Texas Fiduciary Litigation Update

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

DAVID FOWLER JOHNSON

DFJOHNSON@WINSTEAD.COM

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

David maintains an active trial and appellate practice for the financial services industry. David is the primary author of the Texas Fiduciary Litigator blog (www.txfiduciarylitigator.com), which reports on legal cases and issues impacting the fiduciary field in Texas.

David's financial institution experience includes (but is not limited to): breach of contract, foreclosure litigation, lender liability, receivership and injunction remedies upon default, non-recourse and other real estate lending, class action, RICO actions, usury, various tort causes of action, breach of fiduciary duty claims, and preference and other related claims raised by receivers.

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 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]

The financial services industry and fiduciary law in Texas are constantly changing areas. Over time, statutes change, and Texas courts interpret those statutes, the common law, and parties' documents differently. This paper is intended to give an update on the law in Texas that impacts the financial services industry with an emphasis on fiduciary issues. The author has a blog, the Texas Fiduciary Litigator (txfiduciarylitigator.com), wherein he regularly reports on fiduciary issues in Texas.

II. Texas Supreme Court Cases

A. Court Compels Arbitration For Lender

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 borrower left checks as security for the loans. When the borrower defaulted, the lender attempted to cash the checks, and the checks were denied or insufficient funds. The lender then reported the bad checks to legal authorities. The borrower then sued the lender for improperly using the district attorney's office. The parties' agreement stated: "all disputes . . . shall be resolved by binding arbitration only on an individual basis with you." *Id.* The contracts further provide that:

> [T]he words "dispute" and "disputes" are given the broadest possible meaning and include, without limitation (a) all claims, disputes, or controversies arising from or relating directly or indirectly to the signing of this Arbitration Provision, the validity and scope of this Arbitration Provision and any claim or attempt to set aside this Arbitration Provision; (b) all federal or state law claims, disputes or controversies, arising from or relating directly or indirectly to this Disclosure Statement (including the Arbitration Provision), . . . (c) all counterclaims, cross-claims and third party claims; (d) all common law claims, based on contract, tort, fraud, or intentional torts; (e) all claims based on a violation of any state or federal constitution, statute or regulation; . . . (f) . . . claims for money damages to collect any sum we claim you owe us and/or the Lender; (g) all claims asserted by you individually against us . . . including claims for money damages and/or equitable or injunctive relief; (h) all claims asserted on your behalf by another person; (I) all claims asserted by you as a private attorney general, as a representative and member of a class of persons,

[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.

> or in any other representative capacity, against us . . . ; and/or (j) all claims arising from or relating directly or indirectly to the disclosure by us . . . of any non-public personal information about you.

The trial court denied the lender's motion and agreed with the borrower that (1) their allegations related solely to the lender's use of the criminal justice system so the arbitration clause was inapplicable, and (2) the lender waived its right to arbitration by substantially invoking the judicial process. The court of appeals reversed.

The Texas Supreme Court affirmed the court of appeals's decision. 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." *Id*. The Court stated:

> Given the presumption favoring arbitration and the policy of construing arbitration clauses broadly as noted above, it follows that the arbitration clause here applies—just as it says—to all disputes, even those relating only indirectly to the loan agreements. The Borrowers asserted that after they missed payments, Cash Biz deposited their postdated checks; the checks were returned for insufficient funds; Cash Biz threatened the Borrowers with criminal prosecution unless the loans were repaid; and when the Borrowers failed to pay, Cash Biz indeed pursued charges for issuance of bad checks. The Borrowers allege that when Cash Biz entered into the loan agreements, it failed to disclose the possibility that if the personal checks were presented to the banks for payment and were not paid, criminal prosecutions would follow. The Borrowers' claims are not for breach of any specific obligations under the loan contracts. Nevertheless, their claims are based on the manner in which Cash Biz pursued collection of loans and are at least indirectly related to the contracts the Borrowers signed obligating them to repay the loans. Therefore, we agree with Cash Biz that the Borrowers' claims are within the scope of the arbitration provision.

