A Trustee's Use of Exculpatory, Release, And Disclaimer-Of-Reliance Clauses In Texas

DAVID F. JOHNSON
dfjohnson@winstead.com
www.txfiduciarylitigator.com
Winstead PC
300 Throckmorton St., Suite 1700
Fort Worth, TX 76102
817-420-8223

DAVID FOWLER JOHNSON

DFJOHNSON@WINSTEAD.COM

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

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

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

Represented trustees regarding claims of mismanagement of assets;

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

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

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

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

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

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

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

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

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

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

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I. Introduction[1]

Settlors, trustees, and beneficiaries in Texas may want to insert clauses into trust documents or subsequent agreements that benefit the trustee and free the trustee to take certain actions without potential liability. For example, a settlor may want to limit a trustee's liability for negligent actions, especially where the settlor designates himself as the trustee. The beneficiaries may want to relieve the trustee for any risk associated with maintaining a family business or farm as an asset in the trust even if it breaches a duty to diversify. A trustee and beneficiaries may want to terminate a long-standing dispute, end their relationship, and release each other from all claims. There are many different scenarios where parties may want to insert clauses to limit a trustee's duty or liability.

This article is intended to describe the use and enforceability of exculpatory, release, and disclaimer-of-reliance clauses. Generally, an exculpatory clause is a clause in a trust agreement that limits a trustee's liability for certain conduct. A release is a clause in a subsequent agreement between a trustee and beneficiary that limits the trustee's liability for certain conduct. A disclaimer-of-reliance clause is a clause in a subsequent agreement between a trustee and beneficiary that limits the trustee's liability for misrepresentation-based claims due to the beneficiary's statement that he or she is not relying on any representations or statements by the trustee and is solely relying on his or her own judgment.

All of these clauses are somewhat controversial in the context of a settlor/trustee/beneficiary context in that a trustee owes high fiduciary duties to beneficiaries. Though these clauses may be generally enforceable in arms-length transactions, are they as readily enforceable in the context of a fiduciary relationship? This article explores the use of these clauses in fiduciary relationships in Texas.

Before analyzing the three types of clauses at issue, it is helpful to review the various duties that a trustee owes to a beneficiary and the presumptions that are involved in transactions between a trustee and a beneficiary.

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[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.

A. A Trustee's Common-Law Duties

To understand whether contractual clauses should be enforced between a trustee and a beneficiary, one has to understand the broad scope of the fiduciary relationship. A trustee is held to a high fiduciary standard. *Ditta v. Conte*, 298 S.W.3d 187, 191 (Tex. 2009). The fiduciary relationship exists between the trustee and the trust's beneficiaries, and the trustee must not breach or violate this relationship. *Slay v. Burnett Trust*, 143 Tex. 621, 187 S.W.2d 377, 387-88 (Tex. 1945); RESTATEMENT (SECOND) OF TRUSTS § 170 CMT. A (1959); G. BOGERT, TRUSTS AND TRUSTEES § 543, at 217-18 (2d ed. rev. 1993). The fiduciary relationship comes with many high standards, including loyalty and utmost good faith. *Kinzbach Tool Co. v. Corbett-Wallce Corp*., 160 S.W.2d 509, 512 (Tex. 1942). At all times, a fiduciary must act with integrity of the strictest kind. *Hartford Cas. Ins. v. Walker Cty. Agency, Inc.*, 808 S.W.2d 681, 687-88 (Tex. App—Corpus Christi 1991, no writ). The Texas Supreme Court has described the high standards that a trustee owes the beneficiaries of a trust: "A trust is not a legal entity; rather it is a 'fiduciary relationship with respect to property.' High fiduciary standards are imposed upon trustees, who must handle trust property solely for the beneficiaries' benefit. A fiduciary 'occupies a position of peculiar confidence towards another.'" *Ditta*, at 191. A trustee owes a trust beneficiary an unwavering duty of good faith, loyalty, and fidelity over the trust's affairs and its corpus. *Herschbach v. City of Corpus Christi*, 883 S.W.2d 720, 735 (Tex. App.—Corpus Christi 1994, writ denied) (citing *Ames v. Ames*, 757 S.W.2d 468, 476 (Tex. App.—Beaumont 1988), *modified*, 776 S.W.2d 154 (Tex. 1989)). To uphold its duty of loyalty, a trustee must meet a sole-interest standard and handle trust property solely for the benefit of the beneficiaries. Tex. Prop. Code §117.007; *InterFirst Bank Dallas, N.A. v. Risser*, 739 S.W.2d 882, 898 (Tex. App.—Texarkana 1987, no writ). A trustee has a duty to refrain from self-dealing with trust assets. Tex. Prop. Code Ann. § 113.053(a).

A trustee has a duty to act prudently in managing and investing trust assets. A trustee has the duty to make assets productive while at the same time preserving the assets. *Hershbach v. City of Corpus Christi*, 883 S.W.2d 720, 735 (Tex. App.—Corpus Christi 1994, writ denied). It has a duty to properly manage, supervise, and safeguard trust assets. *Hoenig v. Texas Commerce Bank*, 939 S.W.2d 656, 661 (Tex. App.—San Antonio 1996, no writ). There is a duty to invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. Tex. Prop. Code Ann. § 117.004.

A Trustee also has a duty of full disclosure of all material facts known to it that might affect the beneficiaries' rights. *Montgomery v. Kennedy*, 669 S.W.2d 309, 313 (Tex. 1984). A trustee also has a duty of candor. *Welder v. Green*, 985 S.W.2d 170, 175 (Tex. App—Corpus Christi 1998, pet. denied). Regardless of the circumstances, the law provides that beneficiaries are entitled to rely on a trustee to fully disclose all relevant information. *See generally Johnson v. Peckham*, 132 Tex. 148, 120 S.W.2d 786, 788 (1938). In fact, a trustee has a duty to account to the beneficiaries for all trust transactions, including transactions, profits, and mistakes. *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996); *see also Montgomery,* 669 S.W.2d at 313. A trustee's fiduciary duty even includes the disclosure of any matters that could possibly influence the fiduciary to act in a manner prejudicial to the principal. *Western Reserve Life Assur. Co. v. Graben*, 233 S.W.3d 360, 374 (Tex. App.—Fort Worth 2007, no pet.). The duty to disclose reflects the information a trustee is duty-bound to maintain as he or she is required to keep records of trust property and his or her actions. *Beaty v. Bales*, 677 S.W.2d 750, 754 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.). The duty to disclose reflects the information a trustee is duty-bound to maintain as he or she is required to keep records of trust property and his or her actions. *Beaty v. Bales*, 677 S.W.2d 750, 754 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.). A trustee is under a duty to keep and maintain accurate records of transactions relating to trust property and the administration of the trust. *National Cattle Loan Co. v. Ward*, 113 Tex. 312, 255 S.W. 160 (Comm'n App. 1923); *Faulkner v. Bost*, 137 S.W.3d 254 (Tex. App.—Tyler 2004, no pet.); *Corpus Christi Bank & Trust v. Roberts*, 587 S.W.2d 173, 181 (Tex. Civ. App.—Corpus Christi 1979), *aff'd*, 597 S.W.2d 752 (Tex. 1980) ("One of the primary duties of a trustee is to keep full, accurate and orderly records concerning the status of the trust estate and all acts performed thereunder."); *Shannon v. Frost Nat'l Bank of San Antonio*, 533 S.W.2d 389 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.).

There are many other specific duties that a trustee owes to the beneficiaries.

B. The Fiduciary Has The Burden To Prove The Fairness Of Contracts Between A Trustee And A Beneficiary

Two of the three clauses at issue in this article, the release and disclaimer-of-reliance clause, exist in agreements between a trustee and a beneficiary. "Texas courts have applied a presumption of unfairness to transactions between a fiduciary and a party to whom he owes a duty of disclosure, thus casting upon the profiting fiduciary the burden of showing the fairness of the transactions." *Collins v. Smith,* 53 S.W.3d 832, 840

(Tex. App.—Houston [1st Dist.] 2001, no pet.) (citing *Texas Bank & Trust Co. v. Moore*, 595 S.W.2d 502, 507-08 (Tex. 1980)); *see also See Harrison v. Harrison Interests,* No. 14-15-00348-CV, 2017 Tex. App. LEXIS 1677 (Tex. App.—Houston [14th Dist.] February 28, 2017, no pet. history). Where a transaction between a fiduciary and a beneficiary is attacked, it is the fiduciary's burden of proof to establish the fairness of the transaction. *Fitz-Gerald v. Hull*, 150 Tex. 39, 49, 237 S.W.2d 256, 261 (1951); *Harrison,* 2017 Tex. App. LEXIS 1677. *See also Keck, Mahin & Cate v. Nat'l Union Fire Ins. Co.*, 20 S.W.3d 692, 699 (Tex. 2000) (the Texas Supreme Court considered whether a release agreement could bar claims arising from a fiduciary relationship and held that the presumption of unfairness or invalidity applied).

II. Exculpatory Clause

A. Introduction

It is common for settlors to execute trust documents that contain exculpatory clauses. An exculpatory clause is one that forgives the trustee for some action or inaction. Generally, these types of clauses can be enforceable in Texas and can limit a trustee's duty. *Dolan v. Dolan*, No. 01-07-00694-CV, 2009 Tex. App. LEXIS 4487 (Tex. App.—Houston [1st Dist.] June 18, 2009, pet. denied). In Texas, exculpatory clauses are strictly construed, and a trustee is relieved of liability only to the extent to which it is clearly provided that it will be excused. *See Jewett v. Capital Nat. Bank of Austin*, 618 S.W.2d 109, 112 (Tex. App.—Waco 1981, writ ref'd n.r.e.); *Martin v. Martin*, 363 S.W.3d 221, 230 (Tex. App.—Texarkana 2012, pet. dism'd by agr.). *See also Price v. Johnston*, 638 S.W.2d 1, 4 (Tex. App.—Corpus Christi 1982, no writ) ("When a derogation of the [Texas Trust] Act hangs in the balance, a trust instrument should be strictly construed in favor of the beneficiaries"). For example, a court held that a clause that relieved a trustee from liability for "any honest mistake in judgment" did not forgive the trustee's acts of self-dealing. *Burnett v. First Nat. Bank of Waco*, 567 S.W.2d 873, 876 (Civ. App.—Tyler 1978, ref. n.r.e.).

B. Form And Drafting Tips

For example, common exculpatory clauses may state:

> "The trustee shall be saved harmless from any liability for any action he or she may take, or for the failure of such trustee to take any action, if done in good faith and without gross negligence."

> "Except for willful misconduct or fraud, a Trustee shall not be liable for any act, omission, loss, damage or expense arising from the performance of his, her or its duties under this trust agreement."
>
> "The Trustee may rely on the advice of counsel and shall not be liable for any damage arising from any act done in reliance on the advice of counsel."
>
> "The trustee shall be protected and saved harmless in making any distribution made in good faith."

Further, a settlor may want to consider adding additional provisions in case there is a dispute later regarding the enforcement of the exculpatory clause: "This clause was drafted without the knowledge or encouragement of the trustee," and "The settlor states that he/she is of sound mental capacity and executes this Trust with this clause free of any influence of any person."

C. Restatement And Uniform Act Treatment Of Exculpatory Clauses

The Restatement (Third) of Trusts provides:

> (1) A provision in the terms of a trust that relieves a trustee of liability for breach of trust, and that was not included in the instrument as a result of the trustee's abuse of fiduciary or confidential relationship, is enforceable except to the extent that it purports to relieve the trustee (a) of liability for a breach of trust committed in bad faith or with indifference to the fiduciary duties of the trustee, the terms or purposes of the trust, or the interests of the beneficiaries, or (b) of accountability for profits derived from a breach of trust.

