BANK GENEALOGY 101:
PROVING FIDUCIARY STANDING

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I. Introduction[1]

Banks routinely merge, consolidate, purchase one another, and rename themselves. That is a good thing. Healthier banks acquire banks that are not as healthy. Portfolios become more diverse and market resistant. As a general rule, when those transactions occur, the banks do not go to court to seek approval to remain trustee of each trust they administer. These complicated transactions can potentially cause trouble for the new or resulting bank regarding fiduciary appointments. If challenged by a beneficiary, how does a bank that is not named in a trust instrument and/or court order appointing a trustee prove that it has standing to be trustee of a trust? This article attempts to address many of the issues and the complexities of federal and Texas state laws that allow for the continuation of fiduciary appointments without further court intervention.

II. Ownership Changes

Many bank transactions merely involve sales of stock or mergers between bank holding companies. Such transactions would not change the nature, character or identity of the holding company's subsidiary; rather, the transactions merely changed the identity of the subsidiary's owner. A corporation or a bank is a separate legal entity from its shareholders, officers, and directors. *See Capital Fin. & Commerce AG v. Sinopec Overseas Oil & Gas, Ltd*., 260 S.W.3d 67, 82 (Tex. App.—Houston [1st Dist.] 2008, no pet.); *Boyo v. Boyo*, 196 S.W.3d 409, 419 (Tex. App.—Beaumont 2006, no pet.). A corporation has perpetual existence, and unless its organizational documents or statutes provide otherwise, it only terminates when it is affirmatively dissolved. *See Marcum v. Wengert*, 344 Ark. 153, 40 S.W.3d 230 (2001). It is hornbook corporate law that a corporation or a bank is separate from its owners, and changes in ownership do not affect the entity's property, rights, or duties:

> Important consequences flow from the conception of the corporation as a legal entity distinct from its shareholders. Corporate property belongs, for example, to the corporation, and not to the shareholders. Another consequence is that the existence of the corporation is not affected by changes in the personnel of its shareholders. Furthermore, the corporate rights and duties are not affected by such changes in personnel or by dealings between shareholders individually. The sale of the corporate assets does not give the purchaser the right to be a corporate body, nor does it

[1] 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.

> vest in the purchaser all rights of action possessed by the corporation. Furthermore, the sale of the corporate assets does not dissolve the corporation.

15 TEX. JUR. CORPORATIONS, § 19. *See also Trott v. Flato*, 244 S.W. 1085 (Tex. Civ. App.—San Antonio 1922, writ dism. w.o.j.) ("It is well settled by authority that the ownership of stock, yea, all the stock, in a corporation does not pass either legal or equitable title to the corporate property.”). Stated simply, when a company's owner changes, the company remains the same. *See Kramont Operating Pship., L.P. v. Levy*, No. 07-1430, 2008 U.S. Dist. LEXIS 45799, n.2 (E.D. Pa. June 12, 2008); *Seacoast, Inc. v. LaCouture*, No. 03-00-00178-CV, 2000 WL 1862668, CV, 2000 Tex. App. LEXIS 8486 (Tex. App.—Austin December 21, 2000, pet. denied) (not designated for publication) ("The sale of the shares changed only the ownership of the shares; the corporate status of Seacoast did not change."). Accordingly, a sale of bank stock from one bank holding company to another or the merger of bank holding companies should not alter the fiduciary appointments or interests held by the subsidiary trustee. As there were no changes to the trustee entity itself, there should be no requirement to seek court approval for the subsidiary to remain trustee of any trusts. *See Clower v. Wells Fargo Bank, N.A.*, NO. 2:07-CV-510-TJW-CE, op. at 8 (E.D. Tex. September 12, 2011) (magistrate’s opinion later adopted by district court) (recommending that change of ownership of bank did not require bank to seek court approval to remain trustee).

III. Name Changes

Banks often change their names after a stock sale or otherwise. It is well settled that mere name changes by a bank entity do not alter its fiduciary appointments and do not require the bank to request approval from a court. A corporate name change is not a change in the corporation's identity and has no effect on the corporations property, rights, or liabilities. *See Alley v. Miramon,* 614 F.2d 1372, 1384 (5th Cir. 1980); *S. Pac. Transp. Co. v. Voluntary Purchasing Groups, Inc.*, 229 B.R. 119 (E.D. Tex. 1999); *Zuniga v. Wooster Ladder Co.*, 119 S.W.3d 856, 862 (Tex. App.—San Antonio 2003, no pet.); *Dirt Arresters, Inc. v. H.C. Rental Props., Inc.*, 2000 WL 145095, *1 (Tex. App.—Dallas February 10, 2000, no pet.) (citing TEX. BUS. CORP. ACT ANN. ART. 4.06); *Drennan v. Cmty. Health Inv. Corp.*, 905 S.W.2d 811, 818 (Tex. App.—Amarillo 1995, writ denied).

For example, in *Nelson v. Detroit & Security Trust Co.*, the trust company was the representative of an estate that brought suit to enforce a debt. 56 S.W.2d 860 (Tex. Comm'n. App. 1933). The defendant argued that the trust company could not enforce the debt because another named trust company was named in the will. The court of appeals disagreed, holding that it was the same trust company that simply underwent a name change:

> Security Trust Company, a foreign corporation, was appointed the legal representative of said estate by the probate court of Bexar

> County. The allegations of [plaintiff's] petition show that the Detroit & Security Trust Company and the Security Trust Company is one and the same corporation; that it was formerly named and styled the Security Trust Company, but that its name had been changed to the Detroit & Security Trust Company. The mere change of name has no effect whatever upon the identity of a corporation, or upon its property rights or liabilities. The Detroit & Security Trust Company was in law the same corporation which was appointed as the legal representative of the estate of Henrietta Powers, deceased.

Id. at 862. Indeed, if a person who is a trustee changed her name from Dawn Jones to Dawn Smith, the person is still the same and there is no need to seek court approval to remain trustee. A bank should have no duty to seek court approval when it changes its name. *See Clower v. Wells Fargo Bank, N.A*., NO. 2:07-CV-510-TJW-CE, op. at 9 (E.D. Tex. September 12, 2011) (magistrate's opinion later adopted by district court) (recommending that name change of bank did not require bank to seek court approval to remain trustee).

IV. Consolidations And Mergers

Banks often enter into merger and consolidation transactions. Where at least one of the relevant banks is a national bank, federal statutes apply to the merger and consolidation. If they are both state banks, Texas statutes apply.

A. Federal Statutes

In situations in which a national bank is the surviving or resulting entity, federal statutes provide that consolidated/merged entities will continue as trustees without any need to file a judicial action:

> (e) Status of consolidated [or merged] association; property rights and interests vested and held as fiduciary. The corporate existence of each of the consolidating [or merging] banks or banking associations participating in such consolidation [or merger] shall be merged into and continued in the consolidated national banking association and such consolidated [or merged] national banking association shall be deemed to be the same corporation as each bank or banking association participating in the consolidation [or merger]. All rights, franchises, and interests of the individual consolidating [or merging] banks . . . shall be transferred to and vested in the consolidated [or merged] national banking association by virtue of such consolidation [or merger] without any deed or other transfer. *The consolidated [or merged] national banking association, upon the consolidation [or merger] and without any order or other action on the part of any court or otherwise, shall hold and enjoy all rights of property, franchises, and interests,*

> *including appointments, designations, and nominations, and all other rights and interests as trustee, executor*, *administrator*, . . . and in every other fiduciary capacity, in the same manner and to the same extent as such rights, franchises, and interests were held or enjoyed by any one of the consolidating [or merging] banks or banking associations at the time of consolidation [or merger], subject to the conditions hereinafter provided.

12 U.S.C. §§ 215(e), 215a(e), 215a-1 (emphasis added). Mergers and consolidations under these statutes effectuate a transfer of fiduciary appointments without any need for court approval. *See In re* Trust *Estate of Saulsbury*, 43 Del. Ch. 400, 233 A.2d 739, 1967 Del. Ch. LEXIS 38 (Del. Ch. 1967); *De Korwin v. First Nat'l Bank*, 179 F.2d 347, 1949 U.S. App. LEXIS 3628 (7th Cir. 1949); *New England Merchants Nat'l Bank v. Centenary Methodist Church*, 342 Mass. 360, 173 N.E.2d 294, 1961 Mass. LEXIS 745 (1961). *See also NCNB Texas Nat'l Bank v. Cowden*, 895 F.2d 1488, 1497-98 (5th Cir. 1990) (held that the FDIC had authority to transfer fiduciary appointments held by an insolvent bank to a federally created bridge bank under a statute giving the FDIC the power to "transfer any assets" of an insolvent institution to such a bridge bank, notwithstanding provisions in the relevant trust agreements prohibiting the transfer of such appointments, and the court noted that “12 U.S.C. section 215(e) . . . deals with the consolidation of national banks and provides explicitly that the consolidated banks are authorized to continue in the fiduciary capacities previously exercised without resort to any appointment procedures.”). *See also Clower v. Wells Fargo Bank, N.A.*, NO. 2:07-CV-510-TJW-CE, op. at 9 (E.D. Tex. September 12, 2011) (magistrate’s opinion later adopted by district court) (recommending that merger and consolidation of a bank did not require the bank to seek court approval to remain trustee).

The applicability of each statute depends on whether the transaction was a merger/consolidation between banks located in the same state, or an interstate merger/consolidation. Section 215 permits a national banking association or any bank incorporated under the laws of any state to be consolidated with one or more national banking associations located in the same state with the approval of the Office of the Comptroller of Currency (the “OCC”). *See* 12 U.S.C. § 215. Section 215a permits one or more national banking associations or one or more state banks to merge into a national banking association located within the same state with the approval of the OCC. *See* 12 U.S.C. § 215a. Although 12 U.S.C. Section 215 and 215a do not contain a specific definition for the term “located,” that term means any state where a national bank has a branch or its main office. *See Ghigleiri v. Nationsbank of Texas, N.A.*, No. 3:97-CV-2897-P, 1998 U.S. Dist. LEXIS 6637 (N.D. Tex. May 6, 1998) (citing OCC opinion and *Ghiglieri v. Sun World*, 117 F.3d 309, 316 (5th Cir. 1997)). Section 215a-1, created in 1994, permits a national banking association to engage in an interstate consolidation or merger under Section 215 or 215a, provided that the merger or consolidation was approved pursuant to 12 U.S.C. § 1831u. *See* 12 U.S.C. § 215a-1.

