



## Texas Fiduciary Litigation Update: 2016-2017

**DAVID F. JOHNSON**  
Winstead PC  
[dfjohnson@winstead.com](mailto:dfjohnson@winstead.com)  
[www.txfiduciarylitigator.com](http://www.txfiduciarylitigator.com)  
300 Throckmorton St., Suite 1700  
Fort Worth, TX 76102  
817-420-8223

**DAVID FOWLER JOHNSON**

**DFJOHNSON@WINSTEAD.COM**

Managing Shareholder of Winstead PC's Fort Worth Office  
777 Main St., Suite 1100  
Fort Worth, Texas 76102  
(817) 420-8223

David maintains an active trial and appellate practice for the financial services industry. David has specialized in estate and trust disputes including: trust modification/clarification, trustee resignation/removal, breach of fiduciary duty and related claims, accountings, will contests, mental competency issues, and undue influence. David's recent trial experience includes:

Represented a trustee in federal class action suit where trust beneficiaries challenged whether it was the authorized trustee of over 220 trusts;

Represented trustees regarding claims of mismanagement of assets;

Represented a trustee who filed suit to modify three trusts to remove a charitable beneficiary that had substantially changed operations;

Represented a trustee regarding dispute over the failure to make distributions;

Represented a trustee/bank regarding a negligence claim arising from investments from an IRA account;

Represented individuals in will contests arising from claims of undue influence and mental incompetence;

Represented estate representatives against claims raised by a beneficiary for breach of fiduciary duty;

Represented beneficiaries against estate representatives for breach of fiduciary duty and other related claims; and

Represented estate representatives, trustees, and beneficiaries regarding accountings and related claims.

David is one of twenty attorneys in the state (of the 84,000 licensed) that has the triple Board Certification in Civil Trial Law, Civil Appellate, and Personal Injury Trial Law by the Texas Board of Legal Specialization. Additionally, David was a member of the Civil Trial Law Commission of the Texas Board of Legal Specialization. This commission writes and grades the exam for new applicants for civil trial law certification.

David is a graduate of Baylor University School of Law, *Magna Cum Laude*, and Baylor University, B.B.A. in Accounting.

David has published over twenty (20) law review articles on various litigation topics. David's articles have been cited as authority by: federal courts, the Texas Supreme Court (three times), the Texas courts of appeals (Waco, Texarkana, Tyler, Beaumont, and Houston), McDonald and Carlson in their Texas Civil Practice treatise, William V. Dorsaneo in the Texas Litigation Guide, Baylor Law Review, South Texas Law Review, and the Tennessee Law Review. David has presented and/or prepared written materials for over one hundred and fifty (150) continuing legal education courses.

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## I. Introduction<sup>1</sup>

The fiduciary field in Texas is a constantly changing area. Over time, statutes change, and Texas courts interpret those statutes, the common law, and parties' documents differently. This paper is intended to give an update on the law in Texas that impacts the fiduciary field from a period of mid-2016 to mid-2017. The author has a blog, the Texas Fiduciary Litigator ([txfiduciaryliterator.com](http://txfiduciaryliterator.com)), wherein he regularly reports on fiduciary issues in Texas.

## II. Trust-Related Litigation

### A. In Trust Dispute, Texas Supreme Court Affirms A Constructive Trust Based On A Finding Of Mental Incompetence

In *Jackson Walker LLPO v. Kinsel*, Lesey and E.A. Kinsel owned a ranch, and when E.A. died, he divided his half between his children and Lesey. *Jackson Walker, LLPO v. Kinsel*, No. 07-13-00130-CV, 2015 Tex. App. LEXIS 3586 (Tex. App.—Amarillo April 10, 2015), *aff'd in part*, 2017 Tex. LEXIS 477 (Tex. May 26, 2017). Lesey owned sixty percent at that point. Lesey placed her interest into an intervivos trust, which provided that upon her death, her interests would pass to E.A.'s children. Lesey became frail and moved near a niece, Lindsey, and nephew, Oliver. Lindsey and Oliver referred Lesey to an attorney to assist in drafting a new will and trust amendments. The attorney informed E.A.'s children that Lesey needed to sell the ranch to pay for her care. At that time, Lesey had approximately \$1.4 million in liquid assets and did not need to sell the ranch. Not knowing Lesey's condition, E.A.'s children agreed to sell, and the ranch was sold. Lesey's \$3 million in cash went into her trust. Lindsey, as a residual beneficiary in the trust, would receive most of the money – not E.A.'s children. The attorney also effectuated amending the trust to grant Lindsey and Oliver greater rights, while advising them to withhold that information from E.A.'s children. E.A.'s children sued Lindsey, Oliver, and the attorney for tortious interference with inheritance rights and other tort claims. The jury returned a verdict for E.A.'s children.

The Amarillo court of appeals first addressed the tortious interference with inheritance claim: "Someone who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift." *Id.* The court noted that many Texas intermediate appellate courts recognized such a claim. The court reviewed several Fort Worth

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<sup>1</sup> This presentation is intended for informational and educational purposes only, and cannot be relied upon as legal advice. Any assumptions used in this presentation are for illustrative purposes only. This presentation creates no attorney-client relationship.

Court's opinions, where the case had been transferred from, to see if Fort Worth had recognized such a claim, and determined that Fort Worth had not directly done so. The court also noted that it and the Texas Supreme Court had not recognized the claim. The court held that it was solely the authority of the Texas Legislature or the Texas Supreme Court to create a new cause of action. Court rendered for the defendants refusing to recognize that new cause of action. The court reversed on the fraud and other tort claims due to insufficient evidence of damages. The court affirmed the mental incompetence finding on the trust changes and sale of the ranch. The court then affirmed in part a finding of a constructive trust, making Lindsey hold any proceeds that should have gone to E.A.'s heirs in trust for them.

The Texas Supreme Court granted the petition for review in *Jackson Walker, LLPO v. Kinsel*, No. 15-0403, 2017 Tex. LEXIS 477 (Tex. May 26, 2017). The Court first addressed whether Lesev had mental capacity to execute the documents:

Documents executed by one who lacks sufficient legal or mental capacity may be avoided. Lesev had the mental capacity to execute the documents effectuating the ranch sale and the fourth and fifth amendments to her trust if she “appreciated the effect of what she was doing and understood the nature and consequences of her acts and the business she was transacting.” The proper inquiry is whether Lesev had capacity on the days she executed the documents at issue. But courts may also look to state of mind at other times if it tends to show one's state of mind on the day a document was executed.

The Court quoted from the court of appeals summary of her deterioration in the final years of her life:

[Lesev] 1) grew more infirm, 2) experienced macular degeneration, 3) became legally blind, 4) had to have others give her the pills she had to take, 5) had to have others manage her doctors' care and her finances, 6) became extremely frail, 7) required assistance in walking, bathing, dressing, and eating, 8) became incontinent of urine or urinated on herself, 9) experienced continual confusion and forgetfulness, 10) experienced agitation, and 11) experienced depression. So too did she begin to experience congestive heart failure in 2007 and grow less responsive to the medications administered to ameliorate that condition. The condition resulted in her having renal insufficiency or a precursor to renal failure. Consequently, fluid was pooling in her body, and her heart was unable to “clear it out.” That, according to a physician who testified, could affect a person's mental state “[w]hen it gets that significant.”

*Id.* at \*16. The Court held that not all of Lesey's afflictions suggested that she was mentally compromised, and noted that evidence of physical infirmities, without more, does not tend to prove mental incapacity. *Id.* at \*16-19. "But evidence of physical problems that are consistent with or can contribute to mental incapacity is probative." *Id.* The Court noted that a board-certified forensic psychiatrist testified how Lesey's physical challenges contributed to her mental incapacity. She testified that by February 2007 Lesey had "mild to moderate dementia and cognitive impairment." *Id.* She added that in 2007 and 2008 Lesey was in the latter stages of congestive heart failure, which led to renal insufficiency. She testified a person's mental state can be affected by that condition. She testified that Lesey began having "confusion" about her medication in 2007 and that nurse and caregiver notes on Lesey indicated "she was confused, she was forgetful. And those began going up until she passed away." *Id.* The psychiatrist opined that by the end of February 2007, Lesey had neither "the executive functioning nor the overall mental capability" to transact business or sign legal documents. *Id.* As to Lesey's dementia, the testimony was that "as you're losing brain cells and if you keep losing so many, some days your brain cells that you have left function better than other days" but that "you'll still have a significant limitation." *Id.* The psychiatrist also noted the deterioration of Lesey's handwriting as evidence of her mental decline.

The Kinsels testified that well before Lesey executed a document in 2007, Lesey was consistently confused, forgetful, and unable to comprehend conversations and documents. She would ask for a car she no longer owned and could no longer understand jokes. *Id.* at \*20-21. Due at least in part to her loss of vision, she could no longer read, work crossword puzzles, or play board games, all pursuits she once enjoyed. *Id.* One testified to a "dramatic change in her mental and physical health" beginning in 2006: "She was very forgetful. She was hard to talk to. Just a little disassociative with people." Carole testified that by Thanksgiving of 2006 Lesey was no longer lucid and would talk and respond only in short sentences or by nodding. *Id.* "She was not the Lesey that I had known my entire life," she testified. Another testified that in late 2006 Lesey was "clearly becoming more and more confused and forgetful, and she would forget things that she had recently done or did." *Id.* He visited Lesey four days after Lesey executed the document, and testified she was "very agitated and confused." *Id.* Lesey told him: "I think I've signed something and I don't know what I've signed." *Id.* He testified that by 2008, Lesey only sometimes remembered conversations from minutes earlier. *Id.* He added, "[O]ftentimes I found that she either had not heard what I said or understood it, or didn't understand it, because I'd have to repeat myself." *Id.*

The Court noted that although the defendant maintained at trial that Lesey never lost mental capacity, the jury considered evidence that contradicted this evidence. *Id.* The Court held:

We agree with the court of appeals that there is sufficient evidence to support the jury's mental-incapacity finding. Keith's [the

attorney's] testimony, and that of those who accompanied him on his visits with Lesey, tends to contradict the evidence that Lesey was mentally impaired. And the evidence shows that Keith took his responsibilities seriously and executed his duties carefully and ably. But it is not our place to weigh the testimony adduced at trial. That is the jury's province.

*Id.*

The Court then turned to whether Texas recognizes the tort of tortious interference with inheritance rights. *Id.* at \*24-31. The Court held that it and the Legislature had never recognized such a tort. It then held:

We take a host of factors into account when considering a previously unrecognized cause of action. Not the least of them is the existence and adequacy of other protections. In this case, the Kinsels secured judgments holding Jane, Bob, Keith, and Jackson Walker personally liable for fraud and tortious interference with their inheritances. But the trial court also imposed a constructive trust on the funds Jane inherited from Lesey as the trust's residual beneficiary. Provided the trial court acted in its discretion in doing so, an issue we separately address below, we see no compelling reason to consider a previously unrecognized tort if the constructive trust proved to be an adequate remedy.

*Id.* The Court held that the constructive trust, based on the mental incapacity finding, provided an adequate remedy and there was no need, in this case, to recognize the tort of tortious interference with inheritance rights. *Id.*

Regarding a constructive trust, the defendants had several arguments for why the trial court abused its discretion in creating a constructive trust in this case. *Id.* at \*31-35. The Court disagreed and held that there does not have to be a breach of a fiduciary duty by the defendants owed to the plaintiffs. *Id.* There was no duty owed by the defendants to the plaintiff. *Id.* Citing to an earlier opinion, the Court held: "It is true that we recently recognized that a 'breach of a special trust or fiduciary relationship or actual or constructive fraud' is 'generally' necessary to support a constructive trust. But in that same case we reaffirmed our statement in *Pope* that '[t]he specific instances in which equity impresses a constructive trust are numberless—as numberless as the modes by which property may be obtained through bad faith and unconscientious acts.'" *Id.*

Even though the defendants did not breach any duty owed to the plaintiffs, the Court concluded that the trial court acted within its discretion in imposing a constructive trust: "We hold the mental-incapacity finding, coupled with the undue-influence finding, provided a more than adequate basis for the trial court to impose a constructive trust." *Id.*

The Court also held that undue influence was not, by itself, a cause of action that allowed an award of damages. *Id.* at n. 3. Rather, the Court held that it was a legal theory that allowed a court to disregard a document, such as a trust or will. The Court also held that there was no evidence that the attorney unduly influenced Lesey. *Id.* at n. 8. The Court held that the following evidence was not sufficient to prove undue influence: the attorney was present for the execution of a document he did not prepare and he drafted a second document and was present for the execution of that document. There was no evidence of what was said between the attorney and Lesey, and the Court also expressly noted that the attorney did not personally gain from these transactions. *Id.*

The Court affirmed the lower court's judgment, sustained the constructive trust, and refused to rule on whether a claim of tortious interference with inheritance rights exists in Texas.

### **B. Court Reviews Damages For Mental Anguish, Exemplary Damages, and Other Categories For A Trustee's Breach Of Fiduciary Duty**

In *Wells Fargo v. Militello*, a trustee appealed a judgment from a bench trial regarding a beneficiary's claims for breach of fiduciary duty, negligence, and fraud. No. 05-15-01252-CV, 2017 Tex. App. LEXIS 5640 (Tex. App.—Dallas June 20, 2017, no pet. history). Militello was an orphan when her grandmother and great-grandmother created trusts for her. She had health issues (Lupus) that prevented her from working a normal job, and she heavily relied on the trusts. When Militello was 25 years old, one of the trusts was terminating, and it contained over 200 producing and non-producing oil and gas properties. The trustee requested that Militello leave the properties with it to manage, and she created a revocable trust allowing the trustee to remain in that position.

Later, in late 2005 and early 2006, Militello advised the trustee that she was experiencing cash flow problems as a result of her divorce and expensive medical treatments. Instead of discussing all six accounts with Militello, the trustee suggested that she sell the oil and gas interests in her revocable trust. The trustee then sold those assets to another customer of the trustee; a larger and more important customer. There were eventually three different sales, and the buyer ended up buying the assets for over \$500,000 and later sold those same assets for over \$5 million. The trustee did not correctly document the sale, continued reporting income in the revocable trust, and did not accurately report the sales to the beneficiary. The failure to accurately document and report the sales and income caused Militello several tax issues, and she had to retain accountants and attorneys to assist her in those matters.

The beneficiary sued, and the trial court held a bench trial in 2012. Later, the trial court awarded Militello: \$1,328,448.35 past economic damages, \$29,296.75 disgorgement of trust fees, \$1,000,000.00 past mental anguish damages, \$3,465,490.20 exemplary damages, and \$467,374.00 attorney's fees. The

trustee appealed, alleging that the evidence was not sufficient to support many of the damages award but did not appeal the liability finding of breach of fiduciary duty. The beneficiary agreed that the economic damages should be remitted (decreased) by around \$340,000, which would also impact the exemplary damages award. The trustee argued that the evidence did not support other awards of damages.

The trial court awarded damages based on Militello's expenses associated with dealing with tax issues, including accountant fees and attorney's fees. The evidence at trial was that the trustee did not timely or properly document any of the sales from Militello's trust, did not notify the oil and gas producers of the transfer of Militello's interests, and did not prepare and record correct deeds until three years after the fact. It failed to amend its internal accounting, resulting in Militello's accounts showing the receipt of amounts that were no longer attributable to interests owned by her trust. These errors caused problems in the preparation of Militello's tax returns, and attracted the attention of various tax authorities. When Militello attempted to obtain information from the trustee to address these problems, it did not provide her with a correct accounting. It was necessary for Militello to retain and consult her own tax advisors in order to resolve these problems. At trial, Militello's tax lawyer gave expert testimony to explain and quantify Militello's damages relating to correcting her tax problems. The court of appeals affirmed the trial court's awards for the Militello for these issues.

The trustee also challenged the trial court's award of \$1,000,000.00 in "past mental anguish damages pursuant to Texas Trust Code Section 114.008(a)(10)." *Id.* Section 114.008 is entitled "Remedies for Breach of Trust," and Subsection 114.008(a)(10) allows a court to "order any other appropriate relief" to "remedy a breach of trust that has occurred or might occur." *Id.* The court held that breaches of fiduciary duty can lead to awards of mental anguish damages. To sustain such an award "[t]here must be both evidence of the existence of compensable mental anguish and evidence to justify the amount awarded." *Id.* "Mental anguish is only compensable if it causes a 'substantial disruption in . . . daily routine' or 'a high degree of mental pain and distress.'" *Id.* "Even when an occurrence is of the type for which mental anguish damages are recoverable, evidence of the nature, duration, and severity of the mental anguish is required." *Id.*

The record included her testimony and months of communications between Militello and the bank showing multiple disruptions and mental distress in Militello's daily life in attempting to obtain her own and her children's housing, medical care, and other needs. Militello established that she was entirely dependent on the trustee's competent administration of her trusts for her financial security and daily living expenses. The primary source of Militello's monthly income was permanently depleted, leaving her constantly worried about her financial security. Militello testified that the stress aggravated her Lupus, and that she suffered an ulcer and "broke out in shingles." *Id.* She received notices from

the IRS and other tax authorities that tax was due on properties she did not own, and she owed thousands of dollars in penalties. Her trust officer refused to discuss these problems with her, referring her to its outside counsel. The court of appeals concluded that there was evidence to support an award of mental anguish damages.

The court next reviewed the amount of the award of mental anguish damages. Appellate courts must “conduct a meaningful review” of the fact-finder’s determinations, including “evidence to justify the amount awarded.” *Id.* The court held that the \$1 million award was not supported by the evidence and suggested a remittitur down to \$310,000 based on evidence of other actual damages:

[T]he record supports a lesser amount of mental anguish damages. The items making up the remainder of Militello’s actual damages, net of the \$921,000 related to the market value of the oil and gas properties, represent expenses, fees, and losses Militello incurred as a direct result of Wells Fargo’s gross negligence and breaches of fiduciary duty. These items include legal fees incurred relating to drafting, creation, and recording of void deeds, lost production revenue, improperly transferred money market funds, bank fees, and the tax-related amounts we have discussed in detail above, among other items. These amounts total \$310,608.89, after subtraction of the amounts Militello voluntarily remitted. Much of the mental anguish Militello described is a direct result of the bank’s unresponsiveness and gross negligence in carrying out its fiduciary duties to her, and is reflected in these expenses. We conclude that the evidence is sufficient to support the amount of \$310,608.89, representing amounts of actual damages caused by the bank’s breaches of fiduciary duty and gross negligence, but excluding the actual damages attributable to market value of the properties. We conclude that this amount would fairly and reasonably compensate Militello for the mental anguish she suffered.

*Id.*

The trustee requested that the appellate court disallow the award of prejudgment interest attributable to the trial court’s delay in signing the judgment. Citing rule of judicial administration 7(a)(2), the trustee argued that “the Court should cut off prejudgment interest for the period starting at the Rule 7(a)(2) date line, which was July 26, 2012.” *Id.* The court held that “[p]rejudgment interest is awarded to fully compensate the injured party, not to punish the defendant.” *Id.* The court stated: “If we were to sustain Wells Fargo’s complaint, Militello would not be fully compensated for lost use of the money due as damages during the lapse of time between the accrual of the claim and the date of judgment. As between Militello, who established Wells Fargo’s liability for breaches of its duties to her, and Wells Fargo, we conclude that Wells Fargo should bear the prejudgment interest cost of the delay.” *Id.*

The court next turned to the trustee's challenge to the exemplary damages award. The trustee contended that Militello did not establish harm resulting from fraud, malice, or gross negligence by clear and convincing evidence, as required by section 41.003 of the Texas Civil Practice and Remedies Code. The trustee argued that breach of fiduciary duty, by itself, is insufficient predicate under section 41.003. The appellate court did not resolve that issue because it concluded there was clear and convincing evidence to support the trial court's express finding that the trustee was grossly negligent.

Gross negligence consists of both objective and subjective elements. Under the objective component, "extreme risk" is not a remote possibility or even a high probability of minor harm, but rather the likelihood of the plaintiff's serious injury. *Id.* The subjective prong, in turn, requires that the defendant knew about the risk, but that the defendant's acts or omissions demonstrated indifference to the consequences of its acts. The court of appeals held that the evidence in the case supported the trial court's findings:

The record reflects that Wells Fargo and its predecessors had served as Militello's fiduciaries since her childhood. As well as serving as trustee for the Grantor Trust, Wells Fargo also served as the trustee for several other family trusts of which Militello was a beneficiary. As trustee, Wells Fargo was aware of the amount of income Militello received each month from each trust, combining the amounts in a single monthly payment made to Militello. If Wells Fargo was not earlier aware that income from the trusts was Militello's sole source of income, it became aware when Militello first contacted the bank about her financial problems in 2005. She explained to Tandy that the income she received from the trusts was insufficient to meet her expenses and debts, and she asked for help. When Tandy retired, Militello again explained her financial situation to Randy Wilson, and made clear the source of her financial problems and her need for help in solving them. Wells Fargo was therefore actually aware of the risk to Militello's financial security from depletion of the Grantor Trust. As Wallace testified, however, Wells Fargo breached its fiduciary duty by failing to explore other possible options to assist Militello through her financial difficulties. Wallace testified that Wells Fargo's conduct involved an extreme degree of risk. He divided his evaluation of Wells Fargo's conduct as a fiduciary into three time periods. His first period, the "evaluation phase," began in December 2005 when Militello contacted Wells Fargo for help, and ended in late May 2006 when the decision to sell the properties was made. Wallace's second period covered the sale itself, including the marketing of the properties and the decision to sell. The third period covered the execution of the sale, and included Wells Fargo's adherence to its own internal policies and carrying out its duties to Militello in distribution of the properties after the sale. Wallace testified in detail



regarding the duties that Wells Fargo, as Militello's fiduciary, should have carried out in each of the three periods. He testified that, among other deficiencies, Wells Fargo failed: to provide sufficient information to Militello to make an informed decision about sales from the Grantor Trust, to obtain a "current evaluation of the property prepared by a competent engineer" before the sales, to explain the valuation to Militello and discuss the tax consequences of a sale, to market the properties to more than one buyer, to negotiate to get the best price possible for the properties, to negotiate a written purchase and sale agreement, to convey correct information to the attorneys preparing the deeds for the sales, to notify the oil and gas producers of the change in ownership, and to create a separate account after the sales, instead commingling the proceeds received "for a period of up to three years." . . . Under our heightened standard of review, we conclude the trial court could have formed a firm belief or conviction that Wells Fargo's conduct involved an extreme degree of risk, and Wells Fargo was consciously indifferent to that risk. We also conclude that Militello offered clear and convincing evidence to support the trial court's finding that Wells Fargo was grossly negligent, and therefore met her burden to prove the required predicate under section 41.003(a).

*Id.* The court also held that the amount awarded was supported by the evidence: "Having considered the relevant *Kraus* and due process factors, we conclude an exemplary damages award of \$2,773,826.67 is reasonable and comports with due process." *Id.* The court did suggest a remittitur due to the decrease in economic damages.

The trustee's final argument dealt with an exculpatory clause in the trust agreement. By its express terms, the clause did not preclude the trustee's liability for gross negligence, bad faith, or willful breach of the trust's provisions:

The Trustee shall not be liable for any loss or depreciation in value of the properties of the Trust, except as such loss is attributable to gross negligence, willful breach of the provisions of this Trust, or bad faith on the part of the Trustee. The Trustee shall not be responsible for any act or omission of any agent of the Trustee, if the Trustee has used good faith and ordinary care in the selection of the agent.

*Id.* The trustee contended that the property code "expressly allows exculpatory clauses to shield a trustee from ordinary negligence." *Id.* (citing Tex. Prop. Code § 114.007). It also argued that it "used good faith and ordinary care" in selecting its agents, including "(1) the law firm that prepared the erroneous deeds, (2) Leonard, who prepared the mineral interest valuation used by the bank, and (3) Harrell, who prepared erroneous tax returns, and consequently is not liable for errors made by those agents." *Id.*

The court of appeals disagreed with the trustee's arguments: "We have concluded that the evidence supports the trial court's finding that Wells Fargo's conduct constituted gross negligence." *Id.* In addition, there was evidence that the trustee "failed to use ordinary care in its selection of Leonard, if not its other agents." *Id.* "Because the exculpatory clause in the Grantor Trust does not apply to losses 'attributable to gross negligence,' we conclude that the trial court did not err in refusing to enforce it to bar Militello's claims." *Id.*

**Interesting Note:** This is an interesting case because it deals with exemplary damages and mental anguish damages in the context of a breach of fiduciary duty by a trustee.

**Exemplary Damages.** "Exemplary damages" includes punitive damages. Tex. Civ. Prac. & Rem. Code Ann. § 41.001(5). A jury may only award exemplary damages if the claimant proves, by clear and convincing evidence, that the harm resulted from: (1) fraud; (2) malice; or (3) gross negligence. *Id.* at § 41.003(a). A defendant's breach of a fiduciary duty is ordinarily not enough, by itself, to support an award of exemplary damages. There must be an aggravating factor, such as actual fraud, gross negligence, or malice. *Hawthorne v. Guenther*, 917 S.W.2d 924, 936 (Tex. App.—Beaumont 1996, writ denied). A breach of fiduciary duty, however, often involves aggravated or fraudulent conduct, regardless of the actual motive of the defendant, that justifies an award of exemplary damages to deter such conduct. See, e.g., *International Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567, 584 (Tex. 1963); *Natho v. Shelton*, No. 03-11-00661-CV, 2014 Tex. App. LEXIS 5842, 2014 WL 2522051, at \*2 (Tex. App.—Austin May 30, 2014, no. pet.); *Lesikar v. Rappeport*, 33 S.W.3d 282, 311 (Tex. App.—Texarkana 2000, pet. denied); *Fidelity Nat'l Title Co. v. Heart of Tex. Title Co.*, No. 03-98-00473-CV, 2000 Tex. App. LEXIS 72 (Tex. App.—Austin 2000, no pet.); *Hawthorne v. Guenther*, 917 S.W.2d at 936; *NRC, Inc. v. Huddleston*, 886 S.W.2d 526, 533 (Tex. App.—Austin 1994, no writ) (upholding portion of district court's judgment awarding actual and punitive damages for breach of fiduciary duty); *Murphy v. Canon*, 797 S.W.2d 944, 949 (Tex. App.—Houston [14th Dist.] 1990, no pet.); *Cheek v. Humphreys*, 800 S.W.2d 596, 599 (Tex. App.—Houston [14th Dist.] 1990, writ denied) ("Exemplary damages are proper where a fiduciary has engaged in self-dealing"); *Morgan v. Arnold*, 441 S.W.2d 897, 905–906 (Tex. Civ. App.—Dallas 1969, writ ref'd n.r.e.).

One important protection for defendants is the statutory cap on the amount of exemplary damages. The Texas Civil Practice and Remedies Code permits exemplary damages of up to the greater of: (1) (a) two times the amount of economic damages; plus (b) an amount equal to any noneconomic damages found by the jury, not to exceed \$750,000; or (2) \$200,000. Tex. Civ. Prac. & Rem. Code Ann. § 41.008(b). This cap need not be affirmatively pleaded as it applies automatically and does not require proof of additional facts. *Zorrilla v. Aypco Constr., II, LLC*, 469 S.W.3d 143 (Tex. 2015). However, these limits do not apply to claims supporting misapplication of fiduciary property or theft of a third degree felony level. Tex. Civ. Prac. & Rem. Code Ann. § 41.008(c)(10).

*Natho v. Shelton*, 2014 Tex. App. LEXIS 5842 at n. 4. The statute states that the caps “do not apply to a cause of action against a defendant from whom a plaintiff seeks recovery of exemplary damages based on conduct described as a felony in the following sections of the Penal Code if ... the conduct was committed knowingly or intentionally....” *Id.* Accordingly, if a defendant is found liable for one of these crimes with the required knowledge or intent, it cannot take advantage of the statutory exemplary damages caps.

**Mental Anguish.** A plaintiff can potentially recover mental-anguish damages if the damages are a foreseeable result of a breach of fiduciary duty. *Perez v. Kirk & Carrigan*, 822 S.W.2d 261, 266-67 (Tex. App.—Corpus Christi 1991, writ denied) (client was entitled to mental anguish award in breach of fiduciary duty by an attorney regarding the disclosure of confidential information). In *Douglas v. Delp*, the Texas Supreme Court stated that mental-anguish damages were not allowed when the defendant’s negligence harmed only the plaintiff’s property. 987 S.W.2d 879, 885 (Tex. 1999). In those cases, damages measured by the economic loss would make the plaintiff whole. *Id.* Applying those concepts to attorney malpractice, the court stated that limiting the plaintiff’s recovery to economic damages would fully compensate the plaintiff for the attorney’s negligence. *Id.* The court concluded “that when a plaintiff’s mental anguish is a consequence of economic losses caused by an attorney’s negligence, the plaintiff may not recover damages for that mental anguish.” *Id.*

The Texas Supreme Court reiterated that when an attorney’s malpractice results in financial loss, the aggrieved client is fully compensated by recovery of that loss; the client may not recover damages for mental anguish or other personal injuries. *Belt v. Oppenheimer, Blend, Harrison & Tate*, 192 S.W.3d 780, 784 (Tex. 2006). In *Tate*, the Court held that estate planning malpractice claims seeking purely economic loss are limited to recovery for property damage. *Id.* The Court held that when the damages are financial loss, a party is fully compensated by recovery of that loss. *Id.* So, if the plaintiff is seeking a claim for breach of fiduciary duty based on negligent conduct, a plaintiff may not be able to obtain mental anguish damages if the economic damages make the plaintiff whole.

In a situation where the plaintiff’s breach of fiduciary duty claim is based on non-negligent conduct, such as fraud or malice, a plaintiff can “recover economic damages, mental anguish, and exemplary damages.” *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 304 (Tex. 2006) (mental anguish damages permissible for fraud claim); *City of Tyler v. Likes*, 962 S.W.2d 489, 497 (Tex. 1997) (stating that mental anguish damages are recoverable for some common law torts involving intentional or malicious conduct). For example, in *Parenti v. Moberg*, the court of appeals affirmed an award of mental anguish damages for a beneficiary suing a trustee for breach of fiduciary duty. No. 04-06-00497-CV, 2007 Tex. App. LEXIS 4210 (Tex. App.—San Antonio May 30, 2007, pet. denied). The court stated: “Here, the jury found that Parenti acted with malice, and Parenti does not challenge that finding. Therefore, because the jury found

that Parenti acted with malice, we hold that the trial court did not err in awarding mental anguish damages to Moberg.” *Id.*

Finally, even if allowed, mental anguish damages are difficult to prove. The Texas Supreme Court has noted: “The term ‘mental anguish’ implies a relatively high degree of mental pain and distress. It is more than mere disappointment, anger, resentment or embarrassment, although it may include all of these. It includes a mental sensation of pain resulting from such painful emotions as grief, severe disappointment, indignation, wounded pride, shame, despair and/or public humiliation.” *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 444 (Tex. 1995). The Court held that an award for mental anguish will normally survive appellate review if “the plaintiffs have introduced direct evidence of the nature, duration, and severity of their mental anguish thus establishing a substantial disruption in the plaintiff’s routine.” *Id.*

In *Service Corp. International v. Guerra*, the Texas Supreme Court reversed an award of mental anguish damages. 348 S.W.3d 221, 231-32 (Tex. 2011). The Court held: “Even when an occurrence is of the type for which mental anguish damages are recoverable, evidence of the nature, duration, and severity of the mental anguish is required.” *Id.* at 231. In *Guerra*, the jury awarded mental anguish damages to three daughters of the deceased when the cemetery disinterred and moved the body of their father. *Id.* at 232. One daughter testified that it was “the hardest thing I have had to go through with my family” and that she “had lots of nights that I don’t sleep.” *Id.* Another daughter testified, “We’re not at peace. We’re always wondering. You know we were always wondering where our father was. It was hard to hear how this company stole our father from his grave and moved him.” *Id.* There was also evidence from third parties that the daughters experienced “strong emotional reactions.” *Id.* Yet, the Court held that this was not sufficient to support an award of mental-anguish damages. *Id.* See also *Hancock v. Variyam*, 400 S.W.3d 59 (Tex. 2013) (reversing award of mental anguish damages).

In *Martin v. Martin*, the court of appeals reversed a mental anguish award against a trustee based on a claim of intentional breach of fiduciary duty because the beneficiary did not have sufficient evidence of harm. 363 S.W.3d 221 (Tex. App.—Texarkana 2012, pet. denied). The evidence of mental anguish was: “It’s impacted our whole family. We don’t -- for generations and generations to come, we don’t have any -- it just hurts. It’s affected my father. I worry about him every day talking to him on the phone, the stress. I worry about those in the company that have to deal with what’s going on.” *Id.* The court held that: “Courtney failed to establish a high degree of mental pain and distress that is more than mere worry, anxiety, vexation, embarrassment, or anger.” *Id.* See also *Onyung v. Onyung*, No. 01-10-00519-CV, 2013 Tex. App. LEXIS 9190 (Tex. App.—Houston [1st Dist.] July 25, 2013, pet. denied) (reversed mental anguish damages because plaintiff did not have sufficient evidence of harm). However, in *Moberg*, the court of appeals affirmed the modest award of \$5,000 in mental anguish damages in a breach of fiduciary duty case against a trustee where the evidence

showed that the beneficiary: “cried, lost sleep, vomited, and missed work for ‘several days’. . .” 2007 Tex. App. LEXIS 4210. These are very fact-specific determinations.

### **C. Court Enforces Trust Even Though The Trust Document Was Missing**

In *Gause v. Gause*, a son brought suit to affirm the existence of a trust established by his father. No. 03-13-00768-CV, 2016 Tex. App. LEXIS 8138 (Tex. App.—Austin June 29, 2016, no pet. history). The father had executed a will and a trust document. After his death, a child read the documents to the other children and took the documents to her home. The documents later became missing. A child then procured a deed to real property from the mother that was supposed to be in the trust. Another child sued to hold the deed void and to establish the terms of the trust. The trial court ruled that the trust was effective, set forth its terms, and otherwise voided the deed.

The court of appeals affirmed. The court held that a deed or other document is not made ineffective by its destruction or loss. Rather, production of the original document is excused when it is established that the document has been lost or destroyed, and parol evidence of the contents of a writing is admissible if the original has been lost or destroyed. Loss or destruction of the document is established by proof of search for this document and inability to find it.

The court acknowledged that trusts involving real property had to meet the statute of frauds writing requirement, but that rule did not remove a trust from the operation of the general rule for lost documents. The court held that the evidence was sufficient to establish the terms of the trust and its existence.

**Interesting Note:** Texas cases have dealt with missing contracts and agreements, and similarly hold that the terms of those agreements can be established through parol evidence. For example, in *Bank of America, N.A. v. Haag*, a depositor created a trust account for his son’s education, but the signature card was lost. 37 S.W.3d 55, 58 (Tex. App.—San Antonio 2000, no writ). Later, his son withdrew all of the money in the account without the depositor’s permission. See *id.* The depositor testified that he signed a signature card and testified to its contents, i.e., he was the only one on the signature card and that his son was not allowed to withdraw the money. See *id.* The trial court awarded judgment to the depositor and against the bank. See *id.* The bank appealed and argued that its statements and after-the-fact documents proved that the account allowed the son to withdraw funds from the account. See *id.* The court of appeals, however, dismissed this argument:

Bank of America seeks to rely on the account statements that commenced in 1990 as an unambiguous written agreement which the parol evidence rule prohibits from being contradicted or varied by extrinsic evidence. However, the account statements do not

evidence the creation of the account, but simply record the information that was transferred to Bank of America's system from University Savings' system. The account statements are not the operative legal document that created the account.

