal and preserve assets for distribution.³⁵ The estate representative is not required to liquidate assets except to the extent necessary to generate cash with which to administer the estate and pay taxes. The representative is not liable for the depreciation of stocks or other assets³⁶.

In other jurisdictions, however, the estate representative may have a duty to promptly liquidate estate assets, including stocks.³⁷ The estate representative may also have a

³⁴ Estate of Beach (1975) 15 Cal.3d 623, 125 Cal.Rptr. 570, 542 P.2d 994; Estate of Newhoff (1980) 107 Misc.2d 589, 435 N.Y.S.2d 632; Estate of Bonaccorsi (1999) 69 Cal.App.4th 462, 81 Cal.Rptr.2d 604; *see also*, 92 ALR 436 (liability for loss by depreciation in value of securities).

³⁵ Estate of Gerber (1977) 73 Cal.App.3d 96, 140 Cal.Rptr. 577; Harper v. Harper (1986) 491 S.O.2d 189.

³⁶ Estate of Bonaccorsi (1999) 69 Cal.App.4th 462, 81 Cal.Rptr.2d 604; Estate of Gerber (1977) 73 Cal.App.3d 96, 140 Cal.Rptr. 577; Harper v. Harper (1986) 491 S.O.2d 189.

³⁷ Estate of Lindberg (1981) 98 Ill.App.3d 212, 424 N.E.2d 1161; Chase v. Pevear (1981) 381 Mass. 350, 419 N.E.2d 1358.

duty imposed to follow the prudent investor rule.³⁸ A trustee has the duty to invest prudently, which includes the duty to diversify the trust portfolio.³⁹ Hiring an investment advisor may be appropriate, but it will not insulate the trustee from liability.⁴⁰ Investment in diverse blue chip stocks in compliance with the prudent investor rule has been held sufficient to insulate a trustee from liability in a declining market.⁴¹

One measure of damage for a trustee's breach of duty is the value of the asset on the date it should have been liquidated, less the value on the date of actual liquidation or accounting, plus interest.⁴² Damages consisting of profits that would have been realized had the proceeds of sale been placed into a fictionalized investment portfolio are generally not allowed.⁴³

In cases where the alleged breaches are separate and distinct, the trustee may not offset losses against gains.⁴⁴ In one case, the court allowed the trustee to offset the loss with

³⁸ Estate of Kugler (1984) 117 Wis.2d 314, 344 N.W.2d 160.

³⁹ Estate of Beach (1975) 15 Cal.3d 623, 125 Cal.Rptr. 570, 542 P.2d 994; Estate of Janes (1997) 90 N.Y.2d 41, 688 N.E.2d 332; Estate of Rowe (2000) 274 A.D.2d 87, 712 N.Y.S.2d 662; Chase v. Pevear (1981) 381 Mass. 350, 419 N.E.2d 1358; *see*, 24 ALR 3d, Duty of Trustee to Diversify Assets, and Liability for Failure to Do So.

⁴⁰ Chase v. Pevear (1981) 383 Mass. 350, 419 N.E.2d 1358.

⁴¹ Boston Safe and Trust Co. v. Boone (1986) 21 Mass.App. 637, 489 N.E.2d 209.

⁴² Estate of Gerber (1977) 73 Cal.App.3d 96, 140 Cal.Rptr. 577; Estate of Janes (1997) 90 N.Y.2d 41, 688 N.E.2d 332, 659 N.Y.S.2d 165; Estate of Rowe (2000) 274 A.D.2d 87, 712 N.Y.S.2d 662; *see*, Restatement of the Law of Trusts 3d, §§ 208-212.

⁴³ Estate of Janes (1997) 90 N.Y.2d 41, 688 N.E.2d 332, 659 N.Y.S.2d 165.