B. Texas Statutes

Texas has statutes that apply to the merger or consolidation of state banks, and those statutes do not require any further court proceedings for the fiduciary appointments to continue in the merged bank. *See* TEX. FIN. CODE ANN. § 59.004 and §182.401 (formerly codified Act of March 23, 1943, 48th Leg., R.S., ch. 97, subch. III, art. 8, 1943 Tex. Gen. Laws 128, 140 (amended 1993)). Section 59.004 is entitled "Succession of Trust Powers" and provides:

> (a) If, at the time of a merger, reorganization, conversion, sale of substantially all of its assets under Chapter 32 or other applicable law, or sale of substantially all of its trust accounts and related activities at a separate branch or other office, a reorganizing or selling financial institution is acting as trustee, guardian, executor, or administrator, or in another fiduciary capacity, a successor or purchasing financial institution with sufficient fiduciary authority may continue the office, trust, or fiduciary relationship:
>
> > (1) without the necessity of judicial action or action by the creator of the office, trust, or fiduciary relationship; and
> >
> > (2) without regard to whether the successor or purchasing financial institution meets qualification requirements specified in an instrument creating the office, trust, or fiduciary relationship other than a requirement related to geographic locale of account administration, including requirements as to jurisdiction of incorporation, location of principal office, or type of financial institution.
>
> (b) The successor or purchasing financial institution may perform all the duties and exercise all the powers connected with or incidental to the fiduciary relationship in the same manner as if the successor or purchasing financial institution had been originally designated as the fiduciary.

TEX. FIN. CODE ANN. § 59.004. Section 182.401 deals with a state trust company, and it provides that "A state trust company may purchase assets from another trust institution, including the right to control accounts established with the trust institution, or assets from another seller, except that the prior written approval of the banking commissioner is required if the purchase price exceeds an amount equal to three times the sum of the trust company's equity capital less intangible assets." *Id*. at § 182.401(a). Moreover, it provides in the event such a transaction occurs:

> If the purchase transaction includes all or substantially all of the assets of another trust institution or other fiduciary, the acquiring state trust company shall succeed by operation of law to all of the

> rights, privileges, and fiduciary obligations of the selling trust institution or other fiduciary under each account included in the assets acquired.

Id. at § 182.401(f). Note that this provision dealing with Texas trust companies was enacted in 1999.

C. Notice Requirements For Merger/Consolidation

The statutes mentioned above do not provide for any notice requirements for a merger and transfer of fiduciary appointments to be effective. In comparison, in a fiduciary substitution under Texas Finance Code chapter 274, there is a requirement to provide notice to beneficiaries and other specifically indentified parties at least 90 days before the effective date of the transfer. Interestingly, under a fiduciary substitution transaction, the "[i]ntentional failure to send the required notice renders the substitution of fiduciary ineffective, [but] an unintentional failure to send the required notice does not impair the validity or effect of substitution." TEX. FIN. CODE ANN. § 274.104, 274.105. Regarding the issue of whether notice must be given in a merger situation, one court of appeals has held that no notice is required. *See In Re Estate of Touring*, 775 S.W.2d 39 (Tex. App.—Houston [14th Dist.] 1989, no writ). In comparing this merger statute with the Texas Substitute Fiduciary Act, the court stated:

> There are no notice requirements at all under this article. While the analogy is subject to attack because a merger is a hybrid continuation of the fiduciary entity while appellant is a separate entity under the same holding company as that of MBank Houston, N.A., the analogy is sufficient to show that notice is not critical.

Id. Accordingly, there is no statutory requirement that notice be given.

There is an argument that a fiduciary would owe a common law duty to provide notice of a merger to a beneficiary. A fiduciary has a duty to inform a beneficiary of "all material facts known to [it] that might affect [the beneficiaries'] rights." *Montgomery v. Kennedy*, 669 S.W.2d 309, 313 (Tex. 1984). *See also Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996); RESTATEMENT (THIRD) OF TRUSTS § 78(3). Certainly, a merger transaction between banks does not involve a conflict of interest or some fact that is obviously pertinent to the trusts' assets. There is an argument that the failure to disclose corporate transactions, not between the trustee and the beneficiaries, but rather among and between banks and bank holding companies is simply not required to be disclosed because they are not "material" facts that might affect the beneficiaries' rights. Moreover, the beneficiaries will receive quarterly statements on bank letterhead that will provide some notice that the name of the bank has changed.

However, there could be an argument that if there are factors that would make a beneficiary not want the resulting bank as trustee, e.g., the resulting bank will be in a precarious financial position, then there is a duty to disclose such to a beneficiary.

There is only one case in Texas discussing the duty to disclose a merger transaction to beneficiaries, and the court held that there was no such duty. In *Wood v. Victoria Bank & Trust Co., N.A*., the court described how Texas Commerce Bank, N.A. acquired the stock of Ameritrust Texas N.A. in 1993, how it then changed its name to Texas Commerce Trust Company, and how Texas Commerce Trust Company later merged into Texas Commerce Bank. 170 S.W.3d 885 (Tex. App.—Corpus Christi 2005, writ denied). The court observed: "As a result of this merger, TCB became the trustee of appellants' accounts thereby creating a fiduciary relationship with appellants." *Id*. at 888. The court found that this merger automatically resulted in the fiduciary relationship passing to the merged bank — without the requirement of any court action.

The court continued to trace the trustee succession, "Early in 1994, with the approval of bank regulatory authorities, TCB formed four subsidiary trust companies including Texas Commerce Trust Company-Corpus Christi (TCTC-CC)." *Id*. The court continued, "On March 9, 1994, TCB entered into a fiduciary substitution agreement with TCTC-CC for the purpose of substituting TCTC-CC as the fiduciary for all Corpus Christi-related accounts. As required by statute, TCB sent notice of the proposed substitutions to designated persons, including appellants." *Id*. at 888. The court continued, "On March 11, 1994 TCB entered into an agreement to sell the stock of TCTC-CC to Victoria Bankshares for $8.75 million. Following regulatory approval from federal and state authorities, the stock sale was completed on June 30, 1994. In conjunction with the sale of stock to Victoria Bankshares, TCTC-CC merged with Victoria Bank & Trust, a subsidiary of Victoria Bankshares." *Id*. The court noted: "TCTC-CC merged into Victoria Bank & Trust pursuant to Texas Revised Civil Statute article 342-305 . . . now codified at Tex. Fin. Code Ann. Sec. 59.004 . . . ." *Id*. at n.5.

In the end, the court affirmed the summary judgment awarded on behalf of Victoria Bank & Trust Company, noting that when the merger took place, it was in accordance with Texas Revised Civil Statute 342-305 and that "as a result, the fiduciary appointments were effectively transferred during the merger; a merger which resulted from the exchange of consideration for the stock of TCTC-CC." *Id*. at 892-93.

The court also rejected the argument that TCB's transferring its fiduciary accounts to its subsidiary and then selling the subsidiary to a third party constituted a "breach of the common law duties of loyalty, which included refraining from self-dealing, faithful administration of trust accounts, and the duty of full disclosure." *Id*. at 893. In rejecting the argument, the court reasoned:

> We agree that the Substitute Fiduciary Act authorized the transfer of accounts to TCTC-CC. . . We also agree that article 342-305 provides for the automatic transfer of fiduciary appointments upon

> the successful merger of two institutions. (citations omitted.) Prior to the enactment of these two statutes, under state law the appointment of a successor trustee could take place only by court order or pursuant to the instrument creating the fiduciary relationship. However, the Legislature enacted these statutes to expressly permit the transfer of accounts 'without the necessity of any judicial action or action by the creator' of the fiduciary account. To find that utilizing these statutes to transfer the accounts still allowed for a breach of common law fiduciary duties would render the statutes meaningless. Therefore, we conclude that by transferring the accounts pursuant to statute, no duties were breached as a matter of law.

Id. *See also NoDak Bancorporation v. Clarkson*, 471 N.W.2d 140 (N.D. 1991) ("We therefore conclude that state law remedies for breach of fiduciary duties arising out of a national bank merger under 12 U.S.C. § 215a are preempted because of conflict with the administrative procedures provided for challenging a merger under that section of federal law."). In light of *Wood*, there is certainly a well-founded argument that there are no court proceedings or notice requirements when there was a merger, consolidation, or stock sale between banks. However, until the Texas Supreme Court rules on this issue, there is no certainty. Note, that the *Wood* court originally issued an opinion that found there was a fact issue on whether the bank had met its common law fiduciary duties, but rescinded that opinion and issued one essentially finding that compliance with the statutes is all that is required.

In the end, pursuant to the *Wood* opinion, a bank should be safe in not providing formal notice to beneficiaries of the merger. Texas law does not clearly require notice, and it certainly does not mandate any particular form of notice. However, communicating with beneficiaries by letter to inform them of the change may be good customer relations and would satisfy any common law duty to keep the beneficiaries informed of significant changes in trust administration. If a bank provides notice to beneficiaries, it should retain a copy of each such letter in the relevant trust file.

D. Opt-Out Rights By Settlors Or Beneficiaries

It should also be noted that the statutes set forth above do not provide for any opt-out procedures that a settlor or beneficiary can use to stop the transfer of a fiduciary account to the resulting bank in a merger or consolidation situation. Therefore, in those circumstances, there should be no need to review a bank's trust instruments. However, once transferred, a settlor, beneficiary, or other party in an inter-vivos or testamentary trust may retain the right to change trustees at will. Such a provision would still be effective, and the settlor or other powerholder would still be able to change trustees, if he or she were so inclined, after a merger or consolidation.

V. Fiduciary Substitutions

Texas has a statute that allows, in limited circumstances, one bank to be substituted for another bank without court approval: Texas Substitute Fiduciary Act (the "Act"). *See* 70th Leg., R.S., ch. 207, § 2, 1987 TEX. GEN. LAWS 1487, repealed by Act of May 24, 1997, 75th Leg., R.S., ch. 1008, § 6(a), 1997 TEX. GEN. LAWS 3091, 3602 (now codified at TEX. FIN. CODE ANN. §§ 274.001-.203). When substitutions occur pursuant to and in compliance with the Act, the substitute trustee does not have to seek court approval:

> On the effective date the subsidiary trust company succeeds to all right, title and interest in all property that the affiliated bank holds as fiduciary, except property held for which there has been no substitution under this Act, without the necessity of any instrument of transfer or conveyance, and the subsidiary trust company shall, *without the necessity of any judicial action or action by the creator of the fiduciary account*, become fiduciary and perform all the duties and obligations and exercise all the powers and authority connected with or incidental to that fiduciary capacity in the same manner as if the subsidiary trust company had been originally named or designated fiduciary.

Former TEX. REV. CIV. STAT. ANN. ART. 548h, Sec. 2(g) (emphasis added). *See Clower v. Wells Fargo Bank, N.A.*, NO. 2:07-CV-510-TJW-CE, op. at 9 (E.D. Tex. September 12, 2011) (magistrate's opinion later adopted by district court) (recommending that fiduciary substitutions did not require bank to seek court approval to be trustee).