*Id.* at 58. The court of appeals approved the trial court's admission of Haag's parol testimony because there was evidence that a signature card existed at one time but was lost. See *id.* The court stated: "When a written, signed contract is lost or destroyed such that the party seeking to prove or enforce the agreement is unable to produce the written agreement in court, the existence and terms of the written contract may be shown by clear and convincing parol evidence." *Id.* (citing *EP Operating Co. v. MJC Energy Co.*, 883 S.W.2d 263, 267 n.1 (Tex. App.—Corpus Christi 1994, writ denied); *Chakur v. Zena*, 233 S.W.2d 200, 202 (Tex. Civ. App.—San Antonio 1950, no writ); *Mark K. Glasser & Keith A. Rowley, On Parol: The Construction and Interpretation of Written Agreements and the Role of Extrinsic Evidence in Contract Litigation*, 49 BAYLOR L. REV. 657, 734-35 (1997)). The court concluded: "Because the written contractual documents evidencing the creation of Haag's account were not introduced into evidence, the trial court did not err in admitting Haag's testimony regarding the terms of the account." *Id.* Based on the testimony of the plaintiff, the court affirmed the jury's verdict that a trust account had been created and that the beneficiary had no right to withdraw the funds as the only person that may withdraw money from a trust account is the person claiming to be the trustee unless that person dies. See *id.* (citing Tex. Fin. Code Ann. § 65.106(a)). See also *Armstrong v. Roberts*, 211 S.W.3d 867 (Tex. App.—El Paso 2006, pet. denied) (testimony of bank's representative regarding contents of missing second page of account agreement was sufficient to support trial court's finding that account had survivorship effect); *In re Estate of Berger*, 174 S.W.3d 845, 846 (Tex. App.—Waco 2005, no pet.) (parol evidence admissible to prove contents of a trust agreement); *Phillips v. Ivy*, No. 10-02-00266-CV, 2004 Tex. App. LEXIS 7539 (Tex. App.—Waco Aug. 18 2004, pet. denied) (a surviving spouse was allowed to admit an "exemplar" CD of the type used during the relevant time to prove the missing document's terms). Accordingly, missing trust documents, like other contracts, can be established by parol (oral) testimony.

Lost documents do provide a wrinkle to the normal burden of proof. One court held that to prove the contents of a lost bank agreement, the plaintiff has the burden to establish same by clear and convincing evidence. See *Bank of America, N.A.*, 37 S.W.3d at 58. In *Phillips v. Ivy*, the court of appeals questioned whether the clear and convincing standard should apply to an agreement that does not involve real property. No. 10-02-00266-CV, 2004 Tex. App. LEXIS 7539, at \*5-6 (Tex. App.—Waco Aug. 18 2004, pet. denied). In any event, because the jury instructions submitted the case to the jury on a clear and convincing evidence standard without objection by the parties, the court of appeals applied that standard. See *id.*

#### **D. Court Holds That Trust No Longer Owned Vehicle Because It Allowed Beneficiary's Wife To Drive It**

In *In the Interest of H.D.V.*, a husband appealed from a bench trial in a divorce proceeding. No. 05-15-00421-CV, 2016 Tex. App. LEXIS 9520 (Tex. App.—Dallas August 26, 2016, no pet. history). His mother had set up a trust for him and funded it with various assets, including a vehicle. The husband was the trustee and primary beneficiary of his trust and his children were named as secondary beneficiaries. The husband allowed his wife to drive the trust's vehicle. In the divorce proceedings, the wife sought ownership of the vehicle, and the trial court awarded it to her. The husband appealed several issues, including the award of the vehicle to the wife.

On appeal, the husband contended that the trial court erred in awarding the wife the vehicle because it was owned by the trust. The trust agreement contained a spendthrift provision prohibiting the principal or income of the trust from being “seized, attached, or in any manner taken by judicial proceedings against any beneficiary or distributed on account of the debts, assignments, sale, divorce, or encumbrance of the beneficiary or distribute.” The husband maintained that awarding the car to wife violated the terms of the trust.

The court of appeals defined spendthrift trusts as

[T]rusts with language prohibiting the voluntary or involuntary alienation of the beneficial interest. Such a trust protects the beneficiary from his creditors by expressly forbidding alienation of his interest in the trust. The corpus, the accrued income which has not been paid to the beneficiary, and any future income to be paid to a beneficiary of a spendthrift trust are not subject to the claims of the creditors of the beneficiary while those amounts are in the hands of the trustee.

*Id.* The court of appeals also noted that the trust agreement gave the husband as trustee the power to “sell, exchange, give options upon, partition, convey, or otherwise dispose of . . . any property that may from time to time be or become part of the Trust estate.” As the husband testified at trial that the car was in the wife's possession, the court of appeals held that there was evidence the vehicle had been conveyed or distributed from the trust and was no longer protected by the spendthrift provision. The court of appeals concluded that the “trial court did not abuse its discretion in awarding the car, which was in Wife's possession, to her as separate property.”

#### **E. Court of Appeals Granted Mandamus Relief To Transfer Venue To County Where A Trust Was Administered**

In *In re Green*, a beneficiary filed against a trustee for breach of fiduciary duty and misappropriation of corporate funds. No. 08-16-00233-CV, 2016 Tex. App.

LEXIS 12830 (Tex. App.—El Paso December 2, 2016, original proceeding). The defendant filed a motion to transfer venue and filed an affidavit where he “averred that he had never managed the testamentary trusts from an office located in Crane County, and he presented evidence showing that he had administered the trust from his business office located at 418 N. Texas Avenue, Odessa, Texas.” He also showed that the address on the checking accounts for the trusts was in Odessa, Texas. He also received correspondence at this same address in his capacity as trustee.

The court of appeals held that it could grant mandamus relief. “Under Section 15.0642 of the Texas Civil Practice and Remedies Code, a party may file a petition for writ of mandamus to enforce a mandatory-venue provision. Because Section 115.002 of the Texas Property Code is a mandatory-venue statute, it is enforceable by mandamus, and Green is not required to show that appeal is an inadequate remedy.” The trustee relied on Section 115.002(b)(2) of the Texas Property Code that provides: “(b) If there is a single, noncorporate trustee, an action shall be brought in the county in which: ... (2) the situs of administration of the trust is maintained or has been maintained at any time during the four-year period preceding the date the action is filed.” *Id.* (citing Tex. Prop. Code Ann. § 115.002(b)).

The Property Code defines “situs of administration” as meaning the location where the trustee maintains the office that is primarily responsible for dealing with the settlor and beneficiaries of the trust. The court held that:

Under this definition, the evidence that the will was probated in Crane County is irrelevant. Likewise, the evidence relied on by the Real Parties in Interest showing that National Foundry is located in Crane County does not support the trial court’s denial of the motion to transfer venue because there is no evidence that Green dealt with the trust beneficiaries primarily at this location. As president of National Foundry, Green dealt with the company business at this location, but it is speculative to assume that he also dealt with the trust beneficiaries from this office. This is especially true since Green presented evidence showing that he dealt with the trust beneficiaries primarily from his business office in Odessa. Based on the evidence presented, Green showed that venue is proper in Ector County.

*Id.* The court granted mandamus relief.

#### **F. Court Affirms Ruling That Adopted Adult Children Were Beneficiaries Of A Trust**

In *Andresakis v. Modisett*, the trustors signed trust agreements in 1976 and 1981, and each agreement created three trusts, one for their daughter, one for their son, and a third trust for their only grandchild, Andresakis. No. 07-16-00003-



CV, 2017 Tex. App. LEXIS 42 (Tex. App.—Amarillo January 4, 2017, no pet. history). The agreements provided, however, for additional separate trusts benefiting “any grandchild subsequently born to or adopted by [their children] and who survives for a period of at least six (6) months.” Under the instruments, any such additional trust for a later-born or later-adopted grandchild of the trustors was to be funded by partitioning assets from the trust estate benefitting Andresakis, such that thereafter the trust estates benefitting each of the trustors’ grandchildren would have equal value. The son married in 1998 and later adopted his wife’s two children (the Modisetts), who were both over eighteen at the time of the adoption.

Andresakis sued the Modisetts and the trustees for a judgment declaring that the Modisetts were not beneficiaries of any trust under either trust agreement. The parties filed counter motions for summary judgment, and the trial court granted the Modisetts’ motion. The Modisetts then moved for a summary judgment declaring their trust interests vested when they were adopted. The trial court disagreed and in its final judgment fixed a vesting date six months later. Both sides filed notice of appeal.

The court of appeals affirmed both findings. The court of appeals first set forth the appropriate standards for interpreting trusts:

The construction of an unambiguous trust instrument is a question of law for the trial court. A trust instrument is construed to determine the intent of the settlor from the language of the four corners of the instrument. All terms are harmonized to give proper effect to each part of the instrument. The instrument should be construed, if possible, so that effect is given to all provisions and no provisions are rendered meaningless. Provided the language of the instrument unambiguously expresses the settlor’s intent, there is no need to construe the instrument because “it speaks for itself.” An instrument is ambiguous if its meaning is uncertain or reasonably susceptible to more than one meaning.

*Id.* Andresakis argued that the trustors intended the class of subsequently adopted children to consist only of children adopted before attaining majority. Andresakis also argued that his interpretation is supported by the provisions of the agreements empowering the trustees to make discretionary distributions to or for a grandchild in an amount “necessary or advisable for the health, support, education and maintenance” of the grandchild, and language requiring the trustees to consider, among other things, the ability of any person who is “legally obligated to support such beneficiary,” when making distributions. The appellate court disagreed with this argument:

We cannot agree that any language of the trust agreements indicates an intention of the trustors to limit adopted grandchild beneficiaries to those adopted as minors. We agree instead with

the trial court that the agreements unambiguously express the contrary intention, that individuals who become grandchildren of the trustors by adoption are beneficiaries, “whenever adopted.” That the sentence containing the phrase, “whenever adopted,” specifically addresses the adoption of step-children further affirms its application to the Modisetts’ adoption by Kenneth Cailloux.

*Id.*

The court also affirmed the vesting finding by the trial court. The trust document stated that the term “such grandchild” referred to an individual born to or adopted by either of the trustors’ children “and who survives for a period of at least six (6) months.” The language also instructed the trustees to “set apart” or “partition” assets to constitute the trust estate of a newly-created trust makes clear that the partition occurs only for the benefit of a grandchild who survives birth or adoption by at least six months. The court disagreed with the Modisetts’ argument that because the agreements vests the trust assets in the trustees without qualification, the Modisetts’ beneficial interest also was vested on the date of their adoption, subject to divestiture if they had not survived their adoption by six months. Rather, the court held that their interests vested six months after they were adopted.

#### **G. Court Holds That Trust Had Sufficiently Pled Standing To Raise A Claim**

In *Galen Family Trust v. State*, a trust filed inverse-condemnation and trespass-to-try-title claims against the state of Texas and officials regarding approximately 70,000 acres near Laredo, Texas. No. 03-15-00816-CV, 2017 Tex. App. LEXIS 1574 (Tex. App.—Austin February 24, 2017, no pet. history). The defendants filed a plea to the jurisdiction, alleging that the trust did not have standing to assert the claims because it did not own the claims. In its plea to the jurisdiction, the State argued that while the trust’s pleadings complain that the property belonged to the heirs, its petition does not allege any facts showing that the trust had an interest in the property. The court of appeals held:

The Trust’s petition, however, describes the Trust as “the current owner of the title” to the disputed property. Construing the pleading liberally in favor of the pleader and looking to the pleader’s intent, we take the Trust’s petition as asserting that the Galan heirs have transferred whatever interest they have in the property to the Trust. Whether the Trust could actually establish an interest and the transfer of that interest are other questions, but because the State does not challenge the existence of these facts (only whether they were pleaded), the Trust’s pleadings are sufficient to affirmatively demonstrate jurisdiction.

The court of appeals later affirmed the dismissal of the trust's claims based on immunity defenses.

#### **H. Court Denied Motion To Stay Enforcement of A Turnover Order Against Fiduciary**

In *In the Estate of Gary*, a trial court granted a motion to remove an administrator and later granted a turn over order regarding same. No. 07-16-00421-CV, 2017 Tex. App. LEXIS 1991 (Tex. App.—Amarillo March 8, 2017, no pet. history). The administrator filed two motions requesting that the trial court set a supersedeas amount on the turn over order. The trial court did not rule on the supersedeas motions, and the administrator file a motion with the court of appeals requesting a stay of execution pending an appeal of the supersedeas order. The court initially granted an emergency motion to stay enforcement but later denied the motion, holding that the administrator did not appropriately bring the motions to the trial court's attention. Simply filing the motions was not sufficient: "we cannot conclude that the trial court has abused its discretion by failing to set the type and amount of security necessary to suspend enforcement of its order when the record does not reflect that the request has been brought to the attention of the trial court and when Gary specifically argued that it was premature for the trial court to set a supersedeas bond in this case."

**Interesting Note:** Many probate/trust orders are immediately appealable and a party may want to supersede them so that the opposing party will not start execution. The amount required to supersede a damages award "must equal the sum of compensatory damages awarded in the judgment, interest for the estimated duration of the appeal, and costs awarded in the judgment." Tex. R. App. P. 24.2(a)(1). See *also* Tex. Civ. Prac. & Rem. Code § 52.006(a). When the judgment is for the recovery of an interest in real or personal property, the trial court should determine the type of security that the judgment debtor must post; however, the amount of the security must be at least the value of the real property's rent or revenue or the value of the personal property interest on the date of judgment. Tex. R. App. P. 24.2(a)(2).

Under Texas Rule of Appellate Procedure 24.2(a)(3), "when the judgment is for something other than money or an interest in property, the trial court must set the amount and type of security that the judgment debtor must post." Tex. R. App. P. 24.2(a)(3). This type of relief could be injunctive or declaratory relief and would also include orders removing a fiduciary, appointing a receiver, or requiring an audit or accounting. This "language is mandatory" and, thus, a judgment debtor must be given the opportunity to preserve the status quo during its appeal:

The purpose of Rule of Appellate Procedure 24 is to provide the means for a party to suspend enforcement of a judgment pending appeal in civil cases. By superseding a judgment against it, the judgment debtor may "preserve[ ] the status quo of the matters in

litigation as they existed before the issuance of the order or judgment from which an appeal is taken.”

*Alpert v. Riley*, 274 S.W.3d 277, 297 (Tex. App.—Houston [1st Dist.] 2008, pet. denied).

However, under Rule 24, a judgment debtor’s right to supersede the enforcement of a judgment during the pendency of an appeal is not absolute. Rule 24.2(a)(3) recognizes that a trial court may refuse to allow a judgment debtor to supersede the judgment so long as the judgment is considered an “other” judgment and the judgment creditor posts security “in an amount and type that will secure the judgment debtor against any loss or damage caused by the relief granted . . . .” Tex. R. App. P. 24.2(a)(3). In such cases, the trial court may decline to permit the judgment to be superseded if the judgment creditor posts security ordered in an amount and type that will secure the judgment debtor against any loss or damage caused by the relief granted the judgment creditor if the appellate court reverses. *Id.* See also *El Caballero Ranch, Inc. v. Grace River Ranch, LLC*, No. 04-16-00298-CV, 2016 Tex. App. LEXIS 9180 (Tex. App.—San Antonio August 24, 2016, mot. denied) (court affirmed trial court’s order denying supersedeas to judgment debtor where creditor posted security). Therefore, an appellate court’s determination regarding whether a judgment is primarily one for money, the recovery of real property, or for something “other than money or an interest in real property” has serious ramifications for a judgment debtor. *El Caballero Ranch, Inc.*, 2016 Tex. App. LEXIS 9180, \*14. In the event that a court determines that the judgment awarded the recovery of money or an interest in real property, the trial court abuses its discretion by failing to allow the debtor to post bond and supersede the enforcement of the judgment during the pendency of the appeal. *Id.* However, in the event the court determines that the judgment awarded something “other than money or an interest in real property,” the trial court has discretion to decline a debtor’s request to supersede the judgment so long as the creditor posts security in an amount that would secure the debtor against any loss or damage. *Id.* The amount that the creditor must post would be in the discretion of the trial court after an evidentiary hearing on that issue. *Id.*

To complain of a trial court’s net worth determination in connection with setting a supersedeas bond amount, a party must file a motion in the court of appeals. Tex. R. App. P. 24.4. A court of appeals may also “issue any temporary orders necessary to preserve the parties’ rights” to seek appellate review of the trial court’s determination. Tex. R. App. P. 24.4(c). A stay may be necessary to preserve the status quo and prevent execution on the underlying judgment pending a court’s resolution of the issues raised with the trial court’s supersedeas determinations. *Id.*

## **I. Court Reverses New Trial Order After A Jury Verdict On A Trust Dispute**

In *In re Jones*, there was a jury trial on the issue of whether a revocable trust was

revoked such that the trustee, Jones, or the settlor's executor, Coyle, had the right to the trust assets. No. 05-16-0081-CV, 2016 Tex. App. LEXIS 6047 (Tex. App.—Dallas June 7, 2016, original proceeding). After rendering judgment in favor of Jones, the trial court granted Coyle's motion for new trial, stating that (i) the evidence was insufficient to support the jury's findings, and (ii) Jones introduced legally insufficient evidence of certain specific facts essential to her recovery. Jones filed a petition for writ of mandamus with the court of appeals challenging the new trial order.

The court of appeals granted the mandamus. The court stated the law regarding challenging orders granting new trials, thusly:

A new trial order must satisfy two "facial requirements." *In re Bent*, No. 14-1006, 2016 WL 1267580, at \*1 (Tex. Apr. 1, 2016) (orig. proceeding). One, the order must state a legally appropriate reason for the new trial. *Id.* Two, the stated reason must be specific enough to indicate that the trial court did not simply parrot a pro forma template but rather derived the articulated reasons from the case's particular facts and circumstances. *Id.* The order must satisfy both requirements, or it is an abuse of discretion correctable by mandamus. *See In re United Scaffolding, Inc.*, 377 S.W.3d 685, 688-89 (Tex. 2012) (orig. proceeding).

The first reason for the new trial order stated that "there is insufficient evidence" to support both of the jury's findings and gave no further explanation. Citing to the Texas Supreme Court, the court held that "[t]he order must indicate that the trial judge considered the specific facts and circumstances of the case at hand and explain how the evidence (or lack of evidence) undermines the jury's findings." The court held that this reason was not sufficiently specific to support a new trial.

The trial court's second reason was similarly defective. The court reasoned that a new trial was warranted because Jones introduced no evidence of certain specific facts essential to her recovery. The court concluded that it had to grant a new trial to avoid granting Coyle a judgment notwithstanding the verdict. The court held: "Although this reason is specific, it is not a legally appropriate reason for ordering a new trial after a jury trial. The defendant's remedy when a claimant has introduced legally insufficient evidence of an essential element of its claim is generally a take-nothing judgment." Accordingly, the court granted mandamus relief and ordered the trial court to vacate its new trial order.

#### **J. Court Enforces Release Agreement Between Trustees/Executors and A Beneficiary**

In *Harrison v. Harrison Interests*, a beneficiary of an estate and multiple trusts had a dispute with the executors and trustees. No. 14-15-00348-CV, 2017 Tex. App. LEXIS 1677 (Tex. App.—Houston [14th Dist.] February 28, 2017, no pet. history). The parties then executed a master agreement that allowed the parties

to dissociate themselves, distribute property, and it contained releases for the fiduciaries. After the agreement was signed, the beneficiary had additional complaints and filed suit. The fiduciaries argued that the releases in the agreement precluded the beneficiary's breach of fiduciary duty claim. The beneficiary argued that certain portions of the agreement were unfair and contended that because the defendants owed him fiduciary duties, as a matter of law, the defendants were required to rebut a presumption the transactions are unfair. The trial court granted summary judgment for the defendants based on the release language.

The court of appeals held that "Texas courts have applied a presumption of unfairness to transactions between a fiduciary and a party to whom he owes a duty of disclosure, thus casting upon the profiting fiduciary the burden of showing the fairness of the transactions." *Id.* "Where a transaction between a fiduciary and a beneficiary is attacked, it is the fiduciary's burden of proof to establish the fairness of the transaction. The beneficiary argued that because the agreement was a transaction between fiduciaries and a beneficiary the presumption applied.

The court of appeals held that it must balance the principle that fiduciary duties arise as a matter of law with an obligation to honor the contractual terms that parties use to define the scope of their obligations and agreements, including limiting fiduciary duties that might otherwise exist. "This principle adheres to our public policy of freedom of contract."

The court noted that the record reflected that the agreement was not executed solely for the purpose of prematurely distributing assets to the beneficiary but also to terminate his relationship with the fiduciaries and settle all claims against them. "This severance of the relationship is achieved not only through purchasing each other's interest in commonly-held assets, but by releasing Dan and Ed from their fiduciary duties."

The court held that in deciding whether the release is valid, the court should consider the following: "(1) the terms of the contract were negotiated, rather than boilerplate, and the disputed issue was specifically discussed; (2) the complaining party was represented by counsel; (3) the parties dealt with each other in an arms-length transaction; (4) the parties were knowledgeable in business matters; and (5) the release language was clear. The court also emphasized that the fact that the parties "are effecting a 'once and for all' settlement of claims" weighs in favor of upholding the release.

Regarding the underlying facts, the court noted that the beneficiary was of legal age and had capacity. He attended college for several years and studied business. He sought a split of interest in assets that were held in common with the fiduciaries, as well as early distribution of assets. He was represented by counsel that he described as "talented and intelligent" throughout the negotiations of the agreement. He was very involved in the negotiations and suggested many of the terms in the agreement himself. He actively participated

in the decisions on the agreement. The releases were disputed and specifically discussed. The agreement clearly and unequivocally released the fiduciaries, in all capacities, from any and all claims, excluding breaches or defaults under the agreement.

The court held that “the record before this court rebuts the presumption of unfairness or invalidity attaching to the release. Accordingly, William’s only remaining claim for breach of fiduciary duty is precluded and the judgment of the trial court is affirmed.”

### **K. Court Affirms Sanctions Order Against Fiduciary Due To Discovery Abuses**

In *Eng v. Kolbe*, a mother sued her daughter for abusing a power of attorney document. No. 03-15-00409-CV, 2017 Tex. App. LEXIS 2680 (Tex. App.—Austin March 30, 2017). The daughter assisted her aging parents with their finances as her father suffered from dementia and her mother suffered from macular degeneration. Later the mother revoked the power of attorney, appointed her other daughter in that role, and then sued her daughter for breach of fiduciary duty, fraud, conversion, and conspiracy to commit fraud. The petition alleged:

Moon alleged in her petition that during the time England managed her finances, England withdrew funds from Moon’s accounts, sold stocks and other investments, retained proceeds for her own use, and transferred additional funds of Moon’s to her own bank accounts, all without permission. Moon also asserted that England engaged in real estate transactions with Moon’s funds. Some of those transactions alleged England used Moon’s funds to purchase properties titled in England’s name alone and transferred Moon’s interests in other properties to England via gift deeds.

The defendant did not turn over relevant documents and records and failed to honestly answer questions in her deposition regarding all of her various conduct and transactions. The trial court entered a sanctions order regarding some of this conduct, compelling her to respond to discovery, produce documents, and pay sanctions in the amount of \$15,000 and attorney’s fees of \$3,000.

The defendant still did not comply with her discovery obligations. Her conduct was finally discovered, and the plaintiff filed a second motion for sanctions. After a hearing, the trial court granted the motion for sanctions, struck all of the defendant’s pleadings, granted plaintiff a default judgment on all issues of liability, and denied the defendant’s request for a jury trial on damages. The trial court then held a damages trial in which it awarded plaintiff actual damages in the amount of \$1,458,251; awarded punitive damages in the amount of \$1,000,000; set aside and declared void the gift deeds for properties; and imposed a constructive trust on certain assets of the defendant, including her homestead, automobile, and bank accounts. The defendant appealed.

The court of appeals affirmed the sanctions order finding that it was fair:

[T]he evidence shows that a direct relationship exists between the trial court's striking England's pleadings and England's offensive conduct. The information about accounts and transactions withheld by England throughout the discovery period was the principal evidence that Moon needed to succeed in most of her claims against England because the existence of these banking and investment accounts went to the heart of the issues in the case. Further, the district court made a finding that it was England who had committed these bad acts and was the responsible party for the misrepresentations and withholding of evidence. Therefore, the punishment was properly directed at the perpetrator of the offensive conduct.

The trial court's sanction of striking England's pleadings and entering a default judgment on liability was also not excessive. The trial court made findings that England's misconduct throughout the litigation had been egregious and that she repeatedly lied and changed her version of the events to suit her needs at the time. Specifically, England changed her testimony about her role in Moon's finances from providing her limited assistance in bill paying to forming a "secret partnership" for the purchase of significant real-property assets. The district court had previously tested lesser sanctions against England after she had concealed bank accounts from Moon during discovery, but those sanctions did not stop England's continued misconduct.

The court of appeals then determined that the trial court erred in denying the defendant a jury trial on the damages issue, and reversed that aspect of the judgment and remanded for a new trial.

#### **L. Courts Hold That Fiduciaries Waived Complaint About Trial Court Orders**

In *In re Estate of Roach*, a trial court removed an executor for multiple grounds, including: (1) Texas Estates Code Section 404.0035(b)(5), which authorizes removal when an independent executor becomes incapable of properly performing his fiduciary duties due to a material conflict of interest, and (2) Section 404.0035(b)(3), which authorizes removal when an independent executor is proved to have been guilty of gross misconduct or gross mismanagement in the performance of his duties. No. 07-16-00315-CV, 2017 Tex. App. LEXIS 4028 (Tex. App.—Amarillo May 3, 2017, no pet. history). The executor appealed but only expressly challenged the conflict-of-interest ground.

The court of appeals noted that an appellant must challenge all independent bases or grounds that fully support a complained of ruling or judgment. It stated



that “[i]f an independent ground fully supports the complained-of ruling or judgment, but the appellant assigns no error to that independent ground, we must accept the validity of that unchallenged independent ground, and thus any error in the grounds challenged on appeal is harmless because the unchallenged independent ground fully supports the complained-of ruling or judgment.” *Id.* The court of appeals affirmed because the executor waived his appeal by not challenging one of the trial court’s order’s grounds. The court held that where one of the independent grounds that fully supports a trial court’s order has not been challenged, the appellate court need not address the evidence supporting this unchallenged ground. The court held:

Removal of an independent executor of an estate may be ordered by a court if the independent executor, inter alia, is proven to have been guilty of gross misconduct or gross mismanagement in performance of his duties, see section 404.0035(b)(3), or becomes incapable of properly performing his fiduciary duties due to a material conflict of interest, see section 404.0035(b)(5). The trial court’s finding that Tom engaged in gross misconduct and gross mismanagement by failing to pursue claims under the Roach Oil note and causing Ashtola to overcharge Rosemary and the estate is an independent ground that fully supports the trial court’s removal of Tom as independent executor. As such, any error resulting in the trial court’s finding of a material conflict of interest is harmless and we must affirm the trial court’s removal of Tom as independent executor on the unchallenged ground that he was guilty of gross misconduct or gross mismanagement.

*Id.*

In *Barcroft v. Walton*, a trustee and executor appealed a trial court’s turnover order. No. 02-16-00404-CV, 2017 Tex. App. LEXIS 4078 (Tex. App.—Fort Worth May 4, 2017, no pet. history). The fiduciary did not file a complete reporter’s record of the hearing on the motion for turnover order and otherwise did not comply with the rules of appellate procedure governing agreed or partial reporter’s records. The court of appeals held that it “must presume that the omitted portions of the reporter’s record support entry of the September 19, 2016 turnover order.” *Id.* The court concluded: “Presuming the omitted portions of the reporter’s record of the September 19, 2016 hearing support the trial court’s entry of the September 19, 2016 turnover order, Barcroft has failed to show an abuse of discretion in any of his three issues. We therefore overrule them and affirm the trial court’s order.” *Id.*

**Interesting Note:** Attorneys specialize in numerous areas of the law. One type of specialization is appellate law. For example, there is a Texas Board of Legal Specialization certification in appellate law. The procedural requirements for an appeal are very complex, and clients should make sure that their trial attorneys enlist the assistance of qualified appellate lawyers when they engage in an appeal. The ramifications for not doing so can be seen in these cases. The

parties attempted to appeal orders on substantive arguments, but the court of appeals did not have to address the merits of the appellants' arguments due to their trial counsel's failure to properly brief the appeals, obtain an adequate record, and challenge all potential grounds upon which the order could have been affirmed.

**M. Court Held That Settlor Had Standing To Assert Extra-Contractual Misrepresentation Claims Regarding Insurance Policies He Previously Transferred To An Irrevocable Insurance Trust**

In *Lee v. Rogers Agency*, Lee purchased three whole-life insurance policies in the 1980s where each had a face value of \$1,000,000. No. 06-15-00037, 2017 Tex. App. LEXIS 1069 (Tex. App.—Texarkana February 8, 2017, pet. filed). It was represented to Lee that the policies provided that Lee could shorten the premium payment period by tendering payment in full. Lee paid \$238,188.15, which he understood would extinguish his obligation to pay premiums on the policies. In 1991, Lee transferred ownership of the policies to an irrevocable insurance trust for tax planning purposes, and the owner became the trustee of the trust.

Later, a class action lawsuit was filed against the insurance company based on allegations that misrepresentations were made about whether a single prepayment would be sufficient to carry the cost of the policies for the life of the insured. This suit was settled with the insurer paying \$2 billion to the class plaintiffs. Allegedly, notice of this class action and settlement was sent to the trustee of Lee's trust, but the trustee did not request to be excluded from the class.

Later, Lee's policies lapsed for non-payment of premiums, and he filed suit against the insurance company, an insurance agency, and the agent for declaratory relief and damages for claims for negligence, DTPA, insurance code, and breach of contract. The insurance company filed a motion for summary judgment and argued that Lee had no standing to litigate his claims or, in the alternative, that his claims were barred by res judicata because they had been fully litigated in the class action. The trial court granted the motion for summary judgment, and Lee appealed.

The court of appeals first addressed whether Lee had standing. In other words, the court determined whether Lee retained the right to assert extra-contractual claims based on the policies or whether those rights were transferred to the trust. The court set forth the following standards for trust construction:

The meaning of a trust instrument is a question of law when there is no ambiguity as to its terms. If the court is capable of giving a definite legal meaning or interpretation to an instrument's words, it is unambiguous, and the court may construe the instrument as a

matter of law. Only when the trust instrument's language is uncertain or reasonably susceptible to more than one meaning will it be considered ambiguous so that its interpretation presents a fact issue precluding summary judgment. The overriding principle to be observed in construing a trust instrument is to ascertain the settlor's intent with the view of effectuating it. "[I]t is the intention of the settlor at the time of the creation of the trust that is determinative." We interpret trust instruments the same way as we interpret wills, contracts, and other legal documents. Thus, when interpreting a trust, a court must "(1) [c]onstrue the agreement as a whole; (2) give each word and phrase its plain, grammatical meaning unless it definitely appears that such meaning would defeat the parties' intent; (3) construe the agreement, if possible, so as to give each provision meaning and purpose so that no provision is rendered meaningless or moot; (4) express terms are favored over implied terms or subsequent conduct; and (5) surrounding circumstances may be considered—not to determine a party's subjective intent—but to determine the appropriate meaning to ascribe to the language chosen by the parties."

Moreover, when determining the parties' intent, the court must be particularly wary of isolating individual words, phrases, or clauses and reading them out of the context of the document as a whole. For this reason, "we 'examine and consider the entire writing in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless. No single provision taken alone will be given controlling effect; rather, all the provisions must be considered with reference to the whole instrument.'"

*Id.* at \* 8-9 (internal citations omitted).

Among other provisions, the trust agreement stated:

The Trustee is hereby vested with all right, title, and interest in and to such policies of insurance, and the Trustee is authorized and empowered to exercise and enjoy, for the purposes of the Trust herein created... The Settlor hereby relinquishes all rights and powers in such policies of insurance which are not assignable, and will, at the request of the Trustee, execute all other instruments reasonably required to effectuate this relinquishment.

*Id.* at \*10-12. The court surmised that: "[T]he first question before us is whether Lee's causes of action in this case are among those 'rights and powers in such policies' that Lee assigned or relinquished when the policies were transferred to the Trust." *Id.* The court held that the trust's provisions must be read in conjunction with the purposes of the trust. "[T]he Trust's purpose was to shield

the Policies from estate taxes at Lee's death, and to do that, Lee had to divest himself of all 'incidents of ownership' in the Policies." *Id.* The court held that whether Lee assigned or relinquished the extra-contractual causes of action at issue turned on whether those causes of action were "incidents of ownership" as defined by federal case law under Section 2042 of the federal income tax code. The court concluded:

When interpreting the terms of the Trust Agreement in this case, we must keep in mind that Lee's assignment and relinquishment of the Policies was intended to be only as broad as was necessary to divest himself of any "incidents of ownership." There is no indication from the Trust language that he intended to convey anything else. If his extra-contractual claims are "incidents of ownership" in the Policies, then they were assigned or relinquished, but if they are not "incidents of ownership," then Lee retained those claims and has standing to assert them against the Appellees.

*Id.* at \*19.

Federal law held that the phrase "incidents of ownership" was defined as "the economic benefits of owning an insurance policy," including "the power to change the beneficiary, to surrender or cancel the policy, to assign the policy or revoke an assignment, to pledge the policy for a loan, or to obtain a loan from the insurer for the surrender of the value of the policy." *Id.* at 19-22. The court also noted that under federal law, when deciding whether a decedent has retained any "incidents of ownership" of life insurance for purposes of Section 2042, "the key question is what power did decedent possess during his lifetime to control the disposition of the policy or the proceeds?" *Id.* The court concluded that the extra-contractual causes of action raised by Lee were not "incidents of ownership" in the policies. Retaining those claims did not allow Lee to change the disposition of the policy proceeds in a manner contrary to the trust's terms, either by redirecting those proceeds to himself or to some person other than the named beneficiaries. Therefore, the court held that Lee had standing to assert those claims in the litigation.

The court next addressed whether the class-action settlement barred Lee's claim due to res judicata. One issue was whether Lee was in privity with the trust and trustee such that a judgment that barred suit by the trust also barred suit by the settlor, Lee. After analyzing res judicata precedent, the court concluded that "in order to determine whether Lee's claims are barred by res judicata, we must decide whether Lee had a 'substantive legal relationship' with the Trustee ..., such that he was actually represented by the Trustee in the [class action] litigation." *Id.* at \* 32.

The court looked at the relationship between a settlor, the trust, and the trustee:

To begin with, a settlor who “[u]nder the terms of the . . . Trust . . . do[es] not manage any of the aspects of the . . . Trust and do[es] not stand to inherit any of the trust assets” is not an “interested person” who has standing to bring an action against a trustee or to bring other proceedings related to a trust under the Texas Property Code. Likewise, a trustee does not have standing to sue a settlor for breach of fiduciary duty.

Absent some assignment of duty to the settlor in the trust instrument, a trustee has no cause of action to sue the settlor of a trust for a breach of fiduciary duty to the trust beneficiaries. A trust settlor has no fiduciary obligation to a trust beneficiary once that trust is created, and control of the trust assets is vested with the trustee. Accordingly, the few Texas cases addressing the legal relationship between a settlor and a trustee have concluded that neither has standing to sue the other, at least where “[u]nder the terms of the . . . Trust . . . the Settlor do[es] not manage any of the aspects of the . . . Trust and do[es] not stand to inherit any of the trust assets.”

This precedent is consistent with Section 200 of the Second Restatement of Trusts, which states, “No one except a beneficiary or one suing on his behalf can maintain a suit against the trustee to enforce the trust or to enjoin or obtain redress for a breach of trust.” Comment b to that section goes on to state: “Settlor and his successors in interest. Neither the settlor nor his heirs or personal representatives, as such, can maintain a suit against the trustee to enforce a trust or to enjoin or obtain redress for a breach of trust. Where, however, the settlor retains an interest in the trust property,[] he can of course maintain a suit against the trustee to protect that interest. Thus, if the settlor is also a beneficiary of the trust, or if he has an interest by way of resulting trust, or if he has reserved power to revoke the trust, he can maintain a suit against the trustee to protect his interest. So also, if the settlor makes a contract with the trustee, he can maintain an action on the contract with the trustee. The trustee, however, merely by accepting the trust and agreeing to perform his duties as trustee does not make a contract with the settlor to perform the trust which the settlor could enforce.

*Id.* at \*34-37. The court then concluded:

Consequently, because (1) Lee, as settlor, is not an “interested person” as defined by the Property Code; (2) Lee neither owed a duty to the Trust nor was owed any duties by the trust; and (3) as Settlor of a “private irrevocable trust . . . , [he lost] the possibility of modification or input on the Trust once the Trust [was] created[,]” ...

then Lee and the trustee do not have a “substantial legal relationship” with each other sufficient to create privity for purposes of res judicata. Although there may be an “incidental legal relationship” between them in the sense that Lee created the Trust and the Trustee subsequently managed it, there is not the “substantive legal relationship” necessary to satisfy due process for purposes of binding Lee by the Willson judgment.