Id. The Court then addressed the argument that the lender had waived the clause by seeking relief from the district attorney's office. The 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:

> [I]n *Vine v. PLS Financial Services, Inc.*, 689 F. App'x 800 (5th Cir. 2017) (per curiam). There, as did Cash Biz here, a short-term lender had borrowers sign postdated checks, which were presented for payment after the borrowers defaulted. *Id*. at 801. When the checks were not paid, the lender submitted the unpaid checks and affidavits to the local district

> attorneys. *Id.* The *Vine* court declined to follow the decision of the court of appeals in this case. *Id.* at 806. Rather, it concluded that the lender's actions in submitting affidavits to prosecuting attorneys waived its right to enforce the arbitration agreement. *Id.*
>
> With due respect, and recognizing that it is important for federal and state law to be as consistent as possible in this area where we have concurrent jurisdiction, we agree with the dissenting justice in *Vine. Id.* at 807 (Higginson, J., dissenting). We conclude, as he did, that although some lenders may be "gaming the system" by taking actions like the lenders took there and as Cash Biz took here, more is required for waiver of a contractual right to arbitrate. *Id.*

Id. The Court affirmed the court of appeals's order compelling arbitration.

B. Court Reverses Judgment For Lender In Home Equity Loan Dispute

In *Kyle v. Strasburger*, a wife alleged that her then-husband forged her signature on the closing documents without her consent to obtain a $1.1 million home-equity loan from a lender, secured by a deed of trust on the couple's homestead. 522 S.W.3d 461 (Tex. June 16, 2017). She also alleged that she was induced by various misrepresentations regarding the loan's purported validity. Kyle sued the lender, its officers, and a related entity as well as her ex-husband seeking forfeiture of principal and interest paid on the loan under Texas Constitution Article XVI, section 50(a)(6)(Q)(xi), a declaratory judgment that the deed of trust is void under Texas Constitution Article XVI, section 50(c), and a declaratory judgment that the special warranty deed conveying the her interest in the property to her ex-husband was invalid. She also asserted claims for statutory fraud and for violations of the Texas Finance Code and Texas Deceptive Trade Practices Act, stemming from the lender's alleged misrepresentations in a foreclosure application about the loan's validity. The lender moved for summary judgment on several grounds, including that the statute of limitations barred her forfeiture claim and both declaratory-judgment claims. The trial court granted the motion without stating its reasons. The court of appeals affirmed.

After the court of appeals issued its opinion and judgment, the Texas Supreme Court issued our opinions in *Garofolo v. Ocwen Loan Servicing*, 497 S.W.3d 474 (Tex. 2016) and *Wood v. HSBC Bank USA, N.A.*, 505 S.W.3d 542 (Tex. 2016). In *Garofolo*, the Court held that section 50(a), which limits the types of loans that may be secured by a homestead and places particularly strict parameters on foreclosure-eligible home-equity loans, does not create substantive rights beyond a defense to foreclosure of a lien securing a constitutionally noncompliant loan. 497 S.W.3d at 478. It further addressed section 50(a)(6)'s requirement that home-equity loans contain certain enumerated terms and conditions, including a provision mandating that the lender forfeit all principal and interest for uncured failures to comply with its loan obligations. It explained that those "terms and

conditions . . . are not constitutional rights unto themselves, nor is the forfeiture remedy a constitutional remedy unto itself. Rather, it is just one of the terms and conditions a home-equity loan must include to be foreclosure-eligible." *Id*. at 478-79. In other words, the absence of constitutionally mandated terms and conditions in a home-equity loan can act as a shield to foreclosure, but a lender's uncured failure to comply with its loan obligations does not give rise to a constitutional cause of action. *Id*. at 479. It can, however, give rise to a breach-of-contract claim. *Id*.

In *Wood,* the Court held that a lien securing a constitutionally noncompliant home-equity loan is not merely voidable; under section 50(c), such a lien is not valid unless and until the defect in the loan is cured. 505 S.W.3d at 548. We further held that no statute of limitations applies to a borrower's claim to quiet title on such a constitutionally invalid lien. *Wood*, 505 S.W.3d at 550.

The Court held that in light of *Wood*, the court of appeals erred in holding that the statute of limitations barred the wife's request for a declaration that the disputed deed of trust is invalid. She submitted some evidence that she did not consent to the lien on her homestead, either at the time of its creation or after the fact, and that the underlying home-equity loan therefore does not comply with Article XVI, section 50(a)(6) of the Texas Constitution. Because section 50(c) renders liens securing constitutionally noncompliant home-equity loans invalid until cured, no statute of limitations applies to her claim to declare the lien invalid.

The Court also held that the court of appeals erred in affirming summary judgment on her claim to declare invalid the special warranty deed conveying her interest to her ex-husband on the ground that she waived the claim on appeal. However, the Court held that its holding in *Garofolo* forecloses the wife's constitutional claim for forfeiture of principal and interest paid on the loan at issue. While forfeiture may be an appropriate contractual remedy for a lender's failure to comply with its home-equity loan obligations, forfeiture is not an independent cause of action under the Texas Constitution.