RESTATEMENT (THIRD) TRUSTS, § 96 (2012). Under the Restatement, exculpatory clauses are strictly construed and "the trustee is relieved of liability only to the extent the provision clearly so provides." *Id*. cmt. (1). In addition to bad faith breaches, the Restatement also provides that an exculpatory clause cannot excuse a trustee for conduct with indifference to the fiduciary duties of the trustee. *Id*. "Nor can a trustee be excused for a breach committed with indifference to the interests of the beneficiaries or to the terms and purposes of the trust—that is, committed without reasonable effort to understand and conform to applicable fiduciary duties." *Id*.

The Restatement also provides that there is a negative presumption against enforcing an exculpatory clause where the trustee is involved in its inclusion in a trust:

> If the terms of the trust were drafted by the trustee, or if the exculpatory clause was caused to be included in the trust by the trustee, the clause is presumptively unenforceable. The presumption is rebuttable, and the clause will be given effect if the trustee proves that the exculpatory provision is fair under the circumstances (including, when applicable, the fiduciary risks to be assumed) and that the existence, contents, and effect of the clause were adequately communicated to or otherwise understood by the settlor. Thus, if a father asks his daughter, a lawyer, to draw a will under which she is to act as trustee, and she includes an exculpatory clause in the will and the father is aware of its existence, nature, and effect when he executes his will, the exculpatory provision is effective.
>
> In determining whether an exculpatory clause was included in the trust instrument as a result of an abuse of a fiduciary or confidential relationship, the following factors (as well as other relevant factors) may be considered: whether the instrument was drawn by the trustee or another acting wholly or in part on behalf of the trustee; whether the trustee prior to or at the time of the trust's creation had been in a fiduciary relationship with the settlor, such as by serving as the settlor's conservator or as the settlor's lawyer in providing the trust instrument or relevant part(s) of it; whether the settlor received competent, independent advice regarding the provisions of the instrument; whether the settlor was made aware of the exculpatory provision and was, with whatever guidance may have been provided, able to understand and made a judgment concerning the clause; and the extent and reasonableness of the provision.

Id. cmt. (1)(d).

The Restatement is similar to the Uniform Trust Code. Section 1008 of the Uniform Code provides:

> (a) A term of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent that it:

> (1) relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries; or
>
> (2) was inserted as the result of an abuse by the trustee of a fiduciary or confidential relationship to the settlor.
>
> (b) An exculpatory term drafted or caused to be drafted by the trustee is invalid as an abuse of a fiduciary or confidential relationship unless the trustee proves that the exculpatory term is fair under the circumstances and that its existence and contents were adequately communicated to the settlor.

UNIFORM TRUST CODE, § 1008 (2000).

D. Pre-*Grizzle* Authority: Public Policy Limits The Enforcement Of Exculpatory Clauses

Historically, Texas courts enforced exculpatory clauses, except that a court would not enforce such a clause to relieve a trustee of intentional or bad faith conduct due to public policy concerns. In *Langford v. Shamburger*, the court held that "it would be contrary to the public policy of this State to permit the language of a trust instrument to authorize self-dealing by a trustee." 417 S.W.2d 438, 444 (Tex. Civ. App.—Fort Worth 1967, writ ref'd n.r.e.)). The beneficiaries sued the trustee for interest on trust funds not invested, for commingling of trust funds, and for profits through self-dealings. The trustee asserted the following exculpatory clause as a defense: "No trustee shall ever be liable for any act of omission or commission unless such act is the result of gross negligence or of bad faith or of the trustee's own defalcation, and no trustee shall ever be liable individually for any obligation of the trust." *Id*. The court held that this language could not excuse the trustee for the "misapplication or mishandling" of trust funds. The court explained as follows:

> Appellee again directs our attention to the exculpatory language of the trust instrument which relieves a trustee from liability except for gross negligence. Appellee contends that we have in effect held that such exculpatory language is unlawful, thus going contrary to the great weight of authority in this State which has upheld similar exculpatory language in other trust instruments. Our holding is not so broad and should not be so construed. What we have held is that the

> exculpatory language in the trust instrument here under consideration does not authorize self-dealing by a trustee. In view of the language of Section 10 of the Texas Trust Act, Article 7425b, we further express the opinion that the language of a trust instrument which specifically authorizes self-dealing by a trustee could present a serious question of public policy.

Id. *See also McLendon v. McLendon*, 862 S.W.2d 662, 676 (Tex. App.—Dallas 1993, writ denied); *Grider v. Boston Co.*, 773 S.W.2d 338, 343 (Tex. App.—Dallas 1989, writ denied).

In *Corpus Christi National Bank v. Gerdes*, the court of appeals held that an exculpatory clause was not against public policy and was enforceable under the facts of that case. 551 S.W.2d 521 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.). The beneficiaries alleged negligence and gross negligence by the trustee in its handling of the estate properties and sought damages. The trial court awarded the beneficiaries damages, and the trustee appealed. The court of appeals held that generally a trustee's powers are conferred by the instrument and neither the trustee nor the courts can add to or take away from such powers, but must permit it to stand as written and give to it only such construction as the trustor intended. *Id*. The will stated that "No Trustee, Co-Trustee or successor Trustee shall be liable for any mistake or error of judgment or negligence, but shall be liable only for her or its own dishonesty." *Id*. at 523. In distinguishing the *Langford* opinion, the court stated: "It is clear, therefore, that the public policy prohibition is limited to exculpatory clauses which authorize self-dealing, which is not in our case." *Id*. at 525. The court reversed the award of damages against the trustee.

In *InterFirst Bank Dallas, N.A. v. Risser*, the court stated:

> The language of a trust instrument cannot authorize self-dealing by a trustee, because that would be contrary to public policy. This limitation should include any situation in which a trustee used the position of trust to obtain an advantage by action inconsistent with the trustee's duties and detrimental to the trust. Neither can an exculpatory provision in the trust instrument be effective to relieve the trustee of liability for action taken in bad faith or for acting intentionally adverse or with reckless indifference to the interests of the beneficiary.

739 S.W.2d 882, 888 (Tex. App.—Texarkana 1987, no writ). The court reviewed the following trust provision: "(f) The Trustee shall never be liable

for any action or any failure to act hereunder in the absence of proof of bad faith." *Id*. The court concluded: "Thus, liability of the trustee for breach of trust in the present case must be based upon self-dealing, bad faith, or intentionally adverse acts or reckless indifference toward the interest of the beneficiary." *Id*. at 888.

In *Neuhaus v. Richards*, beneficiaries sued the trustee for failing to diversify trust assets by retaining stock in the trust and the court of appeals equated that retention clause with an exculpation clause. 846 S.W.2d 70, 74 (Tex. App.—Corpus Christi 1992), *judgment set aside without reference to merits to effect settlement agreement*, 871 S.W.2d 182 (Tex. 1994). The court held that "an exculpatory provision in the trust instrument is not effective to relieve the trustee of liability for action taken in bad faith or for acting intentionally adverse or with reckless indifference to the interests of the beneficiary." *Id*. Accordingly, the court held that even if the trust agreement exculpated the trustees from all liability, it could not have done so for willful misconduct or personal dishonesty. Because one of the alleged breaches of fiduciary duty was willful misconduct, the court held that summary judgment was improper; the trustees made no attempt to negate allegations of willful misconduct. *Id*.

In *Jochec v. Clayborne*, beneficiaries sued a trustee for making a self-interested transaction with an entity with whom she had an ownership interest. 863 S.W.2d 516 (Tex. App.—Austin 1993, writ denied). An exculpatory clause in the trust agreement authorized the trustee to "engage in and carry on any business or undertaking . . . with any person, firm, corporation or any trustee under any other trust." *Id*. The trustee contended that the broad language of the trust instrument entitled her to engage in business with any entity, including those with which she had an ownership interest. The trial court disagreed, and the jury returned a verdict for the beneficiary. The court of appeals held that the trust language should have been submitted in the jury instructions and reversed and remanded the case for new trial. *Id*. The court first addressed the strict construction rule:

> [T]his strict-construction rule should be applied only in circumstances where the intention of the parties cannot be discerned from the parties' actions or conduct. We reach this conclusion because, as indicated above, evidence of the parties' own interpretation of the instrument furnishes "the highest evidence" and is accorded "great, if not controlling, weight." A strict-construction rule, on the other hand, like other general rules of construction, is necessarily arbitrary and

> should be used only as a "tie-breaker" where more direct evidence does not resolve the ambiguity: "[A] rule of construction in law does not overrule or supersede the intention of the parties to the contract." Because we have concluded that the evidence bearing directly on Wehe's intent resolves any ambiguity in the language used in the trust instrument, we decline to apply the strict-construction rule referenced above.

Id. The court then held that the trial court erred in refusing to instruct the jury on this exculpatory language: "Based on the foregoing analysis, we conclude, in light of the parties' acts and conduct, that the parties intended the provision at issue to modify the duty of fidelity. Accordingly, we conclude that the trial court erred in failing to instruct the jury that Janice's duties as trustee were governed by the terms of the trust instrument." *Id*. at 520.

In *Shands v. Texas State Bank*, beneficiaries sued an agent of the executor for not funding a trust and then not investing or diversifying the assets appropriately. No. 04-00-00133-CV, 2001 Tex. App. LEXIS 109 (Tex. App.—San Antonio January 10, 2001, no pet.). The trial court granted summary judgment for the bank, and the beneficiary appealed that decision. The court of appeals affirmed the summary judgment. The court stated that an exculpatory clause ("no Trustee shall be liable for any act or omission except in the case of gross negligence, bad faith or fraud…") in the will protected the bank from liability. The bank produced expert testimony explaining that it did not invest the funds because it was not directed to do so by the executor. The court of appeals held that the beneficiary did not controvert this evidence and affirmed the summary judgment. *Id*. at *26-27.

Texas courts would enforce exculpatory clauses, but they would not enforce such clauses to relieve a trustee of liability for intentional or bad faith conduct due to public policy concerns.

E. *Texas Commerce Bank v. Grizzle:* Texas Supreme Court Liberalizes The Enforcement Of Exculpatory Clauses

In 2002, the Texas Supreme Court revisited exculpatory clauses and held that a trust document could relieve a trustee of liability for even self-interested transactions. In *Texas Commerce Bank v. Grizzle*, the Texas Supreme Court held that public policy as expressed by the legislature in the Trust Code allowed relieving a corporate trustee from liability for self-dealing except for what was specified in sections 113.052 and 113.053. 96

S.W.3d 240, 249 (Tex. 2002). The Court stated that "[w]hile the Trust Code imposes certain obligations on a trustee—including all duties imposed by the common law—the Trust Code also permits the settlor to modify those obligations in the trust instrument." *Id*. at 249. Specifically, the Court held that "the trust Code authorizes a settlor to exonerate a corporate trustee from almost all liability for self-dealing," such as misapplying or mishandling trust funds, including failing to promptly reinvest trust monies. *Id*. at 250. The Court also held that public policy did not bar such exculpatory clauses: "We disagree with the court of appeals' conclusion that public policy precludes such a limitation on liability." *Id*. "The Legislature has expressly authorized the use of exculpatory clauses, stating that they can relieve a corporate trustee from liability except for certain narrow types of self-dealing not at issue here. We therefore decline to hold that a trust instrument cannot exonerate a trustee from liability for failing to promptly reinvest trust monies based on public policy." *Id*. In *Grizzle*, the Texas Supreme Court based its decision on Section 113.059 of the Texas Trust Code that broadly stated that "a settlor may relieve a corporate trustee from a 'duty, liability, or restriction imposed by this subtitle,' except for those contained in sections 113.052 and 113.053." *Id*. Accordingly, the Texas Supreme Court seemed willing to follow the settlor's intent to forgive even some intentional conduct despite other historic public policy considerations to the contrary. *Id.; see also Clifton v. Hopkins*, 107 S.W.3d 755 (Tex. App.—Waco 2003, no pet.).