*Id.* at \*36-37. The court held that Lee did not have standing to raise negligence and breach-of-contract claims, but did have standing to assert the DTPA and insurance code claims against the insurance company. The court reversed and remanded the summary judgment to the trial court for further proceedings. The insurance company has since filed a petition for review in this case to the Texas Supreme Court. On April 28, 2017, the Supreme Court requested that Lee file a response to the petition, and the response is currently due on May 30, 2017.

### **III. Probate Litigation**

#### **A. Court Affirms Order Requiring Partition of Property Where Fiduciary’s Homestead Argument Failed**

In *Byrom v. Penn*, Byrom was appointed executor of his mother’s estate, and he was later removed as executor for breach of fiduciary duty by using estate funds to build a house for himself. No. 12-15-00033-CV, 2016 Tex. App. LEXIS 7680 (Tex. App.—Tyler July 20, 2016, no pet. history). The court imposed a constructive trust in the amount of \$200,000.00 on Byrom’s home. Later, a different court rendered an order authorizing a receiver to sell the home, pay fees and expenses, deposit the balance of funds, not to exceed \$200,000.00, into the registry of the court, and pay any remaining funds to Byrom and the other two co-owners, Dimple Byrom and Dorothy Berry. Byrom and his wife, Dimple, appealed and argued that the order of sale was void because it violated their constitutional and statutory homestead rights.

The court of appeals affirmed. The court held that “the homestead and exemption laws of this state are not ‘the haven of wrongfully obtained money or properties’” and “the homestead protection afforded by the Texas Constitution was never intended to protect stolen funds.” *Id.* Regarding Byrom, the court concluded: “Because the record indicated that Byrom had paid for the construction of the home with money he wrongfully obtained from his mother’s estate, he was not entitled to use the homestead law to his advantage.” *Id.* Further, regarding Dimple, the court concluded: “A wife cannot acquire homestead rights in property held in trust by her husband that defeat or impair the rights of the beneficiary of the trust. Accordingly, Dimple had no homestead rights in the property.” *Id.*

## **B. Court Affirms Judgment Against Executor That Deeded Estate Property To Himself**

In *In the Estate of Montemayor*, the trial court entered summary judgment for an estate beneficiary on a claim to quiet title as against the independent executor, who had deeded estate property to himself. No. 04-15-00397-CV, 2016 Tex. App. LEXIS 7616 (Tex. App.—San Antonio June 1, 2016, no pet. history). The executor appealed, and the court of appeals affirmed. On appeal, the executor argued that the trial court erred by granting the motion for summary judgment because his affidavit allegedly raised a fact issue that when he sold and conveyed the property to himself, he had the authority to do so. The court of appeals noted that a personal representative of an estate may not purchase any estate property sold by the representative or any co-representative of the estate. The court also noted that there is an exception for when the will authorizes such a sale. The court concluded that: “It is undisputed that Montemayor was the independent executor of Luisa's estate when he deeded the property to himself. The will did not authorize Montemayor to purchase the estate property. Therefore, Calentine established Montemayor's claim to the property was invalid or unenforceable.” *Id.* The trial court correctly granted summary judgment, declaring the deed void and quieting title in the new representative of the estate.

## **C. Court Interprets Will's Residuary Clause To Create A Determinable Fee Simple Estate**

In *In re Estate of Morgenroth*, a mother died testate with a will that gave specific devises to her two children, a son and daughter. No. 05-15-00777-CV, 2016 Tex. App. LEXIS 7857 (Tex. App.—Dallas July 25, 2016, no pet. history). The will contained a residuary clause:

All the remaining property, real and otherwise, of every kind and description, wheresoever situated, which I may own or have the right to dispose of at the time of my decease, I give, devise and bequeath to my surviving children, TIFFANY DAWN TRESKOTT and BUDDY LEE MORGENROTH, share and share alike, remainder to the survivor of them.

The daughter died ninety days after her mother, and the son took the position that her interest in the residuary estate belonged to the son. In the estate, the son filed a motion to interpret the will, and the parties filed competing motions for summary judgment requesting the court to determine whether the son was the sole heir to mother's estate. The trial court construed the mother's will as creating a life estate for daughter and son “during their lives, with any property of the Estate of [Mother] still in existence upon the death of the first of [Daughter] and [Son] to pass to the survivor of them.” The daughter's spouse appealed.

The court of appeals described the difference between a determinable estate and a life estate:

A “fee simple absolute” is an estate over which the owner has unlimited power of disposition in perpetuity without condition or limitation. An “executory limitation” is an event which, if it occurs, automatically divests one of devised property. A fee simple estate subject to an executory limitation is called a “determinable fee simple estate.” This is a fee simple interest in every respect, except that it passes to another if the contingency happens. The recipient upon the contingency’s happening has an “executory interest.” A life estate is created by words showing intent to give the right to possess, use, and enjoy the property during life. There can be no life estate in property, real or personal, without a remainder. It may not be necessary always to name the remainderman, in which case the law would define him. But in such case the will must clearly and unequivocally provide for a life estate, thus to overcome the presumption that the testator intended to give the greater estate. Additionally, the life tenant may expressly be given unlimited power to dispose of the property during his lifetime; if such power is exercised, it defeats the remainderman’s interest in the disposed-of property. However, the life tenant may not devise any of that property that remains at her death. No particular language is required to make a life estate.

*Id.* The court construed the will to read that the mother intended to devise a one-half fee simple determinable interest to both son and daughter, rather than a life estate:

Because the residuary clause does not clearly and unequivocally provide a life estate, there is insufficient evidence to overcome the presumption that Mother intended to give her residuary in fee simple—the greater estate... The second phrase, “remainder to the survivor of them,” clearly gives whatever interest Son or Daughter still holds in the residue to the other when the first one of them dies. The occurrence of this “executory limitation”—the event in which either sibling predeceases the other while holding any interest in the residue—automatically divests the predecessor of the remaining devised property and the surviving sibling—giving the surviving sibling an executory interest. To read these two phrases together—without nullifying the second phrase and while preserving the greatest estate possible in the first phrase—is to construe Mother’s devise to Son and Daughter as a determinable fee simple.

*Id.* The court concluded that the son held an executory interest in daughter’s share of mother’s residue; the contingency was daughter predeceasing son with some of mother’s residual estate. Because the daughter died before son while still holding a one-half interest in mother’s residue, the court determined that the son took that property.



#### **D. Court Affirms A Rule 202 Pre-Suit Deposition Order In A Will Contest And Discusses The Acceptance-Of-The-Benefits Doctrine**

In *In re Meeker*, individuals sought a mandamus to reverse a trial court's order granting a Rule 202 pre-suit deposition order. No. 02-16-00103-CV, 2016 Tex. App. LEXIS 6883 (Tex. App.—Fort Worth June 29, 2016, original proceeding). After accepting some benefits under a will and after not opposing its probate, an heir filed a Rule 202 petition for pre-suit deposition. Another individual then filed an intervention to join in the petition. The trial court granted both petitions, and the executor of the will and defendants filed a petition for writ of mandamus. The court of appeals issued a writ of mandamus as to the intervention, but not as to the order allowing the pre-suit deposition. The court described the procedure for a Rule 202 pre-suit deposition as follows:

Rule 202 allows a person to petition a court for an order authorizing the taking of a deposition to “perpetuate or obtain the person's own testimony or that of any other person for use in an anticipated suit” or “to investigate a potential claim or suit.” A rule 202 petition must be verified and must state either that “the petitioner anticipates the institution of a suit in which the petitioner may be a party” or that “the petitioner seeks to investigate a potential claim by or against petitioner.” The petition must also “state the subject matter of the anticipated action, if any, and the petitioner's interest therein.” Further, the petition must “state the names, addresses[,] and telephone numbers of the persons to be deposed, the substance of the testimony that the petitioner expects to elicit from each, and the petitioner's reasons for desiring to obtain the testimony of each.” The court may order a deposition to be taken if it finds that “allowing the petitioner to take the requested deposition may prevent a failure or delay of justice in an anticipated suit” or that “the likely benefit of allowing the petitioner to take the requested deposition to investigate a potential claim outweighs the burden or expense of the procedure.” As we have explained, “Rule 202 depositions are not now and never have been intended for routine use. There are practical as well as due process problems with demanding discovery from someone before telling them what the issues are. . . . Accordingly, courts must strictly limit and carefully supervise presuit discovery to prevent abuse of the rule.”

*Id.* at \*10-11. The court held that the applicant sufficiently met these requirements and that the trial court did not clearly abuse its discretion in granting the relief. The court only addressed one issue regarding the applicant's request, the acceptance-of-the-benefits doctrine as it applies to will contests. The court held that the general rule was that acceptance of benefits in a transaction forecloses an inconsistent challenge to the transaction and upon the more particular principle that one who accepts benefits under a will generally has no

standing to contest it. The rule concerning acceptance of benefits is designed to prevent "one from embracing a beneficial interest devised to him under a will, and then later asserting a challenge of the will inconsistent with the acceptance of benefits." However, the court noted that "Texas courts have held that when a successful challenge to a transaction would not affect the entitlement to benefits already received, there is no inconsistency inherent in the challenge and, thus, no estoppel."

The court cited to an earlier opinion, *Holcomb v. Holcomb*, 803 S.W.2d 411, 414 (Tex. App.—Dallas 1991, writ denied), which held that "Sid must demonstrate that Anita had in fact received benefits to which she would not be entitled under either will . . . . From the record before us, Sid has failed to establish as a matter of law that Anita accepted benefits under the probated will over those which she would otherwise have been entitled to." *Id.* (emphasis added). So, the court held that simply accepting a benefit under a will was not enough to trigger acceptance of the benefits where the party would also be entitled to that benefit under a different will. In other words, if a party receives \$10,000 under will A, accepts those funds, and then challenges will A in favor of Will B, the party will not be estopped from making that challenge if the party will receive \$10,000 or more under Will B. There is other caselaw that disagrees with *Holcomb* and its holding. *In re Estate of McDaniel*, 935 S.W.2d 827, 829 (Tex. App.—Texarkana 1996, writ denied).

The court concluded that: "The prevailing recognition and application of the exception in other jurisdictions to acceptance of benefits under a will, and the consistent application of the exception in Texas to acceptance of benefits under all other instruments, including judgments, persuades us that the exception applies to will challenges and may apply to these facts." The court denied the mandamus to the ruling granting the pre-suit deposition.

The court then granted mandamus relief regarding the intervention. The court held that the intervenor did not allege any personal interest or claim in seeking the deposition. Rather, she relied upon the original applicant's claim and standing. The court held that this did not meet the strict procedural requirements for a Rule 202 deposition petition.

Finally, there was a dissent in this case on the acceptance of the benefits issue. The dissenting justice disagreed with the majority's reliance on the *Holcomb* exception:

To the extent Alan claims, and the Majority Opinion holds, that under the case of *Holcomb v. Holcomb*, 803 S.W.2d 411 (Tex. App.—Dallas 1991, no writ) the acceptance-of-benefits doctrine does not apply because he would have received a larger share of Mr. Meeker's estate under some other yet-to-be-identified will or the laws of intestacy, *Holcomb* has been criticized as contrary to binding Texas Supreme Court authority. Because *Holcomb* is, in

my view, contrary to *Trevino* and is an aberration in the case law, it does not apply....

Here, Alan would not be entitled to the benefits he has already received under the Will; if Alan successfully prosecutes a contest to the Will and obtains a declaration that the Will is void based on Mr. Meeker's alleged lack of capacity, Alan is entitled to no benefits under the Will. After a successful contest to the Will, Alan might be entitled to different and possibly greater benefits under a different will, or under the law of intestate, but Alan would not be entitled to the benefits he has already accepted under the Will if the Will is declared void.

*Id.* at \*25-27.

**Interesting Note:** This is an interesting case in for two reasons: 1) the use of the Rule 202 pre-suit deposition procedure to investigate grounds for a will contest, and 2) the court's analysis of the acceptance-of-the-benefits doctrine in the context of a will contest. A Rule 202 petition is a great option to investigate a claim of mental incompetence, undue influence, or other claims, especially where another party is not cooperating with the disclosure of information. If another party will not respond to requests for documents, explanations, and the identity of other third parties (doctors, attorneys, etc.), then a party can seek that information via a pre-suit deposition and document request without technically filing a full-blown contest. This procedure may also protect a party from the consequences of a no-contest clause.

#### **E. Court Reverses Decision On The Fair Market Value Of A Residence Due To The Surviving Spouse's Interest**

In *Estate of Sloan*, a wife died leaving her home, and her husband was the executor of her estate. No. 02-15-00198-CV, 2016 Tex. App. LEXIS 6465 (Tex. App.—Fort Worth June 16, 2016, no pet. history). The wife's will left all of her assets to three trusts, but provided that her husband could buy assets for fair market value. The husband traded rental properties for the wife's home for half of its value (asserting that she only owned half due to community property rules). After the husband died and this transaction came to light, the trustee sued his estate for breach of fiduciary duty, claiming that the property was the wife's separate property and that the husband underpaid for the house by only paying for half. The husband's estate argued that even if the property was the wife's separate property, the consideration was fair considering the fact that the husband's homestead right decreased the value of the home. The trial court ruled for the trustee, and the husband's estate appealed.

The court of appeals reversed the trial court's judgment. The court noted that a "property's fair market value is what a willing buyer would pay a willing seller, neither acting under any compulsion." "In the willing seller-willing buyer test of

market value it is frequently said that all factors should be considered which would reasonably be given weight in negotiations between a seller and a buyer.” Texas Constitution article XVI, section 52 provides that a surviving spouse may occupy the homestead during the spouse's lifetime without it being partitioned to the heirs of the deceased spouse until the survivor's death. Because this probate homestead right belongs to a surviving spouse regardless of its community or separate property character, its characterization by the decedent is irrelevant. The homestead right therefore "reduc[es]" underlying ownership rights "in a homestead property to something akin to remainder interests and vest[s] in each spouse an interest akin to an undivided life estate in the property." The court of appeals concluded that “as a matter of both logic and law,” the husband’s surviving homestead right, which entitled him to live in the property for the rest of his life and made the interest held by the wife’s estate akin to a vested remainder that would entitle a buyer to possession only upon the husband’s death, necessarily affected what such a buyer would pay a willing seller for the property and therefore reduced the property's market value. Because the parties stipulated that if the husband’s interest decreased the value of the property, his estate would not owe anything, the court of appeals reversed and rendered for his estate.

The court then addressed the trustee’s argument that the husband violated his fiduciary duties by self-dealing when he, individually, purchased property from himself as executor of the estate. The trustee alleged that the husband had a duty of full disclosure, a duty of fair dealing, a duty of acting as a prudent man, and a duty of loyalty to the beneficiaries of the estate and the trusts. The court disagreed, holding: “In light of our holding above that Hollis's homestead right decreased the fair market value of the estate's interest in the property, of the trial court's uncontested finding that Hollis was entitled to \$25,000 in community reimbursement when he bought the property, and of the explicit authorization in Barbara's will for Hollis to purchase assets from her estate at fair market value, we cannot conclude that Hollis violated fiduciary duties when buying the Winton Terrace Property.”

#### **F. Court Reverses A Probate Order Requiring An Executor To Distribute Real Property Free Of Any Liens**

In *In re Estate of Heider*, a probate court ordered that an executor should distribute real property to a beneficiary free of liens. No. 05-14-00436-CV, 2016 Tex. App. LEXIS 5978 (Tex. App.—Dallas June 6, 2016, no pet. history). The will devised the tract of land to the testator’s son, stating “I give, devise and bequeath . . . the section of land in Farmersville east of existing North-South fence line (if not sold); to my son Daniel Gary O’Brien.” This tract was collateral for a \$81,000 loan.

The court of appeals noted that Section 255.301 of the Estates Code states the following: “Except as provided by Section 255.302, a specific devise passes to the devisee subject to each debt secured by the property that exists on the date

of the testator's death, and the devisee is not entitled to exoneration from the testator's estate for payment of the debt." Section 255.302 provides: "A specific devise does not pass to the devisee subject to a debt described by Section 255.301 if the will in which the devise is made specifically states that the devise passes without being subject to the debt. A general provision in the will stating that debts are to be paid is not a specific statement for purposes of this section." The court of appeals held that the will did not "specifically state" that the bequest to the son was to be free of the lien. Therefore, the court reversed the probate court's order and required the distribution of the real property to be with the lien and the debt.

### **G. Court Affirms Dismissal Of Will Contest Based On Public Policy Arguments Arising From Sexual Abuse Allegations**

In *Merrick v. Helter*, a daughter who accused her father of sexual abuse attempted to void her father's will based on public policy grounds. No. 03-14-00708-CV, 2016 Tex. App. LEXIS 8966 (Tex. App.—Austin August 18, 2016, no pet. history). Two days before the father died, he signed a will that left no property to his only child, the daughter, and explicitly disinherited her. After he died and his will was admitted to probate, the daughter filed a contest seeking to invalidate the will on public policy reasons and clear the way for her to inherit through intestate succession. Her principal theory was that her disinheritance violated "public policy"—namely Texas's strong public policy against sexual abuse of children. As her factual predicate for that theory, she alleged that her father had abused her sexually while she was a teenager and had disinherited her after she confronted him with those allegations decades later. The executor filed a motion to dismiss under Texas Rule of Civil Procedure 91a contesting whether the daughter's "public policy" theory would be a viable basis in Texas law for the relief she sought even if her version of the facts were true. The probate court granted the Rule 91a motion and dismissed the daughter's claim.

The court of appeals first addressed the relatively new Rule 91a motion to dismiss. The court noted that Rule 91a permits a party to "move to dismiss a cause of action on the grounds that it has no basis in law or fact." Dismissal on a "no basis in law" ground is appropriate "if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the claimant to the relief sought." The court held that whether this standard is met "depends 'solely on the pleading of the cause of action.'"

The court then moved onto the central issue in the case: whether the daughter could void the will due to public policy reasons. The court noted that the general rule is that a person of sound mind has a perfect legal right to dispose of his property as he wishes and may disinherit an heir if he desires. The daughter relied on authority that certain terms in wills may be deemed unenforceable on "public policy" grounds. She argued that: Texas public policy strongly condemns sexual abuse, particularly sexual abuse of minors, or conduct aimed at concealing or aiding it; that the father used his will and her disinheritance from it

as a means of “silencing” her from divulging the sexual abuse and subsequently “punishing” her for confronting him about it; and the will provision disinheriting her runs afoul of the aforementioned Texas public policy, rendering the provision unenforceable.

The court stated that will construction cases dealt with ascertaining the objective meaning of the language actually used within the “four corners of the will,” not from perceptions of the testator’s subjective intent. The court noted that the daughter’s “public policy” challenge was grounded entirely in asserted conditions or limitations that appear nowhere in the will’s text and allegations about the father’s subjective motives in drafting the will as he did. The court also held: “Even if we were to look beyond the will’s ‘four corners,’ Merrick failed to allege facts to support any theory that Cole conditioned Merrick’s inheritance on her remaining silent about the claimed sexual abuse.”

Finally, the court held:

But more critically, Merrick’s arguments erroneously presume that she has any entitlement to an inheritance from Cole in the first instance. On the contrary, as this Court recently observed in *Anderson*, “a prospective beneficiary’s interest in receiving an inheritance is merely in the nature of an expectancy or hope,” and it was for this reason we held that an inheritance falls short of the type of protected contractual or economic interest whose disturbance could be actionable through the tortious-interference tort. Undergirding that analysis, we explained, was the “perfect legal right” of a testator with sound mind “to dispose of his property as he wishes,” a right that includes, as previously noted, the prerogative of disinheriting an heir if the testator sees fit. Further, as Helter emphasizes, the Legislature has not seen fit either to require testators in Cole’s alleged position either to provide an inheritance for their victim or to proscribe them from disinheriting the victim. The closest the Legislature has come is to authorize probate courts to bar a parent from inheriting from a child (the reverse of the situation here) who dies intestate (whereas here there is a will) where the parent has been convicted or placed on community supervision for certain crimes against that child, including sexual offenses (and no such criminal charges or dispositions occurred here). In the very least, we can say with certainty that the Legislature has not seen fit—at least as of yet—to authorize, let alone require, the recovery Merrick seeks.

The court of appeals affirmed the dismissal, finding that the daughter’s public policy argument found no support in the will, the factual allegations, or the law.

## H. Court Affirms Finding That Will Was Lost And Not Revoked

In *In the Estate of Burrell*, a trial court admitted a copy of will to probate, and a contestant appealed. No. 09-14-00345-CV, 2016 Tex. App. LEXIS 10421 (Tex. App.—Beaumont September 22, 2016, no pet. history). This case was decided under the Texas Probate Code and not the new Estates Code. The Probate Code required that a proponent of a copy of a will substantially prove the contents of the will by the testimony of a credible witness who has read the will, has heard the will read, or can identify a copy of the will. Another requirement was that the proponent of the copy of the will must prove the cause of the will's non-production and that such cause must be sufficient to satisfy the trial court that the will cannot by any reasonable diligence be produced. The court stated the presumptions applicable to this case as follows:

When an original will is lost but was last seen in the testator's possession, a rebuttable presumption arises that the testator destroyed the will with the intention of revoking it. The proponent of the copy of the will must overcome this presumption by a preponderance of the evidence. The proponent of the will can overcome the presumption by presenting evidence of circumstances contrary to the presumption or evidence that someone else fraudulently destroyed the will. "The testimony of a witness that, to her knowledge or belief, the testator did not revoke the will has been held sufficient evidence of nonrevocation to support probate of the will."

The court of appeals described the evidence regarding destruction of the will as follows:

The trial court heard testimony that the decedent placed the will in a fireproof safe along with other legal papers and some old family photographs. Some of the appellants testified that they knew that the decedent had a will and knew that Nance was the only beneficiary under the will. The court heard testimony that the decedent was not in her home before her death, having spent time in a hospital and ultimately passing away in hospice care at a facility in another town. After the decedent's death, Nance found the fireproof safe at the decedent's house, but the safe had been left open and had been emptied. Nance testified that she was unable to locate any of the papers that she watched the decedent place in the safe and was unable to find the keys to the safe. Nance testified that she believed finding the safe in this condition was "unusual[.]" There are different inferences that could be drawn from the testimony and evidence, including that someone located the keys to the safe while the decedent was out of her home and emptied the contents of the safe, including the will.

The court affirmed the trial court's findings that the will proponent met the burden to overcome the presumption of revocation:

There is circumstantial evidence in this record to rebut the presumption of revocation of the decedent's will. The safe in the decedent's home was found open with all of its contents removed and the keys missing, after the decedent had been away from the home due to her illness for a length of time.... Moreover, the evidence is undisputed that Nance and her daughter were the decedent's main caregivers. The evidence also shows that Nance and the decedent continued to have a good, loving relationship up until the decedent's death. Nance testified that the decedent never told her that she revoked the will or otherwise burned or destroyed it.

### **I. Court Affirms Denial Of Statutory Bill Of Review From A Will Contest**

In *In re Estate of Kam*, Kam sought to set aside an order probating her brother's will via a statutory bill of review because he purportedly lacked the requisite testamentary capacity to execute the will or the will was the result of undue influence. No. 05-16-00126-CV, 2016 Tex. App. LEXIS 13837, \*13-14 (Tex. App.—Dallas December 29, 2016, no pet. history). The trial court denied the bill of review, and Kam appealed.

Kam filed a statutory bill of review pursuant to Section 55.251 of the Texas Estates Code, which provides:

(a) An interested person may, by a bill of review filed in the court in which the probate proceedings were held, have an order or judgment rendered by the court revised and corrected on a showing of error in the order or judgment, as applicable.

(b) A bill of review to revise and correct an order or judgment may not be filed more than two years after the date of the order or judgment, as applicable.

The court of appeals held that to prevail on her statutory bill of review, Kam was required to specifically allege and prove substantial error in the will contest judgment and had the burden to furnish the court of appeals with a record supporting her allegations of error by the probate court in denying her statutory bill of review. During the bill-of-review proceeding, Kam attached evidence to her bill of review petition, but did not offer any evidence at the hearing and failed to introduce into evidence the documents attached to her statutory bill of review. Even after opposing counsel pointed out that Kam had not offered any evidence and no evidence had been admitted by the probate court, Kam did not offer evidence or ask the probate court to take judicial notice of its file in the underlying will-contest case. The record did not show that the probate court *sua sponte* took judicial notice of its file. The court of appeals affirmed the denial of the bill of



review petition, stating: “On this record, we conclude the probate court could reasonably have concluded Carol did not carry her burden to establish substantial error in the will contest judgment.” *Id.*

**Interesting Note:** This case illustrates the importance of attorneys thinking about the legal issues and evidence that are necessary to meet their burden of production and persuasion. Before a hearing or trial, it is very important to think about a future appeal. For example, an attorney should consider the following questions. What evidence is necessary to show the court of appeals that an error occurred in the trial court? In what form do I need to get the evidence to make it admissible? If a court excludes my evidence, how will I preserve error regarding that exclusion? How will I make my legal issues known to the court (and ruled on) so that I can present them to the court of appeals? Going through these simple questions can help prevent the fate of the appellant in *Kam*.

## **J. Court Holds That Will Created Void Alienation On Restraint**

In *Knopf v. Gray*, a decedent died in 1993, and her will was admitted to probate the same year. No. 10-15-00273-CV, 2017 Tex. App. LEXIS 191 (Tex. App.—Waco January 11, 2017, no pet. history). Her will provided that “I give all my estate to my son Bobby Gray” and named him as her executor. It later provided: “Now Bobby I leave the rest to you, everything, certificates of deposit, land, cattle and machinery. Understand the land is not to be sold but passed on down to your children, Annette Knopf, Allison Kilway, and Stanley Gray, take care of it and try to be happy.” Bobby Gray later transferred portions of the land referenced in the will to a third party, and Annette Knopf and Stanley Gray filed suit seeking a declaratory judgment that Bobby Gray only held a life estate in the property and could not convey a fee simple interest. The third party and Knopf and Gray filed motions for summary judgment, and the trial court granted the third party’s motion and entered a final judgment. Knopf and Gray appealed and argued that the clause “understand the land is not to be sold but passed on down to your children” creates a life estate in the land for Bobby with the remainder interest going to the children.

The court of appeals affirmed the trial court’s judgment. The court held that “[a]n estate in land that is conveyed or devised is a fee simple unless the estate is limited by express words or unless a lesser estate is conveyed or devised by construction or operation of law.” With respect to the creation of a life estate, the court held that no particular words are needed to create a life estate, but the words used must clearly express the testator’s intent to create a life estate. The court held that the language did not create a life estate:

Mrs. Allen states in her will “I leave the rest to you, everything ...” Mrs. Allen does not reference the life or death of Bobby. In a paragraph following the contested provision, Mrs. Allen leaves her niece a property and also “the right to stay at the Camp House anytime she wishes to. This is a lifetime privilege to her.” Mrs. Allen

specifically limited that bequest to the lifetime of her niece. She makes no such reference in the grant to Bobby to limit the bequest to his lifetime. Mrs. Allen does not clearly express an intent to give Bobby a life estate in the property, and upon his death devise the property to her grandchildren. The language “Understand the land is not to be sold but passed on down to your children” is not a devise to the children from Mrs. Allen, but rather an instruction to Bobby to pass the land down to his children.

Rather, the court held that the language was simply a void attempt to have a restraint on alienation:

A general restraint on the power of alienation, when incorporated in a deed or will otherwise conveying a fee simple right to the property, is void. The contested provision grants Bobby a fee simple in the property, but restricts Bobby from selling the property, and instructs him to pass the property on to his children. Therefore, the contested provision is void as a disabling restraint. Appellants argue that even if the language “understand the land is not to be sold” is void as a disabling restraint, the phrase “but passed on down to your children” creates a remainder interest in the children. There is nothing in the language used to clearly express that Mrs. Allen was making a gift to the children. The language used instructs Bobby to pass the land to the children. We find that the trial court did not err in finding that the Allen Will devised real property in fee simple to Bobby Gray and that Appellants hold no remainder interest. We overrule the sole issue.

Accordingly, the court affirmed the judgment for the third party and the executor. There was a dissenting justice who would have held that there was a fact question on the decedent’s intent regarding a life estate and would not have found the will’s language to be a restraint on alienation.

**K. *Please Release Me, Let Me Go: Court Affirms The Appointment Of A Receiver Over Ray Price’s Assets Pending A Contest***

In *In re Estate of Price*, Ray Price, a renowned country music singer and songwriter, died in 2013 and was survived by his wife and his biological son. No. 06-16-00062-CV, 2017 Tex. App. LEXIS 1265 (Tex. App.—Texarkana February 15, 2017, no pet. history).

*Crazy Arms [And Maybe Mind?]*. Shortly before Price’s death, and while he was in the hospital, he transferred most of his assets to his spouse via various deeds and assignment documents. The spouse’s sister, who was a secretary, drafted the various documents. The spouse and son filed competing motions to probate wills purportedly executed by Price, as well as competing will contests.

*Heartaches By The Number.* The court appointed a temporary administrator, but almost all of the assets did not belong to the estate due to the last-minute transfers to the spouse. So, the son filed an application to appoint a temporary administrator as receiver over the assets purportedly transferred to the spouse in the month of Price's death. The son alleged that Price did not have the mental capacity to execute the documents. The application for the receiver argued that the spouse had possession and control over all of the contested assets and that she could sell them or "allow them to waste away as she is currently doing."

*The Same Old Me [I Swear!].* The trial court appointed a receiver to take possession of property subject to the will contests. The spouse alleged that Price had capacity to execute the transfer documents, and appealed that order. The court of appeals cited to Section 64.001(a)(3) of the Texas Civil Practice and Remedies Code that provides that a court may appoint a receiver in an action between parties jointly interested in any property." The court noted that before a court can appoint a receiver under subsection (a)(3), the court must find that the party seeking appointment of the receiver has "a probable interest in or right to the property or fund, and the property or fund must be in danger of being lost, removed, or materially injured." Even though "[a] receiver appointed pursuant to section 64.001(a) and (b) of the Texas Civil Practice and Remedies Code is not required to show that no other adequate remedy exists," "[t]he appointment of a receiver is a harsh, drastic, and extraordinary remedy, which must be used cautiously." "In determining whether the trial court erred in appointing a receiver, '[o]ur review focuses on whether the pleadings and evidence are sufficient to justify a receivership.'"

*For The Good Times [If You Are The Son].* The court of appeals determined that due to the contest to the transfers, the son had a showing of the requisite interest in the property. The court also determined that the trial court did not abuse its discretion in determining that there was a danger that the property would be lost, removed, or materially injured: "The trial court heard evidence that Janie had disposed of, and believed she could dispose of, assets subject to the will contests and Clifton's petition to set aside the December 9 documents. In light of the pleadings and evidence presented in this case, we will not disturb the trial court's finding that property Clifton had a probable right or interest in was in danger of being lost, removed, or materially injured." Therefore, the court of appeals affirmed the appointment of the receiver.

**L. Court Grants Mandamus Relief To Void Order Naming An Executor More Than Three Years After Admitting Will To Probate As A Muniment Of Title**

In *In re Squyres*, in 2012, Baker filed with the probate court an application to probate a will as a muniment of title. No. 01-16-00236-CV, 2016 Tex. App. LEXIS 8509 (Tex. App.—Houston [1st Dist.] August 9, 2016, no pet. history). The probate court signed an order admitting the will to probate as a muniment of title, and specifically found that "there are no unpaid debts owing by this Estate,

exclusive of any debt secured by liens on real estate” and that “there is no necessity for administration of this Estate.” In 2015, Baker filed an application for the probate court to issue letters testamentary and appoint her as independent executor of the estate, and though she acknowledged that the probate court had already admitted the will to probate as a muniment of title, she alleged: “Since the will was admitted to probate as a muniment of title by this Court, Applicant has learned of potential claims due the Estate. There is a necessity for an administration of the Estate so that such claims may be further investigated.” The court granted her application and appointed her executor. Baker’s sister received notice of this order and filed a motion for reconsideration, alleging that the probate court did not have jurisdiction to grant the application. The probate court denied the motion for reconsideration, and the sister filed a petition for writ of mandamus.

The court of appeals first addressed the finality of probate court orders. The court stated that “a probate order is the ‘functional equivalent’ of a final judgment when it finally disposes of a particular issue between parties.” “Thus, the probate court’s plenary power to vacate, modify, correct, or reform a final order expires 30 days after it is signed.” The court acknowledged that a probate court retains jurisdiction over the administration of an estate until that estate is disposed of, but “that continuing jurisdiction does not alter the court’s plenary power over final judgments.” One exception to this finality rule is found in Estates Code Section 55.251(a), which provides that “[a]n interested person may, by a bill of review filed in the court in which the probate proceedings were held, have an order or judgment rendered by the court revised and corrected on a showing of error in the order or judgment, as applicable.” *Id.* (citing Tex. Est. Code Ann. § 55.251(a)). However, a bill of review “may not be filed more than two years after the date of the order or judgment, as applicable.” *Id.* The court held that the 2012 order admitting the will to probate as a muniment of title finally disposed of all issues in the proceeding and was a final and appealable judgment. Moreover, the order appointing Baker as executor was filed more than three years after the probate court’s plenary power expired and more than a year after the deadline for filing a bill of review. Accordingly, the court of appeals held that the probate court had no jurisdiction to name Baker executor and granted mandamus relief to the sister.

#### **M. Court Dismisses Appeal From Order Appointing A Temporary Administrator And Reverses Temporary Injunction**

In *Harris v. Taylor*, Harris challenged a probate court’s interlocutory order appointing a temporary administrator and a temporary injunction order enjoining her from accessing certain financial accounts. No. 01-15-00925-CV, 2016 Tex. App. LEXIS 8110 (Tex. App.—Houston [1st Dist.] July 28, 2016, no pet. history). Taylor alleged that Harris had entered into joint accounts with rights of survivorship with their father at a time when the father was mentally incompetent, and therefore, Taylor alleged that Harris should not be named executor and sought an injunction precluding Harris from withdrawing funds from the accounts.

The trial court entered an order that appointed a temporary administrator and granted the injunction, and Harris appealed.

The court of appeals dismissed the appeal from the order appointing a temporary administrator because that order was an interlocutory order from which there was no right of appeal. Regarding the temporary injunction, the court reversed that order because the order did not set the matter for trial. Texas Rule of Civil Procedure 683 requires that every temporary injunction order shall include an order setting the matter or trial on the merits. The court held that requirement was mandatory, and any order that omitted that requirement was subject to being declared void and dissolved. Accordingly, the court reversed the injunction order.

#### **N. Court Holds That A One-Line Will Should Have Been Admitted To Probate**

In *In the Estate of Setser*, the decedent signed a 1993 will naming his daughter as the sole beneficiary. No. 01-15-00855-CV, 2017 Tex. App. LEXIS 937 (Tex. App.—Houston [1st Dist.] February 2, 2017, no pet. history). Later, in 2014, he signed a hand-written will naming his good friend and roommate Heim as the sole beneficiary of his estate. This 2014 will stated: “I, Frankie Lee Setser will my property to Charles Edward Heim, 2748 County Road 32, Angleton, Texas 77515-7749.” That was it. The trial court rejected this will as being too conclusory and vague to be operable and admitted the 1993 will to probate. Heim appealed.

The court of appeals reversed, holding that the will was sufficiently written. After discussing the standards for interpreting wills, the court discussed hand-written wills:

A handwritten will is made with the requisite formalities so long as it is in the testator’s handwriting and signed by him. The will need not be dated; accordingly, if a date appears on the document it need not be in the testator’s hand. Nor does the will need to name an executor or other personal representative of the estate in order to be valid. Handwritten wills may be very brief and informal and nonetheless be valid. A will need not contain an express revocation clause in order to revoke a prior one. Absent a revocation clause, a new will impliedly revokes a prior one to the extent of any inconsistency. If it makes a contrary disposition of the testator’s entire estate, the new will completely revokes the prior one. Revocation is usually but not always a question of fact. Once prima facie proof of the possibility of revocation is introduced, the proponent of a prior will has the burden to prove that it was not revoked.