Regarding the wife's claims for statutory fraud and for violations of the Finance Code and DTPA, the Court noted that those claims arise out of the lender allegedly misrepresenting the deed of trust's validity in a foreclosure application and are thus dependent on her entitlement to a declaration that the deed of trust is void. The court of appeals affirmed summary judgment on these additional claims based on its erroneous conclusion that the statute of limitations barred the claim on which they were premised. Accordingly, the Court reversed the court's judgment as to those claims.

In sum, the Court held that the court of appeals properly affirmed summary judgment on the wife's constitutional forfeiture claim. The court erred in holding that her remaining claims were barred on statute-of-limitations and waiver grounds.

C. Texas Supreme Court Rules That Trustee Is Not Liable For Fraud In Leasing Minerals Due To "Red Flags" And Express Contradictory Language That Negated Justifiable Reliance

In *JPMorgan Chase Bank, N.A. v. Orca Assets G.P.*, a trustee leased minerals to a leasee. No. 15-0712, 2018 Tex. LEXIS 250 (Tex. March 23, 2018). That leasee did not immediately record the lease. The trustee's agent then signed a letter of intent to lease tracts from the same area. When the new lease signed leases on the same property, the original leasee contacted the new leasee and informed it of the title defect. The trustee then offered to refund the bonus payments to the new leasee, but that tender was refused. Rather, the new leasee sued the trustee for fraud and other related claims for $400,000,000 arising from statements that the acreage was open for lease. The trial court ruled for the trustee and concluded that the unambiguous terms of the letter of intent and the subsequent leases precluded the new leasee's contract claim and ruled as a matter of law that it could not establish the justifiable-reliance element of its fraud and negligent-misrepresentation claims. The court of appeals affirmed the trial court's contract ruling, but it reversed on fraud and negligent misrepresentation. The court of appeals held that the negation-of-warranty provision did not clearly and unequivocally disclaim reliance on prior representations.

The Texas Supreme Court reversed the court of appeals and affirmed the trial court's ruling for the trustee. The trustee admitted that the statement regarding the acreage being "open" was made and that it was false. Rather, it argued that the evidence disproved the justifiable reliance element for the fraud and negligent misrepresentation claims. Regarding this element, the Court stated:

> Justifiable reliance usually presents a question of fact. But the element can be negated as a matter of law when circumstances exist under which reliance cannot be justified. In determining whether justifiable reliance is negated as a matter of law, courts "must consider the nature of the [parties'] relationship and the contract." "In an arm's-length transaction[,] the defrauded party must exercise ordinary care for the protection of his own interests. . . . [A] failure to exercise reasonable diligence is not excused by mere confidence in the honesty and integrity of the other party." And when a party fails to exercise such diligence, it is "charged with knowledge of all facts that would have been discovered by a reasonably prudent person similarly situated." To this end, that party "cannot blindly rely on a representation by a defendant where the plaintiff's knowledge, experience, and background warrant investigation into any representations before the plaintiff acts in reliance upon those representations."

Id. The Court then discussed the concept of "red flags" as evidence that negates justifiable reliance. The Court previously held that "a person may not justifiably rely on a misrepresentation if 'there are "red flags" indicating such reliance is unwarranted.'" *Id*. (citing *Grant Thornton, LLP v. Prospect High Income Fund,*

314 S.W.3d 913, 923 (Tex. 2010)). The Court used this “red flags” analysis to a non-professional fraud case. The Court stated that the trustee argued that the following “red flags” preclude justifiable reliance: (1) its agent’s statement that he “would have to check” whether the property was open for lease; (2) its insistence on the stricter negation-of-warranty provision; (3) its refusal to accept responsibility for verifying title; (4) the letter of intent itself; (5) its agent’s statement that other lessees were not doing careful title work; (6) the new leasee’s knowledge that competitors might delay recording their leases; (7) the new leasee’s knowledge that it ceased checking property records after signing the letter of intent; and (8) the new leasee’s landman’s “doubts” at the closing, manifested by her request that the trustee confirm once more whether the property was “open.” *Id*. The Court stated:

> We are not prepared to say that any single one of these factors could preclude justifiable reliance on its own and as a matter of law. We especially reject the notion that the mere use of the negation-of-warranty and no-recourse provision in the letter of intent and the leases could wholly negate justifiable reliance. Oil-and-gas leases, like other instruments of conveyance, often negate warranties of title. As the courts did in Grant Thornton and Lewis, we must instead view the circumstances in their entirety while accounting for the parties’ relative levels of sophistication.