F. New Texas Trust Code Provisions: Legislature Revisits Limitations On Exculpatory Provisions

In response to *Grizzle*, the Texas Legislature amended the Texas Property Code in 2005, and it now limits a settlor's ability to exculpate a trustee. The Texas Legislature repealed Section 113.059 and added Sections 111.0035 and 114.007. Section 111.0035 provides that the terms of a trust may not limit a trustee's duty to respond to a demand for an accounting or to act in good faith. Tex. Prop. Code Ann. §111.035(b)(4). In the bill analysis, the Texas Legislature stated Section 111.0035 "is necessary in light of *Texas Commerce Bank v. Grizzle*, 96 S.W.3d 240 (Tex. 2002)." House Comm. on Judiciary, Bill Analysis, Tex. H.B. 1190, 79th Leg., R.S. (2005). Additionally, new Texas Property Code section 114.007 provides that an exculpatory clause is unenforceable to the extent that it relieves a trustee of liability for breaches done with bad faith, intent, or with reckless indifference to the interests of a beneficiary or for any profit derived by the trustee from a breach of trust. Tex. Prop. Code Ann. §114.007.

Section 111.0035(b) expressly provides as follows:

> The terms of a trust prevail over any provision of this subtitle, except that the terms of a trust may not limit:
>
> > (1) the requirements imposed under § 112.031;
> >
> > (2) the applicability of § 114.007 to an exculpation term of a trust;
> >
> > (3) the periods of limitation for commencing a judicial proceeding regarding a trust;
> >
> > (4) a trustee's duty:
> >
> > > (A) with regard to an irrevocable trust, to respond to a demand for accounting made under § 113.151 if the demand is from a beneficiary who, at the time of the demand:
> > >
> > > > (i) is entitled or permitted to received distributions from the trust; or
> > > >
> > > > (ii) would receive a distribution from the trust if the trust terminated at the time of the demand; and
> > >
> > > (B) to act in good faith and in accordance with the purposes of the trust.

Tex. Prop. Code Ann. § 111.0035.

Section 114.007 provides:

> (a) a term of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent that the term relieves a trustee for liability:
>
> > (1) a breach of trust committed: (A) in bad faith; (B) intentionally; or (C) with reckless indifference to the interest of the beneficiary; or
> >
> > (2) any profit derived by the trustee from a breach of trust.

Id. at § 114.007.

In *Dolan v. Dolan*, a beneficiary sued a trustee for investing trust funds into the trustee's needlepoint business. No. 01-07-00694-CV, 2009 Tex. App. LEXIS 4487 (Tex. App.—Houston [1st Dist.] June 18, 2009, pet. denied).

The terms of the trust provided: "The trustee shall in no case be liable for loss to the trust estate, except for his willful breach of trust, bad faith, or gross negligence, nor for any other error of judgment in the exercise of good faith . . . ." *Id*. The court reviewed the evidence and determined that the jury had sufficient evidence to support a finding of gross negligence: "Viewing the evidence in the light most favorable to the judgment and indulging every reasonable inference that supports the judgment, we conclude that this evidence would enable reasonable and fair-minded people to reach the conclusion that George acted with gross negligence with regard to the trust funds that he advanced to Needlepoint." *Id*. at *17.

Most recently, in *Martin v. Martin*, the court of appeals discussed the new statutory provisions and their impact on *Grizzle* and found that an exculpatory clause in the trust document at issue was not enforceable to protect the trustee from actions where he had a conflict of interest. 363 S.W.3d 221 (Tex. App.—Texarkana 2012, pet. denied). In *Martin*, a company was jointly managed for over twenty years by Ruben Martin and Scott Martin. They each created an irrevocable trust for the health, education, and welfare of their children and grandchildren. The brothers were the trustees of each other's trust. Thereafter, a power struggle over the control of the company arose between Ruben and Scott.

Ruben's children filed a lawsuit to remove Scott as the trustee of their trust and alleged breaches of fiduciary duty. Ultimately, the jury found for Ruben's children and ordered over a million dollars in damages to each of them as against Scott. Scott appealed and argued that he had no fiduciary duty of loyalty based on a provision of the trust releasing Scott of fiduciary duties except those imposed by a statute.

The court of appeals held that under the common law, a trustee has the fiduciary duties to hold and manage the property for the benefit of the beneficiaries and owes a trust beneficiary an unwavering duty of good faith, fair dealing, loyalty, and fidelity over the trust affairs and its corpus. Scott argued that the trust document excused him from the obligation to perform such duties.

The court of appeals held that the general rule from the Texas Trust Code is that the terms of the trust prevail over any provision of the code subject to a few statutory exceptions not applicable to the case. The trust document granted the trustee the right to operate to the same extent and manner as if he were a disinterested person. Further, it recognized that no principle or rule relating to "self-dealing or divided loyalty shall be applied to any act of the trustee but that the trustee shall be held to the same standard of liability" as in transactions with disinterested persons.

The court held that Scott would be accountable for fiduciary responsibility only if the Texas Trust Code expressly prohibited the exculpation clause contained in the trust. Scott argued that pursuant to the Texas Supreme Court's *Grizzle* opinion, that the trust agreement waived all fiduciary duties. The court of appeals disagreed and found Scott's argument ignored the statutory changes that had occurred after *Grizzle* was decided.

The court noted that in response to *Grizzle* the Texas Legislature repealed section 113.059 and added sections 111.0035 and 114.007. The court of appeals held that Scott owed Ruben's children the fiduciary duties which, pursuant to sections 111.0035 and 114.007, cannot be waived. The statutory changes modified the holding of *Grizzle*.

Scott also argued that another provision of the trust document required reversal: "no individual trustee shall be liable for negligence or error of judgment, but shall be liable only for such trustee's willful misconduct or personal dishonesty." The court held that section 114.007 prohibits liability from being waived if the breach was committed in bad faith, intentionally, or with reckless indifference to the interest of the beneficiaries. The court noted that the jury found that the breach was committed in "an absence of good faith, intentionally or with reckless indifference to the interest of the beneficiaries." The court found that section 114.007 would prohibit any waiver of liability and held that the exculpatory clauses at issue did not excuse Scott from his actions. There was sufficient evidence to support the jury's liability finding that Scott had breached his fiduciary duties.

G. Conclusion On Exculpatory Clauses

The law in Texas on exculpatory clauses is more narrow now than it was historically. In the past, Texas courts enforced exculpatory clauses, except that a court would not enforce such a clause to relieve a trustee of intentional or bad faith conduct due to public policy concerns. Whether a trustee benefited or not was not really an issue regarding the enforcement of an exculpatory clause. Now, an exculpatory clause is effective in Texas to forgive negligent actions that do not benefit the trustee. If the trustee's conduct was negligent, but the trustee benefited from its conduct, then an exculpatory clause should not be enforceable. Where the trustee does not benefit from the conduct, however, such a clause can protect a trustee from negligent acts that fall short of being done in bad faith, intentional, or with reckless indifference.

III. Release Clause

A. Introduction

A trustee and beneficiary may want to enter into a release agreement. A release is a contractual clause that states that one party is relieving the other party for liability associated with certain conduct. The Texas Supreme Court has defined a release as "liberation from an obligation, duty, or demand; the act of giving up a right or claim to the person against whom it could have been enforced." *El Paso Natural Gas Co. v. Minco Oil & Gas, Inc*., 8 S.W.3d 309, 314 n. 15 (Tex. 1999). It can relate to conduct that will occur in the future and/or conduct that occurred in the past. A release clause is normally not in the trust document; it is a clause that occurs in a document that is negotiated between a trustee and the beneficiary after the relationship is created.

B. Form

A release clause may state as follows:

> The Beneficiaries hereby release, acquit, and forever discharge the Trustee in its corporate, individual, and fiduciary capacity from any and all Claims, liabilities, demands, causes of action, damages, or expenses (including attorney's fees and costs of court) of any kind or character, whether known or unknown, that the Beneficiaries, or any third party claiming by or through them, may now or in the future hold or assert in connection with, arising from, or attributable to [the matters to be released].

The term "claims" could include:

> Any and all claims, including breach of fiduciary duty, negligence, gross negligence, fraud, constructive fraud, negligent misrepresentation, tortious interference, and any other ground, causes of action, and all other obligations and liabilities, whether arising in tort, contract, or equity, which any Party or Parties currently has, may have in the future, or had against the released Party, whether known or unknown, including the Claims brought or which could have been brought by, between, or among the Parties through the effective date of the Agreement that they may now or in the future hold or assert relating to the Trust, the administration or distribution of the Trust's assets, or this Agreement.

C. Restatement And Uniform Act Treatment Of Release Clauses

Regarding release, consent, and ratification, the Restatement (Third) of Trusts states:

> A beneficiary who consented to or ratified, or released the trustee from liability for, an act or omission that constitutes a breach of trust cannot hold the trustee liable for that breach, provided:
>
> > (a) the beneficiary, at the time of consenting to or ratifying the breach or granting the release, had the capacity to do so or was bound in doing so by the act of or representation by another; and
> >
> > (b) the beneficiary (or the beneficiary's representative), at the time of the consent, ratification, or release, was aware of the beneficiary's rights and of all material facts and implications that the trustee knew or should have known relating to the matter; and
> >
> > (c) the consent, ratification, or release was not induced by improper conduct of the trustee.

RESTATEMENT (THIRD) TRUSTS, § 97. The Restatement provides that a beneficiary's consent or release can be given before or after the time of the trustee's act or omission. *Id*. cmt. b. The Restatement makes this clause's application very broad:

> The rule of this Section applies even if the consent involved self-dealing or other adverse interest on the part of the trustee, and regardless of whether the trustee's act or omission was requested by the beneficiary or the beneficiary's consent was sought by the trustee, and it applies regardless of whether the beneficiary and the trustee merely recognized that the propriety of the contemplated act or omission was uncertain or actually knew that it would constitute a breach of trust.

Id. cmt. b. A release by one beneficiary does not prevent another beneficiary from suing the trustee. *Id*. cmt. c. A release solely for prior conduct does not prevent a releasing beneficiary from suing a trustee on future conduct. *Id*. To be effective, a beneficiary should know of all material facts. *Id*. cmt e. The Restatement also provides:

> It is not necessary that the trustee inform the beneficiary of all the details of which the trustee has knowledge; but, because of the strict fiduciary relationship between trustee and beneficiary, a trustee who would rely on a beneficiary's consent, ratification, or release normally has the burden of showing that the beneficiary (or his or her representative) was sufficiently informed to understand the character of the act or omission and was in a position to reach an informed opinion on the advisability of consenting, ratifying, or granting a release. If, however, the trustee is led by the beneficiary reasonably to believe that the beneficiary is aware of the relevant information and rights, and the trustee acts in reliance on that belief, the beneficiary cannot hold the trustee liable even though the beneficiary was in fact insufficiently informed.