Under the Act, there are four requirements that must be met. First, there must be a bank holding company that owns more than fifty percent of a state or national bank, as well as more than fifty percent of a subsidiary trust company. TEX. FIN. CODE ANN. §§ 274.001-.203. Second, an agreement for the substitution must be entered into and filed with the banking commissioner before the effective date of the substitution. Third, not later than ninety days before the effective date of the substitution, written notice must be mailed to the beneficiaries of the accounts, and while "[i]ntentional failure to send the required notice renders the substitution of fiduciary ineffective, [] an unintentional failure to send the required notice does not impair the validity or effect of substitution." *Id*. at 274.104, 274.105. The statute provides that the substitution "is effective for all purposes on the effective date stated in the agreement between the subsidiary trust company and the affiliated bank" unless a beneficiary "files a written petition in a court of competent jurisdiction seeking to have the substitution denied . . . ." *Id*. at 274.106. Fourth, the subsidiary trust company's owning bank holding company must file with the banking commissioner an irrevocable undertaking to be fully responsible for the existing and future fiduciary acts and omissions of its subsidiary trust company. *Id*. at 274.116.

The Texas Substitute Fiduciary Act allows the creator of a trust to exempt his or her trust from the provisions of the Act – thereby a bank could not transfer that trust account to a subsidiary under the act. *See id*. at 274.201(2). *See also Estate of Touring,* 775 S.W.2d 39 (Tex. App.—Houston [14th Dist.] 1989, no pet.) ("Section 2(d) of the Act expressly accommodates a testator who wishes to avoid a possible substitution by authorizing specific language in the document disallowing substitution.").

Texas courts have held that the Texas Substitute Fiduciary Act is constitutional and valid. The validity of this statute was first addressed in *In Re Estate of Touring*, where the Houston Court of Appeals found the Act to be constitutional. 775 S.W. 2d at 39. The court disagreed with the argument that the Act went too far in enabling financial entities, for their own alleged selfish reasons, to encroach unconstitutionally on testators' intent. *Id*. at 43. After describing the requirements of the Act, the court found that "the Act's purpose is rationally related to its means. The legitimate state interest in ensuring maximal investment opportunities for estates outweighs its minimal effect on a testator's personal and property rights." *Id*. After working through a "kitchen sink" of constitutional and procedural arguments, the court affirmed the constitutionality and effectiveness of the Act and affirmed that fiduciary appointments transferred without the need for any court approval.

Another fiduciary substitution was challenged in *Bank One Texas v. Ameritrust N.A*., 858 S.W.2d 516 (Tex. App.—Dallas 1993, writ denied). There, the litigation between Bank One and Ameritrust was over prospective fiduciary appointments. MCorp had consolidated the fiduciary appointments held by its various MBanks into MTrust Corp, N.A. in the late 1980s. When MCorp filed bankruptcy, it sold the MBanks (its retail operations) to Bank One. With the bankruptcy court's approval, it sold the stock of MTrust Corp, N.A. to Ameritrust. Thereafter, a dispute arose between Bank One (the owner of the retail banks) and Ameritrust (the owner of MTrust Corp, N.A.) regarding which bank had the right to prospective fiduciary appointments, i.e., appointments set out in trust-creating instruments that were not yet operative. Those parties agreed that the existing fiduciary appointments, which were expressly listed and attached to the substitution agreements, were properly transferred from the MBanks to MTrust Corp, N.A. but disagreed on whether future appointments, which were not listed and attached to the substitution agreements, were transferred. The court of appeals held that: "If the statute and the intent of the testator are to be given effect, Ameritrust is the successor executor to MBank Dallas." *Id.* at 519. This holding applied to both the existing and prospective appointments. The court further said, "The expressed intent of the legislation is that the subsidiary trust company succeed to all right, title, and interest in all property held by the bank as fiduciary. Failure to file a nonexistent account does not constitute sufficient basis for failure to give effect to the intent of the statute." *Id*.

Moreover, in *Wood v. Victoria Bank & Trust Co., N.A.*, the court dealt the application of the Act. 170 S.W.3d at 885. The court traced the trustee succession, which included: "Early in 1994, with the approval of bank regulatory authorities, TCB formed four subsidiary trust companies including Texas Commerce Trust Company-Corpus Christi (TCTC-CC)." *Id.* The court identified the four trust companies: "The four subsidiary trust companies formed by TCB were Texas Commerce Trust Company-Corpus Christi, Texas Commerce Trust Company-Sherman, Texas, Texas Commerce Trust Company-Waco and Texas Commerce Trust Company-Wichita Falls." *Id*. at 2. The court continued, "On March 9, 1994, TCB entered into a fiduciary substitution agreement with TCTC-CC for the purpose of substituting TCTC-CC as the fiduciary for all Corpus Christi-related accounts. As required by statute, TCB sent notice of the proposed substitutions to designated persons, including appellants." *Id*. at 888. The court found that this transaction was effective and acted to transfer the fiduciary appointments to the new entity without the need for further court approval. The court also held that this transaction was effective even though it was the reverse of transaction contemplated under the Act: to consolidate trust appointments held by various affiliates into one bank entity. Even though the transaction de-consolidated the fiduciary appointments and placed them in multiple affiliates, it was still an appropriate and effective use of the Act. *See id*.

VI. Transfer of Fiduciary Appointments Due To Insolvency

Another issue that arises is when the OCC declares a bank insolvent and appoints the FDIC as receiver. In that circumstance, the insolvent bank may transfer its assets, including its fiduciary appointments, to a bridge bank. The Fifth Circuit has addressed this exact situation and held that in this circumstance, the bridge bank does not have to go back to court and seek approval to remain the fiduciary. *See NCNB Texas Nat'l Bank v. Cowden*, 895 F.2d 1488, 1497-98 (5th Cir. 1990).

In *Cowden*, the OCC declared First Republic Bank Corporation (“First Republic) insolvent and appointed the FDIC as receiver. *See id*. at 1490. In its capacity as receiver, the FDIC entered into a purchase and assumption agreement (“Agreement”) between First Republic and JRB Bank, N.A., a bridge bank chartered by FDIC pursuant to 12 U.S.C. section 1821(i) (current version at 12 U.S.C. section 1821(n)). The Agreement required the FDIC to transfer certain deposits, assets, and liabilities to the bridge bank. *See id.* The beneficiaries of a trust challenged the bridge bank’s authority to act as trustee and alleged that the FDIC had no authority to transfer fiduciary appointments without going back to court to seek approval per the Texas Trust Code.

The Fifth Circuit held that the FDIC had authority to transfer fiduciary property and appointments under a statute giving the FDIC the power to "transfer any assets" of an insolvent institution to such a bridge bank. *See id*. The court held that this federal power preempted state law that required court intervention. And this was true notwithstanding provisions in the relevant trust agreements prohibiting the transfer of such appointments. *See id*. at 1492, 1496, 1501. The court noted that otherwise it would cost the bridge bank an estimated $8 million in legal expenses to seek state court appointments as successor trustee and would create a situation where literally thousands of fiduciary positions would be vacant for a period of years. *See id*. at 1493-94.

VII. Texas Trust Code Provisions

There are Texas Trust Code provisions which permit a court to appoint a successor trustee on "the death, resignation, incapacity, or removal of a sole or surviving trustee" and grant state district courts exclusive jurisdiction over the appointment of trustees where there is a "death, resignation, incapacity or removal" of a trustee. TEX. PROP. CODE ANN. §§ 113.083(a), 115.001. But where there are proper mergers, consolidations, fiduciary transfers, etc., there is no "death, resignation, incapacity or removal" of any trustee, and this provision of the Trust Code is inapplicable.

VIII. Transfer of Fiduciary Appointments For Consideration

Under historical trust law in Texas, a trustee can never resign or transfer his office for monetary consideration, and where a trustee has transferred his fiduciary appointment in exchange for valuable consideration such transfer is void and the consideration should be disgorged and made part of the trust estate. *See Sugden v. Crossland*, 3 Sm. & Gif. 192, 65 Eng. Rep. 620 (1856); *Rosenfeld v. Black*, 445 F.2d 1337 (2d Cir. 1971); *Field v. Western Life Indemnity Co*., 166 F. 607, 610 (N.D. Ill. 1908); *Lednum v. Dallas Trust & Savings Bank*, 192 S.W. 1127, 1128 (Tex. Civ. App.—Dallas 1917, writ ref'd).

But this historical precedent does not take into account that there are now statutes authorizing a transfer of fiduciary appointments in exchange for consideration. *See Wood v. Victoria Bank & Trust Co., N.A*., 170 S.W.3d 885, 892 (Tex. App.—Corpus Christi 2005, writ denied). These authorities are therefore “outdated and do not take into account the evolution of the law relating to corporate fiduciaries.” The *Wood* court stated:

> Article 342-305 expressly authorized Victoria Bank & Trust, after the merger, to succeed to any fiduciary offices held by TCTC-CC. As a result, the fiduciary appointments were effectively transferred during the merger; a merger which resulted from the exchange of consideration for the stock of TCTC-CC. It is this transfer which appellants argue violates the common law prohibition against the sale of a fiduciary office for profit. However, reading the statute in the context in which it was applied indicates that the legislature contemplated and implicitly acknowledged that a bank would receive consideration in exchange, in part, for the transfer of fiduciary appointments. To this extent, the statute can be interpreted as allowing the transfer of a fiduciary office in exchange for consideration. Accordingly, we find under the facts of this case

> that the common law was modified by statute, article 342-305, to permit the transfer of fiduciary appointments for consideration.

Id. at 893. Accordingly, the fact that a bank or its holding company receives consideration in a transaction wherein fiduciary appointments are transferred does not prohibit the transaction from being effective or set up any common law breach of fiduciary duty claims.

IX. Bank's Potential Defenses To Claim Of Lack Of Standing.

The primary defense that a bank would have to a beneficiary's claim that the bank does not have standing is that it does. The bank should endeavor to prove up the various transactions in the chain that establishes its standing. Additionally, notwithstanding those transactions, a bank may have other defenses to a claim that it does not have standing to be trustee.

A. Direct Denial – Prove Up Transactions

1. Burden Of Proof

The allocation of the burden of proof is a legal issue that is reviewed de novo. *See Grilletta v. Lexington Ins. Co*., 558 F.3d 359, 364 (5th Cir. 2009). According to the Supreme Court, in determining the proper allocation of the burden of proof, courts generally apply the default rule that "plaintiffs bear the burden of persuasion regarding the essential aspects of their claims" and consequently "the risk of failing to prove their claims." *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56-57 (2005). Similarly, one commentator has stated "The burdens of pleading and proof with regard to most facts have been and should be assigned to the plaintiff who generally seeks to change the present state of affairs and who therefore naturally should be expected to bear the risk of failure of proof or persuasion." 2 J. STRONG, MCCORMICK ON EVIDENCE § 337, p. 412 (5th ed.1999). *See also* C. MUELLER & L. KIRKPATRICK, EVIDENCE § 3.1, p. 104 (3d ed. 2003) ("Perhaps the broadest and most accepted idea is that the person who seeks court action should justify the request, which means that the plaintiffs bear the burdens on the elements in their claims.").