Id. The Court then held that both parties were sophisticated, and after marching through the circumstances, the Court held that these “red flags” were sufficient to negate justifiable reliance. The Court also held that the lease expressly contradicted the false statements, thus proving that there was no justifiable reliance. Regarding the standard for this analysis, the Court stated:

> In reaching its conclusion, the court of appeals held that for a contradiction to preclude justifiable reliance, both the contractual clause and the extra-contractual representation it supposedly contradicts must explicitly speak to the same subject matter with sufficient specificity to correct and contradict the prior oral representation. Such a requirement is simply too strict to be workable as it essentially requires the contract and extra-contractual representation to use precisely the same terms.

Id. The Court concluded that the evidence showed that the new lease did not justifiably rely on the false statement that the acreage was open:

> 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. Orca, composed of experienced and knowledgeable businesspeople, negotiated an arm’s-length transaction and then placed millions of dollars in jeopardy—all while operating under circumstances that similarly situated parties would have regarded as imminently risky.

> Orca needed to protect its own interests through the exercise of ordinary care and reasonable diligence rather than blindly relying upon another party's vague assurances. Its failure to do so precludes its claim of justifiable reliance as a matter of law.

Id. The Court made it a point to expressly state that "either 'red flags' alone or direct contradiction alone can negate justifiable reliance as a matter of law. In this case, however, both theories apply. And either would be sufficient to preclude justifiable reliance." Id. n. 2. The court reversed and rendered for the trustee.

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

In *Jackson Walker LLPO v. Kinsel*, Lesey and E.A. Kinsel owned a ranch, and when E.A. died, he divided his half between his children and Lesey. *Jackson Walker, LLPO v. Kinsel*, No. 07-13-00130-CV, 2015 Tex. App. LEXIS 3586 (Tex. App.—Amarillo April 10, 2015), *aff'd in part*, 526 S.W.3d 411 (Tex. 2017). Lesey owned sixty percent at that point. Lesey placed her interest into an intervivos trust, which provided that upon her death, her interests would pass to E.A.'s children. Lesey became frail and moved near a niece, Lindsey, and nephew, Oliver. Lindsey and Oliver referred Lesey to an attorney to assist in drafting a new will and trust amendments. The attorney informed E.A.'s children that Lesey needed to sell the ranch to pay for her care. At that time, Lesey had approximately $1.4 million in liquid assets and did not need to sell the ranch. Not knowing Lesey's condition, E.A.'s children agreed to sell, and the ranch was sold. Lesey's $3 million in cash went into her trust. Lindsey, as a residual beneficiary in the trust, would receive most of the money – not E.A.'s children. The attorney also effectuated amending the trust to grant Lindsey and Oliver greater rights, while advising them to withhold that information from E.A.'s children. E.A.'s children sued Lindsey, Oliver, and the attorney for tortious interference with inheritance rights and other tort claims. The jury returned a verdict for E.A.'s children.

The Amarillo court of appeals first addressed the tortious interference with inheritance claim: "Someone who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift." *Id*. The court noted that many Texas intermediate appellate courts recognized such a claim. The court reviewed several Fort Worth Court's opinions, where the case had been transferred from, to see if Fort Worth had recognized such a claim, and determined that Fort Worth had not directly done so. The court also noted that it and the Texas Supreme Court had not recognized the claim. The court held that it was solely the authority of the Texas Legislature or the Texas Supreme Court to create a new cause of action. Court rendered for the defendants refusing to recognize that new cause of action. The court reversed on the fraud and other tort claims due to insufficient evidence of damages. The court affirmed the mental incompetence finding on the trust

changes and sale of the ranch. The court then affirmed in part a finding of a constructive trust, making Lindsey hold any proceeds that should have gone to E.A.'s heirs in trust for them.