Id. cmt. e. Finally, the Restatement provides when a release will not be enforceable due to the trustee's improper conduct in obtaining the release:

> A beneficiary's consent to or ratification of a breach of trust, or release of a trustee from liability for the breach, does not preclude the beneficiary from holding the trustee liable for the breach if the beneficiary's act was induced by fraud, duress, or undue influence by the trustee, or if the trustee induced the consent, ratification or release by abusing the fiduciary relationship. Fiduciary abuse may result if the trustee brings unwarranted pressure to bear on the beneficiary, for example, by threatening to withhold a distribution to which the beneficiary is entitled unless the beneficiary executes a release. An abuse may also result if a trustee procures a release from liability, or procures a beneficiary's approval of a transaction in which the trustee's personal interest is adverse to that of the beneficiary, and the release or transaction involves a bargain that is not substantively fair and reasonable.

Id. cmt. f.

The Uniform Trust Code similarly provides:

> A trustee is not liable to a beneficiary for breach of trust if the beneficiary consented to the conduct constituting the breach, released the trustee from liability for the breach, or ratified the transaction constituting the breach, unless: (1) the consent, release, or ratification of the beneficiary was induced by

> improper conduct of the trustee; or (2) at the time the consent, release, or ratification of the beneficiary did not know of the beneficiary's rights or the material facts relating to the breach.

UNIFORM TRUST CODE, § 1009 (2000). The comments provide: "A consent, release, or affirmance under this section may occur either before or after the approved conduct. This section requires an affirmative act by the beneficiary. A failure to object is not sufficient." *Id*. cmt. Further, "to constitute a valid consent, the beneficiary must know of the beneficiary's rights and of the material facts relating to the breach. If the beneficiary's approval involves a self-dealing transaction, the approval is binding only if the transaction was fair and reasonable." *Id*. Accordingly, under the Uniform Code, a court cannot hold a beneficiary to a previous approval of a self-interested transaction that is not fair to the beneficiary. *Id*.

D. Settlor's Release In A Revocable Trust Situation

For a revocable trust, a settlor may revoke, modify, or amend the trust at any time before the settlors' death or incapacity. Tex. Prop. Code Ann. § 112.051. Accordingly, in a revocable trust situation, a settlor may modify or amend a trust to specifically release a trustee from almost any duty or conduct. *See Puhl v. U.S. Bank, N.A.*, 34 N.E.3d 530 (Ohio Ct. App. 2015) (court held that in a revocable trust, during her lifetime, the settlor had the authority to instruct the trustee to retain stocks, and the trustee had the duty to follow those instructions regardless of the risk presented by the nondiversification).

The Restatement provides that when there is an owner of a power of revocation, withdrawal, or general power of appointment under a trust, that person may release a trustee and bind other beneficiaries to that release: "The settlor thereby acts on behalf of and binds all present and future beneficiaries whose interests are subject to the power." RESTATEMENT (THIRD) TRUSTS, § 97 cmt. c(2). The Uniform Trust Code provides: "An approval by the settlor of a revocable trust or by the holder of a presently exercisable power of withdrawal binds all the beneficiaries." UNIFORM TRUST CODE, § 1009, cmt (2000). However, if the settlor becomes incapacitated, then a guardian must seek approval from a court to modify a revocable trust. *Weatherly v. Byrd*, 566 S.W.2d 292, 293 (Tex. 1978).

E. Beneficiaries' Release In An Irrevocable Trust Situation

In Texas, beneficiaries can release a trustee from certain duties or for certain claims. *Harrison v. Harrison Interests,* No. 14-15-00348-CV, 2017 Tex. App. LEXIS 1677 (Tex. App.—Houston [14th Dist.] February 28,

2017, no pet. history); *Interfirst Bank-Houston, N.A. v. Quintana Petroleum Corp.*, 699 S.W.2d 864 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.) (release and indemnity agreement was enforceable by successor trustee regarding the elimination of the duty to investigate prior trustee's actions); *Burnett v. First Nat'l Bank*, 536 S.W.2d 600 (Tex. App.—Eastland 1976, writ ref'd n.r.e.) ("Letters and instruments delivered to the bank by Burnett established his consent, acquiescence, ratification, and/or release of the acts of the trustee in making the loans to Fidelity Finance and to the JPG oil venture."). *See also K3 Equipment Corp. v. Kintner*, 233 A.D.2d 556, 558, 649 N.Y.S.2d 535, 536 (3d Dep't 1996) (upholding the validity of a general release executed among three equal shareholders in a closely held corporation with respect to the claim that one of them had taken money out of corporate coffers without authorization, but where the plaintiff "made no showing that its execution of the release was tainted by fraud"); *Mergler v. Crystal Props. Assocs.*, *Ltd.*, 179 A.D.2d 177, 181-82, 583 N.Y.S.2d 229, 232 (1st Dep't 1992) (declining to "extend[]" the doctrine of constructive fraud to agreements between attorneys and their former clients). Further, trustees can release the trust from claims. *Crowder v. Crowder Estate Trust*, No. 01-06-00606-CV, 2007 Tex. App. LEXIS 7890 (Tex. App.—Houston [1st Dist.] October 4, 2007, no pet.).

Texas statutes expressly discuss a trustee obtaining an enforceable and effective release from beneficiaries. Unless the terms of the trust provide otherwise, the Texas Trust Code governs the duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficiary. Tex. Prop. Code Ann. § 111.0035(a). The Texas Trust Code expressly states: "The trustee shall administer the trust in good faith according to its terms and *this subtitle*. *In the absence of any contrary terms in the trust instrument or contrary provisions of this subtitle*, in administering the trust the trustee shall perform all of the duties imposed on trustees by the common law." Tex. Prop. Code Ann. § 113.051 (emphasis added). Therefore, the duties set forth under the common law are subject to the trust's terms and the statutes.

The Texas Trust Code expressly states that beneficiaries can release a trustee. A beneficiary who has full capacity and acting on full information may relieve a trustee from any duty, responsibility, restriction, or liability that would otherwise be imposed by the Texas Trust Code. Tex. Prop. Code Ann. § 114.005. To be effective, this release must be in writing and delivered to the trustee. *Id*. The trustee should be careful to properly word the release or else certain conduct may be outside of the scope of the release. *See, e.g., Estate of Wolf*, 2016 NYLJ LEXIS 2965 (July 19, 2016)

(release did not protect trustee from diversification claim that arose after the effective dates for the release).

Further, writings between the trustee and beneficiary, including releases, consents, or other agreements relating to the trustee's duties, powers, responsibilities, restrictions, or liabilities, can be final and binding on the beneficiary if they are in writing, signed by the beneficiary, and the beneficiary has legal capacity and full knowledge of the relevant facts. Tex. Prop. Code Ann. § 114.032. Minors are bound if a parent signs, there are no conflicts between the minor and the parent, and there is no guardian for the minor. *Id*.

Once again, both of the Texas Trust Code provisions set forth above require that the beneficiary act "on full information" and full knowledge of the relevant facts. Tex. Prop. Code Ann. §§ 114.005, 114.032. This is important because releases can be voided on ground of fraud, like any other contract. *Williams v. Glash*, 789 S.W.2d 261 (Tex. 1990). So, fiduciaries should be very careful to provide full disclosures to beneficiaries before execution of a release regarding all material facts concerning the released matter. The trustee should offer to provide access to its books and records and require the beneficiary to confirm that they had access to that information. *See Le Tulle v. McDonald*, 444 S.W.2d 794 (Tex. Civ. App.—Beaumont 1969, writ ref'd n.r.e.) (court reversed summary judgment based on release of trustee where disclosure was not adequate).

The majority of jurisdictions hold that a court may not enforce a release if disclosure was inadequate. *See, e.g., In re Mi-Lor Corp.*, 348 F.3d 294, 303 (1st Cir. 2003) (fiduciaries owe a duty of full disclosure of material facts in connection with a self-dealing transaction, and "in the case of a self-dealing release, information about the conduct of the potential recipients of the release is necessary for deciding whether to grant the release…"); *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1481 (6th Cir. 1989) (holding that federal law applies to the validity of releases and that federal law at a minimum requires the standards of the Restatement of Contract 2d § 173, which states "[i]f a fiduciary makes a contract with his beneficiary relating to matters within the scope of the fiduciary relation, the contract is voidable by the beneficiary unless… all parties beneficially interested manifest assent with full understanding of their legal rights and of all relevant facts that the fiduciary knows or should know."); *Shane v. Shane*, 891 F.2d 976, 986 (1st Cir. 1989) (a release will not bar subsequent claims if the release was obtained by fraud or misrepresentation, and "where a release is obtained without full disclosure of the relevant facts by one who is under a duty to reveal them, it can be

set aside."); *Hale v. Moore*, 2008 WL 53871 (Ky. Ct. App. January 4, 2008); *Wal-Mart, Inc. v. Coughlin*, 255 S.W.3d 424 (Ark. S. Ct. 2007); *Cwikla v. Sheir*, 345 Ill. App. 3d 23, 801 N.E.2d 1103, 1112, 280 Ill. Dec. 158 (Ill. App. 2003) ("Parties in a fiduciary relationship owe one another a duty of full disclosure of material facts when… obtaining a release…. [A] severance agreement arising out of a fiduciary relationship is voidable if one party withheld facts that were material to the agreement…. A withheld fact is material if plaintiff would have acted differently had he been aware of the withheld fact."); *Blue Chip Emerald LLC v. Allied Partners, Inc.*, 299 A.D.2d 278, 750 N.Y.S.2d 291 (N.Y. App. Div. 2002) (a release is voidable if a fiduciary, in furtherance of his individual interests, fails to make full disclosure of all material facts that could reasonably bear on the corporation's decision to grant the release); *Old Harbor Native Corp. v. Afognak Joint Venture*, 30 P.3d 101, 105 (Ala. 2001) (a release is "susceptible to attack under the legal theories of mistake, fraud, and misrepresentation" and a release may be ineffective if a fiduciary breaches his affirmative duty of full disclosure of material facts); *Soderquist v. Kramer*, 595 So. 2d 825, 830 (La. App. 1992) ("The duty imposed on a fiduciary embraces the obligation to render a full and fair disclosure to the beneficiary of all facts which materially affect his rights and interest" and a material question of fact existed as to whether an attorney disclosed to his client the extent of a conflict of interest when obtaining a release as the release would not bar a claim for legal malpractice if full disclosure was not made); *Pacelli Bros. Transp., Inc. v. Pacelli*, 189 Conn. 401, 456 A.2d 325, 329 (Conn. 1983) (a "general release cannot shield an officer or director who has failed in his fiduciary duty to disclose information relevant to a transaction with those whose confidence he has abused…"); *State ex rel. Hayes Oyster Co. v. Keypoint Oyster Co.*, 64 Wn.2d 375, 391 P.2d 979, 986 (Wash. 1964) (corporation's release of former president was not binding because the president had failed to make full disclosure of material facts, and "[a] corporation cannot ratify the breach of fiduciary duties unless full and complete disclosure of all facts and circumstances is made by the fiduciary and an intentional relinquishment by the corporation of its rights"); *Norris v. Cohen*, 223 Minn. 471, 27 N.W.2d 277, 281 (Minn. 1947) ("a general release does not extend to claims of which one party thereto was wrongfully kept in ignorance by the other" and "the wrongful concealment of facts by one party to a release affords sufficient ground to the other for setting it aside, particularly where the information concealed is not equally within the knowledge of both parties."). Accordingly, release agreements should have detailed disclosures in the recitals, and there should be written disclosures explaining release language.