⁴⁴ Restatement of the Law of Trusts 3d, § 213.

gains because the alleged breaches were not separate and distinct, thereby allowing the trustee to “net out” the investment results.⁴⁵

Business Operations: Continuing the decedent’s business oftentimes results in a surcharge, despite the representative’s best intentions. The duty of the representative, as noted, is the preservation of assets. In many instances, the operation of the business loses a good will component without the participation of the decedent. Without court authority or authority granted by will, the representative is subject to significant surcharge exposure in continuing the operation of a decedent’s business.⁴⁶ Even with court authority, the representative may become embroiled in extensive surcharge litigation. In order to comply with the duty of due diligence and to preserve the estate, the representative must determine if the business is viable.⁴⁷ If no adequate investigation is made, the representative likely will be surcharged.⁴⁸ The decision must be made whether to liquidate the business immediately or to operate it pending liquidation at a later date or distribution in kind. It would be prudent for the estate representative to obtain court approval to hire a business consultant to evaluate the business and assist in the determination. Court authorization and the advice of a business consultant may insulate the representative from surcharge exposure.

⁴⁵ In re Estate of Bartlett (1984) 680 P.2d 369, 1984 Okla. LEXIS 109 (Okla. 1984).

⁴⁶ CEB CALIFORNIA DECEDENTS ESTATE PRACTICE § 17.4, 17.6.

⁴⁷ Estate of Baldwin (1982) 442 A.2d. 529; Estate of Spirtos (1973) 34 Cal.App.3d 479, 109 Cal.Rptr. 919; Beck v. Beck (1980) 383 So.2d 268.

⁴⁸ Estate of Spirtos (1973) 34 Cal.App.3d 479, 109 Cal.Rptr. 919; Estate of Baldwin (1982) 442 A.2d. 529.

Self-Dealing/Conflict of Interest: Where a fiduciary acts in several capacities, care must be taken to confirm that there are no conflicts between the fiduciary's respective duties and obligations. A fiduciary who engages in self-dealing or who has a conflict of interest is subject to removal and is liable for any loss to the estate.⁴⁹ A conflict of interest typically arises where the fiduciary acts in several capacities, i.e., as guardian, estate representative and/or trustee. A conflict also arises where the fiduciary acts in a corporate capacity while dealing with the estate.⁵⁰ A fiduciary complying with his or her duties in one capacity may constitute a breach of fiduciary duty in another capacity, and will be held liable for any loss sustained.⁵¹ The court may set aside any transfer effected by the fiduciary where there is self-dealing.⁵² In addition to being liable for any loss, the fiduciary may be required to disgorge any profits.⁵³ Additionally, where the estate assets have been commingled with non-estate assets, the court may impose a resulting trust on the assets.⁵⁴ The cost of segregating the estate assets may be surcharged against the fiduciary.⁵⁵

⁴⁹ Priestley v. Priestley (1997) 949 S.W.2d 594; Ramsdell v. Union Trust Co. (1987) 202 Conn. 57, 519 A.2d 1185; Estate of Chrisman (1988) 746 S.W.2d 131; Beck v. Beck (1980) 383 So.2d 268; Harper v. Harper (1986) 491 S.O.2d 189.

⁵⁰ Harper v. Harper (1986) 491 S.O.2d 189.

⁵¹ Priestley v. Priestley (1997) 949 S.W.2d 594; Beck v. Beck (1980) 383 So.2d 268.

⁵² Estate of Martin (1999) 72 Cal.App.4th 1438, 86 Cal.Rptr.2d 37.

⁵³ California Probate Code § 9601(a)(3).

⁵⁴ Estate of Chrisman (1988) 746 S.W.2d 131.

⁵⁵ Estate of Gerber (1977) 73 Cal.App.3d 96, 140 Cal.Rptr. 577.

Attorney's Fees and Costs: The claim for attorney's fees in surcharge litigation is essentially broken down into two categories: (1) attorney's fees and costs incurred to organize the mess left behind by the prior representative; and (2) attorney's fees and costs incurred in the surcharge litigation itself. As a general rule, the claimant can recover the costs and expenses to inventory, segregate, and organize the estate assets.⁵⁶ The fees allocated to reconstructing the estate inventory and organizing the estate should be allocated specifically to those tasks. The failure to allocate attorney's fees may result in the claim being denied.⁵⁷ Some jurisdictions allow for the award of attorney's fees incurred in litigating the surcharge,⁵⁸ others do not.⁵⁹ Attorneys' fees may be awarded based on a finding that they are a part of the detriment suffered by the estate arising from the representative's breach of duty.⁶⁰ The award of attorneys' fees may be justified by a finding that the litigation was contested in bad faith.⁶¹ A finding of bad faith litigation on the part of the surety may give rise to a claim for extra-contractual damages in those jurisdictions that recognize such recoveries.