The court of appeals noted that the trial court reasoned that Setser’s use of the term “property” without qualification rendered the 2014 will too vague or ambiguous to enforce. The court disagreed and held that, when used without

qualification, the term “property” is unambiguous. “When used in a will, an unqualified reference to “property” encompasses everything of exchangeable value that the testator owned. ‘Property’ is synonymous with ‘estate’ and includes assets of every category.” *Id.* Therefore, the court concluded:

As the ordinary meaning of “property” is well-settled and Setser used that term without restriction in his handwritten 2014 will, the will is susceptible to only one interpretation—it unambiguously bequeaths all of Setser’s property to Heim. Apart from the parties’ dispute about the meaning of “property,” it is undisputed that Setser’s will effected an entirely different disposition of his estate than his prior 1993 will, inasmuch as the 2014 will bequeathed his property to Heim and the 1993 will bequeathed it to Boggs. Thus, the 2014 will impliedly revoked the 1993 will as a matter of law. As Boggs does not challenge the trial court’s finding that the 2014 will was made with the requisite formalities and the record contains some evidence that it was made with the requisite formalities, we conclude that the trial court erred by not admitting Setser’s handwritten 2014 will to probate instead of his prior 1993 will.

*Id.* The court reversed and rendered that the 2014 will should be admitted to probate.

#### **O. Courts Hold That Multiple Probate Court Orders Were Not Appealable**

In *The Management Trust of Norsworthy*, the court reviewed a trustee’s accountings and petition for approval to enter into an agreement with the beneficiary’s wife to make regular distributions to her for certain recurring expenses. No. 05-16-00683-CV, 2017 Tex. App. LEXIS 1335 (Tex. App.—Dallas February 15, 2017, no pet.). Thereafter, the beneficiary’s wife attempted to appeal the following orders: (1) an order requiring prior court approval for disbursements greater than \$2500, (2) an oral denial of a motion to stay or vacate the disbursement approval order, (3) an interim order establishing a budget, (4) an oral denial of motion to compel ex-parte communications, and (5) an order denying a motion for recusal. The court of appeals asked the parties to brief why the court had jurisdiction over these orders. The court acknowledged that “an order in a probate case is deemed an appealable judgment if it is entered in a phase of the probate proceeding that a statute has declared final or in which no issues remain.” The court of appeals held that because these orders simply set the stage for further proceedings and were not even written orders, they were not sufficiently final for appeal and dismissed the appeal.

In *Estate of Easley*, the sole beneficiary of an estate, who was incarcerated, filed motions to remove the executor, for an accounting, and for other relief. No. 07-15-00378-CV, 2017 Tex. App. LEXIS 1640 (Tex. App.—Amarillo February 24, 2017, no pet.). The trial court denied those motions, and the beneficiary

appealed. The court of appeals held that it did not have jurisdiction over the appeal. Regarding the accounting, the court stated: “No statute makes a trial court’s ruling on an interested person’s demand for a periodic accounting immediately appealable, either as a final order or as an interlocutory appeal. An accounting under Probate Code section 149A includes matters subject to further action in the estate administration. Because the trial court’s ruling on Webb’s motion for accounting did not end a discrete phase of the proceeding it was not immediately appealable and we lack appellate jurisdiction.” Regarding the removal motion, the court stated: “We find the order denying Webb’s motion to remove Walker was not final or otherwise appealable. No statute makes the trial court’s order immediately appealable. For that reason, and for the further reason that Webb’s excessive-commission allegation is unresolved, the court’s order did not dispose of a discrete stage of the litigation.”

#### **P. Court Affirms Order Denying Attorney’s Fees To Executor/Attorney**

In *In re Estate of Williams*, an attorney was appointed an administrator of an estate and hired himself as an attorney for the estate. No. 05-15-00392-CV, 2016 Tex. App. LEXIS 5990 (Tex. App.—Dallas June 6, 2016, no pet. history). Later, the trial court denied some of his requested attorney’s fees, and he appealed.

The court of appeals affirmed. The court first held that the order awarding some, but not all, of the fees requested was a final order and that the appellate court had jurisdiction. The court then reviewed the merits of the dispute. The court held that an attorney, as an administrator of an estate, may also perform the legal work and be compensated for his reasonable attorney’s fees.

Estate Code Section 352.051 provides that on proof satisfactory to the court, a personal representative of an estate is entitled to reasonable attorney’s fees necessarily incurred in connection with the proceedings and management of the estate. The court held that this provision entrusts attorney’s fee awards to the trial court’s sound discretion, subject to the requirements that any fees awarded be reasonable and necessary, which are matters of fact, and to the additional requirement that the fees be incurred in connection with the proceedings and management of the estate.

The court concluded that the trial court did not abuse its discretion in setting the amount of fees as it did. “For example, the record before this Court shows that some of the compensation sought by the Law Firm was for activities that were administrative in nature, rather than legal. Among other administrative activities, the Law Firm’s itemized billing statements include entries for traveling to a bank to set up an Estate bank account, obtaining access to online banking records, coordinating checks and receipts for each creditor, a telephone call to previous counsel to pick up checks, telephone calls with the heirs, preparing annual accounts, and communications with real estate agents concerning the general status of properties. Under these circumstances, the probate court was entitled to

conclude the Law Firm had charged the Estate for attorney time when the activity reported had no actual legal significance, and to exclude those charges from the fee award. The court affirmed the trial court's award.

**Interesting Note:** Administrators are entitled to reasonable compensation for their work. Under Texas Estate Code Section 352.002, the standard compensation is "five percent commission on all amounts that he or she actually receives or pays out in cash in the administration of the estate." Tex. Est. Code § 352.002. A court may also alter this standard compensation formula for unusual estates. *Id.* at § 352.003. Additionally, an administrator may hire an attorney and pay the attorney "reasonable attorney fees necessarily incurred in connection with the proceedings and management of the estate." *Id.* at § 352.051. There is an inherent conflict of interest when an administrator hires himself or herself to do the legal work for the estate. If an administrator is different from the attorney, the administrator would independently review the legal bills to make sure that the work was legal in nature, was reasonable in amount, and was for necessary services. Where the administrator and the attorney are the same person, that check may be lacking. Further, there may be pressure to expand the administrator's standard compensation formula by billing activities that the administrator does in managing the estate (which should fall under the administrator formula) as legal work (which would be paid by the hour). As the Estate of Williams case shows, this may be easily enough found and rectified in a dependent administration. But it may not be as easily discovered in an independent administration. Of course, a beneficiary always has a claim against an administrator where it breaches its fiduciary duties by overcompensating itself.

#### **Q. Federal Court Dismisses Beneficiary's Breach Of Fiduciary Duty Claim For Lack of Jurisdiction**

In *Strouse v. Strouse*, a beneficiary sued an executor of an estate for breach of fiduciary duty. No. 4:16cv707, 2016 U.S. Dist. LEXIS 155630 (E.D. Tex. September 27, 2016). Federal district courts are courts of limited jurisdiction and may hear only those cases authorized by a federal statute, the Constitution, or U.S. treaty. Subject matter jurisdiction in federal court is generally conferred through either: (1) federal question jurisdiction under 28 U.S.C. §1331; or (2) diversity of citizenship jurisdiction under 28 U.S.C. §1332. The court *sua sponte* entertained whether it had jurisdiction in this case.

The court noted that the plaintiff stated no facts alleging a violation of any federal law, and "there is no subject matter jurisdiction arising from Plaintiff's claims that Defendant, among other things, 'neglected or refused to discharge her fiduciary duties as executor' and 'failed or refused to administer according to law and decedent's will or trust.'" The court also noted that a federal court has no jurisdiction to probate a will or administer an estate. "[T]he probate exception reserves to state probate courts the probate or annulment of a will and the administration of a decedent's estate; it also precludes federal courts from endeavoring to dispose of property that is in the custody of a state probate court."



*Id.* (citing *Marshall v. Marshall*, 547 U.S. 293, 311-12 (2006)). After the court determined that diversity jurisdiction also did not exist, the court dismissed the case without prejudice based on a lack of jurisdiction.

#### IV. Fiduciary Duties In Business Relations

##### A. In An Usurpation Of Corporate Opportunity Case, The Texas Supreme Court Reversed A Constructive Trust Due To A Failure To Trace The Property To The Alleged Fiduciary Breaches And Reversed A Disgorgement Award Because There Was No Finding Of The Fiduciaries' Profits

In *Longview Energy Co. v. The Huff Energy Fund, LP*, Longview Energy Company sued two of its directors and their affiliates after discovering one affiliate purchased mineral leases in an area where Longview had been investigating the possibility of buying leases. No. 15-0968, 2017 Tex. LEXIS 525 (Tex. June 9, 2017). A jury found that the directors breached their fiduciary duties in two ways: by usurping a corporate opportunity and by competing with the corporation without disclosing the competition to the board of directors. The trial court rendered judgment awarding a constructive trust to Longview on most of the leases in question and related property and also awarded Longview \$95.5 million in a monetary disgorgement award. *Id.* The court of appeals reversed and rendered judgment for the defendants, concluding that (1) the evidence was legally insufficient to support the jury's finding that the directors breached their fiduciary duties by usurping a corporate opportunity, and (2) the pleadings were not sufficient to support a claim for breach of fiduciary duty by undisclosed competition with the corporation. *Longview Energy Co. v. The Huff Energy Fund*, 482 S.W.3d 184 (Tex. App.—San Antonio 2015).

The Texas Supreme Court affirmed the court of appeals's judgment. *Longview Energy Co.*, 2017 Tex. LEXIS at 525. The Court first held that Delaware law prevailed in this case on substantive issues, but that Texas law prevailed on procedural issues. The Court addressed the issue of whether the plaintiff had to trace specific property that supported the constructive trust. Citing Delaware law, the Court held:

A “constructive trust is a remedy that relates to specific property or identifiable proceeds of specific property.” “The constructive trust concept has been applied to the recovery of money, based on tracing an identifiable fund to which plaintiff claims equitable ownership, or where the legal remedy is inadequate—such as the distinctively equitable nature of the right asserted.” Thus, to obtain a constructive trust over these properties located in Texas, Longview must have procedurally proved that the properties, or proceeds from them, were wrongfully obtained, or that the party holding them is unjustly enriched. “Definitive, designated property, wrongfully withheld from another, is the very heart and soul of the

constructive trust theory.” Imposition of a constructive trust is not simply a vehicle for collecting assets as a form of damages. And the tracing requirement must be observed with “reasonable strictness.” That is, the party seeking a constructive trust on property has the burden to identify the particular property on which it seeks to have a constructive trust imposed.

*Id.* at \*15-16. The plaintiff argued that it did not have the burden to trace because that burden shifted to the defendants once the plaintiff proved the assets were commingled. The Court disagreed and noted that “the leases were separately identifiable, were not purchased with commingled funds, and were identified, lease by lease, in both the evidence and the judgment.” *Id.* The Court held that “[g]iven those facts, Longview had the burden to prove that, as to each lease for which it sought equitable relief of disgorgement or imposition of a constructive trust, Riley-Huff acquired that lease as a result of Huff’s or D’Angelo’s breaches of fiduciary duties.” *Id.* The Court concluded that there was no evidence that the defendants obtained any leases due to a breach of fiduciary duty:

There must have been evidence tracing a breach of fiduciary duty by Huff or D’Angelo to specific leases in order to support the imposition of a constructive trust on those leases. The court of appeals noted, and we agree, that there is no evidence any specific leases or acreage for leasing were identified by the brokers as possible targets for Longview to purchase or lease, nor is there evidence that any specific leases or acreage for leasing were recommended to or selected by Longview or its board for pursuit or purchase. Thus, the evidence in this case is legally insufficient to support a finding tracing any specific leases Riley-Huff acquired to a breach of fiduciary duty by either Huff or D’Angelo. Accordingly, Longview was not entitled to have a constructive trust imposed on any leases acquired by Riley-Huff or on property associated with them. Nor was Longview entitled to have title to any of the leases or associated properties transferred to it. The trial court erred by rendering judgment imposing the constructive trust on and requiring the transfer of leases and properties to Longview.

*Id.* at \*22-23.

The Court then turned to the award of disgorgement damages and noted that both Delaware and Texas limits disgorgement to a fiduciary’s profit. “Thus, under either Delaware or Texas law, the disgorgement award must be based on profits Riley-Huff obtained as a result of Huff’s or D’Angelo’s breaches of fiduciary duties.” *Id.* at \*28. The Court noted that the amount of profit resulting from a breach of fiduciary duty will generally be a fact question. The jury question only required the jury to find the amount of *revenues* the defendants received. The Court held that because jury question submitted an incorrect measure for equitable disgorgement of profit, and there was no other finding that could be

used to calculate the profit, there was no jury finding that supported the trial court's disgorgement award. Therefore, the Court affirmed the court of appeals's judgment for the defendants.

### **B. Court Finds That Breach Of Fiduciary Duty Claims Is Preempted By Trade Secrets Claim**

In *Super Starr Int'l, LLC v. Fresh Tex Produce, LLC*, a Texas entity that distributes produce throughout the United States filed suit against another Texas entity that imports foreign grown produce into the United States and other related entities for a variety of claims arising from the defendants' attempts to distribute produce without the plaintiff. No. 13-16-00663-CV, 2017 Tex. App. LEXIS 6801 (Tex. App.—Corpus Christi July 20, 2017, no pet. history). The plaintiff's claims included breach of various agreements, breach of fiduciary duty, misappropriation of trade secrets, and aiding and abetting breach of fiduciary duty. The plaintiff sought and obtained a temporary injunction that precluded the defendants from distributing the produce and other relief, including an order to preserve electronic evidence. The defendants appealed.

The court of appeals reversed and rendered in part and remanded in part. "To obtain a temporary injunction, the applicant must plead and prove three elements: (1) a cause of action; (2) a probable right to relief; and (3) a probable, imminent, and irreparable injury in the interim." *Id.* The court first analyzed the plaintiff's claim that the plaintiff was really a partnership because the parties used the term "partner" in various contexts. The court held that it was solely a limited liability company due to the Texas Business Organizations Code and the wording of the LLC agreement:

The "term 'partner' is regularly used in common vernacular and may be used in a variety of ways," and "[r]eferring to . . . a 'partner' in a colloquial sense is not legally sufficient evidence of expression of intent to form a business partnership." Here, the context in which the statements were made establishes that the parties' use of the term "partner" was colloquial, not legal. Absent something more, we conclude that the Distributor presented no evidence that conclusively negates the plain text of the business organizations code and the operating agreements, both of which require us to determine as a matter of law that the LLC was solely a limited liability company, not a partnership

*Id.*

The court then held that the plaintiff's breach of fiduciary duty claim was preempted by its trade secret claim:

The gravamen of the Distributor's breach of fiduciary duty claim duplicates its claim based on the Texas Uniform Trade Secrets Act.

. . . The Texas Uniform Trade Secrets Act generally “displaces conflicting tort, restitutionary, and other law of this state providing civil remedies for misappropriation of a trade secret.” . . . Where a claim is based on a misappropriation of a trade secret, then it is preempted by the Texas Uniform Trade Secrets Act. In this case, the Distributor’s breach of fiduciary duty claim duplicates its alleged violation of the Texas Uniform Trade Secrets Act. Appellants could not “divert[] [the LLC’s] accounts and business” or “solicit[] [the LLC’s] accounts and employees” without the use of alleged trade secrets. Accordingly, the preemption provision in the Texas Uniform Trade Secrets Act precludes the Distributor’s breach of fiduciary duty claim from serving as a basis for temporary injunctive relief.

*Id.*

The court then reviewed the plaintiff’s aiding and abetting breach of fiduciary duty claim and held that same could not survive without an underlying breach of fiduciary duty claim: “Generally, when a breach of fiduciary duty claim fails, so should an aiding and abetting in the breach of fiduciary duty claim, to the extent one exists in Texas.” *Id.* The court held that there was not a showing of a probable right of recovery regarding these claims.

Finally, the temporary injunction order prohibited the defendants from: “Destroying, deleting, erasing, losing, hiding, altering, or modifying in any manner the electronic information, including emails, text messages, recordings, and other communications involving or mentioning [the Importer], [the Grower], [the LLC], [the Distributor] or any of its principals or employees, or accounts which have done business through [the LLC].” *Id.* The court held that this relief should be reversed because “the Distributor presented no evidence or argument of a probable, imminent, and irreparable injury in the interim stemming from the acts restrained in Restriction 8.” *Id.*

### **C. Court Reversed A Finding Of Breach Of Fiduciary Duty (And \$470,000,000 Judgment) Because No Partnership Ever Existed Due To The Failure Of Conditions Precedent**

In *Enterprise Prods. Partners, L.P. v. Energy Transfer Partners, L.P.*, the jury found Enterprise Products Partners, L.P. (“Enterprise”) was in a general partnership with Energy Transfer Partners, L.P. (“ETP”) regarding a pipeline project and that Enterprise breached its duty of loyalty as a partner to ETP. No. 05-14-01383-CV, 2017 Tex. App. LEXIS 6658 (Tex. App.—Dallas July 18, 2017, no pet. history). The trial court’s judgment awarded ETP actual damages of \$319,375,000 and disgorgement of \$150,000,000. Enterprise argued on appeal that the trial court erred by denying Enterprise’s motions for directed verdict and JNOV because the parties’ written agreements contained unperformed conditions precedent that as a matter of law precluded the forming of the

disputed partnership, and without a partnership, Enterprise owed no fiduciary duties to ETP.

The court of appeals agreed that the parties' agreement had certain unperformed conditions precedent before any partnership was created: "In this case, the Letter Agreement barred the formation of a partnership 'unless and until [1] the Parties have received their respective board approvals and [2] definitive agreements . . . have been . . . executed and delivered by both of the Parties.' These conditions precedent were not performed. Unless they were waived, no partnership was formed, and ETP cannot recover on its claims for breach of joint enterprise and breach of fiduciary duty." *Id.* The court then analyzed whether the Enterprise waived the conditions precedent. ETP did not submit a jury question on waiver, and so under Texas Rule of Civil Procedure 279, such a claim was waived unless it was proved as a matter of law. The court reviewed the evidence and held that there was at least a fact question on waiver. The court concluded "that ETP waived its waiver theory by failing to obtain a jury finding on the waiver theory. Because the conditions precedent were not performed and ETP did not conclusively prove the parties waived the conditions precedent, there was no partnership between Enterprise and ETP. We therefore conclude the trial court erred by denying Enterprise's motions for directed verdict and JNOV." The court reversed the considerable judgment and rendered for defendant Enterprise.

#### **D. Court Holds That Majority Shareholders In Closely Held Corporation Do Not Owe Fiduciary Duties To Minority Shareholders**

In *Herring Bancorp, Inc. v. Mikkelsen*, a corporation acquired a majority of the outstanding shares of preferred stock by "repurchasing" those shares in accordance with the Articles of Incorporation, including the shares owned by a trustee. No. 07-15-00327-CV2017 Tex. App. LEXIS 5131 (Tex. App.—Amarillo June 2, 2017, no pet. history). This was against the wishes of the trustee, a minority shareholder. The trustee filed claims for oppression of a minority shareholder in a closely-held corporation and breach of fiduciary duty.

The court of appeals held that oppression of a minority shareholder was not a viable claim. The court of appeals noted that in *Ritchie* opinion, the Texas Supreme Court specifically refused to recognize a common-law cause of action for minority shareholder oppression in closely-held corporations and concluded that section 11.404 of the Texas Business Organizations Code authorizes the only remedy for oppressive conduct by those in control of a corporation—appointment of a rehabilitative receiver. *Id.* (citing *Ritchie v. Rupe*, 443 S.W.3d 856, 866 (Tex. 2014)). "Because Appellee's oppression of a minority shareholder in a closely-held corporation is not a viable cause of action," the court reversed that finding. *Id.*

The court then turned to the breach of fiduciary duty claim. The court held that there was no formal fiduciary duty between a majority and minority shareholder in a closely-held corporation:

The Texas Supreme Court has never recognized a formal fiduciary duty between a majority and minority shareholder in a closely-held corporation. One's status as a co-shareholder in a closely-held corporation alone does not automatically create a fiduciary relationship between co-shareholders. "A co-shareholder in a closely held corporation does not as a matter of law owe a fiduciary duty to his co-shareholder." Even in the context of disproportionate ownership interests, the vast majority of intermediate appellate courts of this State have declined to recognize a broad formal fiduciary relationship between majority and minority shareholders that applies as a matter of law to every transaction between them.

*Id.* The court therefore reversed a breach of fiduciary duty finding in this case as well.

#### **E. Court Holds That Board Of Trustees Of A Nonprofit Do Not Owe The Same Duties As A Trustee Of A Trust**

In *Young v. Heins*, Young brought third-party claims against the board of trustees of a nonprofit home owner association for breach of fiduciary duty, breach of the duty of good faith and fair dealing, breach of contract, intentional infliction of emotional distress, and for a declaratory judgment. No. 01-15-00500-CV, 2017 Tex. App. LEXIS 5075 (Tex. App.—Houston [14th Dist.] June 1, 2017, no pet. history). In his claims for breach of fiduciary duty and the duty of good faith and fair dealing, Young argued that because the trustees had a fiduciary relationship with him, they owed him a "duty to refrain from self-dealing, a duty of care and loyalty, a duty of full disclosure, a duty to act with the strictest integrity, and the duty of fair, honest dealing." *Id.* Young further argued that they breached their duties to him because they had claimed that he had violated deed restrictions, knowing that he had not done so, and claimed that he had not timely paid his maintenance assessments, knowing that he had in fact paid them. The trustees filed a summary judgment motion, which the trial court granted. The court of appeals noted that the association's bylaws, states that the affairs of the association "shall be managed by a Board of five . . . trustees, who need not be members of the Association." But the court held that the mere use of the word "trustee," does not create a trust or a trustee relationship. *Id.* (citing *Nolana Dev. Ass'n. v. Corsi*, 682 S.W.2d 246, 249 (Tex. 1984); *Stauffacher v. Coadum Cap. Fund 1, LLC*, 344 S.W.3d 584, 588-89 (Tex. App.—Houston [14th Dist.] 2011, pet. denied)). The court concluded that "the duties that a trustee has to a trust do not apply to a director of a nonprofit corporation." *Id.* The court affirmed the summary judgment for the board of trustee members.

## F. Court Affirmed Jury's Findings Of Breach Of Fiduciary Duty By Joint Venture Partner And The Partner's Representative

In *CBIF v. TGI Friday's*, a joint venture partner sued the other partner for breaching fiduciary duties for unreasonably withholding consent regarding amending a lease and by acting out of its own self-interest in threatening the venture and its constituents with the total loss of the venture's business existence if it was not paid millions of dollars in order to buy out its interest in the venture. No. 05-15000157-CV, 2016 Tex. App. LEXIS 12844 (Tex. App.—Dallas December 5, 2016). The defendant claimed that it could not be held liable for breach of fiduciary duty because it was merely exercising its contractual right to vote against proposed changes to the venture's governing documents and that its refusal to agree to the proposed modifications did not constitute a breach of fiduciary duty.

The court of appeals affirmed a finding that the defendant breached its fiduciary duty. The court held: "The relationship between partners is fiduciary in character, and imposes on all the participants the obligation of loyalty to the joint concern and of the utmost good faith, fairness, and honesty in their dealings with each other with respect to matters pertaining to the enterprise." *Id.* at \*48. The court concluded that partners in a joint venture owed each other fiduciary duties. Regarding the defendant's argument that it did not breach any duty because it was just enforcing its contractual rights, the court stated that: "contracts do not exist in a vacuum. Rather, contractual rights, such as those claimed by CBIF, do not operate to the exclusion of fiduciary duties. Instead, where the two overlap, contractual rights must be exercised in a manner consistent with fiduciary duties." *Id.* at \*43. The court reviewed the evidence and held:

CBIF refused to amend the venture's governing documents to give the disadvantaged business entities the requisite level of control, placing TGIFJV in default of the lease's compliance requirement, which jeopardized the entire venture. The evidence also establishes that CBIF pursued its own self-interest at the expense of the joint venture by conditioning its waiver of its right of first refusal to purchase the 10% interest Friday's sold to Domain, to maintain a 35% DBE ownership interest in the joint venture, upon payment of \$109,000. Considering and weighing all of the evidence in the record pertinent to the finding CBIF breached its fiduciary duty to Friday's, we conclude there is more than a scintilla of competent evidence to support the finding and the finding is not contrary to the overwhelming weight of all the evidence as to be clearly wrong and unjust.

*Id.*

Further, an agent of the defendant appealed a finding that he knowingly participated in the breach of fiduciary duty. He argued that he could not be held

individually liable for the partner's (CBIF's) breach of fiduciary duty because he acted only in his capacity as manager of the general partner (Columbia) of the partner (CBIF), and acted in good faith, believing that what he did was for the best interest of both entities. He cited to *Holloway v. Skinner*, 898 S.W.2d 793, 795 (Tex. 1995), in which the Texas Supreme Court held that generally a representative of a party cannot tortiously interfere with that party's contract:

To establish a prima facie case under such circumstances, the alleged act of interference must be performed in furtherance of the defendant's personal interests so as to preserve the logically necessary rule that a party cannot tortiously interfere with its own contract. We hold that to meet this burden in a case of this nature, the plaintiff must show that the defendant acted in a fashion so contrary to the corporation's best interests that his actions could only have been motivated by personal interests.

*Holloway v. Skinner*, 898 S.W.2d at 795. The court in *CBIF* distinguished the *Holloway* case thusly: "But *Holloway* was a breach-of-contract and tortious-interference case, not a breach-of-fiduciary-duty case. Thus, Flory's reliance on it is misplaced." 2016 Tex. App. LEXIS 12844 at \*48-49.

The court then stated that "When a defendant knowingly participates in the breach of a fiduciary duty, he becomes a joint tortfeasor and is liable as such." *Id.* The court affirmed the finding of knowing participation by the representative of the joint venture partner:

CBIF was a partner in TGIFJV... [T]he evidence supports the jury's finding CBIF breached its fiduciary duty to Friday's. Evidence of Columbia's and Flory's roles and involvement in CBIF's actions relative to Terminal A—including their oversight and management of CBIF, their knowledge of the Airport's concern over DBE compliance, and their thwarting Friday's efforts to preserve TGIFJV's space in Terminal A—all likewise support the jury's findings Columbia and Flory knew of the fiduciary relationship and knowingly participated in CBIF's failure to comply with its fiduciary duty to Friday's... When viewed under the appropriate standards, there is legally and factually sufficient evidence to support the jury's finding of knowing participation.

*Id.* See also *Darocy v. Abildtrup*, 345 S.W.3d 129, 138 (Tex. App.—Dallas 2011, no pet.) (evidence of the agent's central "role and involvement in" the principal's operations constituted "legally and factually sufficient evidence to support" knowing participation finding).

The court also affirmed the trial court's refusal to submit a legal justification defense question that was requested by the representative of the defendant. The court state that to have a legal justification defense a party must act in good faith.



“Columbia and Flory, however, cite no authority extending this good-faith defense to a claim of knowing participation—which would seem logically antithetical to good faith—and we find none.” *Id.* at \*51.

The court also affirmed other breach of fiduciary duty findings regarding other entities. For example, the court noted that CBIF was a limited partner that exercised control of a limited partnership, and thus owed fiduciary duties to the other partners. The court also held that the trial court did not err in refusing an instruction that contractual rights supplant fiduciary duties, which the court held was not a correct statement of the law: “Under Texas law, contractual rights do not operate to the exclusion of fiduciary duties, as noted previously. Consequently, Columbia’s and Flory’s requested instructions directing jurors to the contrary were not substantially correct and the trial court’s refusal to submit the instructions is not reversible error.”

The court did reverse certain declaratory relief and attorney’s fees awards, but otherwise affirmed the judgment for the plaintiff.

#### **G. Court Reverses Judgment Dismissing Breach Of Fiduciary Duty Claim Because No-Evidence Summary Judgment Motion Was Not Sufficiently Specific**

In *Tex v. Iom*, a former employer sued a former employee based on a covenant not to compete and breach of fiduciary duty and sued the new employer for tortious interference. No. 12-14-00254-CV, 2016 Tex. App. LEXIS 7317 (Tex. App.—Tyler July 12, 2016, no pet. history). The defendants filed a no-evidence motion for summary judgment, and regarding breach of fiduciary duty, the motion stated: “Plaintiff presents no evidence of breach of fiduciary duty while employed.” It later stated: “Plaintiff also brings a cause of action for breach of fiduciary duty, yet again does not bring forth any evidence of such a breach during the time of his employment (Exhibit 1). Defendant seeks summary judgment that Defendant did not breach his fiduciary duty while employed at Plaintiff.” The trial court granted the motion, and the plaintiff appealed.

The court of appeals noted that a no-evidence motion for summary judgment must state the elements as to which the movant contends there is no evidence. The court held that “[t]he motion must be specific in challenging the evidentiary support for an element of a claim or defense; conclusory motions or general no evidence challenges to an opponent’s case are not authorized.” Further, the court noted that if the motion is not specific in challenging a particular element, the motion is legally insufficient as a matter of law and may be challenged for the first time on appeal. Reviewing the motion in the case, the court held that it was too conclusory:

Rather, Pierce makes only a general argument that NeuroTex has no evidence to support its breach of fiduciary duty cause of action. Thus, we hold that Pierce’s no evidence motion is legally

insufficient with regard to breach of fiduciary duty and the trial court's order granting Pierce's no evidence motion for summary judgment on that cause of action was erroneous.

*Id.* at \*50.

**Interesting Note:** No-evidence summary judgment motions can only be filed when a party's opponent has the burden of proof on a claim or defense. Normally, a plaintiff has the burden of proof on a breach of fiduciary duty claim, and a defendant can properly file a no-evidence motion on that claim. However, there are circumstances – where the fiduciary enters into a transaction with the principal – where the burden is on the defendant/fiduciary to establish that the transaction is fair. In that circumstance, a defendant should not be able to file a no-evidence motion and should have to file a traditional motion for summary judgment. Further, Texas Rule of Civil Procedure 166a(i) only states that a no-evidence motion has to be specific regarding the elements of a claim that are being challenged. So, a movant should not have to challenge any particular underlying facts. Therefore, the opinion's unnecessary statement that a "motion must be specific in challenging the evidentiary support for an element," is doubtful. For example, a no-evidence motion that states "The plaintiff has no evidence to support the element of the existence of a fiduciary relationship of his claim for breach of fiduciary duty" should be sufficient. Of course, an attorney should draft a no-evidence motion to be persuasive, and a persuasive motion will have more detail and argument than the example given.

#### **H. Court Affirms Summary Judgment Holding Insurance Agent Owed No Fiduciary Duties To Insured**

In *Brown v. Carrell*, homeowners filed suit against their insurance agent over damages to their home from Hurricane Ike. No. 09-15-00016-CV, 2016 Tex. App. LEXIS 13782 (Tex. App.—Beaumont December 29, 2016, no pet. history). They had purchased windstorm insurance via their agent, and flood insurance via a different person at closing. After the storm damaged their house, they contacted their agent and reported the loss. They assumed he was the agent for both the windstorm and flood policies and that he would submit a claim to both insurance companies. However, the agent only notified the windstorm insurer of the windstorm claim and did not notify the other insurer of the flood claim. Eventually, the homeowners' flood claim was denied in part because the claim was not timely submitted. The homeowners then filed suit against their agent, alleging a number of causes of action, including breach of fiduciary duty. Ultimately, the trial court granted the agent a no-evidence summary judgment on the homeowners' claims.

On appeal, the homeowners contended that their fiduciary duty claim was based on the fact that the insurance agent was their "agent" and owed them fiduciary duties. The appellate court held that "there is no presumption of agency; thus, a party who alleges agency has the burden to prove the relationship." It defined an

agency relationship as “a consensual relationship that exists between two parties, in which one party, the agent, acts on behalf of the other party, the principal, subject to the principal’s control.” Further, the court held that “For an agency relationship to exist, there must be (1) a meeting of the minds between the parties to establish the relationship, and (2) some act constituting the appointment of the agent.” The only evidence the homeowners relied upon to show that they had an agency relationship with the insurance agent was the insurance agent’s testimony that he was their insurance agent for obtaining the windstorm policy. The court held:

Even if an agency relationship existed between Carrell and the Browns regarding the windstorm policy, there is no evidence that the scope of that agency, actual or apparent, extended to cover the flood insurance policy. The Browns failed to present any evidence to show a meeting of the minds between them and Carrell for Carrell to act as their agent with regard to the flood insurance policy or other evidence to reasonably show that he had apparent authority to act as an agent for Harleysville. The summary judgment evidence is that the Browns only assumed Carrell would take care of reporting their flood claim. Further, the Browns presented no evidence that Carrell had any authority regarding the Browns’ flood policy or that they had the right to control Carrell’s actions regarding the flood policy, elements necessary to show a principal-agent relationship.

The court concluded that the homeowners failed to meet their burden of producing summary judgment evidence regarding the first element of a breach-of-fiduciary-duty cause of action: that a fiduciary relationship existed between the plaintiff and defendant. The court affirmed the summary judgment dismissing the breach of fiduciary duty claim.

**Interesting Note:** The court of appeals held that there was no genuine issue of material fact regarding the existence of a fiduciary relationship between the homeowners and the insurance agent. This is generally the rule in Texas as an insurance broker or agent has no fiduciary duty to the insured. *See Toka Gen. Contrs. v. Wm. Rigg Co.*, No. 04-12-00474-CV, 2014 Tex. App. LEXIS 3776 (Tex. App.—San Antonio April 9, 2014, pet. denied) (court held that insurance agent was not a fiduciary of the customer); *Envtl. Procedures, Inc. v. Guidry*, 282 S.W.3d 602, 626-28 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) (concluding, after reviewing the evidence, that reasonable and fair-minded people could not conclude that a formal fiduciary relationship existed between an insurance broker and an insured); *Choucroun v. Sol L. Wisenberg Insurance Agency-Life & Health Division, Inc.*, No. 01-03-00637-CV, 2004 Tex. App. LEXIS 11097, 2004 WL 2823147, at \*4 (Tex. App.—Houston [1st Dist.] Dec. 9, 2004, no pet.) (holding that an insurance agent “owed no duty to explain the terms of the insurance policy to [the insured] or to advise him on other, alternative policy coverages” (citing *Critchfield v. Smith*, 151 S.W.3d 225, 230 (Tex. App.—Tyler

2004, pet. denied); *Moore v. Whitney-Vaky Ins. Agency*, 966 S.W.2d 690, 692 (Tex. App.—San Antonio 1998, no pet.); and *Pickens v. Tex. Farm Bureau Ins. Cos.*, 836 S.W.2d 803, 805 (Tex. App.—Amarillo 1992, no writ)). See also *Davidson v. W. Heritage Ins. Co.*, No. 5:13-CV-185-C, 2013 U.S. Dist. LEXIS 194844 (N.D. Tex. December 13, 2013); *Lexington Ins. Co. v. N. Am. Interpipe, Inc.*, Civ. A. H-08-3589, 2009 U.S. Dist. LEXIS 51806, 2009 WL 1750523 at \*2 (S.D. Tex. June 19, 2009). Rather, generally, an insurance agent owes his principal, the insurer, a fiduciary duty of good faith and fair dealing in all transactions on the insurer's behalf. See *American Indem. Co. v. Baumgart*, 840 S.W.2d 634, 639 (Tex. App.—Corpus Christi 1992, no writ). Additionally, an insurance agent owes the insurer strict integrity, fair and honest dealing, and the duty not to conceal matters which might influence his actions to the insurer's prejudice. See *id.* See also *Banner Life Ins. Co. v. Pacheco*, 154 S.W.3d 822, n. 8 (Tex. App.—Houston [14th Dist.] 2005, no pet.).

#### **I. Court Finds That There Is A Fact Issue On Whether Corporate Shareholder And Officer Breached Fiduciary Duties To Creditors**

In *Tow v. Wellington Yu*, a bankruptcy trustee sued a corporation's shareholder and officer for breaching fiduciary duties by entering into a settlement agreement that required the sale of real estate where the defendant would take a percentage of the proceeds. No. H-14-3103, 2017 U.S. Dist. LEXIS 21987 (S.D. Tex. January 30, 2017). The defendant filed a motion for summary judgment, and the trial court denied that motion regarding the breach of fiduciary duty claim.

The court first cited to the opinion in *Weaver v. Kellogg*, 216 B.R. 563, 583 (S.D. Tex. 1997). In *Weaver*, the court held that under Texas law "corporate insiders . . . may have a fiduciary duty to the corporation's creditors even when the corporation [is] not insolvent." *Id.* The "corporate insiders" in *Weaver* were two sole shareholders and directors of the corporation. *Id.* at 581-84. The *Weaver* court held that the "Plaintiff may therefore prevail on his breach of corporate duty claims if he shows, for each allegedly wrongful transaction, that [the corporation] was, at the time, in the 'vicinity of insolvency'; that the transaction led to [the corporation's] insolvency; or that the transaction was a fraudulent conveyance." *Id.* at 584. The *Weaver* court found that it could not decide, at the summary judgment stage, the issue of whether the defendants had breached their fiduciary duties because the above listed fact issues had not been resolved.