The burden of proof for breach of fiduciary duty claims that do not involve a specific transaction between the fiduciary and principal falls on the plaintiff. *See, e.g., Wilson v. Cantwell*, 2007 WL 2285947 (N.D. Tex. Aug. 8, 2007). *See also Icom Sys., Inc. v. Davies*, 990 S.W.2d 408, 410 (Tex. App.—Texarkana 1999, no pet.); *Landon v. S & H Mktg. Group, Inc.*, 82 S.W.3d 666, 673 (Tex. App.—Eastland 2002, no pet.). The Fifth Circuit has repeatedly held that "where there is no transaction between the fiduciary and principal, there is no presumption of unfairness, and the burden of proof does not shift to the fiduciary." *See Amwest Sav. Ass'n v. Statewide Capital, Inc*., 144 F.3d 885, 891 (5th Cir. 1998) (citing *Lemons v. Davis*, 306 S.W.2d 224, 227 (Tex. Ct. App. 1957) (holding that principal bore burden of establishing fiduciary's misuse or waste of funds)). *See also Navigant Consulting, Inc. v. Wilkinson*, 508 F.3d 277 (5th Cir. 2007).

However, there is precedent 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.*" *Miller v. Miller*, 700 S.W.2d 941, 946 (Tex. App.—Dallas 1985, writ ref'd n.r.e.) (emphasis added). The issue is whether a bank has the burden of proof to establish its "standing" to be trustee.

In *Clower v. Wells Fargo Bank, N.A.*, the bank was the trustee of trusts that originated from a bank in Wichita Falls, Texas. No. 2:07-CV-510-TJW-CE, (E.D. Tex. September 12, 2011). *See also Clower v. Wells Fargo Bank, N.A.*, 2012 U.S. Dist. LEXIS 30093 (E.D. Tex. March 7, 2012). Beneficiaries from several of those trusts asserted claims for constructive fraud (breach of fiduciary duty) asserting that the bank did not have authority to be the trustee of their trusts and sought to certify a class of over two hundred similar trusts. The beneficiaries alleged that because the bank was not named as trustee in the original trust instruments (some created decades ago), every time there was a renaming, merger at the bank level or holding company level, change in ownership of the bank, or fiduciary substitution, the bank or its predecessors had to seek court approval to remain trustee. The bank and its predecessors never did so. The bank filed a motion for summary judgment proving up all of the transactions and the legal authority that established that it was the trustee of the named plaintiff's trusts.

The court granted a motion for summary judgment in favor of the bank and never ruled on the motion to certify a class. The court first held that whether a cause of action is called constructive fraud or breach of fiduciary duty, the plaintiff alleging the cause of action carries the burden of proof by a preponderance of the evidence. The plaintiffs alleged that the burden of proof was on the trustee to prove up the transactions. But the court stated:

> Although the undersigned has not seen the label "constructive fraud by a fiduciary," there are some cases under Texas law where there is a reversal of the burden of proof in a breach of fiduciary duty action. In these cases, where a fiduciary engages in a transaction with a party to whom the fiduciary owes duties, a presumption of unfairness arises, and the burden is placed on the fiduciary to establish that the transaction was fair. However, where there is no transaction between the fiduciary and principal, there is no presumption of unfairness, and the burden of proof does not shift to the fiduciary. Here, the relevant transactions involved are the transfers of trustee status between banks and/or trust companies, not between the beneficiaries and the banks/trust companies. Therefore, such burden shifting does not apply in this case. The Plaintiffs carry the burden of proof at trial, and no presumption arises in this case.

Id. The court then discussed the bank's evidence of name changes, mergers, consolidations, and fiduciary substitutions and held that the evidence was sufficient to make a prima facie case to support summary judgment. The court then turned to the plaintiff's evidence that allegedly created a fact issue. The court discussed this evidence at length and determined that it did not create a fact issue on whether there was a break in the links that established the bank's standing to be trustee. The court granted summary judgment for the bank. The opinion was written by a magistrate judge, which was for the most part adopted by the district court. The court later denied a motion for rehearing, and the plaintiff never appealed the judgment.

2. Discovering Bank Succession History

Ideally, a bank has maintained sufficient documents and records that it can set out a chain of transactions linking the original bank named in a trust, will, or court order to the current bank acting as trustee. Along those lines, it would be advantageous for a bank to maintain affidavits by bank representatives setting out the particulars of transactions. That way, at a later time, the bank can piece together evidence that will support its standing.

Another good place to start is the FDIC's website: www.fdic.gov. A person can go to that site, and at the top is a topic called: "Industry Analysis." Click on that, and locate the "Bank Data & Statistics" topic. Click on that, and to the far right on the screen locate the "Bank Find" quick link. Click on that, and type in the name of the bank that is being researched. That should pull up any bank that has a similar name. Click on the correct bank. That will pull up a page regarding that bank. Half way down the page is a topic named "Historical profile." Click on that, and it should name all of the institutions that the bank has acquired, name changes, and other information. This process can be repeated for the next bank in the chain. Alternatively, you can start with the first bank in the chain, and work your way to the current bank.

Once you have the date and name of the relevant transactions, a party can request certified copies of approval letters or other transactional documents from the relevant governmental agencies. It should be noted that the use of the term "national association" in a bank name demonstrates the entities' compliance with federal statutes and regulations requiring national banking associations to use the word "national" in their titles. *See* 12 U.S.C. § 22 (the name assumed by such association, which name shall include the word "national"); 12 U.S.C. § 30(a) (any national banking association, upon written notice to the Comptroller of the Currency, may change its name, except that such new name shall include the word "National"); 12 C.F.R. § 5.42(c) (a national bank may change its corporate title provided that the new title includes the word "national"). Moreover, common law provides that it will be assumed that a bank entitling itself as a "national bank" was duly organized as such. *See Slaughter v. First Nat'l Bank*, 109 Ala. 157, 19 So. 430 (1896).

3. Admission Of Agency Documents

a. Generally, Governmental Documents Are Competent Evidence Of The Transaction They Purport To Memorialize

Courts from around the nation have consistently admitted certificates from governmental agencies into evidence and overruled objections to their admissibility.[2] For example, in *Dennehy v. Maycourt Realty Co.,* there was a dispute regarding whether a defendant bank had been consolidated. 92 R.I. 169; 167 A.2d 556 (R.I. S. Ct. 1961). The plaintiff produced an OCC certificate that provided as follows:

> Whereas, satisfactory evidence has been presented to the Comptroller of the Currency that all requisite legal and corporate action has been taken by The Providence Union National Bank, Providence, Rhode Island, and the Industrial Trust Company, Providence, Rhode Is-land, in accordance with the statutes of the United States, to consolidate those two banking institutions under the charter of The Providence Union National Bank and under the title 'Industrial National Bank of Providence', with capital stock of $ 10,000,000;

[2] *See, e.g., Clement v. United States,* 149 F. 305 (8th Cir. 1906); *The Merchants' and Planters' National Bank v. The Trustees of the Masonic Hall, 65 Ga. 603* (Ga. S. Ct. 1880) (OCC certificate was admissible); *Mix v. The National Bank of Bloomington,* 91 Ill. 20 (Ill. S. Ct. 1878) (OCC certificate was admissible and was sufficient to prove corporate existence); *Garton v. The Union City National Bank,* 34 Mich 279 (Mich. S. Ct. 1876) (OCC certificate was admissible and objections were meritless); *Thatcher v. The West River National Ban of Jamaica, Vermont,* 19 Mich. 196, (Mich. S. Ct. 1869) (OCC certificate was admissible and proved existence of bank); *Estate of Davis v. Watkins,* 56 Neb. 288, 76 N.W. 575 (Neb. S. Ct. 1898) (OCC certificate showing receiver being appointed was admissible as it was under seal); *Dennehy v. Maycourt Realty Co.,* 92 R.I. 169; 167 A.2d 556 (R.I. S. Ct. 1961) (OCC certificate on consolidation was admissible); *Leonard v. The State*, 7 Tex. Ct. App. 417, 1879 Tex. Crim. App. LEXIS 248 (Tex. App. 1879) ("As to the exception taken to the admission in evidence of the certificate of the United State comptroller of the currency, over the objection by the defendant, the court below committed no error; for the courts take judicial notice of the national seal of another nation."); *National Bank of Commerce of Tacoma v. Galland*, 14 Wash. 502, 505, 45 P. 35, 36 (Wash. S. Ct. 1896) ("This [OCC] certificate was one which the law required the comptroller to make, and in our opinion was competent evidence tending to show the incorporation of the plaintiff.").

> Now, Therefore, it is hereby certified that such consolidation is approved, effective at 8:00 A.M., February 1, 1954.

Id. The defendant objected and argued it was not a public record. The appellate court disagreed: “we are of the opinion it was a public record and admissible as such.” *Id*. at 557. Moreover, the defendant argued that the certificate did not prove that a consolidation took place – that every scrap of paper was not produced. The appellate court also disagreed: “The final words on the certificate are ‘that such consolidation is approved, effective at 8:00 A.M., February 1, 1954.’ . . . The certificate of the comptroller shows that it was a consolidation of two banks under a new name.” The certificate was admissible and proved that a consolidation happened. *See Clower v. Wells Fargo Bank, N.A*., NO. 2:07-CV-510-TJW-CE, op. at 12 (E.D. Tex. September 12, 2011) (magistrate’s opinion later adopted by district court) (recommending that OCC certificates made prima facie showing that transaction occurred).

Moreover, in *Thatcher v. The West River National Bank of Jamaica, Vermont,* a party objected to an OCC certificate and attempted to argue that the OCC improperly approved a bank because the organization certificate appeared to be notarized by a shareholder of the bank. 19 Mich. 196 (Mich. S. Ct. 1869). The Michigan Supreme Court disagreed and held that it was for the OCC “to decide upon the sufficiency of the evidence of compliance with the act of Congress, and we cannot review his decision. His certificate of compliance removes any objection which might otherwise have been made to the evidence upon which he acted.” *Id*. at 201. In the end the court concluded that: “the evidence of the corporate existence of the plaintiff was full and complete, and there was no evidence of an opposite tendency.” *Id*.

In *Worcester County National Bank*, the court relied on an OCC certificate approving a consolidation to hold that the resulting bank had the authority to hold a fiduciary appointment granted before the consolidation. 263 Mass. 394, 161 N.E. 797 (Mass. Sup. Jud. Ct. 1928). Further, the court held that “a simple name change of the national bank did not disturb its corporate identity or continuity of existence, which has remained uninterrupted.” *Id*.

Very recently, in *Rogers v. Unifund CCR Partners*, a Texas court of appeals held that evidence of standing was sufficient and supported a judgment for a company based on an amount due under a credit card agreement. No. 01-10-01146-CV, 2012 Tex. App. LEXIS 3027 (Tex. App.—Houston [1st District], April 19, 2012, no pet. history). A creditor entered into a credit card agreement with a debtor, who defaulted on making payment. The creditor assigned the account to a company who sued the debtor for the debt. The trial court granted the company's summary judgment, and the debtor appealed, challenging the company's standing to sue on the agreement. The court of appeals stated that in order to establish standing to maintain a breach of contract action, a plaintiff must show either third party beneficiary status or privity. Privity in this context is established by proof that a defendant was a party to an enforceable contract with either the plaintiff or a party who assigned its cause of action to the plaintiff. As part of its summary judgment evidence, the company provided documents detailing ownership of the account at issue that included: 1) an affidavit by the legal liaison for the company who swore that prior to an assignment that the prior bank was a successor by merger to the original bank, 2) copies of FDIC official records indicating the history between the original bank and subsequent banks. The court of appeals found that the company met its burden to plead facts establishing its standing to bring suit.