The Texas Supreme Court granted the petition for review in *Jackson Walker, LLPO v. Kinsel*, 526 S.W.3d 411 (Tex. 2017). The Court first addressed whether Lesey had mental capacity to execute the documents:

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

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

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

Id. The Court held that not all of Lesey's afflictions suggested that she was mentally compromised, and noted that evidence of physical infirmities, without more, does not tend to prove mental incapacity. *Id*. "But evidence of physical problems that are consistent with or can contribute to mental incapacity is probative." *Id*. The Court noted that a board-certified forensic psychiatrist testified how Lesey's physical challenges contributed to her mental incapacity. She testified that by February 2007 Lesey had "mild to moderate dementia and cognitive impairment." *Id*. She added that in 2007 and 2008 Lesey was in the latter stages of congestive heart failure, which led to renal insufficiency. She testified a person's mental state can be affected by that condition. She testified

that Lesey began having "confusion" about her medication in 2007 and that nurse and caregiver notes on Lesey indicated "she was confused, she was forgetful. And those began going up until she passed away." *Id.* The psychiatrist opined that by the end of February 2007, Lesey had neither "the executive functioning nor the overall mental capability" to transact business or sign legal documents. *Id.* As to Lesey's dementia, the testimony was that "as you're losing brain cells and if you keep losing so many, some days your brain cells that you have left function better than other days" but that "you'll still have a significant limitation." *Id.* The psychiatrist also noted the deterioration of Lesey's handwriting as evidence of her mental decline.

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

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

> We agree with the court of appeals that there is sufficient evidence to support the jury's mental-incapacity finding. Keith's [the attorney's] testimony, and that of those who accompanied him on his visits with Lesey, tends to contradict the evidence that Lesey was mentally impaired. And the evidence shows that Keith took his responsibilities seriously and executed his duties carefully and ably. But it is not our place to weigh the testimony adduced at trial. That is the jury's province.

Id.

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

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

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

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

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

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

said between the attorney and Lesey, and the Court also expressly noted that the attorney did not personally gain from these transactions. *Id.*

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

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

In *Longview Energy Co. v. The Huff Energy Fund*, *LP*, Longview Energy Company sued two of its directors and their affiliates after discovering one affiliate purchased mineral leases in an area where Longview had been investigating the possibility of buying leases. 533 S.W.3d 866 (Tex. 2017). A jury found that the directors breached their fiduciary duties in two ways: by usurping a corporate opportunity and by competing with the corporation without disclosing the competition to the board of directors. The trial court rendered judgment awarding a constructive trust to Longview on most of the leases in question and related property and also awarded Longview $95.5 million in a monetary disgorgement award. *Id.* The court of appeals reversed and rendered judgment for the defendants, concluding that (1) the evidence was legally insufficient to support the jury's finding that the directors breached their fiduciary duties by usurping a corporate opportunity, and (2) the pleadings were not sufficient to support a claim for breach of fiduciary duty by undisclosed competition with the corporation. *Longview Energy Co. v. The Huff Energy Fund*, 482 S.W.3d 184 (Tex. App.—San Antonio 2015).

The Texas Supreme Court affirmed the court of appeals's judgment. *Longview Energy Co.*, 533 S.W.3d 866. The Court first held that Delaware law prevailed in this case on substantive issues, but that Texas law prevailed on procedural issues. The Court addressed the issue of whether the plaintiff had to trace specific property that supported the constructive trust. Citing Delaware law, the Court held:

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

> wrongfully withheld from another, is the very heart and soul of the constructive trust theory." Imposition of a constructive trust is not simply a vehicle for collecting assets as a form of damages. And the tracing requirement must be observed with "reasonable strictness." That is, the party seeking a constructive trust on property has the burden to identify the particular property on which it seeks to have a constructive trust imposed.

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

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

Id.

The Court then turned to the award of disgorgement damages and noted that both Delaware and Texas limits disgorgement to a fiduciary's profit. "Thus, under either Delaware or Texas law, the disgorgement award must be based on profits Riley-Huff obtained as a result of Huff's or D'Angelo's breaches of fiduciary duties." *Id.* The Court noted that the amount of profit resulting from a breach of fiduciary duty will generally be a fact question. The jury question only required the jury to find the amount of *revenues* the defendants received. The Court held that because jury question submitted an incorrect measure for equitable

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

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

In *First United Pentecostal Church of Beaumont v. Parker*, a church hired an attorney to defend it against sexual abuse allegations. 514 S.W.3d 214 (Tex. 2017). During the same time, the church also engaged the attorney to assist in a hurricane/insurance claim. When the insurance company offered to pay over $1 million to settle the claim, the attorney generously suggested that the church leave those funds in the attorney's trust account to assist with creditor protection. The attorney then withdrew those funds in 2008 and used them for his personal expenses and the expenses of his firm. The attorney had a contract attorney working with his firm. The contract attorney did not know about the improper use of the money at the time that it was done. Rather, he learned about it in 2010, but failed to disclose that information to the client. Eventually, the contract attorney did disclose the information and sent a letter wherein he repented and admitted to breaching his fiduciary duty. The original attorney fled to Arkansas, but was later caught. He pled guilty to misappropriation of fiduciary property and received a fifteen-year sentence.