In *Tow*, the defendant contended that he did not breach his fiduciary duty to the company and its creditors because the settlement agreement was in their best interests. The trustee argued that the defendant breached his fiduciary duty by negotiating the settlement agreement to give himself a portion of the proceeds from the sale of the property, rather than the company.

The court noted that there was no dispute that defendant owed a fiduciary duty to the company as he was the sole shareholder of a company that was having

major financial issues and was in the “vicinity of insolvency” at the time the settlement agreement was executed, which was a few months before the company filed for bankruptcy. The court concluded:

Looking to *Weaver*, it is beyond debate that Defendant, as the sole shareholder and officer of PGI also owed a fiduciary duty to PGI’s creditors. Defendant gave up PGI’s interest in the Note and Deed of Trust, and he negotiated a settlement agreement where he kept a portion of the sale proceeds for himself, a non-party to the underlying transaction. Therefore, Defendant has failed to show that he did not breach his fiduciary duty to PGI as a matter of law. The court finds that a genuine issue of material fact exists whether Defendant breached his fiduciary duties to PGI, precluding summary judgment on Plaintiff’s claim.

**J. Court Finds Manufacturer/Distributor Relationship Does Not Create An Informal Fiduciary Relationship**

In *Samsung Electronics America v. Chung*, Samsung Electronics America, Inc. (“Samsung”) filed suit against All Pro Distributing, Inc. (“All Pro”) and certain former employees alleging claims for breach of fiduciary duty and aiding and abetting breach of fiduciary duty related to an alleged scheme involving the distribution of service parts for Samsung devices. No. 3:15-CV-4108-D, 2017 U.S. Dist. LEXIS 21700 (N.D. Tex. February 16, 2017). All Pro moved under Federal Rule of Civil Procedure 12(b)(6) to dismiss Samsung’s complaint for failure to state a claim.

The court first addressed the breach of fiduciary duty claim. Samsung asserted an informal fiduciary relationship existed because the two companies had a long standing business relationship of trust and confidence that went beyond any specific contracts. The court noted that an informal fiduciary relationship “may arise from a variety of relationships where the parties are ‘under a duty to act for or give advice for the benefit of another upon matters within the scope of their relation.’” *Id.* (citing *ARA Auto. Grp. v. Cent. Garage, Inc.*, 124 F.3d 720, 723 (5th Cir. 1997)). “The existence of a fiduciary relationship, outside of formal relationships that automatically give rise to fiduciary duties, is usually a fact intensive inquiry.” *Id.* “Under Texas law, ‘a fiduciary duty will not be lightly created’ since ‘it imposes extraordinary duties’ and requires the fiduciary to ‘put the interests of the beneficiary ahead of its own if the need arises.’” *Id.* Samsung cited *ARA* for the proposition that early Texas cases recognized an informal fiduciary duty existed where parties “were looking to profit from a shared risk, e.g., an oil and gas well, or the sale of a particular property and not where the parties’ positions, harmonized for purposes of self-interest, were yet naturally antagonistic.” *Id.* The court, however, stated that *ARA* also noted that “[n]o Texas [or federal] case cited by [plaintiff] or uncovered in our research has affirmed a fiduciary obligation in the context of a . . . manufacturer-distributor relationship, or other transactional setting involving experienced managers . . . . We decline to

be the first.” *Id.* The court was similarly unaware of any authority that would support Samsung’s claim and concluded that Samsung had failed to plead a plausible claim for breach of fiduciary duties.

The court then moved to the aiding and abetting breach of fiduciary duty claim. The court held: “It is settled as the law of this State that where a third party knowingly participates in the breach of duty of a fiduciary, such third party becomes a joint tortfeasor with the fiduciary and is liable as such.” *Id.* (citing *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 160 S.W.2d 509, 514 (Tex. 1942)). “For Samsung to state a claim for aiding and abetting breach of fiduciary duties, it must plead facts that enable the court to draw the reasonable inference that there was “(1) the existence of a fiduciary relationship; (2) that the third party knew of the fiduciary relationship; and (3) that the third party was aware that it was participating in the breach of that fiduciary relationship.” *Id.* (citing *Meadows v. Hartford Life Ins. Co.*, 492 F.3d 634, 639 (5th Cir. 2007)). Samsung alleged (1) that the employee defendants owed them fiduciary duties; (2) that All Pro knew the employees owed Samsung fiduciary duties; and (3) that All Pro knowingly participated in the employees’ breach by paying bribes to obtain discounted or free parts for Samsung devices. The court held that Samsung went beyond mere recital of the standard and alleged facts that, if true, enabled the court to draw the reasonable inference that All Pro is liable for the misconduct alleged. The court denied All Pro’s motion to dismiss this claim.

#### **K. Court Held That Company’s Employee Did Not Owe Fiduciary Duty To Vendor**

In *E-Learning LLC v. AT&T Corp.*, the plaintiff provided computer software services to the defendant. No. 04-16-00291-CV, 2017 Tex. App. LEXIS 1726 (Tex. App.—San Antonio 2017, no pet. history). Beginning in 2010, the parties changed the way they transacted business. From 2010 to 2012, the plaintiff provided goods and services on three projects and dealt exclusively with an employee of the defendant. In 2013, the employee asked plaintiff to develop a proposal for a new project. After submitting a proposal and amendments, the plaintiff began to work on the project. The employee then sent an email advising that funding for the project was not available. After the plaintiff sent an invoice for one-half the amount shown on the proposal, the employee informed the plaintiff that the defendant would not pay the invoice because it had never signed the proposal. The plaintiff then sued and asserted claims for breach of contract, quantum meruit, breach of fiduciary duty, negligent misrepresentation, fraud, and fraud by nondisclosure.

The trial court granted the employee a no-evidence summary judgment on the plaintiff’s breach of fiduciary duty claim. The court of appeals first addressed the legal standards for the plaintiff’s informal fiduciary relationship claim. The court stated that an informal fiduciary relationship may also arise from a moral, social, domestic, or purely personal relationship of trust and confidence. “However, to impose an informal fiduciary duty in a business transaction, the special

relationship of trust and confidence must exist prior to, and apart from, the agreement made the basis of the suit.” Furthermore, the court held that “subjective trust between parties to an arms-length transaction does not transform a business relationship into a fiduciary relationship.” Rather “[t]here must be evidence that the plaintiff relied on the defendant for moral, financial, or personal support or guidance.” The court reviewed the evidence and held that such a relationship was not formed in this case:

BDG argues it produced evidence to raise a fact issue as to the existence of a fiduciary relationship between it and Bishop. In support of this argument, BDG points to the relationship it developed with Bishop during the prior Bishop projects. However, this evidence fails to show that BDG’s relationship with Bishop rose to the level of a fiduciary relationship. There is no evidence that BDG relied on Bishop for moral, financial, or personal support or guidance. Instead, the evidence shows that BDG’s relationship with Bishop was purely a business relationship. Because BDG produced no evidence that it had a fiduciary relationship with AT&T, it did not raise a fact issue on this element.

*Id.* The court affirmed the trial court’s summary judgment on the plaintiff’s breach of fiduciary duty claim.

#### **L. Court Holds That Members of LLC May Owe Each Other Fiduciary Duties**

In *B Choice v. Epicentre Development Associates*, the federal district court affirmed a magistrate’s recommendations concerning whether members of an LLC owe fiduciary duties in Texas. No. H-14-2096, 2017 U.S. Dist. LEXIS 46284 (S. D. Tex. March 29, 2017). The court held that whether the members owed each other fiduciary duties was a fact question:

With regard to the breach of fiduciary duty issue, the EpiCentre Defendants challenge the citation of *Allen v. Devon Energy Holdings, LLC*, 367 S.W.3d 355 (Tex. App-Houston [1st Dist.] 2012, pet. granted, judgm’t vacated, w.r.m.). However, the court finds that the part of the case that is cited was not overruled, is still good law, and supports the Magistrate Judge’s decision that there is a genuine issue of material fact for the jury to [\*6] decide whether some of the EpiCentre Defendants owed a fiduciary duty to plaintiff. To be clear, the court is aware that, in dicta, another court stated that as of April 2010, no Texas court had found that fiduciary duties existed between members of a limited liability company as a matter of law. See *Entertainment Merchandising Technology, LLC v. Houchin*, 720 F. Supp.2d 792, 797 (N.D. Tex. 2010). However, that court acknowledged in the next sentence that whether such fiduciary duty existed was typically a question of fact. Therefore, the

court agrees with the Magistrate Judge that whether the EpiCentre Defendants owed a fiduciary duty to plaintiff is an issue of fact for the jury.

The court then denied the defendant's motion for summary judgment on that ground.

#### **M. Court Reverses Summary Judgment On Breach Of Fiduciary Duty Claim Against Corporate Director**

In *E&E Serv. & Supply v. Ruddick*, a corporation sued a former employee who formed a competing business. No. 11-14-00055-CV, 2016 Tex. App. LEXIS 7514 (Tex. App.—Eastland July 14, 2016, no pet. history). The trial court granted summary judgment for the employee based on the alleged absence of any evidence of a fiduciary duty.

The court of appeals reversed because the employee had served as an officer and director of the corporation in 2008, and, under corporate bylaws, may have continued to serve during the operable time period because, although she was not reappointed as a director, the bylaws provided that a director would continue to serve until a replacement was appointed and a replacement was not appointed until after the relevant time period. The court concluded: "At a minimum, the summary judgment evidence raises a fact question that Ruddick continued to serve as a director or as an officer until her successor was appointed in April 2011. Thus, the trial court erred when it granted summary judgment with respect to whether or not Ruddick owed a fiduciary duty based upon her status as a director and officer of E & E." *Id.*

The court of appeals also held that a traditional summary judgment was in error regarding damages because the employee did not negate all of the damages recoverable for a breach of fiduciary duty. The court noted that "The damages available for a breach of fiduciary duty are quite broad." *Id.* Further, the court held that "courts may disgorge all ill-gotten profits from a fiduciary when a fiduciary agent usurps an opportunity properly belonging to a principal, or competes with a principal." *Id.* Therefore, the court concluded that the "damage grounds do not negate all of the damages recoverable for a breach of fiduciary duty because they do not address any profits or gains received by" the employee or her new employer." *Id.*

#### **N. Court Holds That An Officer Of A General Partner Does Not Individually Owe Fiduciary Duties To The Partnership**

In *Rainier Income Fund I v. Gans*, two limited partnerships sued an individual, who was the president of the general partner of the partnerships and co-owner of the only other limited partner, for breaching fiduciary duties allegedly owed to the limited partnerships. No. 05-15-00460-CV, 2016 Tex. App. LEXIS 6042 (Tex. App.—Dallas June 7, 2016, no pet. history). The plaintiffs claimed that he



breached fiduciary duties to them by not declaring the partnerships dissolved and liquidated. The trial court held that the defendant did not owe any fiduciary duties.

The court of appeals held that there are two types of fiduciary relationships—formal and informal. “Formal fiduciary relationships arise as a matter of law and include the relationships between partners, among others.” The court noted that informal relationships arise from “a moral, social, domestic or purely personal relationship of trust and confidence, generally called a confidential relationship.” The court held that to impose such a relationship in a business transaction, the relationship must exist prior to, and apart from, the agreement made the basis of the suit. The court held that there was no evidence of a formal fiduciary relationship:

Gans is not a partner in the partnership; he is an officer of the general partner. Although appellants cite several cases involving partners who owe duties, appellants do not cite any case for the proposition that an officer of the general partner of a partnership owes a fiduciary duty to the partnership. Instead, they argue Gans “cannot be distinguished from the entities he controls.” Appellants did not, however, allege that the corporate identity of Star Creek, the general partner, should be disregarded. Appellants have not shown a formal fiduciary relationship.

*Id.* The court also held that the plaintiffs did not prove that the individual defendant had an informal fiduciary relationship because they did not direct the court to any evidence to show a prior relationship between the parties existed.

**Interesting Note:** Recently, a federal district court held that employees of fiduciaries may have individual liability for their actions. *Medve v. JPMorgan Chase Bank, N.A.*, No. H-15-2277, 2016 U.S. Dist. LEXIS 11961 (S.D. Tex. February 2, 2016). That court noted that there are three separate legal bases under Texas law for imposing liability on an employee who carries out the fiduciary functions of an entity: “(1) first, the employee owes a fiduciary duty directly as a subagent carrying out the employer’s fiduciary functions, (2) second, the employee is liable if he ‘participates’ in the employer’s breach of fiduciary duty, which the employee necessarily does if he is the one carrying out the breaches, and (3) third, the employee is personally liable for any tort he commits in the course of his employment, and breach of fiduciary duty is of course a tort.” *Id.* (citing *In re Merrill Lynch Trust Co. FSB*, 235 S.W.3d 185 (Tex. 2007); *Leyendecker & Assocs., Inc. v. Wechter*, 683 S.W.2d 369, 375 (Tex. 1984); *Searle-Taylor Mach. Co. v. Brown Oil Tools, Inc.*, 512 S.W.2d 335, 338 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ ref’d n.r.e.)). These issues were not raised in the Gans case, and the court in that case did not address these other potential arguments.

## O. Court Reverses Trial Court And Holds That Escrow Agent Owed Fiduciary Duties

In *Alpha Omega Chi v. Min*, an asset purchase buyer sued an escrow agent for breach of fiduciary duty when the agent released funds without verifying that there were no outstanding tax obligations. No. 05-15-00124-CV, 2016 Tex. App. LEXIS 6457 (Tex. App.—Dallas June 16, 2016, no pet. history). The trial court held a bench trial and found for the defendant, and the plaintiff appealed.

The court of appeals reversed. The court held that the “elements of a breach-of-fiduciary-duty claim are: (1) a fiduciary relationship existed between the plaintiff and defendant; (2) the defendant breached its fiduciary duty to the plaintiff; and (3) the defendant's breach resulted in injury to the plaintiff or benefit to the defendant.” The court then held that “[a]n escrow agent owes fiduciary duties to both the buyers and the sellers of the property, including the duty of loyalty, the duty to make full disclosure, and the duty to exercise a high degree of care to conserve the money placed in escrow and pay it only to those persons entitled to receive it.” After determining that the evidence proved that the defendant was an escrow agent, the court held that the trial court erred in holding that the defendant did not owe fiduciary duties. Thereafter, the court reviewed the parties’ agreement and held that it did not limit the defendant’s common-law fiduciary duties (even if it theoretically could do so).

The court also held that the trial court’s error was harmful. The court held that an error is harmful, and therefore reversible, if the error “(i) probably caused the rendition of an improper judgment, or (ii) probably prevented the appellant from properly presenting the case to the court of appeals.” The court held that:

It follows from finding 11 that the trial court evaluated the issues of breach, causation, and damages under the erroneous assumption that appellees did not owe any fiduciary duties to Alpha. But appellees did owe Alpha fiduciary duties—the duty of loyalty, the duty to make full disclosure, and the duty to exercise a high degree of care to conserve the money placed in escrow and pay it only to the persons entitled to receive it... Had the trial court applied the proper fiduciary standards of conduct to the trial evidence, it could have reached the conclusion that appellees breached those heightened duties. In particular, the trial court could have concluded that appellees’ failure to call the Texas Comptroller to see if any unpaid taxes were outstanding was a breach of the duty to exercise a high degree of care to conserve the money placed in escrow.

Therefore, the court reversed and remanded to the trial court to re-evaluate its findings in light of the fact that the defendant did owe fiduciary duties.

**P. Court Holds That Shareholders In Closely Held Business Do Not Owe Each Other Fiduciary Duties**

In *In re Fritz*, a bankruptcy court determined whether an exception to dischargeability was present. No. 15-347950BJH, 2017 Bankr. LEXIS 930 (N.D. Tex. Bankr. April 3, 2017). Although the state court judgment jointly awarded the plaintiffs \$100,000 in damages and post-judgment interest, it did not specify which of the claims pled in the underlying state court petition supported the award or otherwise allocated the damages between the plaintiffs. This failure to allocate damages among the pled claims was significant because some of the claims pled in the state court petition could have given rise to a nondischargeable judgment under § 523 of the Bankruptcy Code, while others did not.

Regarding the breach of fiduciary duty exception to dischargeability, the court noted that “A discharge under section 727 ... does not discharge an individual debtor from any debt ... for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny.” *Id.* (citing 11 U.S.C. § 523(a)(4)). The court stated: “This subsection is intended to address situations where ‘debts are incurred through abuses of fiduciary positions and through active misconduct whereby a debtor has deprived others of their property by criminal acts.’” The court held that:

[O]nce the Plaintiffs establish a breach of fiduciary duty under Texas law, they still have the burden of proof to “demonstrate the existence of the requisite elements of 11 U.S.C. § 523(a)(4),” such as the existence of the fiduciary duty prior to Fritz’s breaches. Thus, to establish their claim under § 523(a)(4), the Plaintiffs must prove Fritz “engaged in fraud or defalcation while acting in a fiduciary capacity.” “Defalcation is the neglect of a fiduciary duty.”

Turning first to the existence of a fiduciary duty, the Complaint summarily states that “Fritz remained an owner, officer, and director of [the Company], and therefore owed fiduciary duties to both the [C]ompany and to Hill.” As discussed above, the Court has deemed the factual allegations in the Plaintiffs’ Complaint as true. However, the Plaintiffs’ statement that Fritz owes a fiduciary duty to the Company and Hill is a conclusion of law, not a factual allegation. Conclusions of law are the purview of the Court and, as such, the Court does not accept this legal conclusion as true. Accordingly, the Court must independently determine whether Fritz owed a fiduciary duty to Hill and/or the Company.

Taking these in order, for Hill to succeed on his § 523(a)(4) claim, he must first prove that Fritz owed him a fiduciary duty. Although the Complaint generally alleges that Fritz owed a fiduciary duty to Hill, it does not explain the basis for such a duty. Based upon the record before it, the Court can only infer that the alleged fiduciary

duty is based upon Hill's and Fritz's positions as co-shareholders of the Company. Under Texas law, however, "a co-shareholder in a closely held corporation does not as a matter of law owe a fiduciary duty to his co-shareholder." Because Hill has failed to prove that Fritz owed him a fiduciary duty, Hill's § 523(a)(4) claim for fraud or defalcation while acting in a fiduciary capacity fails.

*Id.* (*Hoggett v. Brown*, 971 S.W.2d 472, 488 (Tex. App.—Houston [14th Dist.] 1997, no pet.) (no fiduciary duties between shareholders)).

The court then reviewed the dischargeability of the company's judgment, and held that the debtor did owe fiduciary duties to the company as an officer and director. However, the court was not able to allow a discharge because the underlying judgment was not specific enough to show that the trial court awarded the judgment based on a breach of fiduciary duty claim (as opposed to a breach of contract claim).

**Interesting Note:** This case raises a reoccurring issue in bankruptcy discharge cases arising from fiduciary cases: specificity of a state court judgment. A plaintiff should be very careful to obtain the necessary findings to support the exception to bankruptcy discharge and also obtain a judgment that makes the required findings and specifically grants damages based on a breach of fiduciary duty claim (potentially in addition to other claims). The author refers the reader to his earlier blog post on bankruptcy and dischargeability issues.

#### **Q. Court Affirms Jury Finding Of No Breach Of Fiduciary Duty In Partnership Dispute**

In *Thunder Rose Enters. v. Kirk*, the plaintiffs sued the defendant for various claims, including breach of fiduciary duty based on an alleged partnership dispute. No. 13-15-00431-CV, 2017 Tex. App. LEXIS 3481 (Tex. App.—Corpus Christi April 20, 2017, no pet. history). The jury determined that the defendant did not breach a duty, and the plaintiffs appealed.

The court of appeals initially held that the relationship between partners is fiduciary in character and "imposes upon all the participants the obligation of loyalty to the joint concern and of the utmost good faith, fairness, and honesty in their dealings with each other with respect to matters pertaining to the enterprise." *Id.* The court of appeals affirmed, holding that the plaintiffs/appellants did not explain in their briefing how their complaints constituted a breach of fiduciary duty:

Although they extensively cite the trial record, appellants offer no references to legal authority indicating that the specific actions purportedly taken by Kirk, even if they were conclusively established by the evidence, constitute breaches of his fiduciary duty. They also do not explain which of the duties listed in the jury

charge were breached by any of the alleged actions. In any event, the evidence conflicted with regard to these actions and the jury was entitled to believe the contrary evidence. We therefore determine that the evidence did not conclusively establish that Kirk breached his fiduciary duties in any of the manners specified in the jury charge.

*Id.*

## **R. Court Holds That Fiduciary Duties Did Not Arise In A Licensing Transaction**

In *Jacked Up, LLC v. Sara Lee Corp.*, Jacked Up entered into a licensing agreement whereby Sara Lee would produce and sell energy drinks developed by Jacked Up. No. 15-11019, 2017 U.S. App. LEXIS 7311 (5th Cir. April 25, 2017). Shortly thereafter, Sara Lee sold its beverage division to the J.M. Smucker Company (“Smucker”). Smucker decided not to assume Sara Lee’s licensing agreement with Jacked Up, and in November 2011, Sara Lee formally terminated the agreement. Jacked up then sued Sara Lee for breach of fiduciary duty and other claims, and the trial court dismissed all of the claims via summary judgment. Jacked Up appealed.

Jacked Up argued on appeal that its “partner’ relationship” with Sara Lee and the non-disclosure agreement (“NDA”) both parties signed created a fiduciary relationship between them. Sara Lee argued that the parties dealt with each other at arm’s length and noted that neither an NDA nor one party’s subjective trust in the other suffices to create fiduciary duties. The court of appeals agreed with Sara Lee and affirmed the dismissal of the breach of fiduciary duty claim. The court held that licensing agreements, NDAs, and other agreements requiring confidentiality generally do not create fiduciary relationships. The court found important that the licensing agreement made clear that it “does not, and shall not, be deemed to make any party hereto the agent, partner, joint venturer or legal representative of any other party for any purpose whatsoever.” *Id.* So, the parties’ express agreement negated a fiduciary relationship.

Jacked Up argued that it created a partnership with “dominant partner” Sara Lee. But it failed to cite any authority for the proposition that a dominant party in a commercial transaction, where each party is represented by counsel, owes fiduciary duties to the weaker party. The court did not find any authority either. Jacked Up argued that “the collaborative effort to develop the products, the joint marketing efforts, . . . and the promises of a long-term deal all would permit a reasonable juror to find the existence of a fiduciary relationship.” *Id.* The court held: “Such corporate dealings do not transform an arm’s length transaction into a fiduciary relationship.” *Id.* The court concluded: “In sum, Jacked Up fails to point to sufficient evidence that would support finding a fiduciary relationship between the parties. Therefore, we affirm the district court’s grant of summary judgment in favor of Sara Lee on Jacked Up’s breach of fiduciary duty claim.” *Id.*

## S. Court Reverses Summary Judgment For Directors Where They Could Not Consent To Their Own Breaches of Fiduciary Duty

In *Corley v. Hendricks*, three individuals (Gaylen, Dan, and Corley) operated a business as shareholders, officers, and directors. No. 02-16-00293-CV, 2017 Tex. App. LEXIS 3846 (Tex. App.—Fort Worth April 27, 2017, no pet. history). Galen then terminated Corley and removed him as an officer and director. Corley then sued the other two for breach of fiduciary duty, theft under the TTLA, fraud, and civil conspiracy, as well as a shareholder’s derivative action under Texas Business Organizations Code section 21.563. Tex. Bus. Orgs. Code Ann. § 21.563 (West 2012). During the course of discovery, an expert learned that Gaylen had moved \$2.4 million from a retained earnings account to Gaylen’s personal account and did other inappropriate activities such as pay for family vacations from the business. Galen and Dan filed a motion for no-evidence summary judgment on Corley’s theft claim under the TTLA, asserting that there was no evidence that they acted without consent. They argued that because Gaylen and Dan were officers and directors at the time of Gaylen’s actions, her actions had the effective consent of the company. The trial court granted the defendants’ motion for summary judgment, and the plaintiff appealed.

The court of appeals reversed, holding that Gaylen and Dan could not give consent to the improper transactions because they were interested directors and officers. “Interested directors and shareholders cannot give effective consent to breaching their fiduciary duty to the company by stealing from the company at the expense of other directors and shareholders.” *Id.* The court held:

In Corley’s affidavit attached to his summary judgment response, he stated that he did not know and was not told about the transactions in which the Hendrickses allegedly stole funds from SSBI. Corley could not consent to transactions he knew nothing about. Corley thus presented the trial court with more than a scintilla of summary judgment evidence that he—the only disinterested director and shareholder—had not consented to the transactions. See Tex. Bus. Orgs. Code Ann. § 21.418(b)(1) (providing that a transaction involving an interested director is valid if the material facts as to the director’s interest in the transaction are disclosed and the transaction is approved by the majority of disinterested directors or by a good faith vote by the shareholders).

The Hendrickses’ only summary judgment ground relied on their ability to consent to the transactions, which, as a matter of law, they could not do. Because the Hendrickses could not consent to their own theft, and because Corley produced evidence that he did not consent to the transactions, Corley produced evidence raising a fact issue about whether SSBI had consented to the transactions.

*Id.* The court reversed the summary judgment and remanded the case for further proceedings in the trial court.

#### **T. Court Voided Judgment Based On Family Settlement Agreement Where Party Revoked Consent**

In *In re Estate of Spiller*, a party appealed an order admitting a will to probate and ordering the independent administrator to distribute the estate in accordance with a family settlement agreement. No. 04-15-00449-CV, 2016 Tex. App. LEXIS 6811 (Tex. App.—San Antonio June 29, 2016, no pet. history). Earlier in the case, there was a will contest on the basis of mental competence and undue influence. The parties then went to a hearing and announced that they had settled the dispute and read the family settlement agreement into the record. The parties then had disputes about what some of the terms of the settlement meant. One party filed a motion to enter a judgment based on the agreement, and the other party objected to the judgment stating that the agreement was not final. The trial court then entered an order based on the agreement.

The court of appeals reversed the order and held that it was void. The court held that a “party may revoke its consent to a settlement agreement at any time before judgment is rendered on the agreement.” *Id.* Further, a “judgment rendered after one of the parties revokes his consent is void.” *Id.* The court noted that the trial court stated that it approved the family settlement agreement and “will sign an order” admitting the will to probate in accordance with the agreement. The court of appeals held that in using the future term “will,” the trial court expressed an intention to render the order in the future. *Id.* The court concluded:

Willman, however, revoked his consent to the family settlement agreement before any order was subsequently rendered. Because the trial court rendered the order admitting the 2006 will to probate and ordering the distribution of the estate in accordance with the family settlement agreement after Willman revoked his consent to the family settlement agreement, the trial court's order is void.

*Id.* The court of appeals noted that whether the family settlement agreement was an enforceable contract and would support a breach of contract claim was not before the court. *Id.* (citing *S & A Rest. Corp. v. Leal*, 892 S.W.2d 855, 857 n.1 (Tex. 1995) (noting party revoking consent to settlement agreement could be sued for breach of the settlement agreement)). Accordingly, on remand, the party seeking to enforce the agreement can file a breach of contract claim and attempt to enforce the agreement after an adjudication of that claim.

## V. Potpourri Issues

### A. Texas Supreme Court Addresses The Causation Requirement For A Breach Of Fiduciary Duty Claim And Conspiracy, Aiding And Abetting Breach Of Fiduciary Duty, And Joint Venture Theories

In *First United Pentecostal Church of Beaumont v. Parker*, a church hired an attorney to defend it against sexual abuse allegations. 2017 Tex. LEXIS 295 (Tex. March 17, 2017). During the same time, the church also engaged the attorney to assist in a hurricane/insurance claim. When the insurance company offered to pay over \$1 million to settle the claim, the attorney generously suggested that the church leave those funds in the attorney's trust account to assist with creditor protection. The attorney then withdrew those funds in 2008 and used them for his personal expenses and the expenses of his firm. The attorney had a contract attorney working with his firm. The contract attorney did not know about the improper use of the money at the time that it was done. Rather, he learned about it in 2010, but failed to disclose that information to the client. Eventually, the contract attorney did disclose the information and sent a letter wherein he repented and admitted to breaching his fiduciary duty. The original attorney fled to Arkansas, but was later caught. He pled guilty to misappropriation of fiduciary property and received a fifteen-year sentence.

Not in the forgiving mood, the church then filed a lawsuit against the attorney, his firm, and the contract attorney for a number of causes of action, including breach of fiduciary duty, conspiracy to breach fiduciary duty, and aiding and abetting breach of fiduciary duty. The contract attorney filed a no-evidence motion for summary judgment, mainly arguing that there was no evidence that his conduct caused any damages to the client. Basically, he argued that the deed was already done when he learned of the attorney's theft and his assistance in covering up the theft did not cause any damage. The trial court granted the motion for summary judgment, and the client appealed. The court of appeals affirmed the judgment, though there was a dissenting justice.

The Texas Supreme Court first addressed whether the trial court correctly rendered judgment for the contract attorney on the breach-of-fiduciary-duty claim. The court held that the elements of a claim for breach of fiduciary duty are (1) the existence of a fiduciary duty, (2) breach of the duty, (3) causation, and (4) damages. The court agreed in part with the client's argument that under *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 160 S.W.2d 509, 514 (Tex. 1942), that proof of damages was not required when the claim is that an attorney breached his fiduciary duty to a client and that the client need not produce evidence that the breach caused actual damages. The court held that when the client seeks equitable remedies such as fee forfeiture or disgorgement, that the client does not need to prove that the attorney's breach caused any damages. However, the court held that when the client seeks an award of damages (a legal



remedy) that the client does have to prove that the attorney's breach caused the client injury:

Plainly put, for the church to have defeated a no-evidence motion for summary judgment as to a claim for actual damages, the church must have provided evidence that Parker's actions were causally related to the loss of its money. It did not do so. On the other hand, the church was not required to show causation and actual damages as to any equitable remedies it sought.

The contract attorney argued that the summary judgment should be affirmed because, although the client did plead equitable remedies in the trial court, that the client waived those claims by failing to raise them in its appellate briefing. The court held that, although the client did not use the terms "equitable," "forfeiture," or "disgorgement" in its brief, that the client's issue statement "fairly" included that argument. The court reversed the trial court's summary judgment regarding the client's equitable remedies because there was no causation requirement.

The court then turned to the conspiracy claim. The court held that an action for civil conspiracy has five elements: (1) a combination of two or more persons; (2) the persons seek to accomplish an object or course of action; (3) the persons reach a meeting of the minds on the object or course of action; (4) one or more unlawful, overt acts are taken in pursuance of the object or course of action; and (5) damages occur as a proximate result. The court explained:

An actionable civil conspiracy requires specific intent to agree to accomplish something unlawful or to accomplish something lawful by unlawful means. This inherently requires a meeting of the minds on the object or course of action. Thus, an actionable civil conspiracy exists only as to those parties who are aware of the intended harm or proposed wrongful conduct at the outset of the combination or agreement.

In this case, the client argued that there were two possible conspiracies: an initial conspiracy to steal its money, and a subsequent conspiracy to cover up the theft. Regarding the first theory, the court held that there was no evidence that the contract attorney knew that the original attorney had withdrawn and spent the money at the time that it happened and affirmed the trial court's summary judgment on that theory. Regarding the second theory, the court held that there was no evidence that the contract attorney's actions caused any damage. The court held that a conspiracy plaintiff must establish that a conspiracy defendant's actions caused an amount of harm, and thus prior actions by co-conspirators are not sufficient to prove causation:

The actions of one member in a conspiracy might support a finding of liability as to all of the members. But even where a conspiracy is

established, wrongful acts by one member of the conspiracy that occurred before the agreement creating the conspiracy do not simply carry forward, tack on to the conspiracy, and support liability for each member of the conspiracy as to the prior acts. Rather, for conspirators to have individual liability as a result of the conspiracy, the actions agreed to by the conspirators must cause the damages claimed. Here the church does not reference evidence of a conspiracy between Parker and Lamb to take or spend the church's money. Rather, it points to evidence that once Parker learned that the church's money was gone, he was concerned—as he well should have been—and he agreed with Lamb to try to replace it. The evidence that Parker conspired with Lamb to cover up the fact that the money was missing and attempt to replace it was evidence that Parker tried to mitigate the church's loss, not that he conspired to cause it. The damage to the church had already been done when Parker and Lamb agreed to cover up the theft and try to replace the money.

The court affirmed the trial court's summary judgment on the conspiracy claim.

The court reviewed the aiding and abetting breach of fiduciary duty claim. The court first held that the client did not adequately raise that claim in the summary judgment proceedings and waived it. In any event, assuming such a claim existed and assuming it was adequately raised, the court held that there was not sufficient evidence to support such a claim in this case:

Moreover, as noted above, although we have never expressly recognized a distinct aiding and abetting cause of action, the court of appeals determined that such a claim requires evidence that the defendant, with wrongful intent, substantially assisted and encouraged a tortfeasor in a wrongful act that harmed the plaintiff. Here the church references no evidence that Parker assisted or encouraged Lamb in stealing the church's money. In his response to the PSI report, Lamb disclaimed Parker's involvement, and Parker clearly and consistently disclaimed knowing that Lamb was taking the church's money from the firm's trust account until the summer of 2010 after the money was gone. While it is true that Parker helped Lamb cover up the theft, this cannot be the basis for a claim against Parker for aiding and abetting Lamb's prior theft or misapplication of the church's money when there is no evidence that Parker was aware of Lamb's plans or actions until after they had taken place. See *Juhl*, 936 S.W.2d at 644-45 (noting that courts should look to the nature of the wrongful act, kind and amount of assistance, relation to the actor, defendant's presence while the wrongful act was committed, and defendant's state of mind (citing RESTATMENT (SECOND) OF TORTS § 876 cmt. d (1977))). As we discussed above, Lamb spent all of the church's

money before Parker became involved, and there is no evidence the church was harmed by the only wrongful act in which Parker assisted or encouraged Lamb—covering up the fact that Lamb had spent the church's money.

The court finally addressed a joint venture claim by the client. The court held that the elements of a joint venture are (1) an express or implied agreement to engage in a joint venture, (2) a community of interest in the venture, (3) an agreement to share profits and losses from the enterprise, and (4) a mutual right of control or management of the enterprise. "Joint venture liability serves to make each party to the venture an agent of the other venturers and hold each venturer responsible for the wrongful acts of the others in pursuance of the venture." The court reviewed evidence offered by the client and held that it was taken out of context. The court held that none of the evidence provided support for the client's claim that there was "an express or implied agreement by Parker to be part of a joint venture with Lamb for the purpose of stealing the church's money." Therefore, the court affirmed the summary judgment on the joint venture claim.

**Interesting Note:** The court held that it had previously expressly stated that Texas had not adopted an aiding and abetting claim at this time. The court cited to its previous opinion of *Juhl v. Airington*, 936 S.W.2d 640, 643 (Tex. 1996), wherein the court held that there was a question in Texas as to whether there is a concert of action theory. That case dealt with whether a group of parties were responsible for a negligence claim and did not address a breach of fiduciary duty claim.

This case highlights a rather confusing area of law in Texas. The Texas Supreme Court has previously held that there is a claim for knowing participation in a breach of fiduciary duty in Texas. See *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 138 Tex. 565, 160 S.W.2d 509, 514 (1942). The general elements for a knowing-participation claim are: 1) the existence of a fiduciary relationship; 2) the third party knew of the fiduciary relationship; and 3) the third party was aware it was participating in the breach of that fiduciary relationship. *Meadows v. Harford Life Ins. Co.*, 492 F.3d 634, 639 (5th Cir. 2007).

Depending on how the Texas Supreme Court rules in the future, there may be a recognized aiding-and-abetting breach-of-fiduciary-duty claim in Texas. The Texas Supreme Court has stated that it has not expressly adopted a claim for aiding and abetting outside the context of a fraud claim. See *Ernst & Young v. Pacific Mut. Life Ins. Co.*, 51 S.W.3d 573, 583 n. 7 (Tex. 2001); *West Fork Advisors v. Sungard Consulting*, 437 S.W.3d 917 (Tex. App.—Dallas 2014, no pet.). Notwithstanding, Texas courts have found such an action to exist. See *Hendricks v. Thornton*, 973 S.W.2d 348 (Tex. App.—Beaumont 1998, pet. denied); *Floyd v. Hefner*, 556 F.Supp.2d 617 (S.D. Tex. 2008). One court identified the elements for aiding and abetting as the defendant must act with unlawful intent and give substantial assistance and encouragement to a wrongdoer in a tortious act. *West Fork Advisors*, 437 S.W.3d at 921.

