



Texas Fiduciary Litigation Update

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Introduction

- Fiduciary litigation is an ever changing area of the law.
- The author reviews and reports on new cases regularly at his blog: Texas Fiduciary Litigator (txfiduciaryliterator.com)
- “The Intersection of Texas Courts and The Fiduciary Field.”
- You can sign up for email alerts!
- This presentation is intended to provide an update on current legal precedent that impacts fiduciaries.

Arbitration

- *In Henry v. Cash Biz, LP*, a borrower sued a lender for the lender reporting the borrower's bad checks to the district attorney's office. No. 16-0854, 2018 Tex. LEXIS 164 (Tex. February 23, 2018).
- The trial court granted the motion to compel, and the court of appeals reversed.
- The Court first held that the claims were within the scope of the clause. The Court stated: "the arbitration agreement applies to 'all disputes' and specifies that 'dispute and disputes' are given the broadest possible meaning and include, without limitation . . . all claims, disputes, or controversies arising from or relating directly or indirectly to the signing of this Arbitration Provision."

Arbitration

- The Court held that the claims fell within the broad scope of the clause.
- The also Court held that simply reporting the bad checks to the district attorney's office was not sufficient to waive arbitration rights.
- Interestingly, in doing so, the Court expressly disagreed with the Fifth Circuit in *Vine v. PLS Financial Services, Inc.*, 689 F. App'x 800 (5th Cir. 2017) (per curiam).

Arbitration

- In *Oak Crest Manor Nursing Home, LLC v. Barba*, a plaintiff sued a nursing home based on a patient's suicide. No. 03-16-00514-CV, 2016 Tex. App. LEXIS 12710 (Tex. App.—Austin December 1, 2016, no pet.).
- The nursing home filed a motion to compel arbitration based on an admission agreement signed by the patient.
- The plaintiff responded that due to the patient lacked capacity and the arbitration provision was void.
- The trial court denied the motion, and the court of appeals affirmed, holding that the trial court had the authority to judge mental capacity and that the evidence supported the trial court's finding.

Forum-Selection Clause

- In *In re JP Morgan Chase Bank, N.A.*, trust beneficiaries sued the trustee for alleged breaches of fiduciary duty in Dallas, Texas. No. 05-17-01174-CV, 2018 Tex. App. LEXIS 1883 (Tex. App.—Dallas March 14, 2018, original proceeding).
- Court of appeals held that the forum-selection clause in the trust document was enforceable.
- The court held that although a venue-selection clause contrary to Section 115.002 would be unenforceable, the same is not true of a forum-selection clause.

Fraud/Negligent Misrepresentation

- In *JPMorgan Chase Bank, N.A. v. Orca Assets G.P.*, a trustee leased minerals to a leasee and represented that acreage was open when it was not. No. 15-0712, 2018 Tex. LEXIS 250 (Tex. March 23, 2018).
- The leasee sued for fraud and negligent misrepresentation, and the trial court granted summary judgment for the trustee.
- The court of appeals reversed.
- The Texas Supreme Court affirmed the trial court and held that the evidence showed that the leasee did not justifiably rely on the representation.

Fraud/Negligent Misrepresentation

- “Viewed in context with the numerous ‘red flags,’ Orca’s sophistication in the oil-and-gas industry, and the direct contradiction between the representation and the letter of intent, Orca cannot maintain its claim of justifiable reliance.”
- Important application of justifiable or reasonable reliance and extends the “red flags” test beyond the professional context.

Claims Against Trustee

- *Wells Fargo v. Militello*, No. 05-15-01252-CV, 2017 Tex. App. LEXIS 5640 (Tex. App.—Dallas June 20, 2017, pet. filed).
- The beneficiary sued a trustee for breach of fiduciary duty based on the sale of oil and gas properties owned by the trust.
- The trial court awarded the beneficiary: \$1,328,448.35 past economic damages, \$29,296.75 disgorgement of trust fees, \$1,000,000.00 past mental anguish damages, \$3,465,490.20 exemplary damages, and \$467,374.00 attorney's fees.

Claims Against Trustee

- The first issue involved expenses incurred by the beneficiary in curing harm allegedly caused by the trustee's not documenting the sales correctly.
- Militello's tax lawyer gave expert testimony to explain and quantify the damages relating to correcting her tax problems.
- The court of appeals affirmed the trial court's awards.

Claims Against Trustee

- The trustee also challenged the trial court's award of \$1,000,000.00 in "past mental anguish damages pursuant to Texas Trust Code Section 114.008(a)(10)."
- Section 114.008 is entitled "Remedies for Breach of Trust," and Subsection 114.008(a)(10) allows a court to "order any other appropriate relief" to "remedy a breach of trust that has occurred or might occur." *Id.*
- The court held that breaches of fiduciary duty can lead to awards of mental anguish damages.

Claims Against Trustee

- Militello established that she was entirely dependent on the trustee's competent administration of her trusts for her financial security and daily living expenses.
- The primary source of Militello's monthly income was permanently depleted, leaving her constantly worried about her financial security. Militello testified that the stress aggravated her Lupus, and that she suffered an ulcer and "broke out in shingles."
- The court of appeals concluded that there was evidence to support an award of mental anguish damages.