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

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

client does not need to prove that the attorney's breach caused any damages. However, the court held that when the client seeks an award of damages (a legal remedy) that the client does have to prove that the attorney's breach caused the client injury:

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

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

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

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

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

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

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

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

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

> while the wrongful act was committed, and defendant's state of mind (citing RESTATMENT (SECOND) OF TORTS § 876 cmt. d (1977))). As we discussed above, Lamb spent all of the church's money before Parker became involved, and there is no evidence the church was harmed by the only wrongful act in which Parker assisted or encouraged Lamb—covering up the fact that Lamb had spent the church's money.

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

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

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

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

identified the elements for aiding and abetting as the defendant must act with unlawful intent and give substantial assistance and encouragement to a wrongdoer in a tortious act. *West Fork Advisors*, 437 S.W.3d at 921.

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

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

III. Texas Supreme Court Case To Watch: Court Will Decide Whether Texas Recognizes A Tortious Interference With Inheritance Claim

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

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

> of a cause of action, we, as an intermediate appellate court, will not be the first to do so.

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

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

IV. Cases From The Texas Courts of Appeals

A. Court Enforced Forum-Selection Clause In Trust Document

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). The Trust Agreement was executed in New York and included the following forum-selection clause: "Eleventh: The validity and effect of the provisions of this Agreement shall be determined by the laws of the State of New York, and the Trustee shall not be required to account in any court other than one of the courts of that state." *Id.* The trustee filed a motion to dismiss the suit due to the forum selection clause, alleging that the beneficiaries had to file suit in New York. The trial court denied that motion, and the trustee filed a petition for writ of mandamus to the court of appeals.

The beneficiaries argued that the language of the forum-selection clause applied only to a cause of action for an accounting and did not apply to their breach of fiduciary duty claims. The court of appeals disagreed, holding that the phrase "to account" was broader. After reviewing several definitions of the phrase, the court concluded: "[W]e conclude 'required to account in' is used as a broad, unrestricted phrase and means relators may not be sued or otherwise required to explain alleged wrongdoing regarding the Trust or its administration in any state other than New York." *Id.* The court also found support for its conclusion from the trust document in that "account" was used broadly in other portions of the trust. The court concluded the scope of the forum-selection clause included the beneficiaries' claims for breach of fiduciary duty and was not limited to only claims for an accounting.

The beneficiaries also argued that the mandatory venue statute in Texas Property Code Section 115.002(c) shows strong public policy to keep the action in Texas. 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. *Id*. (citing *Liu v. Cici Enters., LP,* No. 14-05-00827-CV, 2007 Tex. App. LEXIS 81, 2007 WL 43816, at *2 (Tex. App.—Houston [14th Dist.] Jan. 9, 2007, no pet.) (mem. op.) ("The distinction between a forum-selection clause and a venue-selection clause is critical. Under Texas law, forum-selection clauses are enforceable unless shown to be unreasonable, and may be enforced through a motion to dismiss. In contrast, venue selection cannot be the subject of private contract unless otherwise provided by statute.")). Further, although the beneficiaries contended that proceeding in New York would be unreasonable and seriously inconvenient, they failed to present any evidence to support those contentions. The court held that the trial court abused its discretion in denying the motion to dismiss and granted mandamus relief.

B. Court Affirmed Summary Judgment For Trustee Based On The Application Of An Exculpatory Clause

In *Kohlhausen v. Baxendale*, the court affirmed a summary judgment for a trustee on the basis of an exculpatory clause in the trust document. No. 01-15-00901-CV, 2018 Tex. App. LEXIS 1828 (Tex. App.—Houston [1st Dist.] March 13, 2018, no pet. history). A mother created a testamentary trust for the benefit of her son Kelley William Joste. The Will, which named Kelley as trustee and beneficiary of his trust, also set forth the provisions governing the administration:

> 6.2 With regard to each trust created by this [Article VI], my Trustee shall distribute to the Beneficiary of such trust or any descendant of such Beneficiary such amounts of trust income and principal as shall be necessary, when added to the funds reasonably available to each such distributee from all other sources known to my Trustee, to provide for the health, support, maintenance and education of each such distributee, taking into consideration the age, education and station in life of each such distributee.
>
> 9.4 . . . Any Executor or Trustee shall be saved harmless from any liability for any action such Executor or Trustee may take, or for the failure of such Executor or Trustee to take any action if done in good faith and without gross negligence.