There is not any particularly compelling guidance on whether these claims (knowing participation and aiding and abetting) are the same or different or whether they are recognized in Texas or not. And if they do exist and are different, what differences are there regarding the elements of each claim? The Texas Supreme Court still has much to explain related to this area of law.

The Texas Supreme Court does appear to clear up one important causation issue. There was confusion as to whether a finding of conspiracy or aiding and abetting or knowing participation automatically imposes joint liability on all defendants for all damages. Most of the cases seem to indicate that a separate damage finding is necessary for each defendant because the conspiracy may not proximately cause the same damages as the original bad act. See *THPD, Inc. v. Continental Imports, Inc.*, 260 S.W.3d 593 (Tex. App.—Austin 2008, no pet.); *Bunton v. Bentley*, 176 SW.3d 1 (Tex. App.—Tyler 1999), *aff'd in part, rev'd in part on other grounds*, 914 S.W.3d 561 (Tex. 2002); *Belz v. Belz*, 667 S.W.2d 240 (Tex. App.—Dallas 1984, writ ref'd n.r.e.). The court has now held that the conspiracy defendant's actions must cause the damages awarded against it, and a plaintiff cannot solely rely on just the original bad actor's conduct. So, there should be a finding of causation and damages for each conspiracy defendant (unless the evidence proves as a matter of law that all conspiracy defendants were involved from the very beginning). For a great discussion of these forms of joint liability for breach of fiduciary duty, please see E. Link Beck, *Joint and Several Liability*, STATE BAR OF TEXAS, 10TH ANNUAL FIDUCIARY LITIGATION COURSE (2015).

## **B. Court Holds That Former Broker Did Not Owe Fiduciary Duties To Client Regarding An Investment**

In *Holmes v. Newman*, the plaintiff made an investment in a start-up internet company that provided betting tips to gamblers for a fee. No. 01-16-00311-CV, 2017 Tex. App. LEXIS 6177 (Tex. App.—Houston [1st Dist.] July 6, 2017, no pet. history). The defendant, Newman, worked at TD Ameritrade and the plaintiff, Holmes, was a customer. Newman left TD Ameritrade before the investment in the start-up company. After the investment did not turn out as hoped, the plaintiff sued the defendant for various claims, including breach of fiduciary duty. The defendant filed a no-evidence motion for summary judgment, which the trial court granted.

In the appellate court, the plaintiff did not contend that any formal relationship between him and the defendant gave rise to a fiduciary duty at the time of their agreement; rather, he argued that the prior broker/client relationship between the two gave rise to an informal fiduciary duty because that prior relationship of trust and confidence caused him to rely on the defendant for financial advice, including the decision to invest in the start-up business. The court of appeals analyzed the duties owed by brokers:

While a broker owes his investor-client a fiduciary duty, that duty varies in scope with the nature of their relationship. The nature of the account—whether nondiscretionary or discretionary—is one factor to be considered, as are the degree of trust placed in the broker and the intelligence and qualities of the consumer. A broker’s duty is usually restricted to executing the investor’s order when the investor controls a nondiscretionary account and retains the ability to make investment decisions. In a nondiscretionary account, the fiduciary relationship is one of principal/agent, and the agency relationship begins when the customer places the order and ends when the broker executes it; the broker’s duties in this type of account are only to fulfill the mechanical, ministerial requirements of the purchase or sale of the security or futures contracts on the market. As a general proposition, a broker’s duty in relation to a nondiscretionary account is complete, and his authority ceases, when the sale or purchase is made and the receipts therefrom accounted for. There is nothing in the record to show that Holmes’s account with TD Ameritrade was discretionary or that the broker/client relationship between the two gave rise to anything other than a principal/agent duty to execute the trades ordered. Thus, Holmes has not raised a fact question regarding whether Newman owed him any fiduciary duty other than fulfilling the trades authorized by Newman.

Because Newman’s fiduciary duty was satisfied once the trades were made in accordance with Holmes’s instructions, it is not the sort of preexisting relationship of trust and confidence that would give rise to a continuing, informal relationship imposing even broader fiduciary duties than Newman held under the prior relationship.

*Id.* The court of appeals affirmed the trial court’s judgment for the defendant.

**Interesting Note:** This case is consistent with existing Texas law. “In a non-discretionary account, the agency relationship begins when the customer places the order and ends when the broker executes it because the broker’s duties in this type of account, unlike those of an investment advisor or those of a manager of a discretionary account, are ‘only to fulfill the mechanical, ministerial requirements of the purchase or sale of the security or future[s] contracts on the market.’” *Hand v. Dean Witter Reynolds Inc.*, 889 S.W.2d 483, 493 (Tex. App.—Houston [14th Dist.] 1994, writ denied). “As a general proposition, a broker’s duty in relation to a non-discretionary account is complete, and his authority ceases, when the sale or purchase is made and the receipts therefrom accounted for.” *Id.*

Indeed, Texas courts have generally held that self-directed accounts are not special deposits that require fiduciary duties between the holder and

depositor. See *Lee v. Gutierrez*, 876 S.W.2d 382 (Tex. App.—Austin 1994, no writ); *Sammons v. Elder*, 940 S.W.2d 276 (Tex. App.—Waco 1997, no writ). In one case, the court held that a custodian had no right to approve a transaction, and that the customer had the legal right to transfer assets that were supposed to be in the account. See *Colvin v. Alta Mesa Resources*, 920 S.W.2d 688 (Tex. App.—Houston [14th Dist.] 2001, no pet.).

Notwithstanding, customers have sued financial institutions for doing as directed and not warning the customer of the impact of the directions. In *Sterling Trust Co. v. Adderley*, the Texas Supreme Court remanded an issue back to the trial court due to an improper jury instruction regarding breach of fiduciary duties. 168 S.W.3d 835 (Tex. 2004). The self-directed account custodian/defendant was originally found to be secondarily liable for aiding a fraudulent scheme that misappropriated money from investors. The jury instruction regarding a breach of fiduciary duty was held to be improper because it was overly broad and did not account for the contractual limitations on fiduciary duties, which the Court held were allowed under Texas law. See *id.* at 847. The limiting provisions stated, “Sterling Trust has no responsibility to question any investment directions given by the individual regardless of the nature of the investment,” and that “Sterling Trust is in no way responsible for providing investment advice.” *Id.* Although the Texas Supreme Court did not analyze common-law duties owed by defendants, it did make clear that contractual limitations would impact duties owed between parties.

As opposed to a self-directed IRA account, a discretionary account allows the custodian to make investment and other decisions for the customer. A discretionary account is one where the broker makes the investment decisions and manages the account. As one court described, “[a]n unsophisticated investor is necessarily entrusting his funds to one who is representing that he will place the funds in a suitable investment and manage the funds appropriately for the benefit of his investor/entrustor. The relationship goes well beyond a traditional arms’-length business transaction that provides ‘mutual benefit’ for both parties.” *Western Reserve Life Assur. Co. v. Graben*, 233 S.W.3d 360 (Tex. App.—Fort Worth 2007, no pet.) (affirmed breach of fiduciary duty claim against defendant).

Whereas a self-directed account custodian or broker can simply execute the trades directed by the customer without fear of liability, the same cannot be said of a discretionary account custodian. As one court stated, the custodian “acted as a financial advisor whom the Clients trusted to monitor the performance of their investments and recommend appropriate financial plans to them. Accordingly, the duty that Hutton owed the Clients went well beyond the ‘narrow’ duty of executing trade orders.” *Western Reserve Life Assur. Co. v. Graben*, 233 S.W.3d at 374.

The custodian of a discretionary account has to meet a higher duty of care. See *Anton v. Merrill Lynch*, 36 S.W.3d 251, (Tex. App.—Austin 2001, pet. denied). In *Anton*, the court described these duties as:

(1) manage the account in a manner directly comporting with the needs and objectives of the customer as stated in the authorization papers or as apparent from the customer's investment and trading history; (2) keep informed regarding the changes in the market which affect his customer's interest and act responsively to protect those interests; (3) keep his customer informed as to each completed transaction; and (4) explain forthrightly the practical impact and potential risks of the course of dealing in which the broker is engaged.

*Id.* at 257-58.

### **C. Courts Of Appeals Address Conspiracy, Knowing Participation, and Aiding And Abetting Breach Of Fiduciary Duty Claims**

In *Rhymes v. Filter Res., Inc.*, a former employer sued a former employee and the employee's new business for breach of contract, breach of fiduciary duty, and tortious interference related to the employee's competition with the former employer after leaving its employ. No. 09-14-00482-CV, 2016 Tex. App. LEXIS 10394 (Tex. App.—Beaumont September 22, 2016, no pet. history). The jury found that the defendants tortiously interfered with the former employer's relationships with customers, and the defendants appealed.

The court of appeals affirmed the breach of fiduciary duty finding against the employee as he formed his company and contacted his former employer's customers before leaving his employ. The court then turned to the tortious interference finding. The court of appeals held that to prevail on a claim for tortious interference, a plaintiff must prove the following: "(1) there was a reasonable probability that the plaintiff would have entered into a business relationship with a third party; (2) the defendant either acted with a conscious desire to prevent the relationship from occurring or knew the interference was certain or substantially certain to occur as a result of the conduct; (3) the defendant's conduct was independently tortious or unlawful; (4) the interference proximately caused the plaintiff injury; and (5) the plaintiff suffered actual damage or loss as a result." *Id.* The court held that breach of fiduciary duty is an intentional tort, and also held that when "a third party knowingly participates in the breach of duty of a fiduciary, such third party becomes a joint tortfeasor with the fiduciary and is liable as such."

The defendant argued that knowing participation could not support the jury's finding of tortious interference because there was no separate question on that issue. The court of appeals disagreed. The jury was asked if "Rhymes and/or Rhymes Industrial intentionally interfere[d] with Filter Resources' prospective contractual or business relations[.]" The trial court instructed the jury that tortious interference occurs, in part, when the party "acted with a conscious desire to prevent the relationship from occurring or knew that the interference was certain

or substantially certain to occur as a result of his conduct[.]” The court of appeals concluded that the knowing participation claim was subsumed within this question/instruction:

To find that Industrial knowingly participated in Rhymes’s breach, the jury would have to find that (1) Industrial knew that Rhymes owed a duty to Filter and (2) Industrial was aware of its participation in the breach. Such findings are subsumed within the jury’s conclusion that Industrial knew that interference with Filter’s relationships was certain or substantially certain to occur as a result of Rhymes’s conduct. The trial court was not required to submit a separate question on knowing participation.

Finally, the defendant also contended that knowing participation cannot support tortious interference because it is a derivative tort rather than an independent tort. The court disagreed, holding that “‘Independently tortious’ does not mean that the plaintiff must prove an independent tort; rather, it means that the ‘defendant’s conduct would be actionable under a recognized tort.’” The court of appeals affirmed the jury’s liability verdict for the plaintiff.

In *Zaidi v. Shah*, business partners were involved in litigation regarding the purchase and sale of real property for the operation of a hospital. No. 14-14-00855-CV, 2016 Tex. App. LEXIS 9989 (Tex. App.—Houston [14th Dist.] September 8, 2016, no pet. history). The trial court found for the plaintiffs against all defendants, and awarded over \$13 million dollars in damages. One of the plaintiffs’ claims was that the defendants breached a fiduciary duty, and the court found that the defendants, individually and collectively, owed fiduciary duties to the plaintiffs and committed various acts and omissions that would breach such duties, such as making material misrepresentations and failing to disclose material facts. One set of defendants challenged this holding because they did not owe fiduciary duties. The court of appeals held:

Fiduciary duties arise in two types of relationships. A confidential relationship—which may arise from a moral, social, domestic, or purely personal relationship of trust and confidence—may give rise to an informal fiduciary duty. An informal fiduciary duty will not be imposed in a business transaction unless the personal confidential relationship existed prior to, and apart from, “the agreement made the basis of the suit.”

The court noted that the plaintiffs neither alleged nor offered evidence of such a preexisting confidential relationship with any member of the appealing defendants. The court also noted that the plaintiffs did not dispute the absence of fiduciary duties, but instead argued only that one defendant was a fiduciary to many parties and that “all entities and individuals who conspired with, participated with, aided/abetted, or employed Zaidi while he was committing any breaches of fiduciary duty were also responsible for those breaches.” *Id.* The



court of appeals noted that there was a difference between a breach-of-fiduciary-duty claim and an aiding-and-abetting breach-of-fiduciary duty claim:

But, to hold the General Partner, Chagla, and Prestige liable for conspiring in Zaidi's breach of fiduciary duty is one theory of liability, and to hold them liable for breaching their own fiduciary duties is a distinct theory of liability. Regardless of whether there is legally sufficient evidence that Zaidi's co-defendants conspired in his breach of fiduciary duty—a question we do not address—such evidence would not support a finding that each of the Turnaround Parties owed fiduciary duties to each of the Borrowers.

The court of appeals reversed and remanded the case for a new trial because the trial court in a bench trial failed to adequately present findings of fact and conclusions of law that linked its damages findings to valid causes of action.

In *OrchestrateHR, Inc. v. Trombetta*, a former employer sued its prior employee for breach of fiduciary duty and other related claims arising from the former employee's competition with the former employer. No. 3:13-CV-2110-KS-BH, 2016 U.S. Dist. LEXIS 117986 (N.D. Tex. September 1, 2016). The former employer also sued other defendants for aiding and abetting the former employee in that breach of fiduciary duty. The opinion does not discuss the underlying facts and evidence in any detail. The defendants filed a motion for summary judgment, arguing that Texas does not recognize an aiding-and-abetting breach-of-fiduciary-duty claim. The district court denied this aspect of the motion, stating: "it is well-established under Texas law that third parties may be liable as a joint tortfeasor where they 'knowingly participate in the breach of the duty of a fiduciary.'" *Id.*

In *Wooters v. Unitech Int'l, Inc.*, a former employer, Unitech, sued its former employees for breach of fiduciary duty when it discovered that those employees had stolen its trade secrets in preparation for launching a competing company. No. 01-15-00174-CV, 2016 Tex. App. LEXIS 9610 (Tex. App.—Houston [1st Dist.] August 30, 2016, no pet. history). Unitech sued a third-party, Wooters, alleging that Wooters had conspired with the former employees to breach their fiduciary duties to Unitech, to steal Unitech's trade secrets, and to unlawfully convert Unitech's property. A jury found that Wooters had conspired to breach the former employees' fiduciary duties to Unitech, and Wooters appealed.

The court of appeals first reviewed the law concerning conspiracy. The court stated:

Civil conspiracy is a combination by two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means. The essential elements of a civil conspiracy are (1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or

more unlawful, overt acts; and (5) damages as the proximate result.... Proof of a joint intent to engage in the conduct that resulted in the injury, without more, does not establish a cause of action for civil conspiracy. Civil conspiracy instead requires the specific intent to agree to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means. '[T]he parties must be aware of the harm or wrongful conduct at the inception of the agreement.' ... Texas has recognized a cause of action for conspiracy to breach a fiduciary duty in transactions in which a third party knowingly participates in an employee's breach of fiduciary duty during his employment and the third party improperly benefits from it.

The court also analyzed the competing interests regarding an employee's fiduciary duties to its employer:

Because Unitech's conspiracy claim against Wooters is based on the underlying wrongful conduct of breach of a fiduciary duty by an employee against an employer, we consider the law that defines the parameters of that duty. An employee has a duty to act primarily for the benefit of his employer in matters connected with his employment. An employee may not (1) appropriate the company's trade secrets; (2) solicit the former employer's customers while still working for his employer; (3) solicit the departure of other employees while still working for his employer; or (4) carry away confidential information.... But the basis for liability for breach of an employee's duty is limited: it is "tempered by society's legitimate interest in encouraging competition." Thus, "[a]n at-will employee may properly plan to go into competition with his employer and may take active steps to do so while still employed" and may secretly do so with other employees, without disclosing his plans to his employer. An employee also may use his general skills and knowledge obtained through employment to compete with the former employer. Thus, an employee's duty to his employer does not require an employee to disclose his plans to compete; he may secretly join with other employees to plan a competing company without violating any duty to his employer.

The court then analyzed the evidence and found that there was no evidence that Wooters conspired to breach fiduciary duties. The court first noted that Wooters was not a party to any agreement between Unitech and its former employees and "those agreements cannot serve as the basis for determining whether Wooters engaged in a conspiracy to breach fiduciary duty under the common law." *Id.* Rather, the court framed the issue thusly: "some evidence must show that Wooters knowingly participated in an unlawful breach of duty beyond lawful preparation to compete. Thus, we consider whether a reasonable jury could find that Wooters, a non-employee, agreed with Kutach and Pennington that they

would breach the fiduciary duty they owed to Unitech and knowingly participated in that breach to his benefit in connection with the steps that they took toward realizing Infinity Subsea as a competing company.” *Id.* The court reviewed a number of facts that implicated the former employees’ breaches of duty, but noted that no evidence showed that Wooters was involved in those specific actions and that most of them occurred before Wooters was involved. Further, “[t]he evidence of Wooters’s participation in a plan to form Infinity Subsea and solicitation of investors toward that effort, without more, cannot support the conspiracy finding against Wooters, as it is evidence of plans to compete, which is not unlawful.” *Id.* The court also disregarded evidence of phone calls: “The phone records do not support an inference of knowing participation in a breach of fiduciary duty as more likely than an inference that the discussions revolved around formulating future business plans. The latter does not denote conspiracy to participate in tortious conduct.” *Id.* The court concluded: “Because no evidence demonstrates that Wooters knowingly participated in unlawful conduct for an improper gain beyond evidence of participation in plans to compete when Kutach and Pennington’s employment ended, no evidence supports a finding against Wooters for civil conspiracy to breach a fiduciary duty.”

**Interest Note:** These cases highlight a rather confusing area of law in Texas. There is a claim for knowing participation in Texas. See *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 138 Tex. 565, 160 S.W.2d 509, 514 (1942). The general elements for a knowing-participation claim are: 1) the existence of a fiduciary relationship; 2) the third party knew of the fiduciary relationship; and 3) the third party was aware it was participating in the breach of that fiduciary relationship. *Meadows v. Harford Life Ins. Co.*, 492 F.3d 634, 639 (5th Cir. 2007).

There may be a recognized aiding-and-abetting breach-of-fiduciary-duty claim in Texas. The Texas Supreme Court has stated that it has not expressly adopted a claim for aiding and abetting outside the context of a fraud claim. See *Ernst & Young v. Pacific Mut. Life Ins. Co.*, 51 S.W.3d 573, 583 n. 7 (Tex. 2001); *West Fork Advisors v. Sungard Consulting*, 437 S.W.3d 917 (Tex. App.—Dallas 2014, no pet.). Notwithstanding, Texas courts have found such an action to exist. See *Hendricks v. Thornton*, 973 S.W.2d 348 (Tex. App.—Beaumont 1998, pet. denied); *Floyd v. Hefner*, 556 F.Supp.2d 617 (S.D. Tex. 2008). One court identified the elements for aiding and abetting as the defendant must act with unlawful intent and give substantial assistance and encouragement to a wrongdoer in a tortious act. *West Fork Advisors*, 437 S.W.3d at 921.

As noted above in the *Wooters* case, there is also a recognized civil conspiracy claim in Texas. But there is not any particularly compelling guidance on whether these claims are the same or different. And if they are different, what differences are there regarding the elements of each claim? There also seems to be some confusion as to whether a finding of conspiracy or aiding and abetting or knowing participation automatically imposes joint liability for all damages. Most of the cases seem to indicate that a separate damage finding is necessary for each defendant because the conspiracy may not proximately cause the same

damages as the original bad act. See *THPD, Inc. v. Continental Imports, Inc.*, 260 S.W.3d 593 (Tex. App.—Austin 2008, no pet.); *Bunton v. Bentley*, 176 SW.3d 1 (Tex. App.—Tyler 1999), *aff'd in part, rev'd in part on other grounds*, 914 S.W.3d 561 (Tex. 2002); *Belz v. Belz*, 667 S.W.2d 240 (Tex. App.—Dallas 1984, writ ref'd n.r.e.). For a great discussion of these forms of joint liability for breach of fiduciary duty, please see E. Link Beck, *Joint and Several Liability*, STATE BAR OF TEXAS, 10TH ANNUAL FIDUCIARY LITIGATION COURSE (2015).

#### **D. Court Affirms Power Of Attorney Holder's Right To Revoke Gift**

In *Wise v. Mitchell*, a power of attorney holder, Mitchell, filed a revocation of a deed that the principal issued to Wise. No. 05-15-00610-CV, 2016 Tex. App. LEXIS 6502 (Tex. App.—Dallas June 20, 2016, no pet. history). After the principal's death, Mitchell, as executor, moved for partial summary judgment to cancel the deed based on the revocation document, and the trial court granted that relief. Wise appealed, arguing in part that Mitchell did not have the authority to revoke the deed and that her revocation was not effective because she had not filed her power of attorney document in the public records before the revocation document was filed.

The court of appeals first addressed the filing requirement. The statute that was in effect at the time required that for a real estate transaction, a durable power of attorney form had to be filed in the office of the county clerk of the county in which the property was located. The court of appeals held that this did not require a particular sequence, and that Mitchell complied with this requirement by filing her form at the same time as the revocation document.

The court of appeals then addressed Mitchell's authority to execute the revocation document. The court held that the power of attorney document was governed by former Texas Probate Code sections 481 through 489, which allowed for a non-statutory durable power of attorney form. The court held that the language of a power of attorney determines the extent of the authority conveyed to the agent, and that it would construe a power of attorney as a whole in order to ascertain the parties' intentions and rights. The court held that the authority granted by a power of attorney is strictly construed, so as to exclude the exercise of any power that is not warranted either by the actual terms used, or as a necessary means of executing the authority with effect.

Here, the power of attorney document authorized Mitchell to "perform any and all acts in my stead and to do and perform all such other matters as may be necessary and expedient for the purpose of carrying out the objects above mentioned." The decedent placed no restrictions on the acts that Mitchell could take as her agent. The court noted that "Where an instrument is free from qualifying features either on its face or from the evidence, the agent has unlimited power to act in complete substitution for any act which the principal might himself do if present and acting." Finally, because the deed was testamentary in nature and vested no interest in Wise prior to the decedent's

death, the Deed was subject to revocation by Mitchell acting as the decedent's agent under the power of attorney. The court held that Mitchell had the power to revoke the deed and affirmed the trial court's judgment for Mitchell.

#### **E. Court Reversed Summary Judgment For A Client As Against His Financial Advisor**

In *Kang v. Song*, Song sued Kang for fraud, violations of the Texas Securities Act, violations of Texas's Deceptive Trade Practices Act (DTPA), breach of fiduciary duty, negligent misrepresentation, breach of contract, and negligence based on Kang's actions as Song's investment adviser. No. 02-15-00148-CV, 2016 Tex. App. LEXIS 10198 (Tex. App.—Fort Worth September 15, 2016, no pet. history). Song filed a motion for traditional summary judgment on each of his claims. As evidence, Song relied on his affidavit, the affidavit of his attorney, and deemed admissions. Kang filed a response to the motion and an affidavit contradicting some of the statements in Song's affidavit. The trial court granted summary judgment for Song, and awarded Song economic damages of \$811,572.02, treble damages under the DTPA of \$1,623,144.04, and attorney's fees of \$730,414.81. Kang appealed pro se.

The court of appeals reversed the judgment and remanded for further proceedings. First, the court addressed the main evidence in the case, the deemed admissions. The court held that there was no evidence that the requests for admissions were ever served on the defendant because there was no certificate of service. The court of appeals then disregarded that evidence. The court then turned to the parties' affidavits. Song stated that he relied on Kang's statements that he was a stock trader and investor who managed third party accounts for years, he held Series 7 and Series 66 licenses, and he would not lose any of Song's principal investment and would receive a profit. Kang stated that he had been a financial advisor for twenty-five years and had been Song's financial advisor for eighteen years, Song was a sophisticated business owner and investor, and that Song told him that Song's investment objective for his stock investments is to double the value each year.

Regarding Song's breach of fiduciary duty claim, the court stated as follows:

Song characterized Kang as an investment adviser, while Kang referred to himself as a financial advisor. An investment or financial advisor generally owes a fiduciary duty to clients, and thus, under either characterization of Kang's role, he owed a fiduciary duty to Song. However, what a fiduciary duty requires of the fiduciary can vary. Song's affidavit was evidence that Kang did more than merely act at Song's direction in making investments and that Kang acted as an advisor trusted by Song to make appropriate trades in line with Song's conservative investment strategy. But Kang produced his own affidavit to contradict Song's. While Kang's affidavit is short, it is some evidence that Song is an experienced business

person who follows an aggressive investment strategy with the intent to double his investments each year, rather than an unsophisticated investor relying on his advisor to make decisions about investment strategy. And while Song stated that he relied on Kang's having stockbroker licenses and his statements about his past success in trading in deciding to trust and hire Kang, Kang produced evidence that they had a nearly two-decade history of Kang providing Song with financial advice and working with him on business deals, raising a question about what factors led Song to give Kang access to his trading accounts, and thus whether Kang breached any duties to Song with respect to his obligation to disclose relevant information. In other words, Kang was Song's fiduciary and as such owed him certain duties, but the summary judgment evidence did not establish as a matter of law what those duties encompassed or whether they were breached. And because Kang's affidavit raised a fact issue about the nature of the investment strategy Song instructed him to follow, Song's affidavit does not establish as a matter of law that his losses came from Kang's breach of any duties, rather than the inherent risk of trading in securities. Viewing the evidence in the light most favorable to Kang, we conclude that Song did not establish his claim for breach of fiduciary duty as a matter of law, and thus the trial court erred by granting summary judgment on that claim.

The court similarly found that there were fact questions regarding Song's other claims, and reversed and remanded the case for further proceedings. The court cited the following precedent for the proposition that Kang, the financial advisor, owed fiduciary duties: *Izzo v. Izzo*, No. 03-09-00395-CV, 2010 Tex. App. LEXIS 3623, 2010 WL 1930179, at \*7 (Tex. App.—Austin May 14, 2010, pet. denied) (mem. op.) (holding that sufficient evidence supported the trial court's conclusion that the appellee acted as the appellant's investment adviser prior to their marriage and that he therefore owed the appellee a fiduciary duty that arose prior to the marriage); *W. Reserve Life Assur. Co. of Ohio v. Graben*, 233 S.W.3d 360, 374 (Tex. App.—Fort Worth 2007, no pet.) (holding that the appellee's financial advisor had a duty to act as a fiduciary); William Alan Nelson II, *Broker-Dealer: A Fiduciary by Any Other Name?*, 20 FORDHAM J. CORP. & FIN. L. 637, 659-60 (2015) (stating that "courts and regulators look to the substance of the relationship rather than relying on titles to discern fiduciary responsibility," regardless of whether individuals describe themselves as investment advisers, financial advisors, brokers, or dealers).

#### **F. Court Holds That Fiduciary Shield Doctrine Does Not Protect A Representative From Tortious Conduct**

In *Ren v. ANU Res., LLC*, a plaintiff sued an entity and its representatives for breach of contract, breach of fiduciary duty, and other tort claims arising from investments in oil and gas properties. No. 14-16-00035-CV, 2016 Tex. App.

LEXIS 10401 (Tex. App.—Houston [14th Dist.] September 22, 2016, no pet. history). One of the defendant representatives filed a special appearance, challenging the trial court’s personal jurisdiction over him. The trial court denied the special appearance, and the defendant appealed.

On appeal, the defendant argued that he was not subject to specific jurisdiction in Texas under the fiduciary shield doctrine because he did not conduct business in Texas in his individual capacity. Rather, he claimed that his actions were solely on behalf of Chinese corporate entities. The court of appeals described the fiduciary shield doctrine as follows:

Under the fiduciary shield doctrine, a nonresident officer or employee may not be subject to personal jurisdiction when all of his contacts with the forum state were made on behalf of his corporation or employer. However, this court has repeatedly held that the doctrine does not protect a corporate representative from the exercise of specific jurisdiction as to intentional torts or fraudulent acts for which he may be held individually liable.

The court then held that because the plaintiff alleged intentional torts against the defendant for which he could be held individually liable, primarily for tortiously interfering with an agreement and defrauding the plaintiff, it rejected the defendant’s argument that he was entitled to protection from jurisdiction simply because his acts were allegedly done in a corporate capacity. After reviewing other evidentiary matters, the court affirmed the trial court’s denial of the special appearance.

**G. Court Reverses No-Evidence Summary Judgment On Fiduciary Duty Claim Because Motion Was Not Sufficiently Precise**

In *Neurodiagnostic Tex, L.L.C. v. Pierce*, the court reviewed a summary judgment entered regarding an employer’s breach of fiduciary duty claim. No. 12-14-00254-CV, 2016 Tex. App. LEXIS 11754 (Tex. App.—Tyler October 31, 2016, no pet. history). The court stated the following on the drafting of no-evidence motion:

A no evidence motion for summary judgment must state the elements as to which the movant contends there is no evidence. The motion must be specific in challenging the evidentiary support for an element of a claim or defense; conclusory motions or general no evidence challenges to an opponent’s case are not authorized. If a no evidence motion for summary judgment is not specific in challenging a particular element or is conclusory, the motion is legally insufficient as a matter of law and may be challenged for the first time on appeal.

The defendant stated in its motion: “Plaintiff also brings a cause of action for breach of fiduciary duty, yet again does not bring forth any evidence of such a breach during the time of his employment (Exhibit 1). Defendant seeks summary judgment that Defendant did not breach his fiduciary duty while employed at Plaintiff.” The court of appeals concluded that this was not sufficiently precise: “Pierce makes only a general argument that NeuroTex has no evidence to support its breach of fiduciary duty cause of action. Thus, we hold that Pierce’s no evidence motion is legally insufficient with regard to breach of fiduciary duty and the trial court’s order granting Pierce’s no evidence motion for summary judgment on that cause of action was erroneous.”

**Interesting Note:** Texas Rule of Civil Procedure 166a(i) states: “a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial.” Tex. R. Civ. P., 166a(i). “Breach” is an element of a breach of fiduciary duty claim. The defendant in the *Pierce* case stated that the plaintiff: “does not bring forth any evidence of such a breach during the time of his employment.” The motion should have been sufficient to place the burden of production (burden to produce evidence) on the non-movant to create a genuine issue of material fact on whether there was a breach of a fiduciary duty.

#### **H. Court Holds That There Was No Harm In Failing To Submit A Breach Of Fiduciary Duty Question To A Jury**

In *Gengenbach v. Rodriguez*, a defendant alleged a counterclaim for breach of fiduciary duty arising from a farming operation. No. 13-14-00711-CV, 2016 Tex. App. LEXIS 12289 (Tex. App.—Corpus Christi November 17, 2016, no pet. history). The trial court refused to submit a question on that claim, and the jury found in favor of the plaintiff on the plaintiff’s fraud claim. The defendant appealed and argued, in part, that the trial court erred in refusing to submit his fiduciary duty claim to the jury. The defendant argued that there was some evidence in the record indicating that he and the plaintiff verbally agreed to be farming partners and that the plaintiff breached that agreement by, among other things, selling the crop without the defendant’s consent or approval.

The court of appeals found that the trial court’s error, if any, was harmless due to the jury’s answer to a different question. The court held that “error in the omission of a [jury question] is harmless ‘when the findings of the jury in answer to other issues are sufficient to support the judgment.’” *Id.* The court then held:

[Q]uestion two of the jury charge asked: “Did [Rodriguez] fail to comply with the verbal agreement [to share profits and losses]?” The jury answered “no” to this question. Based on Gengenbach’s theory of recovery, the jury’s negative answer to this question rejected the “breach” element of Gengenbach’s claim for breach of fiduciary duty. As such, even if the question had been submitted, it



would not have altered the jury's verdict. Therefore, we hold that the trial court's error, if any, in omitting a jury question regarding breach of fiduciary duty was harmless.

*Id.* at \*10-11.

### **I. Court Refuses To Enforce Arbitration Clause Due To Lack Of Mental Capacity**

In *Oak Crest Manor Nursing Home, LLC v. Barba*, a plaintiff sued a nursing home for negligently allowing a patient with mental disorders to leave the facility and jump from a bridge in an attempt to commit suicide. No. 03-16-00514-CV, 2016 Tex. App. LEXIS 12710 (Tex. App.—Austin December 1, 2016). The nursing home filed a motion to compel arbitration based on a facility admission agreement that the patient signed. The plaintiff's response contended that due to the patient's psychological and mental disorders, he lacked capacity to enter into an enforceable contract and, therefore, the agreement and its arbitration provision were unenforceable and void. The court denied the motion to compel, and the defendant sought an interlocutory appeal.

The court of appeals noted that it was the plaintiff's burden to prove that the patient did not have the requisite mental capacity. The court held that "[t]o establish mental capacity to execute a contract, a party 'must have had sufficient mind and memory at the time of execution to understand the nature and effect of [his] act.'" The court reviewed evidence that the patient was mentally incompetent around the time of his admission to the home. It also reviewed the defendant's evidence that he was competent on the day he signed the agreement. The court held that "While the time of execution of a contract is indeed the relevant time for ascertaining competency to contract, evidence of competency from other periods is probative to establish competency at the time of execution if there is evidence that the later mental condition had some probability of being the same condition at the time of execution." The court concluded:

Dr. McRoberts's report, issued only 49 days after the Agreement's execution, is probative of Frank's mental condition on the date of execution in light of the other evidence in the record indicating that Frank's psychiatric diagnoses were already present and were the same as when Dr. McRoberts examined him. We conclude that the record contains legally sufficient evidence to support the probate court's implied determination that Frank did not possess the requisite capacity to contract when he signed the Agreement.

The court also held that the patient's mental incompetency made the agreement void: "the supreme court has held that when the issue of mental capacity to contract is raised, 'the very existence of a contract is at issue,' as with other contract-formation issues, and therefore the court's determination that a party

lacked the capacity to contract would render that contract non-existent and void rather than merely voidable.” Finally, the court determined that because there was no contract to begin with, the defendant could not rely on other theories such as direct-benefits estoppel to enforce the arbitration clause. The court affirmed the order denying the motion to compel arbitration.

**Interesting Note:** This case raises an important issue for financial institutions. Financial institutions routinely have arbitration and other dispute resolution clauses in its contracts with customers. It is also common for a customer to be an elderly person or person with some mental disability. When disputes arise, the customer or his or her representative may challenge the invocation of arbitration or other dispute resolution clause due to mental incompetence. Financial institutions should be very careful that when they enter into these types of contracts that the other contracting party has mental competence. Alternatively, the financial institution should rely on a guardian or power of attorney holder to execute the contract for the customer.

#### **J. Court Dismisses Claims Against Investment Firm For Lack Of Personal Jurisdiction**

In *Happy vs. Tanner*, Tanner sued Retire Happy for breach of fiduciary duty, negligent misrepresentation, fraud, conversion, negligence, promissory estoppel, quantum meruit, and violation of the Texas Securities Act arising from Retire Happy, a Nevada entity, inducing Tanner, a Texas resident, to unsuccessfully invest funds with another Nevada corporation known as the Horizon Group. No. 07-16-00134-CV, 2017 Tex. App. LEXIS 777 (Tex. App.—Amarillo January 27, 2017, no pet. history). Retire Happy filed a special appearance objecting to the court’s exercise of jurisdiction as allegedly Texas had no personal jurisdiction over Retire Happy. The trial court denied the objection, and Retire Happy appealed.

The court of appeals reversed, finding that the trial court did not have specific or general jurisdiction. The court of appeals discussed the various rules regarding personal jurisdiction thusly:

Personal jurisdiction over a nonresident exists when the Texas long-arm statute authorizes it and the exercise of it comports with due process. [*Cornerstone Healthcare Grp. Holding, Inc. v. Nautic Mgmt. VI, L.P.*, 493 S.W.3d 65, 70 (Tex. 2016)]. It is the limitations implicit in due process that guide our analysis. See *id.* Those limitations mandate not only that minimum contacts exist between the defendant and our State but also that the exercise of jurisdiction avoids offending traditional notions of fair play and substantial justice. See *id.*

As for minimum contacts, they are judged or tested against the standard of purposeful availment. See *id.* That is, minimum

contacts arise when the defendant purposefully avails himself of the privilege of conducting activities in forum state and thereby invokes the benefits and protections of the forum's laws. *Id.* Assessing whether that transpired entails consideration of (1) only the defendant's contacts with the forum, as opposed to those of the plaintiff or some third party, (2) whether the contacts are purposeful, as opposed to random, isolated, or fortuitous, and (3) whether the defendant sought some benefit, advantage, or profit by availing himself of the jurisdiction. See *id.* at 70-71.