Claims Against Trustee

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

Claims Against Trustee

- Regarding exemplary damages, the trustee contended that Militello did not establish harm resulting from fraud, malice, or gross negligence by clear and convincing evidence, as required by TCPRC Sec. 41.003.
- The appellate court concluded there was clear and convincing evidence to support the trial court's express finding that the trustee was grossly negligent.

Lost Document

- In *Gause v. Gause*, 496 S.W.3d 913 (Tex. App.—Austin 2016, no pet.), a father executed a trust document, and after his death, a child read the documents to the other children and took the documents to her home, and they became missing.
- The child then produced a deed to herself.
- The court of appeals held that a deed or other document is not made ineffective by its loss and production is excused when it the party establishes it has been lost or destroyed and proves its contents by parol testimony.
- The statute of frauds does not remove a trust from the operation of the general rule for lost documents.

Venue For Trust Dispute

- *In re Green*, No. 08-16-00233-CV, 2016 Tex. App. LEXIS 12830 (Tex. App.—El Paso December 2, 2016, orig. proceeding).
- A beneficiary filed suit against a trustee for breach of fiduciary duty, and the defendant filed a motion to transfer venue.
- Texas Property Code Section 115.002(b)(2) provides: “an action shall be brought in the county in which: ... the situs of administration of the trust is maintained or has been maintained at any time during the four-year period preceding the date the action is filed.”
- “Situs of administration” means the location where the trustee maintains the office that is primarily responsible for dealing with the settlor and beneficiaries of the trust.
- Court ordered that the motion to transfer venue should be granted.

Release Of Trustee

- In *Harrison v. Harrison Interests*, No. 14-15-00348-CV, 2017 Tex. App. LEXIS 1677 (Tex. App.—Houston [14th Dist.] February 28, 2017, pet. denied), a beneficiary and trustees executed an agreement that contained releases, but the beneficiary sued anyway.
- The court of appeals held that “Texas courts have applied a presumption of unfairness to transactions between a fiduciary and a party to whom he owes a duty of disclosure, thus casting upon the profiting fiduciary the burden of showing the fairness of the transactions.”
- The court of appeals held that it must balance this principle 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.

Release Of Trustee

- 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 also emphasized that the fact that the parties “are effecting a ‘once and for all’ settlement of claims” weighs in favor of upholding the release.
- Based on the record, the court affirmed the judgment for the trustees.

Lender's Claim Against Estate

- In *In re Estate of Chapman*, a bank conducted a non-judicial foreclosure sale of secured real estate owned by an estate and then sued the administrator of the estate in district court due to a deficiency remaining on the note after the foreclosure sale. No. 06-17-00051-CV, 2017 Tex. App. LEXIS 10478 (Tex. App.—Texarkana November 9, 2017, no pet.).
- By foreclosing on its collateral, the bank effectively satisfied its claim against the estate, and under Texas Estates Code Ann. § 403.052, the bank was forbidden from asserting the claim against any other asset of the estate.

Aiding And Abetting

- In *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214 (Tex. 2017), a church hired an attorney to defend it against sexual abuse allegations.
- Due to a hurricane claim, an insurance company offered over \$1 million, and the church left those funds in the attorney's trust account.
- The attorney then stole the funds.
- The church filed a lawsuit against the attorney, his firm, and the contract attorney for a number of causes of action, including breach of fiduciary duty, conspiracy, and aiding and abetting.

Aiding And Abetting

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

Aiding And Abetting

- The court reviewed the aiding-and-abetting claim, and “assumed” it existed.
- Such a claim requires evidence that the defendant, with wrongful intent, substantially assisted and encouraged a tortfeasor in a wrongful act that harmed the plaintiff.
- The court stated: “the church references no evidence that Parker assisted or encouraged Lamb in stealing the church’s money,” and affirmed summary judgment on this claim.
- Court affirmed summary judgment on conspiracy because there was no evidence the contract attorney’s actions caused any harm.

Tortious Interference

- In *Anderson v. Archer*, the trial court's judgment awarded the plaintiffs \$2.5 million in damages based on a tortious interference with inheritance claim. No. 03-13-00790-CV, 2016 Tex. App. LEXIS 2165 (Tex. App.—Austin March 2, 2016, pet. granted).
- The defendants appealed and the court of appeals held that Texas law does not recognize such a claim.
- The court also rejected an argument that a tortious interference with inheritance claim is merely a subset of the tort of tortious interference with a contract or prospective contractual or business relationship.

Tortious Interference

- The Texas Supreme Court recently issued an opinion in *Jackson Walker, LLPO v. Kinsel*, 526 S.W.3d 411 (Tex. 2017), where the court of appeals addressed the issue of whether a tortious interference with inheritance rights claim existed in Texas.
- The Court held that it would not decide that issue in *Kinsel* because the plaintiff had other adequate remedies.
- It appears that the Court will address this important issue in the *Anderson* case.