Accordingly, courts consistently hold that governmental certificates are admissible and evidence the banking transactions.

b. Generally, Governmental Documents Are Not Hearsay

Regarding hearsay, the governmental documents are public records and fall under the hearsay exception found in Federal Rule of Evidence 803(8):

> The following are not excluded by the hearsay rule . . . Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to a duty to report . . . (C) in civil actions . . . factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

See FED. R. EVID. 803(8); TEX. R. EVID. 803(8). Public records are presumed admissible in the first instance, and regarding subsection (C) and the party opposing their introduction bears the burden of coming forward with enough "negative factors" to persuade a court that a report should not be admitted. *See In re Nautilus Motor Tanker Co.*, 85 F.3d 105, 112-13 (3d Cir. 1996).

For example, OCC certificates are from a governmental agency that is generally charged with the regulation of banks and that is specifically charged with approving name changes. *See North Dakota v. Merchants Nat'l Bank & Trust Co*., 579 F.2d 1112 (8th Cir. 1978). Section 30 of the National Bank Act provides that "any national banking association, upon written notice of the Comptroller of the Currency, may change its name, except that such new name shall include the word 'National.'" 12 U.S.C. § 30. In requiring approval of the OCC for change of name by national banking association, Congress intended to confer discretionary authority on OCC. *See First Nat'l Bank v National Bank of South Dakota*, 667 F.2d 708 (8th Cir. 1981). Moreover, the OCC must approve or deny any application by a national bank to acquire or be acquired by another depository institution. *See* 12 U.S.C. § 215c(b)(1). The OCC must approve or deny an application of a national bank to merge or consolidate. *See id*. at § 215a; *Nehring v. First DeKalb Bancshares, Inc*., 692 F.2d 1138 (7th Cir. 1982).

OCC and Texas Department of Banking certificates are public records that indicate the activity of the offices in approving of name changes, mergers, and other transactions. Moreover, those same matters were observed by them pursuant to a duty to report and could be viewed as factual findings resulting from an investigation made pursuant to legal authority. *See, e.g., Mueller v. First Nat'l Bank*, 797 F.Supp. 656 (C.D. Ill. 1992) (OCC documents were not hearsay as they were public documents under Federal Rule of Evidence 803(8)).

Moreover, hearsay objections to documents attached to certificates are also meritless. The underlying documents are not hearsay statements, rather they are operative documents. *See* FED. R. EVID. 801; *U.S. v. Pang*, 362 F.3d 1187, 1192 (9th Cir. 2004). Hearsay is an out-of-court statement introduced to prove the truth of the matter asserted. *See* FED. R. EVID. 801(c). The comments state:

> If, however, an out-of-court statement's significance lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay . . . . The effect is to exclude from hearsay the entire category of "verbal acts" and "verbal parts of an act, in which the statement itself affects the legal rights of the parities or is a circumstance bearing on conduct affecting their rights.

Id., advisory committee's note. Therefore, underlying transactional documents are legally operative documents that establish the rights of parties and are not hearsay. *See also Stuart v. Unum Life Ins. Co. of Am*., 217 F.3d 1145 (9th Cir. 2000) (insurance policy not hearsay); *United States v. Bellucci*, 995 F.2d 157, 161 (9th Cir. 1993) (certificate of insurance was not hearsay); *Remington Invs., Inc. v. Berg Prod. Design*, Inc., 1999 U.S. App. LEXIS 3654 (9th Cir. March 3, 1999) (lease and guaranty were not hearsay); *Liani v. Baker*, No. 09-CV-2651 (ILG), 2010 U.S. Dist. LEXIS 64785 (E.D. N.Y. June 28, 2010) (letter containing alleged release was operative document and non-hearsay); *Arasimowicz v. Bestfoods, Inc*., 81 F.Supp.2d 526, 530 (S.D.N.Y. 2000) (finding letter was legally operative document and non-hearsay). Therefore, governmental approval documents should not violate the hearsay rule. *See Clower v. Wells Fargo Bank, N.A*., NO. 2:07-CV-510-TJW-CE, op. at 12 (E.D. Tex. September 12, 2011) (magistrate's opinion later adopted by district court) (recommending that OCC documents did not violate hearsay rule).

c. Generally, Governmental Documents Are Not Inadmissible Due To The Best Evidence Rule

If a best evidence objection is lodged at the governmental agency documents themselves, it is meritless because public records are an exception to the best evidence rule. *See* FED. R. EVID. 1005. Those documents would evidence the agencies' decisions approving of the transactions. If a best evidence objection is related to the governmental documents referencing underlying transactional documents, the best evidence rule does not apply because the governmental documents are not quoting from the contents of the underlying transactional documents. They would merely mention their existence and approve of the effect of those documents. The best evidence rule only applies when the evidence is being introduced "to prove the content of a writing." *See id.* at 1002. The rule is inapplicable when content is not at issue. *See Smith v. Atlantic Richfield Co*., 814 F.2d 1481, 1486 (10th Cir. 1987) ("The witnesses did not testify in any detail to what was contained in the documents evidencing MSHA's approval. The witnesses testified simply that MSHA approval existed. There was no violation of Rule 1002"); *United States v. Sliker*, 751 F.2d 477, 483 (2d Cir. 1984) (best evidence rule did not bar testimony of bank president on existence of FDIC insurance when content of insurance policy was not at issue). Therefore, governmental approval documents should not violate the best evidence rule. *See Clower v. Wells Fargo Bank, N.A*., NO. 2:07-CV-510-TJW-CE, op. at 12-13 (E.D. Tex. September 12, 2011) (magistrate's opinion later adopted by district court) (recommending that OCC documents did not violate best evidence rule).

4. Presumption In Favor Of Agency Approvals

The decision of a governmental agency denying or approving a bank application is entitled to a presumption of regularity. *See First Nat'l Bank v. Camp*, 333 F.Supp. 682 (N.D. Miss. 1971), *aff'd*, 467 F.2d 944 (5th Cir. 1972). The presumption of regularity is a basic tenet of administrative law. In *Department of State v. Ray*, the United States Supreme Court held there is a presumption of legitimacy accorded to the government's official conduct. 502 U.S. 164, 178-79 (1991). Where the presumption is applicable, clear evidence is required to displace it. *See United States v. Armstrong*, 517 U.S. 456, 464 (1996) ("[I]n the absence of clear evidence to the contrary, courts presume that [Government agents] have properly discharged their official duties"); *United States v. Chemical Foundation, Inc*., 272 U.S. 1, 14-15 (1926) ("The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties").

A party challenging the determination of an agency such as the OCC must overcome a "considerable burden." *See BCCA Appeal Group v. U.S.E.P.A*., 355 F.3d 817 (5th Cir. 2004) (quoting *Am. Petroleum Inst. v. EPA*, 787 F.2d 965, 983 (5th Cir. 1986)). A review of the determination of a federal agency is reviewed under the arbitrary and capricious standard set out in the Administrative Procedure Act (APA), 5 U.S.C. § 706. This standard of review is highly deferential. The Supreme Court has stated unequivocally that a "court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc*., 419 U.S. 281, 285, 290, 95 S.Ct. 438, 442, 444, 42 L.Ed.2d 447 (1974); *Louisiana Environmental Society, Inc. v. Dole*, 707 F.2d 116, 118-19 (5th Cir. 1983); *City of Houston v.*

FAA, 679 F.2d 1184, 1190 (5th Cir. 1982) (purpose of judicial review is not to "fly speck" an agency decision for “technical deficiencies”).

5. Expert Evidence Should Be Admissible

The hypothetical case made the basis of this article involves whether a bank is the appropriate trustee using various federal and state laws and regulations. Factually, the case will involve complicated issues dealing with banks' name changes, ownership changes, mergers, acquisitions, and fiduciary substitutions. These events will be evidenced by complex documents. The question for the court will be whether the bank and its predecessors met the legal requirements. A bank may want to offer expert testimony regarding the application of the facts to the law dealing with name changes, ownership changes, mergers, acquisitions, and fiduciary substitutions. This testimony would assist the Court in determining whether the bank is the appropriate trustee.

Experts may testify when the expert, by reason of study and/or experience, has special knowledge that jurors do not possess and is better able to draw conclusions from the facts at hand. *See Seale v. Winn Exploration Co.,* 732 S.W. 2d 667, 669 (Tex. App.—Corpus Christi 1987, writ denied). Specifically, Texas Rule of Evidence 702 states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." TEX. R. EVID. 702. Thus, the three requirements for the admission of expert testimony are: 1) the testimony must "assist the trier of fact to understand the evidence or determine the fact in issue"; 2) the proposed testimony must be "scientific, technical, or other specialized knowledge"; and 3) the witness must be qualified. *See E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 556 (Tex. 1995).

A beneficiary may allege that the bank’s expert should not be allowed to testify because his or her proposed testimony would not assist the trier of fact because he or she would only offer legal conclusions. Experts' opinions may not be struck just because they embrace the ultimate issues in the case. "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." *See* TEX. R. EVID. 704. For example, in *Birchfield v. Texarkana Memorial Hospital*, the Texas Supreme Court held that "[f]airness and efficiency dictate that an expert may state an opinion on a mixed question of law and fact as long as the opinion is confined to the relevant issues and is based on proper legal concepts." 747 S.W.2d 361, 365 (Tex. 1987). In that case, the Court held that an expert may testify that conduct constituted "negligence" and "gross negligence" and that certain acts were "proximate cause." *Id. See also Louder v. De Leon*, 754 S.W.2d 148, 148-49 (Tex. 1988) (Texas Supreme Court held that "expert testimony on proximate cause is admissible as long as it is based on proper legal concepts."). Following the *Birchfield* case, many courts of appeals have held that the proper predicate for eliciting an opinion on a legal term of art was laid.[3]

Indeed, courts can admit testimony under both the Federal Rules of Evidence and the Texas Rules of Evidence from attorneys on matters that may be deemed "legal issues." For example, in *Royal Maccabees Life Insurance Co. v. James*, the court of appeals held that the trial court property admitted the testimony of an insurance adjuster about his interpretation of an insurance policy and his opinions on mixed questions of fact and law on whether the insurer's conduct "constituted bad faith, unfair dealing, and fraud" as well as violations of insurance code provisions. 146 S.W.3d at 354.