Next, the contacts of which we speak can be viewed as creating two types of personal or in personam jurisdiction. One is specific in nature and involves the relationship between the cause of action and the defendant's contacts with Texas. That is, the focus lies upon the relationship between the defendant, the forum, and the litigation. [*TV Azteca v. Ruiz*, 490 S.W.3d 29, 42 (Tex. 2016)] (quoting *Walden v. Fiore*, 571 U.S. , 134 S. Ct. 1115, 1121, 188 L. Ed. 2d 12 (2014)); *My Vacation Eur., Inc v. Sigel*, No. 05-14-00435-CV, 2015 Tex. App. LEXIS 667, at \*6-7 (Tex. App.—Dallas Jan. 26, 2015, no pet.) (mem. op.). And, the test used contains two components. Not only must there be evidence of purposeful availment, but also a nexus must exist between the contacts evincing purposeful availment and the plaintiff's claim. See *TV Azteca*, 490 S.W.3d at 37, 52. As said in *Azteca*, “[f]or specific-jurisdiction purposes, purposeful availment has no jurisdictional relevance unless the defendant's liability arises from or relates to the forum contacts.” *Id.* at 52. So, even if there is purposeful availment, specific jurisdiction does not exist unless the defendant's liability arises from its contacts with the forum. See *My Vacation*, 2015 Tex. App. LEXIS 667, at \*6-7 (stating that “[i]f we conclude a nonresident defendant has made minimum contacts with Texas by purposefully availing itself of the privilege of conducting activities here, then we address whether the defendant's alleged liability arises out of or is related to those contacts”).

Next, to satisfy the purposeful-availment prong, the evidence must illustrate not only that the aforementioned contacts existed but also that the defendant's contacts were purposefully directed to the forum state. *TV Azteca*, 490 S.W.3d at 38. Consequently, the defendant's contacts with the forum itself are paramount, not the defendant's contacts with the plaintiff who resides in the forum. See *id.* at 42.

As for determining the existence of the requisite nexus between the minimum contacts and the claim, proof “that the plaintiff would have no claim ‘but for’ the contacts, or that the contacts were a ‘proximate cause’ of the liability” is unnecessary. *Id.* at 52-53.

Instead, we look to the substance of the claim, whether the defendant's contacts with the forum will be the focus of the trial and consume most if not all the litigation's attention, and whether those contacts relate to the operative facts of the claim. See *id.* at 53.

The other manner to gain jurisdiction is more general in nature. There, we see if the minimum contacts with the forum were sufficiently continuous and systematic so as to render the defendant at home in the forum irrespective of the interrelationship between the claim and contacts. *Cornerstone Healthcare Grp.*, 493 S.W.3d at 71. This mode of gaining jurisdiction over a nonresident defendant entails a more demanding analysis of the minimum contacts than that applicable to specific jurisdiction and has a "substantially higher' threshold." *PHC-Minden, L.P. v. Kimberly-Clark Corp.*, 235 S.W.3d 163, 168 (Tex. 2007) (quoting 4 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1067.5 (3d ed. 2007)). Normally, the nonresident must be engaged in long-standing business within the forum, such as through marketing or shipping products to it, performing services in it, or maintaining one or more offices there. *Id.* Less extensive activities will not qualify for general in personam jurisdiction. *Id.* Moreover, the contacts weighed are those occurring within a reasonable time before the suit was filed, and are not simply those related to or from which the claim arose. See *id.* at 170.

The court of appeals first reviewed whether the trial court had specific jurisdiction over the defendant. The record did not show how either Tanner or her husband came in contact with Retire Happy, but it did show that any and all interaction by her and him with Retire Happy occurred through email, the telephone, and a website. The court held:

Evidence of a website (irrespective of whether it is interactive) simply illustrates the potential for activity from the forum in question and the website owner's knowledge of that potentiality. It does not illustrate actual use or its extent. In short, there needs to be more than the existence of a website (whether interactive or not) to support an inference that the forum was targeted by the website owner or that the latter directed its marketing efforts at the forum. And, the additional evidence or conduct is missing here.

....

Nor do we have any idea of how many people access its website on any given day, how many are from Texas, or whether they utilize it for anything other than informational purposes. Nor do we know if Retire Happy structured its website or any other marketing effort in some way to target people in Texas, as opposed to residents of this

nation's other forty-nine states and the other innumerable nations and countries on this earth wherein people have internet access. It is conceivable to suggest that the company should have reasonably known that someone in Texas could access its site, but more is needed than that if the lessons of TV Azteca are to be heeded.

The court also noted that less than 4% of the defendant's clients were in Texas and there was no evidence how much those clients made up the defendant's business. "Phone calls, emails and fax messages between Tanner and Retire Happy; twenty-two of 600 'clients' in some form or fashion residing or having resided in the forum at some time or another; and the existence of a website that may be accessed in any state one encounters the internet is not the sufficient additional conduct upon which to reasonably infer an intent to target or direct activities at Texas." The court concluded that the defendant did not purposefully availed itself of the privilege of conducting activities in the forum.

The court took less time to reject any contention of general jurisdiction:

As for the contacts here, we have no offices, employees or resident agents of Retire Happy in Texas. No one from the entity visited Texas for business purposes. Nor do we have evidence that the investment opportunities allegedly afforded by Retire Happy encompassed realty, personalty, or businesses in Texas. Indeed, they were in Florida. So too does it appear that monies used to fund the investments were transferred from locales outside Texas. Nor we have evidence of any marketing directed at Texas. Of the entities twenty-two "clients" who "reside or resided" in Texas, we have no information about how or where they were secured. The nature and extent of their interaction with Retire Happy is also unknown, as is how the entity even communicates with them. To suggest that they or anyone else in Texas (other than the Tanners) utilized the Retire Happy website is also nothing but conjecture. Simply put, the evidence—when viewed in a light most favorable to the trial court's decision—falls short of illustrating that Retire Happy engaged in or developed a long-standing business within the forum or otherwise maintained continuous and systematic contact with Texas so as to render it at home in the forum.

The court reversed the trial court's denial of the special appearance and dismissed Retire Happy.

#### **K. Court Affirmed Dismissal Of Breach Of Fiduciary Duty Claims Against Condo Board Members**

In *Brown v. Hensley*, a condominium complex was damaged by a hurricane, and the board of the complex allowed the complex to be demolished. No. 14-14-00981-CV, 2017 Tex. App. LEXIS 727 (Tex. App.—Houston [14th Dist.] January

26, 2017, no pet. history). Some of the unit owners sued the board for breach of fiduciary duty and other claims arising from this decision. The trial court granted the board members' motion for summary judgment.

The court of appeals affirmed this dismissal based on the Texas Charitable Immunity and Liability Act, which limits the liability of charitable organizations and immunizes volunteers who meet certain conditions. *Id.* (citing Tex. Civ. Prac. & Rem. Code §§ 84.001). Under the Act, and subject to exceptions, "a volunteer of a charitable organization is immune from civil liability for any act or omission resulting in death, damage, or injury, if the volunteer was acting in the course and scope of the volunteer's duties or functions, including as an officer, director, or trustee within the organization." Tex. Civ. Prac. & Rem. Code § 84.004(a). The Act defines "charitable organization" to include a homeowners association. Tex. Civ. Prac. & Rem. Code § 84.003(1)(C). Additionally, the Act defines "volunteer" to mean "a person rendering service for or on behalf of a charitable organization who does not receive compensation in excess of reimbursement for expenses incurred." Tex. Civ. Prac. & Rem. Code § 84.003(2). The term includes a person serving as a director. *Id.*

The plaintiffs asserted that the board members were liable in their individual capacities under Section 84.007(b). This subsection provides the Act "does not limit or modify the duties or liabilities of a member of the board of directions or an officer to the organization or its members and shareholders." Tex. Civ. Prac. & Rem. Code § 84.007(b). This subsection addresses liabilities of directors "to the organization or its members and shareholders." The court held that the board members' liability to the condo association was not at issue as the plaintiffs did not bring a derivative action on behalf of the association or as a class action on behalf of all unit owners. Therefore, the court affirmed the summary judgment.

#### **L. Court Finds Family Member Did Not Owe Fiduciary Duties**

In *Walker v. Walker*, a son sued his father and brother regarding the ownership of a beach house. No. 14-16-00357-CV, 2017 Tex. App. LEXIS 2742 (Tex. App.—Houston [14th Dist.] March 30, 2017, no pet. history). The son alleged that the father made an oral gift of the property to the son. The son alleged that the father wrongfully deeded the same property to the brother at a later date. The son and his wife brought suit to quiet title based on a claim of an oral parol gift of realty, and also asserted claims for damages based on promissory estoppel, unjust enrichment, and breach of fiduciary duty. The trial court granted summary judgment for the defendants, and the plaintiff appealed.

Regarding the breach of fiduciary duty claim, the court of appeals discussed whether the brother owed the son a fiduciary duty:

[The] law also recognizes that certain relationships may give rise to an informal fiduciary duty based on "a moral, social, domestic or purely personal relationship of confidence and trust." Informal

fiduciary duties will not be created lightly. Some relationships involving trust and confidence simply do not rise to the stature of a fiduciary relationship. Subjective trust of one person in another is also not sufficient to create a duty. "[A] confidential relationship is a two-way street: 'one party must not only trust the other, but the relationship must be mutual and understood by both parties.'" Family relationships may give rise to an informal fiduciary duty between family members where there is sufficient evidence of a relationship of trust and confidence. A mere family relationship, however, by itself is generally not sufficient. We will examine the actualities of the relationship between the parties in determining the existence of a confidential fiduciary relationship. Where there is no evidence to establish the relationship or the facts are undisputed, a court may determine the question as a matter of law.

*Id.* at \* 30-31. The court reviewed the evidence and determined that it did not support any fiduciary duties. There was no evidence that the wife and brother-in-law had any relationship of trust and confidence: "There is no evidence showing that she sought Layne's advice or guidance on any matter, nor evidence of any other circumstances suggesting a relationship of trust and confidence between them." *Id.* The court also held that there was no evidence showing that the son was often guided by the judgment or advice of the brother, or that the son put any particular trust and confidence in the brother with regard to the son's financial decisions. Nor was there any evidence indicating that the brother recognized that the son was relying on him to the extent that a fiduciary duty arose. Although the son argued generally that there was a history of the brother handling "family transactions," he did not point to any evidence establishing that he relied upon or put his confidence in the brother with regard to any specific "family transactions."

The court also held that even though the son and brother inherited real property and owned it as cotenants, that cotenants in real property do not ordinarily owe fiduciary duties to each other. *Id.* (citing *Scott v. Scruggs*, 836 S.W.2d 278, 282 (Tex. App.—Texarkana 1992, writ denied) ("Absent a special relationship there is no fiduciary obligation owed by one cotenant to the others.")). Therefore, the court affirmed the summary judgment dismissing the breach of fiduciary duty claim.

#### **M. Court Affirms Summary Judgment In Breach Of Fiduciary Duty Claim Against Attorney**

In *Ashton v. Koonsfuller*, a plaintiff sued a lawfirm for breach of fiduciary duty related to her divorce proceeding. No. 05-16-00130-CV, 2017 Tex. App. LEXIS 4293 (Tex. App.—Dallas May 10, 2017, no pet. history). The plaintiff argued that the defendant breached its fiduciary duty to her by: (1) withdrawing from representation without protecting her from the loss of her 401(k) account; (2) failing to disclose she did not have to agree to the sale of her homestead to pay

attorney's fees; (3) entering into a Rule 11 agreement without her consent; and (4) billing over \$800,000 in fees and costs without any discernable benefit to her. The lawfirm filed a no-evidence summary judgment, and the trial court granted same. The plaintiff appealed.

The court of appeals first distinguished a breach of fiduciary duty claim from a legal malpractice claim:

An attorney breaches his fiduciary duty to his client when he benefits improperly from the attorney-client relationship by, among other things, subordinating his client's interest to his own, retaining the client's funds, engaging in self-dealing, improperly using client confidences, failing to disclose conflicts of interest, or making misrepresentations to achieve these ends. Texas courts have generally held that breach of fiduciary duty by a lawyer involves the integrity and fidelity of an attorney and focuses on whether an attorney obtained an improper benefit from representing the client. The focus is not on "whether an attorney represented a client with the requisite level of skill."

*Id.* Regarding the allegation concerning the 401(k), the court of appeals held that an attorney does not breach its duty by being paid: "KoonsFuller obtaining its fees is not, standing alone, an improper benefit sufficient to constitute a breach of fiduciary duty." *Id.* Whether the alleged advice to cash in the 401(k) was a breach of duty, the court held that the "complaint that KoonsFuller did not represent her with the requisite level of skill may give rise to a professional negligence claim, but does not constitute a breach of fiduciary duty claim." *Id.*

Regarding the alleged homestead advice, the court held that the plaintiff did not have evidence that she actually sold her homestead, and therefore, there was no evidence of any harm: "There is no evidence in the record that Ashton actually sold the residence or used the proceeds from the sale of her homestead to pay attorney's fees. Even if we assume KoonsFuller's advice to Ashton fell below the level of skill that Ashton expected, Ashton has not shown she acted on that advice or it caused harm to her." *Id.*

The Rule 11 agreement issue was similarly deficient because the plaintiff did not present evidence that the defendant acted against her express wishes in entering the agreement. Finally, the court held that the plaintiff's expert's affidavit and deposition testimony was conclusory regarding the defendant's bills and alleged excessive work. Without that evidence, the court affirmed on the billing practices issues. The court affirmed the trial court's summary judgment for the defendant lawfirm.



## VI. Damages Issues

### A. Court Reversed Forfeiture Award Due To Trial Court Not Indicating It Followed The Correct Standard

In *Cooper v. Sanders H. Campbell/Richard T. Mullen, Inc.*, a company filed suit under a promissory note against a former joint venture partner. No. 05-15-00340-CV, 2016 Tex. App. LEXIS 9253 (Tex. App.—Dallas August 24, 2016, no pet. history). The defendant filed a counterclaim for breach of fiduciary duty and sought equitable forfeiture for the amount owed under the note. The trial court initially awarded the plaintiff \$1.4 million on the note, but later reduced that award by \$520,000 for the equitable forfeiture claim. Both parties appealed.

The court of appeals affirmed the plaintiff's note claim, and then turned to the defendant's equitable forfeiture claim. The defendant argued that the trial court should have awarded an amount of forfeiture for the entire note claim, and not just a partial award. The plaintiff argued that the forfeiture award should be reversed because "the record does not show the trial court made the required determination that the conduct of the Mullen Co. was a 'clear and serious' breach of fiduciary duty, which the trial court can conclude only after applying the factors identified by the Texas Supreme Court." *Id.* (citing *ERI Consulting Eng'rs, Inc. v. Swinnea*, 318 S.W.3d 867, 874, 875 (Tex. 2010)). The court first set out the standards for equitable forfeiture:

Courts may fashion equitable remedies such as disgorgement and forfeiture to remedy a breach of a fiduciary duty. Disgorgement is an equitable forfeiture of benefits wrongfully obtained. A party must plead forfeiture to be entitled to that equitable remedy. Whether a forfeiture should be imposed must be determined by the trial court based on the equity of the circumstances. However, certain matters may present fact issues for the jury to decide, such as whether or when the alleged misconduct occurred, the fiduciary's mental state and culpability, the value of the fiduciary's services, and the existence and amount of harm to the principal. Once the factual disputes have been resolved, the trial court must determine: (1) whether the fiduciary's conduct was a "clear and serious" breach of duty to the principal; (2) whether any monetary sum should be forfeited; and (3) if so, what the amount should be.

As stated above, the trial court's first step is to determine whether there was a "clear and serious" breach of duty. The trial court should consider factors such as: (1) the gravity and timing of the breach; (2) the level of intent or fault; (3) whether the principal received any benefit from the fiduciary despite the breach; (4) the centrality of the breach to the scope of the fiduciary relationship; (5) any other threatened or actual harm to the principal; (6) the adequacy of other remedies; and (7) whether forfeiture fits the

circumstances and will work to serve the ultimate goal of protecting relationships of trust. However, forfeiture is not justified in every instance in which a fiduciary violates a legal duty because some violations are inadvertent or do not significantly harm the principal.

Second, the trial court must determine whether any monetary sum should be forfeited. The central purpose of forfeiture as an equitable remedy is not to compensate the injured principal, but to protect relationships of trust by discouraging disloyalty. Disgorgement is compensatory in the same sense as attorney fees, interest, and costs, but it is not damages. As a result, equitable forfeiture is distinguishable from an award of actual damages incurred as a result of a breach of fiduciary duty. In fact, a claimant need not prove actual damages to succeed on a claim for forfeiture because they address different wrongs. In addition to serving as a deterrent, forfeiture can serve as restitution to a principal who did not receive the benefit of the bargain due to his agent's breach of fiduciary duty. Third, if the trial court determines there should be a forfeiture, it must determine what the amount should be. The amount of disgorgement is based on the circumstances and is within the trial court's discretion. For example, it would be inequitable for an agent who performed extensive services faithfully to be denied all compensation if the misconduct was slight or inadvertent.

*Id.* (internal citations omitted).

The court then noted that the defendant did not plead for equitable forfeiture, though he did plead for breach of fiduciary duty and seek an award of damages. The defendant did not seek a jury finding on the plaintiff's mental state or culpability, the value of its services, or the existence and amount of harm to defendant. The jury found that the plaintiff breached its fiduciary duty to the defendant, but awarded him no damages. The defendant then asked the trial court to enter an award of forfeiture damages in his motion for judgment notwithstanding the verdict, and in other post-trial motions. However, the defendant did not adequately brief the issue and the factors relevant to such a claim. The court of appeals held that the record did not support the trial court's award, and remanded the case for further proceedings to allow the trial court to consider the appropriate legal standards, elements, and factors in finding that a forfeiture award should be entered:

Cooper did not identify or brief in the trial court the requirement that the trial court conclude there was a "clear and serious" breach of duty as a predicate to assessing a sum that should be awarded as an equitable forfeiture. Cooper does not cite to anything in the record, nor can we find anything in the record, to show that in the fashioning of the equitable forfeiture award the trial court

considered the “principles” or “factors” enumerated in *ERI Consulting*. Accordingly, we conclude the claim of forfeiture should be remanded to the trial court for consideration of the factors described by the Texas Supreme Court.

**Interesting Note:** This court of appeals holds that a trial court’s analysis regarding an award of equitable forfeiture must be shown in the record. This is a departure from normal rules of procedure regarding a trial court’s findings. When a trial court makes factual findings in a dispute, a party may seek findings of fact and conclusions of law – that is true even if some issues are submitted to a jury. *IKB Indus. v. Pro-Line Corp.*, 938 S.W.2d 440, 443 (Tex. 1997). Where neither party timely requests findings of fact, an appellate court must uphold the trial court’s judgment on any valid legal theory that was presented to the court and is supported by the evidence. *Davis v. Huey*, 571 S.W.2d 859, 862 (Tex. 1978). When no findings of fact are properly requested or filed, the trial court’s judgment implies all findings of fact necessary to support it. *Sixth RMA Partners v. Sibley*, 111 S.W.3d 46, 52 (Tex. 2003); *Carter v. William Sommerville and Son, Inc.*, 584 S.W.2d 274, 276 (Tex. 1979). Moreover, in the context of a jury trial, there can be omitted elements of a claim. Texas Rule of Civil Procedure 279 provides that where some elements of claim or defense are submitted to the jury, but others are not, the omitted elements are presumed in favor of the trial court’s judgment. Tex. R. Civ. P. 279. Accordingly, if a party does not want the omitted elements found in favor of the judgment, it has the burden to request express findings from the trial court on those omitted elements. Tex. R. Civ. P. 299; *Insurance Co. of St. Louis v. Bellah*, 373 S.W.2d 691, 692 (Tex. App.—Fort Worth 1963, no writ).

The *Cooper* court did not state in the opinion whether either party requested findings, though it is apparent from the opinion that the trial court did not enter any findings. Under normal procedure regarding a claim submitted to a jury, the omitted findings should have been found in favor of the judgment as some of the elements were submitted to the jury (breach of fiduciary duty) but others were not (mental culpability). However, equitable forfeiture is an equitable remedy that a trial court decides, not a jury. *Burrow v. Arce*, 997 S.W.2d 229, 245 (Tex. 1999). Yet, as there were no findings of fact requested, all of the findings necessary to support the factors and elements for equitable forfeiture should have been presumed in favor of the judgment. This opinion stands for the proposition that there appears to be a reverse presumption that a trial court does not follow the law or follow proper standards in the context of equitable forfeiture where the record is silent on the court’s process. A party (especially the winning party) should request the trial court to enter findings of fact and conclusions of law regarding an equitable forfeiture award. That is not necessarily common sense to an attorney in Texas. Normally, the prevailing party does not seek findings, because in their absence all findings will be presumed in favor of the judgment. The winning party in an equitable forfeiture case should request findings of fact and also prepare a draft of those findings for the court’s consideration.

Of course if findings are entered (or implied findings applied) that does not mean that a court of appeals should automatically affirm the judgment; the plaintiff can still challenge those implied findings for legal or factual sufficiency of the evidence. A party should specifically challenge the trial court's finding of fact in its issues presented and in its arguments in the brief. *In re Estate of Bessire*, 399 S.W.3d 642, 648-49 (Tex. App.—Amarillo 2013, pet. denied); *In re M.W.*, 959 S.W.2d 661, 664 (Tex. App.—Tyler 1997, writ denied). Appellate complaints must be directed at specific findings of fact rather than at the judgment as a whole. *In re Estate of Bessire*, 399 S.W.3d at 648-49; *In re M.W.*, 959 S.W.2d at 664. A broad challenge to the sufficiency of evidence without specifying the challenged finding of fact preserves nothing for review. *Bransom v. Standard Hardware, Inc.*, 874 S.W.2d 919, 927 (Tex. App.—Fort Worth 1994, writ denied). An appellant should brief an appeal of implied findings as if they had been given as express findings. *Russell v. Russell*, 865 S.W.2d 929 (Tex. 1993); *Gianguosso v. Crosley*, 840 S.W.2d 765, 769 (Tex. App.—Houston [1st Dist.] 1992, no writ); see also MCDONALD & CARLSON, TEXAS CIVIL PRACTICE 2D, §18.12-18.13. Unless the trial court's findings are challenged by a point of error on appeal, they are binding upon the appellate court and the parties, and the appealing party waives any complaint regarding the evidence to support the findings. *Cass v. Stephens*, 156 S.W.3d 38, 77 (Tex. App.—El Paso 2004, pet. denied); *Northwest Park Homeowners Ass'n, Inc. v. Brundrett*, 970 S.W.2d 700 (Tex. App.—Amarillo 1998, pet. denied); *Whitehead v. Univ. of Tex.*, 854 S.W.2d 175, 178 (Tex. App.—San Antonio 1993, no writ). If a party fails to challenge findings of fact that support the judgment, the court of appeals should summarily affirm the judgment. *Brundrett*, 970 S.W.2d at 704.

So, where a trial court makes express findings, a party appealing from a trial court's award of equitable forfeiture should specifically challenge via issue statements the factual findings in support of the award and then argue those issues in the body of the brief. Where there are no express findings, the appealing party should: 1) complain that the trial court did not make any findings and seek an abatement in the court of appeals so that the trial court make those findings; and 2) in an abundance of caution, argue that the specific implied findings are not supported by the evidence.

#### **B. Court Affirmed Award of Prejudgment Interest On Fee Forfeiture Award**

In *Holliday v. Weaver*, clients obtained a fee forfeiture award against an attorney for breach of fiduciary duty related to the improper use of settlement proceeds. No. 05-15-00490-CV, 2016 Tex. App. LEXIS 7264 (Tex. App.—Dallas July 7, 2016, no pet. history). After a bench trial, the trial court found for the clients and further found that the appropriate remedy for the attorney's breach of fiduciary duty was "complete disgorgement of Holliday's fee including certain expenses" which totaled \$10,786.84. The trial court also awarded almost \$3,000 in prejudgment interest on the fee forfeiture award, and the attorney appealed.

The court of appeals affirmed the prejudgment interest award. The court held that “[i]nterest is awarded as compensation for the loss of use of money” and that “[i]t is intended to fully compensate the injured party, not to punish the defendant.” “An award of prejudgment interest may be based on either an enabling statute or general principles of equity.” Further, the court held that there is no statute authorizing an award of prejudgment interest on amounts recovered for breach of fiduciary duty. Therefore, the court held that “[w]here no statute controls, the decision to award prejudgment interest is left to the sound discretion of the trial court.” *Id.*

The attorney argued that prejudgment interest may not be awarded on fee forfeiture awards because those are allegedly not compensatory damages. The court disagreed and held that “[w]here there has been a clear and serious violation of a fiduciary duty, equity dictates not only that the fiduciary disgorge his fees, but also all benefit obtained from use of those fees,” which included prejudgment interest. The court concluded: “Because the award of prejudgment interest in this case fits the purpose of such interest, which is to fully compensate the Weavers, we conclude the trial court did not abuse its discretion in granting the award.” The court cited the following cases for further support: *Derrick Res., Inc. v. Wilstein*, 471 S.W.3d 468, 487 (Tex. App.—Houston [1st Dist.] 2015, pet. filed) (allowing prejudgment interest on fee forfeiture award in a trustee’s breach of fiduciary duty case); *Lee v. Lee*, 47 S.W.3d 767, 800 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (same).

### **C. Court Held That Submission Of Jury Question On Fiduciary Duty Was Harmless Due To Duplication Of Damages**

In *Hughes v. Hughes*, a husband and wife sued each other for various claims, including breach of fiduciary duty. No. 13-15-00496-CV, 2017 Tex. App. LEXIS 3489 (Tex. App.—Corpus Christi April 20, 2017, no pet. history). In the charge conference, the wife objected to the question as having an improper definition of fiduciary duty and objected to the following question as not identifying the specific transactions in question. *Id.* at \*28. The definition used by the trial court tracked the exact language of pattern jury charge, entitled “Question and Instruction—Breach of Fiduciary Duty with Burden on Fiduciary.” The court of appeals noted that the commentary for this particular question and instruction advises to submit this question “whether the duty is based on a formal or an informal relationship, when the fiduciary bears the burden of proof.” The court of appeals held that a fiduciary duty exists between spouses. The court then concluded that any error was harmless:

Assuming without deciding that submitting question eight to the jury was error, we nevertheless could not conclude that such charge was reasonably calculated to or probably caused the rendition of an improper judgment because the amount of damages awarded to Dan under the breach of fiduciary duty claim is the same compensation as the amount of damages awarded in the actual

fraud claim. Furthermore, Dan recovered this amount only once rather than twice in the judgment.

*Id.* at \*29.

**D. Court Affirms Submission of Mitigation Instruction In A Breach Of Fiduciary Duty Case To Affirm A Jury's Finding Of No Damages**

In *E.L. & Associates v. Pabon*, a company sued two former directors and their son for breaching fiduciary duties when the company lost a lease for a restaurant it operated and the directors' son opened a nearly identical restaurant in the same location. No. 14-15-00631-CV, 2017 Tex. App. LEXIS 4547 (Tex. App.—Houston [14th Dist.] May 18, 2017, no pet. history). A jury found that the directors breached their fiduciary duties and that their son assisted in the breaches of fiduciary duty, but awarded no damages to the company. The company appealed and complained that the trial court should not have submitted a mitigation instruction in the damages question. The instruction stated: “Do not include in your answer any amount that you find E.L. & Associates, Inc. could have avoided by the exercise of reasonable care.” *Id.* at \*7.

The court of appeals first discussed the concept of the duty to mitigate damages:

The doctrine of mitigation of damages, sometimes referred to as the doctrine of avoidable consequences, requires an injured party to use reasonable efforts to avoid or prevent losses. In the context of a breach of contract case, the doctrine has been stated as follows: “Where a party is entitled to the benefits of a contract and can save himself from the damages resulting from its breach at a trifling expense or with reasonable exertions, it is his duty to incur such expense and make such exertions.” The doctrine has been applied in breach of contract and tort cases.

*Id.* at \*9 (internal citations omitted).

The company argued that it could not have a duty to mitigate before it incurred damages, and the court of appeals disagreed: “It is not the damages themselves that trigger the duty to mitigate, but knowledge by the non-breaching party of the breach that ultimately causes the damages. The question before us, then, is what the breach of fiduciary duty was, and when EL&A had knowledge of the breach.” *Id.* at \*13.

The court then found that the company had knowledge of the defendant's breaches before any damages occurred and that it could have done something to mitigate the harm:

[T]he jury properly could have considered evidence of Efrain or George's failure to mitigate by signing a new lease if there was

evidence that they were aware of the breach before the Pabons' lease was signed on March 15, 2011. To that end, the record contains evidence that EL&A repeatedly was made aware throughout 2009 and 2010 that the Pabons were refusing to renew and provide a guaranty for the lease on EL&A's behalf. The record also contains evidence that EL&A was made aware at least as early as January 2011 that the Pabons had disclosed Efrain's status as the majority shareholder of EL&A. Based on this evidence, the record before us could support a jury finding that EL&A failed to reasonably mitigate its damages — its loss of the restaurant location — by having Efrain sign and become guarantor of a lease after learning of the Pabons' breaches but before (1) the month-to-month lease was terminated in February 2011; or (2) Solis signed the new lease for the same location on March 15, 2011.

The court then held that the trial court did not err by including a mitigation instruction in the damages question and affirmed the judgment.

## **VII. Legislative Update: Durable Power Of Attorney Statute**

### **A. Introduction**

The Texas Legislature has recently instituted broad changes to the Texas Estates Code's Texas Durable Power of Attorney Act regarding durable power of attorney provisions. The Real Estate, Probate, and Trust Law (REPTL) Section of the State Bar of Texas supported HB 1974 because that section primarily consists of estate planners who want to plan around expensive guardianships by the use of durable power of attorney documents. Those planners were frustrated by financial institutions not accepting those documents. Accordingly, one aspect of the new statutory provisions is to make sure that financial institutions and other entities accept power of attorney documents. The provisions also potentially allow broad additional powers to the designated agents; powers that would even allow the agents to benefit themselves from the principal's assets. The legislative history provides:

The Real Estate, Probate, and Trust Law Section of the State Bar of Texas (REPTL) proposes H.B. 1974, which provides several changes to the Texas Durable Power of Attorney Act intended to ensure that validly-executed durable powers of attorney (DPOA) can be used more effectively in Texas, in furtherance of the legislative goal of reducing the need for guardianship proceedings, and to provide additional powers to the designated agents. DPOAs are vital for planning for the possibility of incapacity, and are specifically included as an alternative to guardianship under the Estates Code. But many Texas citizens have been unable to effectively use DPOAs due to their rejection for arbitrary or

unexplained reasons. H.B. 1974 makes DPOAs more readily available.

Overview: H.B. 1974 makes important changes to the statute by: providing for reasonable acceptance of DPOAs in a timely fashion so that guardianship can be avoided; eliminating risk to persons who accept DPOAs by allowing them to rely on an agent's certification that the DPOA is valid for the purpose it is being presented or an opinion of the agent's counsel who is hired at the principal's expense; giving the person who is asked to accept the DPOA numerous valid reasons to reject, some of which cannot be challenged by the principal or agent; and providing a mechanism to have a court decide any disputes. This bill does not require someone to automatically accept a DPOA and does not shift liability to those who do accept a DPOA. Rather, it provides new liability protection to those who accept a DPOA without knowledge that it was invalid and includes new procedures to properly reject a DPOA. Similar provisions have been enacted in 30 other states without issue.

## **B. Persons Now Required To Accept Power Of Attorney Documents (With Limited Exceptions)**

**Required Acceptance of Durable Power Of Attorney.** Section 751.201 of the Texas Estates Code provides:

[A] person who is presented with and asked to accept a durable power of attorney by an agent with authority to act under the power of attorney shall: (1) accept the power of attorney; or (2) before accepting the power of attorney: (A) request an agent's certification under Section 751.203 or an opinion of counsel under Section 751.204 not later than the 10th business day after the date the power of attorney is presented, except as provided by Subsection (c); or (B) if applicable, request an English translation under Section 751.205 not later than the fifth business day after the date the power of attorney is presented, except as provided by Subsection (c).

Tex. Est. Code Ann. § 751.201(a). A person who requests: “(1) an agent's certification must accept the durable power of attorney not later than the seventh business day after the date the person receives the requested certification; and (2) an opinion of counsel must accept the durable power of attorney not later than the seventh business day after the date the person receives the requested opinion.” *Id.* at § 751.201(b). The statute does provide that the parties can agree to extend the periods provided above. *Id.* at § 751.201(c). Importantly, a person is not required to accept a power of attorney if the agent does not provide a



requested certification, opinion of counsel, or English translation. *Id.* at § 751.201(e).

**Agent's Certification.** As stated above, the person to whom the power of attorney is presented may request that the agent provide an agent's certification, under penalty of perjury, of any factual matter concerning the principal, agent, or power of attorney. If the power of attorney becomes effective on the disability or incapacity of the principal, the person may also request that the certification include a written statement from a physician that states that the principal is presently disabled or incapacitated. *Id.* at § 751.203. The statute provides a form for the certification for parties to use. *Id.* at § 751.203(b).

**Opinion of Counsel.** Before accepting a power of attorney, the person may request from the agent an opinion of counsel regarding any matter of law concerning the power of attorney so long as the person provides to the agent the reason for the request in a writing or other record. *Id.* at § 751.204(a). If timely sought, this opinion will be prepared by the principal or agent, at the principal's expense. *Id.* at § 751.204(b). However, if the person requests the opinion later than the 10th business day after the date the agent presents the power of attorney, the principal or agent may, but is not required to, provide the opinion and it will be done at the requestor's expense. *Id.* at § 751.204(c).

**English Translation.** The person may request from the agent presenting the power of attorney an English translation of the power of attorney if some or all of the power of attorney document is not written in English. *Id.* at § 751.205(a). If timely requested (within five days of getting the power of attorney document), the translation must be provided by the principal or agent at the principal's expense. *Id.* at § 751.205(b). However, if, without an extension, the person requests the translation later than the fifth business day after the date the power of attorney is presented, the principal or agent may, but is not required to, provide the translation, at the requestor's expense. *Id.* If the person asks for an English translation, then the power of attorney is not considered presented until the date the person receives the translation. *Id.* at § 751.201(d). At that point the person can request a certification and/or attorney opinion.

**Person Accepting Power Of Attorney Has Defenses.** The statute now has certain provisions that protect the person receiving a certification, opinion, or translation: "A person may rely on, without further investigation or liability to another person, an agent's certification, opinion of counsel, or English translation that is provided to the person under this subchapter." *Id.* at § 751.210. So, if the certification has false statements, the person has no duty to investigate those facts and may rely on the certification without liability to a third party. For example, if the agent states that the principal has never revoked the power of attorney, but the principal really did so, then a financial institution that conducted a transaction with the agent has a defense if the executor of the principal's estate later sues based on the transaction.

Moreover, a signature on a power of attorney that purports to be the signature of the principal is presumed to be genuine. *Id.* at § 751.022. A person who in good faith accepts a power of attorney without actual knowledge that the signature of the principal is not genuine may rely on a presumption that the signature is genuine and that the power of attorney was properly executed. *Id.* at § 751.209(a). Additionally, a person who in good faith accepts a power of attorney without actual knowledge that the power of attorney is void, invalid, or terminated, that the purported agent's authority is void, invalid, or terminated, or that the agent is exceeding or improperly exercising the agent's authority may rely on the power of attorney as if: (1) the power of attorney were genuine, valid, and still in effect; (2) the agent's authority were genuine, valid, and still in effect; and (3) the agent had not exceeded and had properly exercised the authority. *Id.* at § 751.209(b).