F. Is There A Presumption Of Unfairness And How Can A Trustee Meet This Burden?

As noted above, generally, when a fiduciary enters into a transaction with a principal, there is a negative presumption that the transaction is invalid and the burden is on the fiduciary to prove the fairness and enforceability of the transaction. The issue is whether this presumption applies to release agreements between a trustee and a beneficiary, and if so, how can a trustee meet this burden.

In *Keck, Mahin & Cate v. Nat'l Union Fire Ins. Co.*, the Texas Supreme Court considered whether a release agreement could bar claims arising from a fiduciary relationship. 20 S.W.3d 692, 699 (Tex. 2000). The court determined that the release did not preclude claims brought against an attorney. The plaintiff challenged the validity of the release on the grounds that the insured did not understand the agreement, was not fully informed before signing it, or, alternatively, that there were fact questions as to whether the release was negotiated at arms-length and in good faith. *Id*. at 698-99. The Court held that because the relationship was fiduciary in nature and the release was negotiated during the attorneys' representation of the insured, the presumption of unfairness or invalidity applied. *Id*. at 699. The attorneys had the burden to show the release was fair or valid. *Id*. at 699. The court stated:

> Contracts between attorneys and their clients negotiated during the existence of the attorney-client relationship are closely scrutinized. Because the relationship is fiduciary in nature, there is a presumption of unfairness or invalidity attaching to such contracts.
>
> . . .
>
> KMC had the burden on summary judgment to prove that the release agreement it negotiated with Granada was fair and reasonable. Further, it was KMC's burden as a fiduciary to establish that Granada was informed of all material facts relating to the release. The present summary judgment record does not establish the state of Granada's information or that the agreement was fair and reasonable. The only evidence that KMC identifies is a recitation in the release that KMC "advised Granada in writing that independent representation [would be] appropriate in connection with the execution of this Agreement." This bare recitation is not sufficient to rebut the "presumption of unfairness or invalidity attaching to the

> contract." Accordingly, KMC has not carried its summary judgment burden… KMC has not established that the release agreement is a complete defense to National's and INA's equitable subrogation claim...

Id. at 699. However, the Court noted the presumption would not have arisen had the insured hired new attorneys before agreeing to the release. *Id*. at 699 n. 3. In other words, after the fiduciary relationship terminates, agreements between the former fiduciary and the former principal are not presumptively unfair. *Id*. *See also* David F. Johnson, *The Use of Presumptions In Summary Judgment Procedure In Texas and Federal Courts*, 54 BAYLOR L. REV. 605 (2002).

Most recently, in *Harrison v. Harrison Interests*, a beneficiary of an estate and multiple trusts had a dispute with the executors and trustees. No. 14-15-00348-CV, 2017 Tex. App. LEXIS 1677 (Tex. App.—Houston [14th Dist.] February 28, 2017, no pet. history). The parties then executed a master settlement agreement that allowed the parties to dissociate themselves, distribute property, and that agreement contained releases for the fiduciaries. After the agreement was signed, the beneficiary had additional complaints and filed suit. The fiduciaries argued that the releases in the agreement precluded the beneficiary's breach of fiduciary duty claim. The beneficiary argued that certain portions of the agreement were unfair and contended that because the defendants owed him fiduciary duties, as a matter of law, the defendants were required to rebut a presumption that the transactions are unfair. The trial court granted summary judgment for the defendants based on the release language, and the beneficiary appealed.

The court of appeals held: "Texas courts have applied a presumption of unfairness to transactions between a fiduciary and a party to whom he owes a duty of disclosure, thus casting upon the profiting fiduciary the burden of showing the fairness of the transactions." *Id*. "Where a transaction between a fiduciary and a beneficiary is attacked, it is the fiduciary's burden of proof to establish the fairness of the transaction." *Id*. The beneficiary argued that because the agreement was a transaction between fiduciaries and a beneficiary that the presumption of unfairness applied. The court did not expressly hold that the presumption of unfairness would apply to every such contract. But the court did review the agreement, and ultimately hold that a presumption of unfairness was rebutted in the case.

The court of appeals noted that it must balance the principle that fiduciary duties arise as a matter of law with an obligation to honor the contractual

terms that parties use to define the scope of their obligations and agreements, including limiting fiduciary duties that might otherwise exist. "This principle adheres to our public policy of freedom of contract." *Id*.

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

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

Regarding the underlying facts, the court noted that the beneficiary was of legal age and had capacity. He attended college for several years and studied business. He sought a split of interest in assets that were held in common with the fiduciaries, as well as early distribution of assets. He was represented by counsel that he described as "talented and intelligent" throughout the negotiations of the agreement. *Id*. He was very involved in the negotiations and suggested many of the terms in the agreement himself. He actively participated in the decisions on the agreement. The releases were disputed and specifically discussed. The agreement clearly and unequivocally released the fiduciaries, in all capacities, from any and all claims, excluding breaches or defaults under the agreement. The court held that "the record before this court rebuts the presumption of unfairness or invalidity attaching to the release. Accordingly, William's only remaining claim for breach of fiduciary duty is precluded and the judgment of the trial court is affirmed." *Id*.

As Texas statutes expressly allow beneficiaries to release trustees, a fact that was not mentioned in the *Harrison* opinion, it is unclear whether the same presumption should apply in the trust/beneficiary context.

G. Drafting Tips For An Enforceable Release

There are several important issues to consider in drafting an enforceable release. The first issue is the scope of the release. In *Victoria Bank and Trust Co. v. Brady*, the Texas Supreme Court held that a releasing instrument must mention the claim to be released in order to be effective. 811 S.W.2d 931, 938 (Tex. 1991). The agreement in *Brady* purported to release all claims attributable to a specific loan transaction between a bank and its customer. *Id*. In subsequent litigation between these parties, the customer raised claims relating to another transaction with the bank, and the bank raised the release in defense. In rejecting the bank's defense, the court noted that the parties' agreement plainly limited itself to the specific loan and thus did not cover this other transaction. *Id*. at 939. *See also Mikob Props. v. Joachim*, 468 S.W.3d 587, 594–598 (Tex. App.—Dallas 2015, pet. denied).

On the other hand, broad releases can be enforceable even if they do not name every potential claim. In *Keck, Mahin & Cate v. Nat'l Union Fire Ins. Co.*, the court considered whether a broad release agreement arising from a fiduciary relationship barred claims that were not specifically mentioned. 20 S.W.3d 692, 699 (Tex. 2000). The court held that the broad release would cover all claims:

> The present release is clearly broader than the one in *Brady*. It is not expressly limited to a specific claim or transaction but rather purports to cover "all demands, claims or causes of action of any kind whatsoever." Nothing in Brady forbids such a broad-form release. Brady simply holds that the release must "mention" the claim to be effective. It does not require that the parties anticipate and identify each potential cause of action relating to the release's subject matter. Although releases often consider claims existing at the time of execution, a valid release may encompass unknown claims and damages that develop in the future. Thus, we conclude that this release was sufficient to forgive all claims against KMC for malpractice attributable to legal services rendered to Granada "between June 1, 1988 and April 1, 1992."

Id. *See also Blockbuster Inc. v. C Span Entertainment, Inc.*, 276 S.W.3d 482, 487 (Tex. App.—Dallas 2008, pet. granted, vacated w.r.m.).

The release should mention that the releasing party is releasing all future claims that it has now or may have in the future. *Cannon v. Pearson*, 383 S.W.2d 565, 570 (Tex. 1964). Without that type of language, there is an

argument that the release is only valid for claims in existence at the time the release is given. *Berry v. Guyer*, 482 S.W.2d 719, 720 (Tex. Civ. App.—Houston [14th Dist.] 1972), *disapproved on other grounds*, *Williams v. Glash*, 789 S.W.2d 261, 265 n.2 (Tex. 1990).

Generally, a contract without consideration is unenforceable. *Garza v. Villarreal*, 345 S.W.3d 473, 483 (Tex. App.—San Antonio 2011, no pet.). Consideration is a bargained-for exchange of promises or return performance and consists of benefits and detriments to the contracting parties. *Id*. "The surrender of a legal right constitutes valid consideration to support a contract." *Id*. A release should state that consideration supports the release. Any contract that contains a recital of consideration is presumed to be supported by the recited consideration, and a party challenging the contract on a lack of consideration basis has the burden of proving same. *Blockbuster Inc. v. C-Span Entertainment, Inc.*, 276 S.W.3d 482, 488 (Tex. App.—Dallas 2008, pet. granted, vacated w.r.m.). Consideration is essential to an enforceable contract. *Aubrey v. Workman*, 384 S.W.2d 389, 393 (Tex. Civ. App.—Fort Worth 1964, writ ref'd n.r.e.). Consideration to support a release can be many different things. For example, if the parties mutually release each other from disputed claims to avoid the expense of a suit, that can be sufficient consideration. *Shield Co. v. Williamson*, 355 S.W.2d 811, 813 (Tex. Civ. App.—Fort Worth 1962, no writ).

A trustee generally has the right to proceed to court to obtain instructions, approvals, discharges, accountings, etc. A trustee's agreement to forego those litigation rights should also be sufficient consideration to a release.

The Restatement provides that a release is contractual and subject to contract law, but may be donative in nature. RESTATEMENT (THIRD) TRUSTS, § 97 cmt. b. Under the Restatement, consideration is not necessary to enforce a release. *Id*. cmt. b(3).

H. Court Approval

The trustee who wants a written consent, release, and/or indemnity agreement from the settlor or beneficiary may also want to seek court approval of such an agreement. The Texas Trust Code allows for judicial approval in advance. Tex. Prop. Code §115.001. The Texas Civil Practice and Remedies Code also allows a court to declare the rights or legal relations regarding a trust and to direct a trustee to do or abstain from doing particular acts or to determine any question arising from the administration of a trust. Tex. Civ. Prac. & Rem. Code Ann. § 37.005. For example, in *Cogdell v. Fort Worth Nat'l Bank*, the trustee settled claims

and sought judicial approval of the settlement agreement. 544 S.W.2d 825, 829 (Tex. Civ. App.—Eastland 1977, writ ref'd n.r.e.). The court of appeals noted that the trustee sought court approval of a settlement agreement that released claims against the trustee, because of a potential conflict of interest, and held that the approval of the settlement was a question for the court. *Id*.

I. Conclusion on Release Clauses

Releases are important clauses that protect parties from litigation or that terminate litigation. Further, these clauses can allow a trustee to take actions that the beneficiaries desire that may later be scrutinized. They are necessary in a trustee/beneficiary relationship. Yet, these clauses can be abused, and the common law and statutes require that a beneficiary have full information and be competent.

IV. Disclaimer-Of-Reliance Clauses

A. Introduction

Parties in Texas are commonly using disclaimer-of-reliance clauses in various transactional documents. The purpose of this clause is to ward off future misrepresentation claims. One element of a misrepresentation claim is that the plaintiff reasonably relied on the defendant's misrepresentation. *In re Int'l Profit Assocs., Inc*., 274 S.W.3d 672, 678 (Tex. 2009) (false representation "was intended to be and was relied upon by the injured party" as element of fraudulent inducement); *Wise v. SR Dall., LLC*, 436 S.W.3d 402, 409 (Tex. App.—Dallas 2014, no pet.) ("the listener relies on the nondisclosure resulting in injury" is an element of fraud by nondisclosure); *Mitchell Energy Corp. v. Bartlett*, 958 S.W.2d 430, 439 (Tex. App.—Fort Worth 1997, pet. denied) ("plaintiff's reasonable reliance on the deception" is an element of fraudulent concealment). The defendant uses the disclaimer-of-reliance clause to establish that the plaintiff did not rely on the defendant's alleged representation. Where the clause is adequately written, courts in Texas have enforced disclaimer-of-reliance clauses in non-fiduciary relationships. The issue is whether such a clause should have the same impact where it is used in a transaction between a principal and his or her fiduciary.