Additionally, in *Lyondell Petrochemical Co. v. Fluor Daniel, Inc*., the court of appeals reversed a trial court's exclusion of an expert's opinion that a contractor violated OSHA regulations even though the regulation was

[3] *See, e.g., Rodgers v. Commission for Lawyer Discipline*, 151 S.W.3d 602, 617 (Tex. App.—Fort Worth 2004, pet. denied) (trial court did not abuse discretion in allowing lawyer to give expert opinion that attorney's advertisement violated the disciplinary rules of professional conduct); *Royal Maccabees Life Ins. Co. v. James*, 146 S.W.3d 340, 354 (Tex. App.—Dallas 2004, pet. denied); *Bevers v. Gaylord Broad. Co*., *L.P*., No. 05-01-00895-CV, 2002 Tex. App. LEXIS 5083 (Tex. App.—Dallas July 18, 2002, pet. denied) (expert could testify regarding compliance with Federal Aviation Regulations); *Pittsburgh Corning Corp. v. Walters*, 1 S.W.3d 759, 777 (Tex. App.—Corpus Christi 1999, pet. denied) (expert could state opinion on defendant's negligence and gross negligence because he was provided proper legal standard as predicate); *Entrekin v. Raney*, NO. 14-97-01274-CV, 1998 Tex. App. LEXIS 7438 (Tex. App.—Houston [14th Dist.] Dec. 3, 1998, no pet.) (not designated for publication) (party was required to have expert evidence regarding the compliance with federal regulation); *Isern v. Watson*, 942 S.W.2d 186, 193 (Tex. App.—Beaumont 1997, pet. denied) (same); *Lyondell Petrochemical Co. v. Fluor Daniel, Inc*., 888 S.W.2d 547, 554-56 (Tex. App.—Houston [1st Dist.] 1994, writ denied); *Crum & Forster, Inc. v. Monsanto Co.*, 887 S.W.3d 103, 133-35 (Tex. App.—Texarkana 1994, no writ) (testimony by chemical company's expert on the illegality of Mary Carter agreements was admissible on a question of mixed law and fact because the opinion was based on proper legal concepts and expert was shown to know the legal principles about which he spoke); *Transport Ins. Co. v. Faircloth*, 861 S.W.2d 926, 937-39 (attorney could testify as expert on procedures required by law), *rev'd on other grounds*, 898 S.W.2d 269 (Tex. 1995); *Keene Corp. v. Rogers*, 863 S.W.2d 168, 176-77 (Tex. App.—Texarkana 1993, no writ) (suggesting that an epidemiologist could, if supplied with the proper legal concepts, offer an opinion as to whether asbestos products are unreasonably dangerous); *Metot v. Danielson*, 780 S.W.2d 283, 288 (Tex. App.—Tyler 1989, writ denied) (trial court erred in excluding expert's testimony on negligence and proximate cause).

straightforward because the regulation's application to the facts was not. 888 S.W.2d at 554-56. The court of appeals determined that the expert's opinions should have been admitted because they were helpful in correlating factual compliance with the legal requirements of the regulations:

> Although the wording was straightforward, and may, as the trial court put it, have needed no expert testimony to "explain" it to the jury, the application of that regulation to a set of facts, to determine whether Lyondell had complied with the regulation, was not straightforward. That determination demanded more of the jury than merely making a check-off comparison between its own fact findings and some specific, objective regulatory standards -- such as a requisite number of hours of instruction, for instance.

Id.

Furthermore, in attorney malpractice cases, legal experts testify as to the facts and the law and reach conclusions on whether an attorney was negligent and a proximate cause of the alleged injury based on that analysis. This often requires detailed expert testimony about legal concepts as they apply to the relevant facts of the case. *See Alexander v. Turtur & Assocs., Inc.*, 146 S.W.3d 113, 117 (Tex. 2004) (attorney malpractice claim required expert testimony on causation). In fact, courts strike legal experts in this context who do not properly set forth the legal basis for their opinions. *See, e.g., Childs v. Crutchfield, Decordova & Chauveaux, P.C.*, No. 09-07-065-CV, 2008 Tex. App. LEXIS 2540 (Tex. App.—Beaumont Apr. 10, 2008, pet. denied); *Juarez v. Elizondo*, No. 04-06-00433-CV, 2007 Tex. App. LEXIS 2133 (Tex. App.—San Antonio Mar. 21, 2007, pet. denied) ("Justice Dorsey provided no legal support for his opinions; accordingly, the trial court did not abuse its discretion in excluding Justice Dorsey's opinions regarding the jury charge.").

Similarly, in a number of federal cases, courts have admitted testimony on "legal" issues from experts, including attorneys. *See C.P. Interests, Inc. v. California Pools, Inc.* 238 F.3d 690 (5th Cir. 2001) (admitting expert testimony from a trademark expert, an attorney, to testify on trademark issues in the case). It is appropriate for an expert witness to testify on issues within his particular expertise and experience, including regulatory issues that are supported by the evidence in the case. *See U.S. v. Willey,* 57 F.3d 1374, 1389 (5th Cir. 1995). One court stated:

> [Federal Rule of Evidence 702] allows experts to suggest an appropriate inference to be drawn from the facts in evidence if the expert's specialized knowledge is helpful in understanding the facts. The rule has been interpreted to permit expert opinions even if the matter is within the competence of the jurors if specialized knowledge will be helpful, as it may be in a particular situation.

Id. (citing 1 MCCORMICK ON EVIDENCE § 13, pg. 54 (1992)). Furthermore, "[w]here complex administrative processes are at issue, expert testimony can be helpful to explain them to the trier of fact." *CFM Communications, LLC v. Mitts Telecasting Co.,* 424 F. Supp. 2d 1229, 1240 (E.D. Cal. 2005). For example, in *Marx & Co. Inc. v. Diners' Club, Inc*., the court ruled that a lawyer who was an expert in securities regulations "was competent to explain to the jury the step-by-step practices ordinarily followed by lawyers and corporations in shepherding a registration statement through the SEC." 550 F.2d 505, 598-509 (2d Cir. 1977). The court held:

> Testimony concerning the ordinary practices of those engaged in the securities business is admissible under the same theory as testimony concerning the ordinary business practices of physicians or other trade customs: to enable the jury to evaluate the conduct of the parties against the standards of practice in the industry.

Id. Expert witnesses are permitted to reference laws and statutes in their testimony. *See Huddleston v. Herman & MacLeon*, 640 F.2d 534, 552 (5th Cir. 1981), *modified on other grounds*, 459 U.S. 375 (1983) (permitting an expert's testimony on securities law because it assisted the jury's weighing of the evidence).

Presumably, a bank’s expert will testify about the customary and appropriate practices of those engaged in the banking industry and the necessary steps required for succession of a trustee through the various transactions and circumstances presented in the facts of the case. Additionally, there are federal and state banking laws that govern the numerous transactions, and the expert's testimony will assist the court in the evaluation of the evidence.

6. Reliance Is An Element Of Nondisclosure Claim

The most likely claim that a beneficiary will have is a nondisclosure claim. There is an issue as to whether that claim requires that the beneficiary prove that it relied on the bank’s failure to disclose.

Generally, a party has no duty to disclose information. An exception is in a fiduciary or confidential relationship. *See Coburn Supply Co., Inc. v. Kohler Co*., 342 F.3d 372 (5th Cir. 2003); *Imperial Premium Fin., Inc. v. Khoury*, 129 F.3d 347, 352-53 (5th Cir. 1998); *Bay Colony Ltd. v. Trendmaker, Inc*., 121 F.3d 998, 1004 (5th Cir. 1998); *Engstrom v. First Nat'l Bank of Eagle Lake*, 936 S.W.2d 438, 444-45 (Tex. App.—Houston [14th Dist.] 1997, writ denied); *Travel Music of San Antonio, Inc. v. Douglas*, 2002 Tex. App. LEXIS 3828, No. 04-00-00757-CV, 2002 WL 1058527, at *4 (Tex. App.—San Antonio, May 29, 2002) (not designated for publication). This would just be a fraud by nondisclosure claim wherein the duty to disclose is created by a fiduciary relationship. *See Litson-Gruenber v. JPMorgan Chase & Co.,* No. 7:09-CV-056-0, 2009 U.S. Dist. LEXIS 117749 (N.D. Tex. December 16, 2009) ("A claim of breach of fiduciary duty does not necessarily involve fraud. In the present case, however, Plaintiff's claims are premised on allegations of fraud and the pleadings are therefore subject to the heightened pleading standard of Rule 9(b)."). *See also Willis v. Maverick*, 760 S.W.2d 642, 645 (Tex. 1988) (The breach of the duty of full disclosure by a fiduciary is tantamount to fraudulent concealment.); *Bright v. Addison*, 171 S.W.3d 588 (Tex. App.—Dallas 2005, pet. dism'd).

Courts in Texas have held that fraud by nondisclosure (or concealment) requires proof of all of the elements of fraud by affirmative misrepresentation, including reliance. *See, e.g., Jacuzzi, Inc. v. Franklin Elec. Co.,* No. 3:07-CV-1090-D, 2008 U.S. Dist. LEXIS 4414 (N.D. Tex. January 22, 2008); *Schlumberger Tech. Corp. v. Swanson,* 959 S.W.2d 171, 181, (Tex. 1997) (holding that "fraud by non-disclosure is simply a subcategory of fraud" requiring, e.g., proof of reliance); *Peltier Enters., Inc. v. Hilton,* 51 S.W.3d 616, 623 (Tex. App.—Tyler 2000, no pet.) (holding that fraudulent concealment "requires proof of the same elements [as fraud by affirmative misrepresentation]"); *Kelley v. Galveston Autoplex,* 196 F.R.D. 471 (S.D. Tex. 2000) ("The common law fraud claim involves issues of individual reliance and as such is not appropriate for class treatment. Despite Plaintiff's argument to the contrary, reliance is an element of common law fraud under Texas law even in cases based on non-disclosure. Thus, because reliance is an issue, the predominance and superiority requirements would not be met even if there were common issues of fact or law."). *See also Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 181 (Tex. 1997).

The Texas Supreme Court has set out the elements of fraud by nondisclosure as: (1) the defendant failed to disclose facts to the plaintiff; (2) the defendant had a duty to disclose those facts; (3) the facts were material; (4) the defendant knew the plaintiff was ignorant of the facts and the plaintiff did not have an equal opportunity to discover the facts; (5) the defendant was deliberately silent when it had a duty to speak; (6) by failing to disclose the facts, the defendant intended to induce the plaintiff to take some action or refrain from acting; (7) the plaintiff relied on the defendant's nondisclosure; and (8) the plaintiff was injured as a result of acting without that knowledge. *See Bradford v. Vento,* 48 S.W.3d 749, 754-55 (Tex. 2001).