Id. After the mother died, Kelley exercised his right to become the sole trustee of his trust. After Kelley died, his estranged daughter received control of the trust's assets. She then died. Her executor then sued her father's executor for the father's alleged breaches his fiduciary duty by: (1) failing to disclose information; (2) engaging in self-dealing, i.e., gifting himself trust assets in excess of his support needs; (3) failing to make any distributions to his daughter or consider her support needs; (4) failing to consider his other sources of support and his

own station in life before making distributions to himself; (5) commingling trust assets with personal assets; (6) pledging trust assets as collateral in violation of the will's terms; and (7) failing to document his activity as trustee.

The father's executor filed a summary judgment in which he argued that he was entitled to judgment as a matter of law on all of the causes of action based on the plain language of the will's exculpatory clause which relieved the trustee from liability for any actions or omissions "if done in good faith and without gross negligence." After a hearing, the trial court granted the motion.

The court of appeals held that the clause in the will was an exculpatory clause, and that an exculpatory clause is an affirmative defense. "A defendant urging summary judgment on an affirmative defense is in the same position as a plaintiff urging summary judgment on a claim," and that the party asserting an affirmative defense has the burden of pleading and proving it. The court held that after the trustee establishes the existence of the exculpatory clause, the burden shifts to the nonmovant to bring forward evidence negating its applicability. The court stated:

> In this case, Baxendale pleaded the exculpatory clause and attached a copy of the Will containing the clause to his summary judgment motion. The Will plainly states that Kelley is not liable for any acts or omissions so long as such conduct was done "in good faith and without gross negligence." Because Baxendale established that he was entitled to summary judgment as a matter of law on all of Kohlhausen's claims based on the plain language of the Will, Kolhausen was required to bring forth more than a scintilla of evidence creating a fact issue as to the applicability of the clause, i.e., evidence that Kelley's acts or omissions were done in bad faith or with gross negligence.
>
> ….
>
> In her affidavit, Kohlhausen averred that after reviewing the financial documents available to her she was "unaware of any evidence that Kelley made any distributions to Valley from the Trust between 1997 and 2012." Kohlhausen further averred: "I have reviewed the account statements produced by [Baxendale]. These statements are incomplete and I am unable to ascertain from them an accurate account of what receipts and distributions were made from the Trust during the time Kelley was trustee." Kohlhausen also stated that she was "unaware of any documentation to suggest Kelley ever contacted Valley to inquire about her support needs during the time he was trustee."
>
> ….
>
> At most, Kohlausen's affidavit does not raise a fact issue as to whether Kelley failed to disclose information regarding the Trust to Valleyessa,

> make distributions to Valleyssa, consider her support needs, or document his activities as trustee. The paucity of evidence in this case is a result of the fact that both principals to the dispute have passed away. There is no one to depose and no affidavits to file establishing key facts. Moreover, the terms of the Will provided that Valleyessa was a contingent beneficiary, and Kelley, as the primary beneficiary, was allowed but not required to make a distribution to Valleyessa. Kohlhausen's attorney is reduced to an attempt to build a case on the scant records left behind by Kelley. Such evidence amounts to no more than a scintilla and is insufficient to even establish what actions Kelley took or failed to take as trustee, much less that Kelley acted in bad faith or with gross negligence.

Id. The court held that because the summary judgment evidence failed to raise an issue of material fact as to whether any of the father's alleged acts or omissions were taken in bad faith for involved gross negligence, the plaintiff failed to meet her burden of establishing the inapplicability of the exculpatory clause to such acts or omissions and affirmed the summary judgment for the defendant.

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

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

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

The beneficiary sued, and the trial court held a bench trial in 2012. Later, the trial court awarded Militello: $1,328,448.35 past economic damages, $29,296.75 disgorgement of trust fees, $1,000,000.00 past mental anguish damages, $3,465,490.20 exemplary damages, and $467,374.00 attorney's fees. The trustee appealed, alleging that the evidence was not sufficient to support many of the damages award but did not appeal the liability finding of breach of fiduciary duty. The beneficiary agreed that the economic damages should be remitted (decreased) by around $340,000, which would also impact the exemplary damages award. The trustee argued that the evidence did not support other awards of damages.