B. Form And Drafting Tips

The disclaimer-of-reliance clauses in several Texas Supreme Court opinions state:

> [N]one of us is relying upon any statement or representation by any agent of the parties being released hereby. Each of us is relying on his or her own judgment.
>
> That none of them is relying upon any statement or any representation of any agent of the parties being released hereby. Each of the Plaintiffs and Intervenors is relying on his, her, or its own judgment….

A broad, enforceable disclaimer-of-reliance clause should mention: (1) that the parties are not relying on any statement, representation, or fact stated by the other party; (2) the word "rely"; (3) the term "omission(s)" in addition to statements and representations; (4) that the parties are solely relying on their own advice, counsel, and investigation; and (5) a statement that the term parties includes agents, representatives, attorneys, successors, assigns, affiliates, etc. A broad clause could state as follows:

> The parties represent and state that they are not relying on any statement, representation, omission, or fact stated by the other party or their agents, representatives, attorneys, successors, assigns, affiliates, and they are solely relying on their own advice, counsel, and investigation.

C. History Of Contractual Provisions On The Element Of Reliance

1. Texas Public Policy Does Not Favor Fraud

Needless to say, Texas (like every other jurisdiction) wishes to discourage fraud regarding transactions. *See, e.g., Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc*., 960 S.W.2d 41, 47 (Tex. 1998). The Texas Supreme Court long ago held in *Graham v. Roder* that tort damages were recoverable based on the plaintiff's claim that he was fraudulently induced to exchange a promissory note for a tract of land. 5 Tex. 141, 149 (1849). "Texas law has long imposed a duty to abstain from inducing another to enter into a contract through the use of fraudulent misrepresentations. As a rule, a party is not bound by a contract procured by fraud." *Formosa*, 960 S.W.2d at 46. "Fraud vitiates whatever it touches," and a contract is subject to avoidance on the ground of fraudulent inducement. *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 327, 331 (Tex. 2011); *Estate of Stonecipher v. Estate of Butts*, 591 S.W.2d 806, 810 (Tex. 1979). Texas's public policy opposes fraudulent conduct regarding contract formation.

2. Texas Historically Did Not Allow Contractual Provisions To Defeat Fraud Claims As A Matter Of Law

Consistent with its strong public policy against lying, Texas did not historically allow a party to escape its fraud by relying on a term of the contract that was itself the product of fraud. "One who is entitled to avoid an entire written contract because it lacked his assent, can no longer be held bound by any of its stipulations including those relating to representations or guaranties which induced its execution." *Edward Thompson Co. v. Sawyers*, 234 S.W. 873, 874-75 (Tex. 1921).

For example, in *Dallas Farm Machinery Co. v. Reaves*, a plaintiff sued a defendant for fraudulently inducing a contract. 307 S.W.2d 233, 249 (Tex. 1957). The Texas Supreme Court held that public policy against fraud trumps contract formation: "In obedience to the demands of a larger public policy, the law long ago abandoned the position that a contract must be held sacred regardless of the fraud of one of the parties in procuring it." *Id*. The Court held that public policy voids any attempt by a crafty contractual clause to escape fraud liability: "public policy . . . strikes down all attempts to circumvent that policy by means of contractual devices." *Id*.

The Court acknowledged that it was possible for "a party knowingly to agree that no representations have been made to him, while at the same time believing and relying upon representations which in fact have been made and in fact are false but for which he would not have made the agreement." *Id*. The Court held that in real life parties accept agreements containing "exculpatory clauses in one form or another" and "without critical examination" "but where they do so, nevertheless, in reliance upon" the other party's statements. *Id*. The Court rejected the attempt to allow a contractual clause to "thwart public policy" and "open the door to a multitude of frauds." *Id*.

The Court later similarly held that an "as-is" clause does not foreclose all fraud claims. *Prudential Ins. Co. of Am. v. Jefferson Assocs*., 896 S.W.2d 156, 160 (Tex. 1995). The as-is clause in *Prudential* had a disclaimer-of-reliance clause: "Purchaser acknowledges that it is not relying upon any representation, statement or other assertion with respect to the Property condition, but is relying upon its examination of the Property." *Id*. at 160. The Court stated: "A buyer is not bound by an agreement to purchase something 'as is' that he is induced to make because of a fraudulent representation or concealment of information by the seller." *Id*. "A seller cannot have it both ways: he cannot assure the buyer of the condition of a thing to obtain the buyer's agreement to purchase 'as is,' and then disavow

the assurance which procured the 'as is' agreement." *Id*. The Texas Supreme Court, historically, did not allow contract drafting to defeat a plaintiff's fraud claim.

D. Courts Begin To Enforce Disclaimer-Of-Reliance Clauses

In 1997, the Texas Supreme Court upheld a disclaimer-of-reliance clause in a highly negotiated settlement agreement and determined that there was a clear intent to disclaim reliance where the agreement provided, "[N]one of us is relying upon any statement or representation by any agent of the parties being released hereby. Each of us is relying on his or her own judgment." *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 180 (Tex. 1997). The Court held that "a release that clearly expresses the parties' intent to waive fraudulent inducement claims, or one that disclaims reliance on representations about specific matters in dispute, can preclude a claim of fraudulent inducement." *Id*. at 181. Such an enforceable disclaimer requires that "the parties' intent is clear and specific." *Id*. at 179. The Court cited to its earlier opinion in *Prudential* and further remarked: "We emphasize that a disclaimer of reliance or merger clause will not always bar a fraudulent inducement claim." *Id*. Based on the clause in the contract stating that the parties solely were relying on their own judgment, the Court also stated that such a clause barred fraud by nondisclosure claims. *Id*.

In 2008, the Court once again enforced a disclaimer-of-reliance clause in a settlement agreement where it stated: "[T]hat none of them is relying upon any statement or any representation of any agent of the parties being released hereby. Each of the Plaintiffs and Intervenors is relying on his, her, or its own judgment…." *Forest Oil Corp. v. McAllen*, 268 S.W.3d 51, 57, n. 4 (Tex. 2008). The Court dismissed a fraud claim, noting that the agreement had "virtually identical disclaimer language" to that in *Schlumberger*. *Id*. at 56. The Court held that even where the disclaimer-of-reliance clause is clear that "Courts must always examine the contract itself and the totality of the surrounding circumstances when determining if a waiver-of-reliance provision is binding." *Id*. at 60. The Court also emphasized the strong policy favoring settlement agreements. *Id*. at 60. The Court limited the reach of its decision by stating:

> Today's holding should not be construed to mean that a mere disclaimer standing alone will forgive intentional lies regardless of context. We decline to adopt a per se rule that a disclaimer automatically precludes a fraudulent inducement claim, but we hold today, as in *Schlumberger*, that 'on this

> record,' the disclaimer of reliance refutes the required element of reliance."

Id. at 61. The Court provided the policy reason—freedom of contract—as to why a disclaimer-of-reliance clause should be enforced:

> After-the-fact protests of misrepresentation are easily lodged, and parties who contractually promise not to rely on extra-contractual statements—more than that, promise that they have in fact not relied upon such statements—should be held to their word. Parties should not sign contracts while crossing their fingers behind their backs.... If disclaimers of reliance cannot ensure finality and preclude post-deal claims for fraudulent inducement, then freedom of contract, even among the most knowledgeable parties advised by the most knowledgeable legal counsel, is grievously impaired.

Id.

The Court more recently held that a merger clause was not sufficient to disclaim reliance. *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am*., 341 S.W.3d 323, 335 (Tex. 2011). In *Italian Cowboy*, the clause did not contain the language that the parties were solely relying on their own judgment, and the Court held that it was not sufficient to clearly disclaim reliance. *Id*. Regarding the provisions in *Schlumberger* and *Forest Oil*, the Court stated: "In each case, the intent to disclaim reliance on others' representations—that is to rely only on one's own judgment—was evident from the language of the contract itself." *Id*. The Court held that additional scrutiny is required when analyzing a clause contained in a commercial agreement: "lest we forgive intentional lies regardless of context." *Id*. The Court held that the clause did not bar a fraud claim because it did not meet the elevated requirement of disclaiming reliance on representations in "clear and unequivocal language." *Id*. at 336.

More recently, there has been a split in the Texas courts of appeals regarding what language is necessary to have a clear disclaimer-of-reliance clause. In *Mercedes-Benz USA, LLC v. Carduco*, the Thirteenth Court of Appeals rejected a disclaimer-of-reliance clause argument. No. 13-13-002960-CV, 2016 Tex. App. LEXIS 3254 (Tex. App.—Corpus Christi March 31, 2016, pet. filed). In *Carduco*, the language stated, "Dealer acknowledges that no representations or statements other than those expressly set forth therein were made by MBUSA or any officer, employee, agent, or representative thereof, or were relied upon by Dealer in entering into this Agreement." *Id*. at *58-59. The court of appeals cited to the *Italian*

Cowboy opinion that focused on the phrase "each of us is relying on his or her own judgment" and held that the language in *Carduco* did not show that "the parties clearly and unequivocally disclaimed reliance in the contract." *Id*.

In *Community Mgmt., LLC v. Cutten Dev., L.P.*, the court of appeals considered a clause that stated that the purchaser of real property would not rely on prior representations but did not state that the buyer would solely rely on its own judgment or investigation. No. 14-14-00854-CV, 2016 Tex. App. LEXIS 6771 (Tex. App.—Houston [14th Dist.] June 28, 2016, pet. filed). The court admitted that the language in the case was not as clear as *Schlumberger* and *Forest Oil*, but nevertheless held that the language in the case "appears to clearly and unequivocally disclaim reliance." *Id*. at *16-18. The court also held that the absence of the important phrase "the buyer was solely relying on its own investigation" did not matter. *Id*. at *17-20. The lower court also dismissed Community's fraud by nondisclosure and concealment claims when Community never disclaimed reliance on nondisclosures and concealments. *Id*. The court of appeals did not use a heightened standard for clarity as this case involved a normal commercial transaction and not a settlement or release agreement. *Id*.

The *Carduco* and *Community* cases are currently pending in the Texas Supreme Court.

Finally, in *Orca Assets, G.P. L.L.C. v. JPMorgan Chase Bank, N.A.*, the Dallas Court of Appeals noted that there are different standards between commercial contracts and settlement agreements regarding the standard of clarity for disclaimer-of-reliance clauses. No. 05-13-01700-CV, 2015 Tex. App. LEXIS 8396, n. 6 (Tex. App.—Dallas August 11, 2015, pet. filed). The Texas Supreme Court has accepted the petition for review in *Orca*.

E. Courts Adopt Factors For Enforcing Disclaimer-Of-Reliance Clauses

In *Forest Oil Corp. v. McAllen*, the parties previously settled a long-running lawsuit over oil and gas royalties and leasehold development and included an arbitration agreement for environmental claims not covered by the settlement. 268 S.W.3d at 51. Later the landowner sued for environmental damage, and the defendant sought to compel arbitration under the settlement agreement. The landowner argued that the arbitration agreement was induced by fraud and was unenforceable because the

defendant had allegedly promised that there was no environmental contamination on the property at the mediation.