Reliance is an element of a fraud by affirmative misrepresentation claim even when raised against a fiduciary. *See Johnson v. Brewer & Pritchard, P.C.,* 73 S.W.3d 193, 211 (Tex. 2002). Specifically, courts find that a plaintiff who asserts a constructive fraud claim in the context of a fiduciary relationship still must establish that it relied on the nondisclosure. *See, e.g., Entm't Merch. Tech., L.L.C. v. Houchin,* No. 4:09-CV-187-A, 720 F. Supp. 2d 792 (N.D. Tex. 2010) (where there was fact question on fiduciary relationship, summary judgment for defendant still affirmed where plaintiff failed to demonstrate detrimental reliance); *Avery Pharms., Inc. v. Haynes & Boone, L.L.P.,* No. 2-07-317-CV2009 Tex. App. LEXIS 769 (Tex. App.—Fort Worth Feb. 5, 2009, no pet); *Bright v. Addison,* 171 S.W.3d 588, 600 (Tex. App.—Dallas 2005, pet. denied); *Spethmann v.*

Anderson, 171 S.W.3d 680, 690 (Tex. App.—Dallas 2005, no pet.). For example, in *Saenz v. Martinez*, the court of appeals held that that there was no evidence to support a constructive fraud allegation by a beneficiary as against a trustee where there was no evidence of reliance. No. 04-07-00339-CV, 2008 Tex. App. LEXIS 8297 (Tex. App.—San Antonio Nov. 5, 2008, no pet.). The court stated:

> While Martinez, as trustee, was certainly under a duty to provide Saenz with an accounting in accordance with the Texas Property Code, Saenz did not adduce summary judgment evidence he relied on this failure in deciding whether to enter into the settlement agreement. There is no evidence of the element of reliance to support Saenz's affirmative defense of constructive fraud.

Id. at *21-22*.*

However, there are cases that state that a beneficiary does not have to prove all of the elements for fraud. *See Archer v. Griffith*, 309 S.W.2d 735 (Tex. 1965); *Landford v. Shamburger*, 417 S.W.2d 438 (Tex. Civ. App.—Fort Worth 1967, writ ref'd n.r.e.); *Miller v. Miller*, 700 S.W.2d 941 (Tex. App.—Dallas 1985, writ ref'd n.r.e.).

A plaintiff alleging fraud establishes reliance by showing the defendant's acts induced him to either act or refrain from acting, to his detriment. *See Van Marcontell v. Jacoby,* 260 S.W.3d 686 (Tex. App.—Dallas 2008, no pet.). Each plaintiff will have to have evidence regarding his or her reliance on the bank's alleged failure to disclose that they were going through mergers, consolidations, stock sales and/or name changes without seeking approval from a court to remain trustee. There will have to be testimony that if those facts were disclosed the beneficiary would have done something differently or refrained from doing something he or she did. Moreover, there will likely also be evidence that the bank and its predecessors forwarded statements on a quarterly basis disclosing the name of the current trustee.

B. Statute of Limitations Defense

Texas precedent previously held that a claim to remove a trustee had a four-year statute of limitation. The Texas Supreme Court held that there is no statute of limitation to remove a trustee. In *Ditta v. Conte*, Conte was the trustee of a trust benefiting her mother, who was declared incapacitated in 1997. 298 S.W.3d 187 (Tex. 2009). In 2000, Ditta, the guardian for the incapacitated mother, filed suit after an accounting showed Conte and her brother had taken money from the trust for their personal expenses. The probate court ordered Conte to repay the trust but only if her mother needed the money. In 2004, Ditta sued to remove Conte as trustee, and claimed that Conte should be removed because of her improper use of trust funds and because her debt to the trust created a conflict of interest. The trial court removed her as trustee and modified the trust's terms to permit a bank to be trustee. The court of appeals reversed, holding that Ditta's lawsuit to remove Conte as trustee was barred by the four-year statute of limitations that applied for a breach of fiduciary duty claim.

The Supreme Court reversed the court of appeals and held that the four-year limitations period on suits alleging breach of fiduciary duty does not apply to the removal of a trustee. The Court stated: "The removal decision turns on the special status of the trustee as a fiduciary and the ongoing relationship between trustee and beneficiary, not on any particular or discrete act of the trustee." *Id*. "Because a trustee's fiduciary role is a status, courts acting within their explicit statutory discretion should be authorized to terminate the trustee's relationship with the trust at any time, without the application of a limitations period." *Id*. However, the Court noted that actions against a fiduciary for damages are still controlled by the statute of limitations analysis: "While the four-year limitations period proscribes whether an interested person can obtain monetary recovery from a trustee's fiduciary breach, it does not affect whether the interested person can seek that trustee's removal." *Id*.

But that Court expressly stated that it was not ruling upon whether the equitable defense of laches could apply. It also did not discuss other equitable defenses such as ratification, estoppel, and waiver.

C. Laches Defense

The defense of laches requires the establishment of two distinct elements: (1) an unreasonable delay by the moving party in asserting their rights and (2) the person raising the defense must be disadvantaged as a result of this delay by the moving party. *See Culver v. Pickens*, 176 SW2d 167 (Tex. 1943); *Knesek v. Witte*, 754 S.W.2d 814, 816 (Tex. App.—Houston [1st Dist.] 1988, writ denied). Laches bar an action where the plaintiff acquiesces in the way and manner an estate is handled for many years. *See Garver v. First Nat'l Bank*, 432 S.W.2d 745 (Tex. App.—Amarillo 1968, writ ref'd n.r.e.). In *Garver*, a husband and wife filed suit against a bank seeking recovery of an interest in the proceeds of oil and gas leases that had been deposited with the bank for the benefit of the heirs of the wife's parents. 432 S.W.2d at 746. The bank had handled the deposits for many years, as directed by the estate's executors, who were the wife's brothers. The court of appeals affirmed a summary judgment in favor of the bank, holding among other things that the plaintiffs' claims were barred by laches because the plaintiffs had acquiesced in the brothers' handling of the estate's proceeds for a period of nineteen years. 432 S.W.2d at 749. The court held that no one has the right to remain inactive when action is demanded while another party so changes his position that great damage will be inflicted by granting the remedial writ. *Id*. Laches applies to bar such a claim, which is precisely the type of claim asserted by Plaintiffs here. *Id*.

D. Ratification Defense

The elements of ratification are: (1) approval by act, word, or conduct; (2) with full knowledge of the facts of the earlier act, and (3) with the intention of giving validity to the earlier act. *See Sandi Samms v. Autumn Run Cmty. Improvement Ass'n.*, 23 S.W.3d 398, 403 (Tex. App.—Houston [1st. Dist.] 2000, pet. denied). In order to prove the intent required for ratification, a party must show that the opposing party, after obtaining knowledge of the facts of the transaction, either (1) continued to accept benefits under the transaction or (2) conducted himself so as to recognize the transaction as binding. *See LSR Joint Venture No. 2 v. Callewart*, 837 S.W.2d 693, 699 (Tex. App.—Dallas 1992, writ denied). A ratification may be shown by an express act or word or may be inferred from a party's course of conduct. *See Curtis v. Pipelife Corp*., 370 S.W.2d 764, 768 (Tex. Civ. App.—Eastland 1963, no writ). An express ratification is not necessary; any act based on a recognition of the contract as subsisting or any conduct inconsistent with an intention of avoiding it has the effect of waiving the right of rescission. *See Rosenbaum v. Tex. Bldg. & Mortg. Co*., 140 Tex. 325, 167 S.W.2d 506 (1943); *Newsom v. Starkey*, 541 S.W.2d 468 (Tex. Civ. App.—Dallas 1976, writ ref'd n.r.e.). Any retention of the beneficial part of the transaction affirms the contract and bars an action for rescission as a matter of law. *See Daniel v. Goesl*, 161 Tex. 490, 341 S.W.2d 892 (1960). Where a party affirms a contract through his actions and conduct after knowledge of the facts, the defense of waiver or ratification is established as a matter of law. *Id*.

E. Waiver Defense

Waiver is defined as an intentional relinquishment of a known right or intentional conduct inconsistent with claiming such right. *See Sun Exploration & Prod. Co. v. Benton*, 728 S.W.2d 35, 37 (Tex. 1987). The elements of waiver are: (1) an existing right; (2) actual or constructive knowledge of the existence of the right; and (3) the intent of the alleged waiving party (which can be inferred from conduct). *See Bass & Co. v. Dalsan Props.—Abilene*, 885 S.W.2d 572, 577 (Tex. App.—Dallas 1991, no writ). A party can impliedly waive the other party's breach where he fails to object to a deviation by the other party from the strict terms of the contract. *See Childress v. Cook*, 245 F.2d 798 (5th Cir. 1957). A party may evidence waiver by conduct of such a nature as to mislead the opposite party into an honest belief that the waiver was intended or assented to. *See Shaver v. Schuster*, 815 S.W.2d 818 (Tex. App.—Amarillo 1991, no writ). Waiver can be established as a matter of law. *See H.A. Lott, Inc. v. Pittsburgh Plate Glass Co*., 432 S.W.2d 583, 586 (Tex. Civ. App.—Amarillo 1968, no writ). Further, the doctrine of waiver is applicable to all rights and privileges to which a person is legally entitled. *See Burton v. Nat'l Bank of Commerce*, 679 S.W.2d 115 (Tex. App.—Dallas 1984, no writ).

F. Estoppel Defense

Estoppel prevents one party who has induced another to act in a particular way from adopting an inconsistent position, attitude, or course of conduct that will cause loss or injury to the other person. *See Houtchens v. Matthews*, 557 S.W.2d 581, 585 (Tex. Civ. App.—Fort Worth 1977, writ dism.). The elements of equitable estoppel are: (1) a false representation or concealment of material facts, (2) made with the knowledge, actual or constructive, of those facts, (3) to a party without knowledge, or the means of knowledge, of those facts, (4) with the intention that it should be acted on, and (5) the party to whom it was made must have relied or acted on it to his prejudice. *See Gulbenkian v. Penn*, 151 Tex. 412, 252 S.W.2d 929 (1952). A false representation may be accomplished by conduct, or when one has a duty to speak, by mere silence. *See Champlin Oil & Refining Co. v. Chastain*, 403 S.W.2d 376 (Tex. 1965).

Additionally, quasi estoppel is a defense that prevents a party from obtaining a benefit by asserting a right to the disadvantage of another that is inconsistent with the party's previous position. *See Vessels v. Anschutz Corp*., 823 S.W.2d 762 (Tex. App.—Texarkana 1992, writ denied). Quasi estoppel refers to conduct such as ratification, election, acquiescence, or acceptance of benefits. *See Steubner Realty 19 v. Cravens Road 88*, 817 S.W.2d 160, 164 (Tex. App.—Houston [14th Dist.] 1991, no writ). Further, quasi estoppel may be asserted even though there has been no concealment or misrepresentation on one side, and no ignorance or detrimental reliance on the other side. *See Vessels*, 823 S.W.2d at 762. The doctrine applies when it would be unconscionable to allow a person to maintain a position inconsistent with one in which he acquiesced, or of which he accepted a benefit. *See Steubner Realty 19*, 817 S.W.2d at 164. One who retains benefits under a transaction cannot avoid its obligations and is estopped to take an inconsistent position. *See Vessels*, 823 S.W.2d at 762; *Theriot v. Smith*, 263 S.W.2d 181, 183 (Tex. Civ. App.—Waco 1953, writ dism'd).