⁵⁶ Estate of Fain (1999) 75 Cal.App.4th 973, 89 Cal.Rptr.2d 618; Estate of Gerber (1977) 73 Cal.App.3d 96, 140 Cal.Rptr. 577.

⁵⁷ Estate of Bonaccorsi (1999) 69 Cal.App.4th 462, 81 Cal.Rptr.2d 604.

⁵⁸ Brake v. Murphy (1999) 736 So.2d 745, 1999 Fla.App. LEXIS 8323, 24 Fla.Law W.D. 1443; Chase v. Pevear (1981) 383 Mass. 350, 419 N.E.2d 1358.

⁵⁹ Epperson v. Greer (1981) 626 S.W.2d 884; Estate of Gerber (1977) 73 Cal.App.3d 96, 149 Cal.Rptr. 577; Estate of Lash (2000) 329 N.J. Super. 249, 747 A.2d 327.

⁶⁰ Old Republic Surety v. Reischmann (1998) 23 Fla.Law W.D. 1359, 713 So.2d 434.

⁶¹ Estate of Snover (1996) 4 Neb.App. 533; 546 N.W.2d 341; Guardianship of Davison (1982) 31 Wn.App. 480, 642 P.2d 1259; Estate of Fain (1999) 75 Cal.App.4th 973, 89 Cal.Rptr.2d 618; California Probate Code § 11003.

Reliance on Counsel: The representative may be held liable for a loss caused by the attorney. Where the representative turns funds over to counsel and a loss occurs, the representative can be surcharged on the grounds that the representative abdicated his or her non-delegable fiduciary duties.⁶² If, however, the absconding attorney receives the estate funds in the capacity as an escrow holder, the representative will not be surcharged if he or she acted with reasonable diligence.⁶³ Significantly, the attorney for the representative is not subject to surcharge by the probate court.⁶⁴ The recognized procedure is for the representative to seek recovery from the attorney. The court does, however, have the discretion to reduce any award of attorney's fees,⁶⁵ or to order the return of attorney's fees paid without prior approval.⁶⁶

Taxes: Failure to timely file and pay taxes resulting in penalties and interest charges being assessed against the estate will usually lead to a surcharge.⁶⁷ Failure to timely

⁶² Estate of Guiol (1972) 28 Cal.App.3d 818, 105 Cal.Rptr. 35; Estate of Spiritos (1973) 34 Cal.App.3d 479, 109 Cal.App.4th 919; Gaver v. Early (1923) 191 Cal. 123, 215 P. 394.

⁶³ Estate of Barbikas (1959) 171 Cal.App.2d 452, 341 P.2d 32.

⁶⁴ Estate of Lippner (1987) 135 Misc.2d. 34, 514 N.Y.S.2d. 182; Estate of Lagios (1981) 118 Cal.App.3d. 459, 173 Cal.Rptr. 506.

⁶⁵ Estate of Snover (1996) 4 Neb.App. 533; 546 N.W.2d 341; Estate of Heller (1992) 7 Cal. App.4th 862; Estate of Bonaccorsi (1999) 69 Cal.App.4th 462, 87 Cal.Rptr.2d 604; Estate of Estes (1982) 134 Ariz. 70, 654 P.2d 4.

⁶⁶ Estate of Lippner (1987) 135 Misc.2d. 34, 514 N.Y.S.2d. 182; Estate of Gilfillan (1978) 79 Cal.App.3d 429, 144 Cal.Rptr. 862.

⁶⁷ Estate of Harvey (1964) 224 Cal.App.2d 555, 36 Cal.Rptr. 788; Estate of Lock (1981) 122 Cal.App.3d 892, 176 Cal.Rptr. 358.

make an election under the applicable tax code resulting in a loss to the estate will also result in a surcharge.⁶⁸ Reliance on counsel is not a defense.⁶⁹

Theft/Defalcation: Theft or defalcation by a representative will almost always result in a surcharge. The only exception is where the absconding representative is a beneficiary of the estate.⁷⁰ In that situation, a surcharge may be offset against the legatee's distributive share.