The Texas Supreme Court held that the landowner's fraudulent-inducement claim was barred because the disclaimer-of-reliance clause in the contract conclusively negated reliance on representations made by either side. *Id*. The Court found that the case was controlled by *Schlumberger,* which held "where the parties' intent is clear and specific, [a no-reliance clause] should be effective to negate a fraudulent inducement claim." *Id*. The Court noted:

> Our decision in *Schlumberger* assumed that (1) the company knew during negotiations that it was misrepresenting the value of the interest, and (2) the misrepresentations were made with the intent of inducing the Swansons to settle. Despite these assumptions, we held as a matter of law that the Swansons could not show fraudulent inducement. . . .
>
> Essentially, *Schlumberger* holds that when knowledgeable parties expressly discuss material issues during contract negotiations but nevertheless elect to include waiver-of-reliance and release-of-claims provisions, the Court will generally uphold the contract.

Id. at 57. The Court suggested the following non-exclusive factors in analyzing whether to enforce a waiver clause:

> (1) the terms of the contract were negotiated, rather than boilerplate, and during negotiations the parties specifically discussed the issue which has become the topic of the subsequent dispute;
>
> (2) the complaining party was represented by counsel;
>
> (3) the parties dealt with each other in an arm's length transaction;
>
> (4) the parties were knowledgeable in business matters; and
>
> (5) the . . . language was clear.

Id. at 60. The court also added a sixth factor, stating the fact that an agreement is a "once and for all" settlement constitutes an additional factor for rejecting fraud-based claims. *Id*. at 58.

Courts have held that all of the factors do not have to be present before a court can enforce such a clause as a matter of law. *See McDougal v. Stevens*, 2009 Tex. App. LEXIS 9182 (Tex. App.—San Antonio Jan. 30, 2009) (enforced clause and affirmed summary judgment where parties were not represented by counsel); *Garza v. State & County Mut. Fire Ins. Co.*, No. 2-06-202-CV, 2007 Tex. App. LEXIS 3070, 2007 WL 1168468 at *6 (Tex. App.—Fort Worth Apr. 19, 2007, pet. denied) (finding that waiver provision conclusively negated justifiable reliance even though plaintiff was not a sophisticated party); *Morgan Bldgs. & Spas, Inc. v. Humane Soc'y of Se. Tex.*, 249 S.W.3d at 490 (enforcing a reliance disclaimer in a "boilerplate" contract); *Simpson v. Woodbridge Props., L.L.C.*, 153 S.W.3d at 684 (same).

Courts have subsequently held that the threshold factor is whether the clause is clear. Once the intent to disclaim reliance is established, a court should be guided by the four other factors in determining the enforceability of a disclaimer of reliance. *Dresser-Rand Co. v. Bolick*, No. 14-12-00192-CV, 2013 Tex. App. LEXIS 8867, 2013 WL 3770950, at *7 (Tex. App.—Houston [14th Dist.] July 18, 2013, pet. abated) (mem. op.).

F. Texas Courts Review Of Disclaimer-Of-Reliance Clauses In Fiduciary Transactions

1. Courts Must Consider Parties' Freedom Of Contract

In Texas, sophisticated parties have broad latitude in defining the terms of their relationship. *Forest Oil Corp. v. McAllen*, 268 S.W.3d 51, 58 (Tex. 2008). Courts must construe contracts by the language contained in the document, with a mind to Texas's strong public policy favoring preservation of the freedom to contract. *El Paso Field Servs., L.P. v. MasTec N. Am., Inc.*, 389 S.W.3d 802, 811-12 (Tex. 2012). "In short, the parties strike the deal they choose to strike and, thus, voluntarily bind themselves in the manner they choose." *Cross Timbers Oil Co. v. Exxon Corp.*, 22 S.W.3d 24, 26 (Tex. App.—Amarillo 2000, no pet.). Accordingly, a court must balance the principle that fiduciary duties arise as a matter of law with its obligation to honor the contractual terms that parties use to define the scope of their obligations and agreements, including limiting fiduciary duties that might otherwise exist. *See Harrison,* 2017 Tex. App. LEXIS 1677. Indeed, Texas courts have held that parties' agreements can alter, or even eliminate, fiduciary duties. *See, e.g., Strebel v. Wimberly*, 371 S.W.3d 267, 284 (Tex. App.—Houston [1st Dist.] 2012, pet. denied) (court enforced provision in limited partnership agreement that eliminated fiduciary duties by general partner to limited partners); *In re Estate of Miller*, 446 S.W.3d 445, 455 (Tex. App.—Tyler 2014, no pet.) ("Unless

otherwise provided by statute or law, duties owed by an agent to his principal may be altered by agreement.") (citing *Nat'l Plan Adm'rs, Inc. v. Nat'l Health Ins. Co.*, 235 S.W.3d 695, 700 (Tex. 2007)); *Beckham Res., Inc. v. Mantle Res., LLC,* No. 13-09-00083-CV, 2010 Tex. App. LEXIS 1323, 2010 WL 672880, at *10 (Tex. App.—Corpus Christi-Edinburg Feb. 25, 2010, pet. denied); *Kline v. O'Quinn*, 874 S.W.2d 776, 787 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (holding that contract between lawyers defined scope of their duties to each other, and refusing to impose fiduciary duties in addition to the duties expressly provided for in contract); *Jochec v. Clayburne*, 863 S.W.2d 516, 520 (Tex. App.—Austin 1993, writ denied) (holding trial court erred by refusing to recognize that trustee's fiduciary duties had been contractually limited).

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

It should be noted that older Texas precedent states that an agreement by a fiduciary to exclude *all* fiduciary responsibility is against public policy. *See Swanson v. Schlumberger Tech. Corp*., 895 S.W.2d 719, 734 (Tex. App.—Texarkana 1994) ("[A]n agreement by a fiduciary to exclude all fiduciary responsibility is against public policy."), *rev'd on other grounds*, 959 S.W.2d 171 (Tex. 1997); *Maykus v. First City Realty and Financial Corp.*, 518 S.W.2d 887, 893-94 (Tex. Civ. App.—Dallas 1974, no writ); *Langford v. Shamburger*, 417 S.W.2d 438, 444 (Tex. Civ. App.—Fort Worth 1967, writ ref'd n.r.e.); *Dial v. Martin*, 37 S.W.2d 166, 188 (Tex. Civ. App.—Amarillo 1931) (recognizing that agreements tending to cause unfaithful conduct by fiduciaries are against public policy because they are, "in effect, agreements to wrong or defraud the persons whose interests the fiduciaries have in charge"), *rev'd on other grounds*, 57 S.W.2d 75 (Tex. Comm'n App. 1933, judgm't adopted).

2. Caselaw That Is Contrary To The Ability Of A Fiduciary To Use A Disclaimer-Of-Reliance Clause

When a defendant owes fiduciary duties to a plaintiff who disclaims reliance, courts may be reluctant to enforce the disclaimer. There is an argument that enforcing a disclaimer would be inconsistent with the law of fiduciary responsibilities because the fiduciary could withhold necessary information, or provide inaccurate information, to a party to whom it owes a special degree of honesty and trust. For this reason, some courts in other jurisdictions have not enforced disclaimers in the context of a fiduciary relationship unless the fiduciary has fully disclosed all material information, which defeats the purpose of the disclaimer. As one court noted, "[i]f a fiduciary relationship already exists, the fiduciary must disclose all material facts before diving through the escape hatch of a contractual disclaimer." *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 589, 948 N.E.2d 132, 154 (2011), *aff'd sub nom. Khan v. Deutsche Bank AG*, 978 N.E.2d 1020 (Ill. 2012) ("where parties in a preexisting fiduciary relationship make a contractual representation to one another that no representations have been made, the contract, including its no-representation clause, is voidable unless the fiduciary has made full disclosure of all material facts"); *Littman v. Magee*, 54 A.D.3d 14 (1st Dept. 2008); *Blue Chip Emerald LLC v. Allied Partners Inc.*, 299 A.D.2d 278, 750 N.Y.S. 2d 291 (N.Y. App. Div. 2002), overruled in part by, *Centro Empresarial Cempresa S.A. v. Am. Movil, S.A.B. de C.V.*, 17 N.Y.3d 269, 952 N.E.2d 995, 1002, 929 N.Y.S.2d 3 (N.Y. 2011); *Kramer v. Schloss*, 2004 U.S. App. LEXIS 3794 (2nd Cir. February 27, 2004).

There is very little caselaw in Texas regarding the use of disclaimer-of-reliance clauses in fiduciary transactions. In *Schlumberger*, the Texas Supreme Court dealt with an argument that a disclaimer-of-reliance clause was not enforceable because the defendant owed the plaintiff a fiduciary duty either as a partner or due to a confidential relationship. 959 S.W.2d at 175. The Court noted: "Schlumberger argues that the Swansons' fraud claims are barred as a matter of law because the Swansons were represented by legal counsel throughout the arm's-length negotiations between the parties." *Id*. The Court also noted: "The Swansons respond, however, that there was a long-standing fiduciary relationship that arose either because Schlumberger and the Swansons were partners or because they were parties to a confidential relationship. Given that relationship, the Swansons argue, Schlumberger cannot unilaterally eliminate the fiduciary duty by generating a dispute with the Swansons." The court held: "As the relationship between the parties informs both parties' arguments on the effect of the disclaimer of reliance, we must first determine the nature of that relationship."

The Court then determined that the defendant did not owe any fiduciary duties to the plaintiff. The Court stated: "Given that Schlumberger and the Swansons were dealing with each other at arm's length, we now turn to Schlumberger's contention that the disclaimer of reliance clause in the release precludes the Swansons' fraudulent inducement claim. It does." *Id*. After analyzing the disclaimer-of-reliance clause arguments, the Court concluded: "We conclude only that on this record, the disclaimer of reliance conclusively negates as a matter of law the element of reliance on representations about the feasibility and value of the sea-diamond mining project needed to support the Swansons' claim of fraudulent inducement. As there is no evidence of a fiduciary or confidential relationship, the trial court correctly rendered a judgment notwithstanding the verdict against the Swansons on their claims of breach of fiduciary duty and fraudulent inducement." *Id*. at 181. Though the Court never stated that it would not have enforced the disclaimer-of-reliance clause in the context of a fiduciary relationship, it does seem to lean that direction via dicta.

In *Harris v. Archer*, the court of appeals rejected a disclaimer-of-reliance argument where the parties were fiduciaries. 134 S.W.3d 411, 447 (Tex. App.—Amarillo 2004, no pet.). The court distinguished *Schlumberger* thusly:

> Unlike *Schlumberger*, the record before us manifests a fiduciary relationship. There is no evidence that the parties intended to settle their disputes and partnership affairs with both sides having knowledge of or there having been negotiations about the imminent sale of the partnership property for a profit of over $ 300,000. Nor is there language in either of the agreements specifically disclaiming reliance on statements, representations, or non-disclosures of material information by the other parties. The record does not support Archer's position that, as a matter of law, the agreement was intended to release claims for breach of a fiduciary duty to disclose material information.

Id. *See also Stark v. Benckenstein*, 156 S.W.3d 112, 122-123 (Tex. App.—Beaumont 2004, pet. denied) (holding that disclaimer-of-reliance clause in a release was enforceable after holding that it was executed at a time when the parties did not owe each other fiduciary duties).