These provisions provide limited protections to the person accepting the power of attorney document. The person is protected if he/she/it is in good faith and without actual knowledge of a defect. That simply means that there may be a fact issue regarding “good faith” or “actual knowledge.” The statute also does state whose burden it is to prove “good faith” or “actual knowledge” or the lack thereof.

Finally, it should be noted that the provision dealing with a certification, opinion, or translation does not expressly have a “good faith” or “actual knowledge” requirement. But there is an argument that a person that knows that a certification, opinion, or translation is false did not “rely” on it and cannot take advantage of the liability protection.

**Grounds For Refusing Acceptance.** A person is not required to accept a power of attorney if: the person would not otherwise be required to enter into a transaction with the principal; the transaction would violate another law or a request from law enforcement; the person filed a SAR regarding the principal or agent or the principal or agent has prior criminal activity; the person has a negative business history with the agent; the person knows that the principal has revoked the agent's authority; the agent refused to provide a certification, opinion, or translation; the person believes in good faith that a certification, opinion, or translation is incorrect or deficient; the person believes in good faith that the agent does not have authority to conduct the transaction; the person has knowledge that a judicial proceeding has been instigated regarding the power of attorney document or has been completed with negative results for the document; the person receives conflicting instructions from co-agents; the person has knowledge that a complaint has been raised to the proper authorities that the principal may be subject to physical or financial abuse, neglect, exploitation, or abandonment by the agent or a person acting with or on behalf of the agent; or the law that would apply to the power of attorney document does not require the person to accept the document.

The statute provides:

(1) the person would not otherwise be required to engage in a transaction with the principal under the same circumstances, including a circumstance in which the agent seeks to: (A) establish a customer relationship with the person under the power of attorney when the principal is not already a customer of the person or expand an existing customer relationship with the person under the power of attorney; or (B) acquire a product or service under the power of attorney that the person does not offer;

(2) the person's engaging in the transaction with the agent or with the principal under the same circumstances would be inconsistent with: (A) another law of this state or a federal statute, rule, or regulation; (B) a request from a law enforcement agency; or (C) a policy adopted by the person in good faith that is necessary to comply with another law of this state or a federal statute, rule, regulation, regulatory directive, guidance, or executive order applicable to the person;

(3) the person would not engage in a similar transaction with the agent because the person or an affiliate of the person: (A) has filed a suspicious activity report as described by 31 U.S.C. Section 5318(g) with respect to the principal or agent; (B) believes in good faith that the principal or agent has a prior criminal history involving financial crimes; or (C) has had a previous, unsatisfactory business relationship with the agent due to or resulting in: (i) material loss to the person; (ii) financial mismanagement by the agent; (iii) litigation between the person and the agent alleging substantial damages; or (iv) multiple nuisance lawsuits filed by the agent;

(4) the person has actual knowledge of the termination of the agent's authority or of the power of attorney before an agent's exercise of authority under the power of attorney;

(5) the agent refuses to comply with a request for a certification, opinion of counsel, or translation under Section 751.201 or, if the agent complies with one or more of those requests, the requestor in good faith is unable to determine the validity of the power of attorney or the agent's authority to act under the power of attorney because the certification, opinion, or translation is incorrect, incomplete, unclear, limited, qualified, or otherwise deficient in a manner that makes the certification, opinion, or translation ineffective for its intended purpose, as determined in good faith by the requestor;

(6) regardless of whether an agent's certification, opinion of counsel, or translation has been requested or received by the person under this subchapter, the person believes in good faith

that: (A) the power of attorney is not valid; (B) the agent does not have the authority to act as attempted; or (C) the performance of the requested act would violate the terms of: (i) a business entity's governing documents; or (ii) an agreement affecting a business entity, including how the entity's business is conducted;

(7) the person commenced, or has actual knowledge that another person commenced, a judicial proceeding to construe the power of attorney or review the agent's conduct and that proceeding is pending;

(8) the person commenced, or has actual knowledge that another person commenced, a judicial proceeding for which a final determination was made that found: (A) the power of attorney invalid with respect to a purpose for which the power of attorney is being presented for acceptance; or (B) the agent lacked the authority to act in the same manner in which the agent is attempting to act under the power of attorney;

(9) the person makes, has made, or has actual knowledge that another person has made a report to a law enforcement agency or other federal or state agency, including the Department of Family and Protective Services, stating a good faith belief that the principal may be subject to physical or financial abuse, neglect, exploitation, or abandonment by the agent or a person acting with or on behalf of the agent;

(10) the person receives conflicting instructions or communications with regard to a matter from co-agents acting under the same power of attorney or from agents acting under different powers of attorney signed by the same principal or another adult acting for the principal as authorized by Section 751.0021, provided that the person may refuse to accept the power of attorney only with respect to that matter; or

(11) the person is not required to accept the durable power of attorney by the law of the jurisdiction that applies in determining the power of attorney's meaning and effect, or the powers conferred under the durable power of attorney that the agent is attempting to exercise are not included within the scope of activities to which the law of that jurisdiction applies.

*Id.* at § 751.206.

**Party Refusing A Power Of Attorney Must Give A Timely Response.** Generally, if a person refuses to accept a power of attorney, then that person should provide the agent a written statement setting forth the reason or reasons

for the refusal. *Id.* at § 751.207. However, if the person is refusing the power of attorney due to a reason set forth in Section 751.206(2) or (3), then the person shall provide to the agent a written statement signed by the person under penalty of perjury stating that the reason for the refusal is a reason described by Section 751.206(2) or (3), and the person is not required to provide any additional explanation. *Id.* at § 751.207(b). This response must be provided to the agent on or before the date the person would otherwise be required to accept the power of attorney. *Id.* at § 751.207(c).

**Cause Of Action For Wrongfully Refusing Power Of Attorney.** The principal or agent may bring an action against a person who wrongfully refuses to accept a power of attorney. *Id.* at § 751.212(a). This suit may not be commenced until after the date the person is required to accept the power of attorney. *Id.* at § 751.212(b). The exclusive remedies are that the court shall order the person to accept the power of attorney and may award the plaintiff court costs and reasonable and necessary attorney's fees. *Id.* at § 751.212(c). The court shall dismiss an action that was commenced after the date a written statement was provided to the agent. *Id.* at § 751.212(d). If the agent receives a written statement after the date a timely action is commenced, the court may not order the person to accept the power of attorney, but instead may award the plaintiff court costs and reasonable and necessary attorney's fees. *Id.* at § 751.212(e). To the contrary, a court may award costs and fees to the defendant if: (1) the court finds that the action was commenced after the date the written statement was timely provided to the agent; (2) the court expressly finds that the refusal was permitted; or (3) Section 751.212(e) does not apply and the court does not issue an order ordering the person to accept the power of attorney. *Id.* at § 751.213.

**Person May Bring Suit To Construe Power Of Attorney.** A person who is asked to accept a power of attorney may bring an action requesting a court to construe, or determine the validity or enforceability of, the power of attorney. *Id.* at § 751.251(b). This provision does not expressly allow a person to receive an award of attorney's fees or court costs from the agent or principal. The person may potentially also assert a request for a declaratory judgment regarding the effectiveness of the power of attorney document, and that statute allows a trial court to potentially award of fees. Tex. Civ. Prac. & Rem. Code Ann. 37.009.

**Person Cannot Require Alternative Measures.** A person who is asked to accept a power of attorney may not require that: "(1) an additional or different form of the power of attorney be presented for authority that is granted in the power of attorney presented to the person; or (2) the power of attorney be recorded in the office of a county clerk unless the recording of the instrument is required by Section 751.151 or another law of this state." Tex. Est. Code Ann. § 751.202.

**Person's Knowledge Judged By Employee Conducting Transaction.** A person is not considered to have actual knowledge of a fact relating to a power of attorney, principal, or agent if the employee conducting the transaction or activity

involving the power of attorney does not have actual knowledge of the fact. *Id.* at § 751.211. A person is considered to have actual knowledge of a fact relating to a power of attorney, principal, or agent if the employee conducting the transaction or activity involving the power of attorney has actual knowledge of the fact. *Id.* at § 751.211. "Actual knowledge" means the knowledge of a person without that person making any due inquiry and without any imputed knowledge. *Id.* at § 751.002.

This is a very favorable definition of actual knowledge for financial institutions. A principal may have relationships in multiple parts of a financial institution: commercial (loans), retail (accounts), and fiduciary (trust administration, investment advisor). The fact that a person in the trust department may know something about the principal and agent will not be imputed to the teller that closes a transaction for the agent. The transaction will be judged solely by the teller's actual knowledge without the teller making any inquiry with other parts of the financial institution and without the teller being imputed the knowledge of the trust administrator.

**Other Laws Still Apply.** The remedies and rights in the Act are not exclusive and do not abrogate any right or remedy under any law. *Id.* at § 751.006.

**Agent Entitled To Reimbursement And Compensation.** Unless the power of attorney otherwise provides, an agent is entitled to reimbursement of reasonable expenses incurred on the principal's behalf and compensation that is reasonable under the circumstances. *Id.* at § 751.024.

### **C. Agent Can Change Rights of Survivorship And Beneficiary Designations If Granted That Authority**

If the principal provides for such power in the power of attorney document, the agent may create or change rights of survivorship or beneficiary designations.

**Power To Create Or Modify Survivorship And Beneficiary Rights.** Section 751.031 provides that if the principal grants the following authority in the power of attorney document, the agent may: "(1) create, amend, revoke, or terminate an inter vivos trust; (2) make a gift; (3) create or change rights of survivorship; (4) create or change a beneficiary designation; or (5) delegate authority granted under the power of attorney." Tex. Est. Code Ann. 751.031(b). The provision does limit this right: an agent who is not "an ancestor, spouse, or descendant of the principal may not exercise authority under the power of attorney to create in the agent, or in an individual to whom the agent owes a legal obligation of support, an interest in the principal's property, whether by gift, right of survivorship, beneficiary designation, disclaimer, or otherwise." *Id.* at §751.031(c). However, that limitation is, itself, limited by the following clause: "Unless the durable power of attorney otherwise provides." *Id.* So, if the power of attorney document expressly allows the agent to name himself or herself as a

beneficiary, the agent can do so. If the agent is the principal's ancestor, spouse, or descendant, then the agent can name himself or herself as a beneficiary.

Unless the power of attorney otherwise provides, and agent can:

- (1) create or change a beneficiary designation under an account, contract, or another arrangement that authorizes the principal to designate a beneficiary, including an insurance or annuity contract, a qualified or nonqualified retirement plan, including a retirement plan as defined by Section 752.113, an employment agreement, including a deferred compensation agreement, and a residency agreement;
- (2) enter into or change a P.O.D. account or trust account under Chapter 113; or
- (3) create or change a nontestamentary payment or transfer under Chapter 111.

*Id.* at § 751.033.

Under Section 752.108(b) and Sections 752.113(b) and (c), unless the principal has granted the authority to create or change a beneficiary designation expressly as required by Section 751.031(b)(4), an agent may be named a beneficiary of an insurance contract, an extension, renewal, or substitute for the contract, or a retirement plan only to the extent the agent was named as a beneficiary by the principal before executing the power of attorney. *Id.* at §§ 752.108(b), 752.113(b), (c). "If an agent is granted authority under Section 751.031(b)(4) and the durable power of attorney grants the authority to the agent described in Section 752.108 or 752.113, then, unless the power of attorney otherwise provides, the authority of the agent to designate the agent as a beneficiary is not subject to the limitations prescribed by Sections 752.108(b) and 752.113(c)." *Id.* at §751.033. "If an agent is not granted authority under Section 751.031(b)(4) but the durable power of attorney grants the authority to the agent described in Section 752.108 or 752.113, then, unless the power of attorney otherwise provides and notwithstanding Section 751.031, the agent's authority to designate the agent as a beneficiary is subject to the limitations prescribed by Sections 752.108(b) and 752.113(c)." *Id.* at § 751.033(c).

So, in other words, if the power of attorney document expressly allows the agent to name himself or herself as a beneficiary of a retirement or insurance contract, he or she can do so even if he or she was not previously named a beneficiary. If the power of attorney document does not expressly allow the agent to name himself or herself, but there is a general power to enter into retirement and insurance transactions, then the agent can name himself or herself as a beneficiary only if he or she was previously so named by the principal.

**Gifts.** Unless the durable power of attorney otherwise provides, a general grant of authority to make a gift only authorizes the agent to:

(1) make outright to, or for the benefit of, a person a gift of any of the principal's property, including by the exercise of a presently exercisable general power of appointment held by the principal, in an amount per donee not to exceed: (A) the annual dollar limits of the federal gift tax exclusion under Section 2503(b), Internal Revenue Code of 1986, regardless of whether the federal gift tax exclusion applies to the gift; or (B) if the principal's spouse agrees to consent to a split gift as provided by Section 2513, Internal Revenue Code of 1986, twice the annual federal gift tax exclusion limit; and

(2) consent, as provided by Section 2513, Internal Revenue Code of 1986, to the splitting of a gift made by the principal's spouse in an amount per donee not to exceed the aggregate annual federal gift tax exclusions for both spouses.

*Id.* at §751.032.

The agent may make a gift only as the agent determines is consistent with the principal's objectives if the agent actually knows those objectives. *Id.* If the agent does not know the principal's objectives, the agent may make a gift of the principal's property "only as the agent determines is consistent with the principal's best interest based on all relevant factors, including the factors listed in Section 751.122 and the principal's personal history of making or joining in making gifts." *Id.*

**Duty To Preserve Principal's Estate Plan.** The statute provides that the agent should take into account the principal's estate plan in making decisions:

An agent shall preserve to the extent reasonably possible the principal's estate plan to the extent the agent has actual knowledge of the plan if preserving the plan is consistent with the principal's best interest based on all relevant factors, including: (1) the value and nature of the principal's property; (2) the principal's foreseeable obligations and need for maintenance; (3) minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes; and (4) eligibility for a benefit, a program, or assistance under a statute or regulation.

*Id.* at 751.122.

**Concern With New Provisions Broadening Agent's Authority.** It is not uncommon for an agent to take advantage of the power that he or she has regarding the principal's assets. The agent may start taking assets for his or her own benefit, use the principal's assets as collateral for a loan to the agent,



receive assets for the agent's own benefit that should be deposited into the principal's accounts, create new accounts or change account signature cards that create an ownership interest in the agent, etc.

The new provisions of the Estates Code allow a principal to allow an agent to name himself or herself as the beneficiary of accounts, insurance products, and retirement accounts. The author has grave concerns about the way that vulnerable persons sign power of attorney documents. Principals often have diminished capacity at the time that power of attorney documents are executed. Attorneys, who are often retained by the agent, may not adequately explain all of the provisions of the power of attorney document. An agent may not even retain an attorney and may simply create such a document (from the statutory form) and have the principal sign it without any explanation.

Principals routinely use beneficiary designations as a form of estate planning. So, the principal may execute a will and omit a person or decrease a devise to that person if the principal has otherwise already provided for that person via a beneficiary designation. If a power of attorney document is signed with broad powers that the principal does not really understand, the agent may completely change the principal's estate planning by changing beneficiary designation. If the power of attorney document allows the agent to name himself or herself, then the agent can take property that should go to someone else and give it to himself or herself. In any event, the agent can redirect assets from the person the principal originally intended to have those assets and give them to someone else. There is no need for these results. In the author's opinion, the ability of an agent to effectuate transactions for the principal's benefit should not include the ability to change beneficiary designations that only impacts who gets the assets once the principal is deceased. Should an agent be able to execute a new will for the principal and name himself or herself as the beneficiary of the estate or name someone else? Of course not. Yet, that is essentially what the statute allows regarding non-probate assets.

## **VIII. Legislative Update: Exploitation of Vulnerable Persons Statute**

### **A. Introduction**

The Texas Legislature passed, and the Governor signed, an act that creates new protections for vulnerable individuals. HB 3921 creates a new chapter 280 of the Texas Finance Code and a new Article 581, Section 45, of the Texas Securities Act in the Texas Civil Statutes. The Texas Legislature now requires employees to report suspected incidences of financial exploitation to their employers, and for the financial institution, security dealers, or financial adviser to similarly make reports to the Texas Department of Family and Protective Services (the "Department"). This legislation takes effect September 1, 2017. Legislative history provides:

Interested parties contend that certain vulnerable adults lose a significant amount of money each year to fraud and financial exploitation. H.B. 3921 seeks to protect the financial well-being of these individuals by authorizing financial institutions, securities dealers, and investment advisers to place a hold on suspicious transactions involving these vulnerable adults and by requiring the reporting of suspected financial exploitation.

**Definitions Of Vulnerable Person And Financial Exploitation.** A “vulnerable adult” means someone who is sixty-five (65) years or older or a person with a disability. Tex. Fin. Code Ann. § 280.001. The term “exploitation” means: “the act of forcing, compelling, or exerting undue influence over a person causing the person to act in a way that is inconsistent with the person’s relevant past behavior or causing the person to perform services for the benefit of another person.” *Id.* at § 280.001(2).

“Financial exploitation” means:

(A) the wrongful or unauthorized taking, withholding, appropriation, or use of the money, assets, or other property or the identifying information of a person; or (B) an act or omission by a person, including through the use of a power of attorney on behalf of, or as the conservator or guardian of, another person, to: (i) obtain control, through deception, intimidation, fraud, or undue influence, over the other person’s money, assets, or other property to deprive the other person of the ownership, use, benefit, or possession of the property; or (ii) convert the money, assets, or other property of the other person to deprive the other person of the ownership, use, benefit, or possession of the property.

Tex. Fin. Code Ann. § 280.001(3).

## **B. Financial Institutions**

**Employee Reporting Obligation.** Section 280.002 provides that “if an employee of a financial institution has cause to believe that financial exploitation of a vulnerable adult who is an account holder with the financial institution has occurred, is occurring, or has been attempted, the employee shall notify the financial institution of the suspected financial exploitation.” Tex. Fin. Code Ann. § 280.002. “Financial Institution” means: “a state or national bank, state or federal savings and loan association, state or federal savings bank, or state or federal credit union doing business in this state.” Tex. Fin. Code Ann. § 277.001.

**Financial Institution Reporting Obligation.** If an employee makes such a report or the financial institution otherwise has cause to believe a reportable event has occurred, then the financial institution shall assess the suspected financial exploitation and submit a report to the Department. *Id.* at § 280.002. The

report shall include: (1) the name, age, and address of the elderly person or person with a disability; (2) the name and address of any person responsible for the care of the elderly person or person with a disability; (3) the nature and extent of the condition of the elderly person or person with a disability; (4) the basis of the reporter's knowledge; and (5) any other relevant information. *Id.* (citing Tex. Hum. Res. Code § 48.051). The financial institution should submit the report not later than the earlier of: (1) the date it completes an assessment of the suspected financial exploitation; or (2) the fifth business day after the date the financial institution is notified of the suspected financial exploitation or otherwise has cause to believe that the suspected financial exploitation has occurred, is occurring, or has been attempted. *Id.* Furthermore, a financial institution may at the time the financial institution submits the report also notify a third party reasonably associated with the vulnerable adult of the suspected financial exploitation, unless the financial institution suspects that the third party is guilty of financial exploitation of the vulnerable adult. *Id.* at § 280.003.

**Financial Institution's Ability To Place A Hold On Transactions.** If a financial institution submits a report, it "(1) may place a hold on any transaction that: (A) involves an account of the vulnerable adult; and (B) the financial institution has cause to believe is related to the suspected financial exploitation; and (2) must place a hold on any transaction involving an account of the vulnerable adult if the hold is requested by the Department or a law enforcement agency." *Id.* at § 280.004. This hold generally expires ten business days after the report was submitted. *Id.* The financial institution may extend a hold for an additional thirty business days "if requested by a state or federal agency or a law enforcement agency investigating the suspected financial exploitation." *Id.* The financial institution may also petition a court to extend a hold. *Id.*

**Duty To Create Policies.** The statute requires that a financial institution adopt internal policies, programs, plans, or procedures for: (1) the employees of the financial institution to make the notification; and (2) the financial institution to conduct the assessment and submit the report. *Id.* at § 280.002(d). These policies may authorize the financial institution to make a report to other appropriate agencies and entities. *Id.* at § 280.002(e). A financial institution shall also adopt internal policies, programs, plans, or procedures for placing a hold on a transaction. *Id.* at § 280.004.

**Immunity.** An employee or financial institution who makes a report to the Department or to a third party is immune from any civil or criminal liability unless the employee or financial institution acted in bad faith or with a malicious purpose. *Id.* at § 280.005. Further, a financial institution that in good faith and with the exercise of reasonable care places or does not place a hold on any transaction is immune from any civil or criminal liability or disciplinary action resulting from that action or failure to act. *Id.* at § 280.005.

**Records.** A financial institution shall provide access to or copies of records relevant to the suspected financial exploitation to the Department, law

enforcement or a prosecuting attorney. The provisions in Texas Finance Code Section 59.006 relating to notice and reimbursement for customer records do not apply to these provisions.

### **C. Securities Dealers and Financial Advisers**

**Professionals' Duties To Report.** It provides that if a securities professional has cause to believe that financial exploitation of a vulnerable adult who is an account holder with the dealer or investment adviser has occurred, is occurring, or has been attempted, the securities professional shall notify the dealer or investment adviser of the suspected financial exploitation. "Securities professionals" are agents, investment adviser representatives, or persons who serve in a supervisory or compliance capacity for a dealer or investment adviser.

**Dealer's/Investment Adviser's Duty To Report.** If a dealer or investment adviser is notified of suspected financial exploitation or otherwise has cause to believe that financial exploitation of a vulnerable adult who is an account holder with the dealer or investment adviser has occurred, is occurring, or has been attempted, the dealer or investment adviser shall assess the suspected financial exploitation and submit a report to the Securities Commissioner and the Department. The dealer or investment adviser shall submit the reports not later than the earlier of: (1) the date the dealer or investment adviser completes the dealer's or investment adviser's assessment of the suspected financial exploitation; or (2) the fifth business day after the date the dealer or investment adviser is notified of the suspected financial exploitation or otherwise has cause to believe that the suspected financial exploitation has occurred, is occurring, or has been attempted. If a dealer or investment adviser submits reports, they may also notify a third party reasonably associated with the vulnerable adult of the suspected financial exploitation, unless the dealer or investment adviser suspects the third party of financial exploitation of the vulnerable adult.

**Duty To Create Policies.** Each dealer and investment adviser shall adopt internal policies, programs, plans, or procedures for the securities professionals or persons serving in a legal capacity for the dealer or investment adviser to make the notification and for the dealer or investment adviser to conduct the assessment and submit reports. The policies, programs, plans, or procedures may authorize the dealer or investment adviser to report the suspected financial exploitation to other appropriate agencies and entities in addition to the Securities Commissioner and the Department, including the attorney general, the Federal Trade Commission, and the appropriate law enforcement agency. Each dealer and investment adviser shall also adopt internal policies, programs, plans, or procedures for placing a hold on a transaction.

**Ability To Place Hold On Transactions.** If a dealer or investment adviser submits reports, they: (1) may place a hold on any transaction that involves an account of the vulnerable adult, and the dealer or investment adviser has cause to believe is related to the suspected financial exploitation; and (2) must place a

hold on any transaction involving an account of the vulnerable adult if the hold is requested by the Securities Commissioner, the Department, or a law enforcement agency. The hold expires ten business days after the date the dealer or investment adviser submits the reports. This can be extended for up to thirty business days if requested by a state or federal agency or a law enforcement agency investigating the suspected financial exploitation. The dealer or investment adviser may also petition a court to extend a hold placed on any transaction.

**Immunity.** A securities professional, dealer, or investment adviser who makes a notification or report or who testifies or otherwise participates in a judicial proceeding is immune from any civil or criminal liability arising from the notification, report, testimony, or participation in the judicial proceeding, unless the securities professional, person serving in a legal capacity for the dealer or investment adviser, or dealer or investment adviser acted in bad faith or with a malicious purpose. A dealer or investment adviser that in good faith and with the exercise of reasonable care places or does not place a hold on any transaction is immune from civil or criminal liability or disciplinary action resulting from the action or failure to act.

**Records.** A dealer or investment adviser shall provide on request access to or copies of records relevant to the suspected financial exploitation to the Department, law enforcement or a prosecuting attorney.

#### **D. Other Reporting Duties**

The Texas Human Resources Code has a general provision that requires anyone to report the exploitation of elderly or disabled individuals. Section 48.051 states: “a person having cause to believe that an elderly person, a person with a disability, or an individual receiving services from a provider as described by Subchapter F is in the state of abuse, neglect, or exploitation shall report the information required by Subsection (d) immediately to the department.” Tex. Hum. Res. Code § 48.051. In the Texas Human Resources Code, the term “exploitation” means “the illegal or improper act or process of a caretaker, family member, or other individual who has an ongoing relationship with an elderly person or person with a disability that involves using, or attempting to use, the resources of the elderly person or person with a disability, including the person’s social security number or other identifying information, for monetary or personal benefit, profit, or gain without the informed consent of the person.” *Id.* at § 48.002. Importantly, the Texas Human Resources Code provides a criminal penalty for not reporting the exploitation: “A person commits an offense if the person has cause to believe that an elderly person or person with a disability has been abused, neglected, or exploited or is in the state of abuse, neglect, or exploitation and knowingly fails to report in accordance with this chapter.” *Id.* at § 48.052. Generally, this offense is a Class A misdemeanor. *Id.* The Texas Human Resources Code has similar immunity defenses for making reports. *Id.* § 48.054.

Importantly, the new provisions provide that complying with those reporting obligations also satisfies the reporting obligations under the Texas Human Resources Code. So, there is no duty to make multiple reports.

### **E. Application of U.C.C. Section 3.307 To Notice Of Financial Exploitation**

The statutory definition of “financial exploitation” seems very broad. Financial institutions, dealers, and financial advisers should be aware of another provision that dictates when a financial institution has notice of a breach of fiduciary duty. Texas Business and Commerce Code Section 3.307 sets forth the rules dictating when a taker of an instrument would lose its holder-in-due-course status and potentially make financial institutions vulnerable to other causes of action, such as conversion due to having notice of fiduciary breaches. Tex. Bus. & Com. Code Ann. § 3.307. Section 307 has been explained in this way:

When a fiduciary holds an instrument in trust for or on behalf of the represented person, he is usually authorized to negotiate the instrument only for the benefit of the represented person. When the fiduciary negotiates the instrument for his own benefit rather than for the benefit of the represented person in breach of his trust, an equitable claim of ownership on the part of the represented person arises. The represented person may assert this claim against any person not having the rights of a holder in due course. A taker cannot be a holder in due course if he has notice of the claim of the represented person. Section 3-307 determines when the taker has notice of such a claim that prevents her from becoming a holder in due course.

6 WILLIAM D. HAWKLAND & LARRY LAWRENCE, UNIFORM COMMERCIAL CODE SERIES § 3-307:3 (Rev. Art. 3) (1999).

Section 3.307(b) of the Texas Business and Commerce Code states:

If (i) an instrument is taken from a fiduciary for payment or collection or for value, (ii) the taker has knowledge of the fiduciary status of the fiduciary, and (iii) the represented person makes a claim to the instrument or its proceeds on the basis that the transaction of the fiduciary is a breach of fiduciary duty, the following rules apply:

(1) notice of breach of fiduciary duty by the fiduciary is notice of the claim of the represented person;

(2) in the case of an instrument payable to the represented person or the fiduciary as such, the taker has notice of the breach of fiduciary duty if the instrument is:

(A) taken in payment of or as security for a debt known by the taker to be the personal debt of the fiduciary;

(B) taken in a transaction known by the taker to be for the personal benefit of the fiduciary; or

(C) deposited to an account other than an account of the fiduciary, as such, or an account of the represented person;

(3) if an instrument is issued by the represented person or the fiduciary as such, and made payable to the fiduciary personally, the taker does not have notice of the breach of fiduciary duty unless the taker knows of the breach of fiduciary duty; and

(4) if an instrument is issued by the represented person or the fiduciary as such, to the taker as payee, the taker has notice of the breach of fiduciary duty if the instrument is:

(A) taken in payment of or as security for a debt known by the taker to be the personal debt of the fiduciary;

(B) taken in a transaction known by the taker to be for the personal benefit of the fiduciary; or

(C) deposited to an account other than an account of the fiduciary, as such, or an account of the represented person.

Tex. Bus. & Com. Code Ann. § 3.307.

Although the definition of financial exploitation is broader than the provisions of Section 3.307, Section 3.307 is a good place to start to determine whether there is notice that financial exploitation may be occurring.

#### **F. New Provisions Application To Aiding And Abetting Breach Of Fiduciary Duty, Knowing Participation, Or Conspiracy**

When an exploiter takes advantage of a vulnerable person, the exploiter often does not make wise investments with the wrongfully obtained assets. In other words, when someone attempts to retrieve those assets for the vulnerable person or his or her estate, the exploiter may be judgment proof. So, the plaintiff will often look to others who have deeper pockets and may be able to pay a judgment. There are several theories in Texas that allow a plaintiff to sue a third party for the exploiter's bad conduct.

When a third party knowingly participates in the breach of a fiduciary duty, the third party becomes a joint tortfeasor and is liable as such. *Kinzbach Tool Co. v.*

*Corbett-Wallace Corp.*, 138 Tex. 565, 160 S.W.2d 509, 513-14 (Tex. 1942); *Kaster v. Jenkins & Gilchrist, P.C.*, 231 S.W.3d 571, 580 (Tex. App.—Dallas 2007, no pet.); *Brewer & Pritchard, P.C. v. Johnson*, 7 S.W.3d 862, 867 (Tex. App.—Houston [1st Dist.] 1999), *aff'd on other grounds*, 73 S.W.3d 193 (2002). The elements are: (1) a breach of fiduciary duty by a third party, (2) the aider's knowledge of the fiduciary relationship between the fiduciary and the third party, and (3) the aider's awareness of his participation in the third party's breach of its duty. *Darocy v. Abildtrup*, 345 S.W.3d 129, 137-38 (Tex. App.—Dallas 2011, no pet). There may also be an aiding-and-abetting-breach-of-fiduciary-duty claim in Texas. See *First United Pentecostal Church of Beaumont v. Parker*, 2017 Tex. LEXIS 295 (Tex. Mar. 17, 2017) (assumed that such a claim existed in Texas but held that it was not expressly so holding).

A civil conspiracy involves a combination of two or more persons to accomplish an unlawful purpose, or to accomplish a lawful purpose by unlawful means. *Tilton v. Marshall*, 925 S.W.2d 672, 681 (Tex. 1996). An action for civil conspiracy has five elements: (1) a combination of two or more persons; (2) the persons seek to accomplish an object or course of action; (3) the persons reach a meeting of the minds on the object or course of action; (4) one or more unlawful, overt acts are taken in pursuance of the object or course of action; and (5) damages occur as a proximate result.

The point is that a plaintiff may allege that the financial institution, dealer, or financial adviser knew of the exploiter's fiduciary relationship, knew that breaches were occurring, and still assisted in completing the transactions. The plaintiff may cite to these new broad statutes (and Section 3.307) as giving legal definition to when a financial institution, dealer, or financial adviser has notice of breach of fiduciary duty. If the financial institution, dealer, or financial adviser did not properly report financial exploitation as required by the statutes, then the plaintiff will certainly take advantage of that fact in proving liability and/or exemplary damages. Accordingly, these new statutes may be far-reaching ramifications for financial institutions, dealers, or financial advisers beyond the express words in those statutes.

## **G. Conclusion**

Certainly, the author agrees that financial exploitation of vulnerable individuals is bad and should be punished. However, the new provisions seem to be very broad and have vague aspects that place new duties on financial institutions, dealers, financial advisers and their employees. These duties also seem to be placed at the expense of the financial institutions, dealers, and financial advisers. These new provisions raise many questions:

1) When should financial institutions, dealers, and financial advisers be imputed knowledge that a client is a vulnerable person? Is it just actual knowledge or should there be a "should have known" component? Is the knowledge of one employee imputed to all other employees?



- 2) The burden to make a report involves vulnerable individuals who have an account with financial institutions, dealers, and financial advisers. Does an employee or financial institution, dealer, or financial adviser have any duty to investigate or report under this statute any exploitation of vulnerable individuals who are not account holders? What if they are borrowers or attempted borrowers? Presumably, the Texas Human Resources Code provisions will still apply even if the other newer provisions do not.
- 3) What evidence will be necessary to raise a “cause to believe” that employees or financial institutions, dealers, and financial advisers should make a report?
- 4) What will the assessment entail? Does the financial institution, dealer, or financial adviser have a duty to investigate “outside the walls”? If the assessment leads to the belief that no exploitation has occurred, does there still have to be a report?
- 5) The definition of “financial exploitation” is very broad and would also seem to include even proper behavior, such as a power-of-attorney holder or agent compensating himself or herself for their services. What duties will financial institutions, dealers, and financial advisers have to report proper behavior that seems to fit within the broad definition of “financial exploitation”?
- 6) If financial institutions, dealers, and financial advisers have to file suit to extend a hold, can they seek attorney’s fees and costs from the vulnerable individual and/or the exploiter for doing?
- 7) Do the new statutes create duties that a vulnerable individual can later use as a basis for a negligence suit? Can vulnerable individuals sue financial institutions, dealers, and financial advisers for not assessing or reporting financial exploitation or placing or extending a hold that then leads to damages to the vulnerable individuals?
- 8) When do financial institutions, dealers, and financial advisers have to adopt internal policies, programs, plans, or procedures regarding assessing and reporting financial exploitation and regarding holds? Do these have to be in writing or can they be oral? Does a defendant have to turn these over in litigation? Can these be used to set a standard of care, such that if financial institutions, dealers, and financial advisers have higher internal policies, programs, plans, or procedures than what is required by law, will the defendants have to meet their higher standards?
- 9) With regard to immunity, what are the legal standards for proving “bad faith or with a malicious purpose”? Who has the burden to prove that a report was made in “bad faith or with a malicious purpose”? Is the defendant presumed to act in good faith?
- 10) With regard to immunity for holds, what are the standards for “good faith and with the exercise of reasonable care”? Does reasonable care involve what a

reasonably prudent financial institution, dealer, or financial adviser do or simply a normal person? Will the parties be required to have expert evidence on the standard of care? If financial institutions, dealers, and financial advisers are in good faith, but do not exercise reasonable care, are they able to claim immunity? If there is no immunity, what potential damages can a vulnerable individual claim (direct or consequential damages)?

## **IX. Texas Supreme Court Case To Watch**

### **A. Texas Supreme Court Will Decide Whether Texas Recognizes A Tortious Interference With Inheritance Claim**

In *Anderson v. Archer*, the trial court's judgment awarded the plaintiffs \$2.5 million in damages based on a tortious interference with inheritance claim. No. 03-13-00790-CV, 2016 Tex. App. LEXIS 2165 (Tex. App.—Austin March 2, 2016, pet. granted). The defendants appealed and argued that Texas law does not recognize such a claim. The court of appeals agreed with the appellants. The court held that prior cases from that court and the Texas Supreme Court had never adopted such a claim:

In short, we agree with the Amarillo Court of Appeals that “neither this Court, the courts in *Valdez*, *Clark*, and *Russell*, nor the trial court below can legitimately recognize, in the first instance, a cause of action for tortiously interfering with one's inheritance.” We also agree with the Amarillo court's assessment that neither the Legislature nor Texas Supreme Court has done so, or at least not yet. Absent legislative or supreme court recognition of the existence of a cause of action, we, as an intermediate appellate court, will not be the first to do so.

*Id.* The court also rejected an argument that a tortious interference with inheritance claim is merely a subset of the tort of tortious interference with a contract or prospective contractual or business relationship. It held that it was a separate claim that had not yet been recognized. The court therefore reversed the award for the plaintiff. The plaintiff sought review in the Texas Supreme Court, and today, the Court granted the petition for review. The Court's staff described the issue as: “The principal issue is whether Texas should recognize tortious interference with inheritance rights.”

The Texas Supreme Court recently issued an opinion in *Jackson Walker, LLPO v. Kinsel*, No. 15-0403, 2017 Tex. LEXIS 477 (Tex. May 26, 2017), where the court of appeals addressed the issue of whether a tortious interference with inheritance rights claim existed in Texas. The Court held that it would not decide that issue in *Kinsel* because the plaintiff had other adequate remedies. It appears that the Court will address this important issue in the *Anderson* case.

## **X. Conclusion**

This paper was intended to provide an update of recent legal issues in the complex area of fiduciary litigation in Texas. For more information, please visit [txfiduciaryliterator.com](http://txfiduciaryliterator.com).