Insurance Policies: Failure to maintain and pay premiums on insurance policies may result in a surcharge in favor of the policy beneficiary.⁷¹

Interest: Failure to place the estate funds in an interest bearing account will lead to a surcharge. The award of interest, however, is usually within the court's discretion.⁷²

Rental Value: Failure to rent out estate real property may lead to a surcharge.⁷³

⁶⁸ Estate of Estes (1982) 134 Ariz. 70, 684 P.2d 4.

⁶⁹ In re Estate of Bartlett (1984) 680 P.2d 369, 1984 Okla. LEXIS 109 (Okla. 1984).

⁷⁰ Estate of Johnson (1984) 162 Cal.App.3d 917, 208 Cal.Rptr. 821.

⁷¹ Conservatorship of Coffey (1986) 186 Cal.App.3d 1431, 231 Cal.Rptr. 421.

⁷² Estate of Alexander (2000) 2000 P.A. Super 206, 758 A.2d 182; Chase v. Pevear (1981) 383 Mass. 350, 419 N.E.2d 1358.

⁷³ Estate of Fain (1999) 75 Cal.App.4th 973, 89 Cal.Rptr.2d 618; Estate of Bonaccorsi (1999) 69 Cal.App.4th 462, 87 Cal.Rptr.2d 604.

C. Extra-Contractual Damages

A surety's common law liability for breach of the implied covenant of good faith and fair dealing has been recognized in several states, and the courts held that extra-contractual damages may be recovered.⁷⁴ A discussion of the distinction between surety and insurance and the policy considerations behind the recovery of extra-contractual damages is beyond the scope of this article.⁷⁵ In two states, the courts have held that there is no common law action for "bad faith" under which a surety can be held liable for extra-contractual damages.⁷⁶ In those states that allow for the recovery of extra-contractual damages, the surety must promptly respond to a claim on the bond. The surety has a duty to investigate and make a determination regarding the validity of the claim. Otherwise, the surety leaves itself vulnerable to a claim of bad faith.⁷⁷

⁷⁴ Transamerica Premier Ins. Co. v. Brighton School District, 940 P.2d 348 (Col. 1997); Loyal Order of Moose, Lodge 1392 v. International Fidelity Insurance Co., 797 P.2d 622 (Alaska 1990); Dodge v. Fidelity and Deposit Co. of Maryland, 778 P.2d 1240 (Ariz. 1989); Szarkowski v. Reliance Ins. Co., 404 N.W.2d 502 (N.D. 1987); Suver v. Personal Service Ins. Co., 462 N.E.2d 415 (Ohio 1984). A comprehensive discussion of the distinction between surety and insurance in the bad faith context is beyond the scope of this article.

⁷⁵ For a detailed discussion, see E.G. Gallagher, Ed., *THE LAW OF SURETYSHIP* (2nd Ed. 2000) ABA.

⁷⁶ Cates Construction, Inc. v. Talbot Partners, 980 P.2d 407 (Cal. 1999); Great American Ins. Co. v. North Austin Municipal Utility, 908 S.W.2d 415 (Tex. 1995).

⁷⁷ Old Republic Surety Co. v. Reischmann (1998) 713 So.2d 434, 23 Fla. Law Wd. 1359; Guardianship of Davison (1982) 31 Wn.App. 480, 642 P.2d 1259; *see* footnote 74.

IV. CONCLUSION

A fiduciary has many duties and responsibilities, the breach of which may lead to surcharge litigation. Surcharge claims can arise in a myriad of situations. In order to limit one's exposure, careful organization and segregation of the estate assets is necessary. In addition, maintenance of accurate records will facilitate the resolution of many disputes. Joint control of accounts may be established to minimize any risk. In addition, prior court approval of the fiduciary's actions should insulate the fiduciary from unnecessary exposure. Failure to follow a prudent course, however, may have disastrous consequences for both the fiduciary and the surety.