Once again, in *Forest Oil Corp. v. McAllen*, the Court set forth factors that a court should consider in determining whether a disclaimer-of-reliance clause should be enforced. 268 S.W.3d at 60. One of those factors was that "the parties dealt with each other in an arm's length transaction." *Id*.

Clearly, fiduciaries do not deal with each other in arms' length transactions, but is that one factor dispositive? The Texas Supreme Court has not resolved this issue at this time.

3. Caselaw That Supports Fiduciaries' Ability To Enforce Disclaimer-Of-Reliance Clauses

Courts in other jurisdictions also hold that a sophisticated party may release its fiduciary from fraud claims when the releasing party understands that the fiduciary is acting in its own interest and the release is knowingly executed. *Centro Empresarial Cempresa S.A. v. Am. Movil, S.A.B. de C.V.,* 952 N.E.2d 995, 1001 (N.Y. 2011). For example, in *Centro Empresarial Cempresa S.A.,* the court held that when sophisticated commercial entities negotiate a broad release of fiduciary duties, "[t]hey cannot . . . invalidate that release by claiming ignorance of the depth of their fiduciary's misconduct." *Id*. In addition to freedom of contract principles, the rationale for that position is that "when parties in a fiduciary relationship have become adversaries…they ordinarily have discarded the relationship of trust in pressing the dispute." *Barr v. Dyke*, 49 A.3d 1280, 1289 (Me. 2012).

Texas appellate courts have held that, under the facts of the case, that fiduciaries may be able to enforce disclaimer-of-reliance clauses. In *Texas Standard Oil & Gas, L.P. v. Frankel Offshore Energy, Inc.*, the court of appeals held that a disclaimer-of-reliance clause precluded all of the plaintiff's fraudulent-inducement claims even though there was a fiduciary relationship. 394 S.W.3d 753, 763 (Tex. App.—Houston [14th Dist.] 2012, no pet.). In doing so, the court recognized the principle that fraud vitiates a contract "must be weighed against the competing concern that parties should be able to fully and finally resolve their disputes by bargaining for and executing a release barring all further disputes." *Id*. at 762. Axiomatically, fiduciaries, like any other business associates, might wish to ensure finality to their disputes. Thus, their expressed intent to ensure finality, via a fraudulent-inducement release or disclaimer of reliance, as well as their freedom to contract, should be accorded the same respect as the intent of other parties. *See id*.

The court noted that the plaintiff cited no authority from the Texas Supreme Court holding that a fraudulent-inducement release or disclaimer of reliance in a settlement agreement between fiduciaries is per se unenforceable. The court rejected the plaintiff's suggestion that *Schlumberger* and *Forest Oil* stood for such a proposition. Regarding *Schlumberger*, the court noted that the Supreme Court did not expressly hold that a disclaimer between fiduciaries is per se unenforceable.

Regarding *Forest Oil*, the court noted that the Supreme Court did not expressly hold that a disclaimer is enforceable only if the settlement agreement resulted from an arm's length transaction or otherwise hold that a disclaimer between fiduciaries is unenforceable. "To the contrary, the *Forest Oil* court referred to the five considerations listed therein as 'facts . . . that guided our reasoning [in *Schlumberger*]' and 'factors . . . present in *Schlumberger* and [in *Forest Oil*]'—not elements that all must be established for enforceability of a disclaimer." "[T]he court did not foreclose the possibility that, considering all the circumstances, negotiation of a fraudulent-inducement release between fiduciaries might bear aspects of an arm's length transaction." The court held:

> [W]e disagree with Frankel's suggestion that a fraudulent-inducement release between fiduciaries is per se unenforceable simply because they generally owed each other a duty to disclose. Even if GTP still owed Frankel some duty to disclose, the whole purpose of the fraudulent-inducement release was Frankel's waiver of any claim that GTP violated that duty. Thus, consistent with our reasoning that fiduciaries should be allowed to ensure finality to their disputes, the pertinent inquiry is whether, considering all the circumstances, existence of the fiduciary relationship vitiates a conclusion that Frankel bindingly waived its claim that GTP violated the duty to disclose. Even if execution of the Settlement Agreement cannot be considered entirely an arm's length transaction because the parties were still fiduciaries, the *Forest Oil* factors support enforceability of the fraudulent-inducement release.

Id.

Another court of appeals agreed with the reasoning of the *Frankel* opinion. In *Leibovitz v. Sequoia Real Estate Holdings, L.P.*, the court enforced a disclaimer-of-reliance clause. 465 S.W.3d 331, 352 (Tex. App.—Dallas 2015, no pet.). Regarding the party's assertion that a fiduciary relationship impacted the enforcement of the clause, the court stated:

> Appellants contend the trial court erred by granting Holdings' motion for summary judgment on appellants' affirmative defenses of fraudulent concealment and fraudulent inducement because there was a special relationship between Holdings and appellants resulting in a fiduciary duty to disclose material facts and information related to the investment. Regardless of the factual basis for the assertion of fraud, appellants would have to prove reliance, which they

> disclaimed. Appellants do not cite any authority concluding that a disclaimer of reliance is not enforceable by a fiduciary against a party to whom the duty was owed.

Id. at 347. Interestingly, the court had previously held that the parties negotiated the agreement (a settlement agreement) in an arms-length transaction. Thus, the court apparently held that when a principal and a fiduciary negotiate a settlement document to terminate a dispute, that they are negotiating on their own behalf in an arms-length transaction.

Accordingly, Texas courts, to this point, have been open to enforcing disclaimer-of-reliance clauses in transactions between a fiduciary and a principal. These cases have arisen in the context of a settlement agreement after a dispute. The courts have not expressly considered a simple commercial transaction where the fiduciary and principal may not be at odds.

G. Conclusion On Disclaimer-Of-Reliance Clauses

Fiduciaries and their principals/beneficiaries have many occasions when they want to sign an agreement that binds each party. The parties may want to use a disclaimer-of-reliance clause to ward off any future misrepresentation claims. The enforcement of that clause would mean that the beneficiary would not be able to prove reliance, i.e., that the beneficiary did not rely on any statements (whether true or not) or any nondisclosures (whether important or not). Authority from other jurisdictions is mixed as to whether courts should enforce such a clause.

Texas authority is also less than clear. The Texas Supreme Court has not expressly held that such a clause would ever be enforced in the context of a fiduciary relationship. Texas courts of appeals hold that such a clause could be enforced, depending on the facts, and have done so. The following factors may be relevant to an analysis:

- Whether the terms of the agreement were negotiated, rather than boilerplate;
- Whether the disputed issue was specifically discussed;
- Whether the beneficiary was represented by counsel;
- Whether the beneficiary's counsel was competent and experienced in fiduciary law;

- Whether the beneficiary's characteristics support the ability to understand the effect of the agreement and disclaimer clause (e.g., age, mental competence, experience, education, training, sophistication, etc.);
- Whether the release language was clear;
- Whether the agreement terminated the parties' relationship or was part of an ongoing relationship;
- Whether the beneficiary had the advice and assistance of others (e.g., real estate brokers, CPAs, trusted advisors);
- Whether the beneficiary was actively involved in the negotiation of the agreement;
- Whether the beneficiary and fiduciary specifically discussed the disclaimer clause and its impact and meaning;
- Whether the beneficiary signed the agreement voluntarily or as a result of coercion or duress;
- Whether the fiduciary personally gained from the agreement or had a conflict of interest (other than the disclaimer clause at issue);
- Whether the beneficiary had prior similar agreements and experience with disclaimer clauses;
- Whether the parties sought and obtained court approval of the agreement and its terms; and
- If the beneficiary's parent or agent signed the agreement on the beneficiary's behalf, whether there was any conflict between the beneficiary and his or her agent or parent regarding the agreement.

The analysis of these factors should not simply involve a comparison count of how many factors support enforcement and how many do not. Rather, a court should determine the weight that should be given to each of them and may enforce or not enforce a disclaimer-of-reliance clause on a case-by-case basis. It is the quality of the factors that matter and not the quantity.

V. Conclusion

Exculpatory, release, and disclaimer-of-reliance clauses have different applications but their basic purposes are the same: to limit a trustee's liability to a beneficiary. Some may argue that these types of clauses should never be enforceable because a trustee owes fiduciary duties to a beneficiary and, as a matter of public policy, a trustee should not be able to limit its duties or liability for its actions. But that has never been the law in Texas. Settlors and beneficiaries who are competent and who have sufficient knowledge of the relevant facts can allow a trustee to act in a way that may not meet traditional fiduciary duties. *Musick v. Reynolds*, 798 S.W.2d 626, 629 (Tex. App.—Eastland 1990, writ denied) (the settlor and all beneficiaries may consent to modify a trust.).

For example, Texas has long held that a beneficiary can ratify a trustee's act. *See Burnett v First Nat'l Bank of Waco,* 536 S.W.2d 600 (Tex. Civ. App.—Eastland, writ ref'd n.r.e.) (a beneficiary also may, by his consent, acquiescence or ratification, be estopped to complain of a trustee's failure to diversify if the beneficiary had full knowledge of all material facts). *But see Landford v. Shamburger,* 417 S.W.2d 438, 445 (Tex. App.—Fort Worth 1967, writ ref'd n.r.e.) (beneficiary's mere knowledge of a trustee's failure may not protect the trustee from liability), *disapproved on other grounds, Texas Commerce Bank v. Grizzle*, 96 S.W.3d 240, 251 (Tex. 2002).

Due to the relative uncertainty in this area, a trustee can always seek to have a document or agreement blessed by a court. A trustee or a beneficiary may seek advance judicial approval. Tex. Prop. Code Ann. §115.001. The Texas Civil Practice and Remedies Code also allows a court to declare the rights or legal relations regarding a trust and to direct a trustee to do or abstain from doing particular acts or to determine any question arising from the administration of a trust. Tex. Civ. Prac. & Rem. Code Ann. § 37.005; *Cogdell v. Fort Worth Nat'l Bank*, 544 S.W.2d 825, 829 (Tex. Civ. App.—Eastland 1977, writ ref'd n.r.e.) (the trustee settled claims and sought judicial approval of the settlement agreement).

Further, in Texas, on the petition of a trustee or a beneficiary, a court may modify an irrevocable trust and allow a trustee to do things that are not authorized or that are forbidden by the trust document if: (1) the purposes of the trust have been fulfilled or have become illegal or impossible to fulfill; (2) because of circumstances not known to or anticipated by the settlor, the order will further the purposes of the trust; (3) modification of the administrative, nondispositive terms of the trust is necessary or appropriate to prevent waste or avoid impairment of the trust's administration; or (4)

the order is necessary or appropriate to achieve the settlor's tax objectives and is not contrary to the settlor's intentions. Tex. Prop. Code Ann. § 112.054. The first three grounds do not require the agreement of all interested parties; whereas, the fourth ground does require that all beneficiaries agree. Additionally, if all beneficiaries consent, a court may enter an order that is not inconsistent with a material purpose of the trust. *Id*. So, if all beneficiaries agree, it should be relatively easy to modify a trust document to insert appropriate language. This requires that all parties have capacity to consent. *Id*. Even if all beneficiaries do not agree, it is still possible to do so, though it may be more difficult.

Trustees and beneficiaries should consult with attorneys who specialize in trust law to assist in the negotiation, drafting, and implementation of these types of clauses. The law regarding trustee/beneficiary relations is complicated, and the normal rules concerning arms-length transactions may not apply.