G. Application Of Laches, Ratification, Waiver, and Estoppel Defenses.

Commonly, a bank will send quarterly statements to all beneficiaries. These statements would include information showing the bank’s name, activity in the trust accounts, the fees charged by the bank for trust administration services and the net monetary gain or losses in the accounts. Because trust account statements are generally consistently sent to beneficiaries, the beneficiaries were made aware of who was serving as their trustee, what activity was taking place in their account, and how much the trustee was charging for its services. During this time the beneficiaries accept the benefits of these services and represent by their conduct their assent to the trustees doing the work. Further, during this same time period, the beneficiaries presumably never receive any notice that there is a hearing or other proceeding to approve the new "names" serving as trustee. Moreover, a delay by a beneficiary in alleging improper succession and raising the allegation after receiving the benefits of banks' work, may cause the banks harm. As such, banks may be able to argue that beneficiaries' claims are barred by the equitable doctrines of laches, ratification, waiver, and estoppel.

There is general precedent that supports the application of these defenses to a breach of fiduciary duty claim. *See City of Harper Woods Emples. Ret. Sys. v. Oliver*, 589 F.3d 1292, 1300-1301 (D.C. Cir. 2009) (ratification is defense to breach of fiduciary duty); *Himel v. Continental Illinois Nat. Bank & Trust Co.*, 596 F.2d 205, n.6 (7th Cir. 1979) (same). *See also Casey v. Galli*, 94 U.S. 673 (1877) (stockholder was estopped to deny the existence of a corporate status of a bank).

However, there is also precedent that a claim to trusteeship cannot be upheld on equitable grounds. *See Alpert v. Riley*, 274 S.W.3d 277, 290-91 (Tex. App.—Houston [1st Dist.] 2008, pet. denied). In *Alpert*, a defendant argued that the plaintiffs' acquiescence in, and ratification of, the defendant's assumption of trustee duties bared the plaintiffs from challenging that status. *See id*. The court of appeals held that there was no authority to support such an argument. The court also pointed out that a trial court should follow the trustee selection language in a trust instrument and would not allow equitable theories to modify a trust's provisions. *See id*.

Accordingly, although there is precedent that a party acting as trustee can use equitable theories to defeat a breach of fiduciary duty claim, there is precedent that the party may not be able to use those same defenses to maintain trustee status. In other words, although a court may not grant damages due to the applicability of equitable defenses, it could ignore those defenses in appointing a successor trustee and removing the party currently acting as trustee.

X. Potential Liability For A Bank Not Having Standing

Essentially, a trust beneficiary would be arguing that the bank is not the trustee of his or her trust because every time there was a merger, consolidation, stock sale or name change, the bank or its predecessors had the duty to go to court to seek approval to remain the trustee. The claimant would then assert that the bank had a duty to disclose to the beneficiaries that it and its predecessors did not seek approval from various courts to remain trustee and that it did not therefore have authority to be trustee. The plaintiff could also seek injunctive relief, declaratory relief, and assert a right to class certification.

For example, in a suit by beneficiaries to remove a trustee due to an alleged lack of standing, a magistrate judge recommended denying a motion to dismiss for failure to state a claim. *See Clower v. Wells Fargo Bank, N.A*., NO. 2:07-CV-510-TJW-CE, 2010 U.S. Dist. LEXIS 138795 (E.D. Tex. October 18, 2010) (adopted by district court). The court stated as follows:

> More specifically, the Complaint pleads sufficient factual allegations for a claim of breach of fiduciary duty, and as noted above, a breach of fiduciary duty is sufficient to find constructive fraud. The first element of breach of fiduciary duty is a fiduciary relationship. The Complaint alleges facts showing that Wells Fargo is a "foreign corporate fiduciary" and is trustee of a trust in which Plaintiffs are trust beneficiaries. The second element of a breach of a fiduciary duty claim is that the defendant must breach the fiduciary duty to the plaintiff. A trustee has a duty to fully disclose all material facts known to the trustee that might affect the beneficiaries' rights. The Complaint alleges facts showing that Wells Fargo breached its fiduciary duty by failing to disclose material facts. The Complaint alleges:
>
> > Wells Fargo knew of the prior problems with fiduciary appointments because its due diligence in the mergers made it aware of the indemnity agreements between the earlier de facto successor trustees. Wells Fargo used that concealed knowledge to purchase the trust companies at a lower price, and benefitted from the impropriety of those prior trustee changeover transactions that were done without due process.
>
> These facts specifically show the prior "fiduciary appointments" as being material facts relevant to the beneficiaries' rights and that Wells Fargo allegedly concealed that knowledge. Thus, the facts are sufficient to allege a plausible claim for failure to disclose. Finally, the third element of a breach of fiduciary duty claim is injury to the plaintiff or benefit to the defendant. The Complaint pleads sufficient facts for this element when it states, as quoted above, that Wells Fargo was able to purchase the trust companies at a lower price and that this benefitted Wells Fargo. Thus, the Complaint pleads sufficient factual allegations for a plausible claim of breach of fiduciary duty, which is sufficient to show constructive fraud.

Id. at *9-11. It should be noted that the bank/trustee in this case later prevailed after summary judgment proceedings where the bank/trustee proved its standing by proving up the various transactions that linked the original bank to it. *See Clower v. Wells Fargo Bank, N.A*., NO. 2:07-CV-510-TJW-CE, 2012 U.S. Dist. LEXIS 30093 (E.D. Tex. March 7, 2012) (district court denied motion for new trial after previously granting motion for summary judgment for bank/trustee).

The primary damages claim will likely be for fee forfeiture or disgorgement, which may require a court to go through a multi-factor analysis. For example, in *FTC v. Certified Merchant Services, Ltd*., over the objection of a plaintiff that wanted complete fee disgorgement, the Fifth Circuit affirmed a district court's intensive fact determination that disgorged only a portion of fees paid to a receiver using multiple factors including:

> (1) whether the trustee acted in good faith or not; (2) whether the breach of trust was intentional or negligent or without fault; (3) whether the breach of trust related to the management of the whole trust or related only to a part of the trust property; (4) whether or not the breach of trust occasioned any loss and whether if there has been a loss it has been made good by the trustee; (5) whether the trustee's services were of value to the trust.

No. 03-04738, 126 Fed. Appx. 651, 2005 U.S. App. LEXIS 3805 (5th Cir. March 8, 2005). *See also In re N.Y., N. H. & H. R. Co.,* 567 F.2d 166 (2d Cir. 1977) (despite conflict of interest, equity dictated that the trustee be compensated: "To permit the New Haven estate to retain the benefit of those services without paying for them would amount to a windfall for the New Haven."). *See also Burrow v. Arce,* 997 S.W.2d 229, 241 (Tex. 1999); RESTATEMENT (SECOND) OF TRUSTS § 243.

This will require a detailed and individualized fact-finding for each plaintiff's damages. That determination will require, at a minimum, an individualized fact-finding as to the fees and commissions charged to each trust and an examination of the actual trust administration work done for the trust, as the value of that work is an offset. That may require expert testimony as to what a reasonable charge is for various work performed. This may also require a bank to analyze its predecessor banks' work and charges.

There is authority that a party acting as trustee that has not been properly appointed as such is not entitled to any compensation. *See Alpert v. Riley*, 274 S.W.3d at 296. In *Alpert*, the court of appeals determined that the party claiming to be a trustee was not properly appointed as such because of a failure to follow the trustee succession language in the applicable trust document. The court then determined in a very conclusory manner whether the trial court erred in awarding him compensation and held: "our holding that Riley is not the authorized trustee under the 1996 trust precludes any recovery of compensation as a matter of law for actions taken in connection with that trust." *Id*. The court did not discuss whether fee disgorgement and its applicable factors would be appropriate or not.

If a plaintiff is successful and a final determination is made that the bank is not the lawful trustee, there will be an issue as to whether the bank would have the right to immediately stop administering the trusts and transfer the assets into the registry of the Court. These assets may include stocks, bonds, business interests, real estate, oil and gas interests, and the like, many of which require day-to-day administration.

Further, if the bank was never the authorized trustee, would that bank have ever been a fiduciary such that a beneficiary could not raise breach of fiduciary duty claims? The law has a concept of de jure and de facto trustees. A de jure trustee is a party that is properly appointed trustee with the legal authority to act. A de facto trustee "could describe anyone who is not a trustee in fact but is potentially liable as a trustee . . . . [T]he phrase usually refers to a person who has at least a colorable claim to be trustee, acts as one, and, in some instances who seeks the benefits of one." *Alpert v. Riley*, No. H-04-3774, 2011 U.S. Dist. LEXIS 13260 (S.D. Tex. February 10, 2011) (quoting *Allen Trust Co. v. Cowlitz Bank*, 152 P.3d 974, 977 n.2 (Or. Ct. App. 2007)). Courts may hold that a de facto trustee has the same fiduciary duties as a de jure trustee.

The appointment of replacement trustees is another complicated factor. The terms of the trust agreement must be reviewed to determine the process, and multiple beneficiaries may be entitled to have a say in who will be the new trustee. Under Texas law, in the absence of an explicit grant of authority in a will or trust instrument permitting transfer or delegation, the fiduciary responsibilities of an executor or trustee are neither transferrable nor delegable. *See Transamerican Leasing Co. v. Three Bears, Inc*., 586 S.W.2d 472, 476 (Tex. 1979); West v. Hapgood, 141 Tex. 576, 174 S.W.2d 963, 971 (1943). Thus, when an originating instrument does not provide otherwise, the appointment of a successor fiduciary is governed by statute. *See NCNB Texas Nat. Bank of Cowden*, 895 F.2d 1488, 1495 (5th Cir. 1990). The Texas Trust Code provides that "[o]n the death, resignation, incapacity, or removal of a sole or surviving trustee, a successor trustee shall be selected according to the method, if any, prescribed in the trust instrument. If for any reason a successor is not selected under the terms of the trust instrument, a court may and on petition of any interested person shall appoint a successor in whom the trust shall vest." TEX. PROP. CODE ANN. § 113.083(a). Some beneficiaries under a given trust may disagree. In the end, there will have to be an evidentiary hearing to determine the new trustee. Certainly, the party acting as the de facto trustee can apply to be named the de jure trustee.

If a defect in trustee succession applies to more than one trust, there is a decision that a plaintiff may seek to certify a class of trusts and beneficiaries. *See Clower v. Wells Fargo Bank, N.A*., 259 F.R.D. 253 (E.D. Tex. 2009), *vacated*, 2010 U.S. App. LEXIS 12463 (5th Cir. June 17, 2010). The district court granted plaintiffs' motion for class certification. It held that of all the common issues, the predominant one was the liability issue involving the bank's authority in administrating the trusts. The relief sought was to judicially foreclose the bank from opposing any petitions seeking its removal as a trustee by any class member in state probate courts. Plaintiffs argued resolving the case on a class-wide basis involved nothing more than determining if the bank was a proper trustee—in effect a ruling on the validity of transfer of the trusts to the bank, its legal authority, and any breaches of duty thereafter. The court did not believe that a concern over the potential complexity of remedies outweighed the advantages of maintaining the suit as a class action. The Fifth Circuit vacated this decision because the district court has subsequently dismissed the plaintiff's complaint for failure to state a claim.