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

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

The record included her testimony and months of communications between Militello and the bank showing multiple disruptions and mental distress in Militello's daily life in attempting to obtain her own and her children's housing, medical care, and other needs. Militello established that she was entirely dependent on the trustee's competent administration of her trusts for her financial

security and daily living expenses. The primary source of Militello's monthly income was permanently depleted, leaving her constantly worried about her financial security. Militello testified that the stress aggravated her Lupus, and that she suffered an ulcer and "broke out in shingles." *Id*. She received notices from the IRS and other tax authorities that tax was due on properties she did not own, and she owed thousands of dollars in penalties. Her trust officer refused to discuss these problems with her, referring her to its outside counsel. The court of appeals concluded that there was evidence to support an award of mental anguish damages.

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

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

Id.

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

between the accrual of the claim and the date of judgment. As between Militello, who established Wells Fargo's liability for breaches of its duties to her, and Wells Fargo, we conclude that Wells Fargo should bear the prejudgment interest cost of the delay." *Id*.

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

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

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

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

Id. The court also held that the amount awarded was supported by the evidence: "Having considered the relevant *Kraus* and due process factors, we conclude an exemplary damages award of $2,773.826.67 is reasonable and comports with due process." *Id*. The court did suggest a remittitur due to the decrease in economic damages.

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

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

Id. The trustee contended that the property code "expressly allows exculpatory clauses to shield a trustee from ordinary negligence." *Id*. (citing Tex. Prop. Code

§ 114.007). It also argued that it "used good faith and ordinary care" in selecting its agents, including "(1) the law firm that prepared the erroneous deeds, (2) Leonard, who prepared the mineral interest valuation used by the bank, and (3) Harrell, who prepared erroneous tax returns, and consequently is not liable for errors made by those agents." *Id.*

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

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

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

One important protection for defendants is the statutory cap on the amount of exemplary damages. The Texas Civil Practice and Remedies Code permits exemplary damages of up to the greater of: (1) (a) two times the amount of economic damages; plus (b) an amount equal to any noneconomic damages

found by the jury, not to exceed $750,000; or (2) $200,000. Tex. Civ. Prac. & Rem. Code Ann. § 41.008(b). This cap need not be affirmatively pleaded as it applies automatically and does not require proof of additional facts. *Zorrilla v. Aypco Constr., II, LLC*, 469 S.W.3d 143 (Tex. 2015). However, these limits do not apply to claims supporting misapplication of fiduciary property or theft of a third degree felony level. Tex. Civ. Prac. & Rem. Code Ann. § 41.008(c)(10). *Natho v. Shelton*, 2014 Tex. App. LEXIS 5842 at n. 4. The statute states that the caps "do not apply to a cause of action against a defendant from whom a plaintiff seeks recovery of exemplary damages based on conduct described as a felony in the following sections of the Penal Code if … the conduct was committed knowingly or intentionally…." *Id.* Accordingly, if a defendant is found liable for one of these crimes with the required knowledge or intent, it cannot take advantage of the statutory exemplary damages caps.

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

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

In a situation where the plaintiff's breach of fiduciary duty claim is based on non-negligent conduct, such as fraud or malice, a plaintiff can "recover economic damages, mental anguish, and exemplary damages." *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 304 (Tex. 2006) (mental anguish damages permissible for fraud claim); *City of Tyler v. Likes*, 962 S.W.2d 489, 497 (Tex. 1997) (stating that mental anguish damages are recoverable for some common law torts

involving intentional or malicious conduct). For example, in *Parenti v. Moberg*, the court of appeals affirmed an award of mental anguish damages for a beneficiary suing a trustee for breach of fiduciary duty. No. 04-06-00497-CV, 2007 Tex. App. LEXIS 4210 (Tex. App.—San Antonio May 30, 2007, pet. denied). The court stated: "Here, the jury found that Parenti acted with malice, and Parenti does not challenge that finding. Therefore, because the jury found that Parenti acted with malice, we hold that the trial court did not err in awarding mental anguish damages to Moberg." *Id*.

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

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

In *Martin v. Martin*, the court of appeals reversed a mental anguish award against a trustee based on a claim of intentional breach of fiduciary duty because the beneficiary did not have sufficient evidence of harm. 363 S.W.3d 221 (Tex. App.—Texarkana 2012, pet. denied). The evidence of mental anguish was: "It's impacted our whole family. We don't -- for generations and generations to come, we don't have any -- it just hurts. It's affected my father. I worry about him every day talking to him on the phone, the stress. I worry about those in the company that have to deal with what's going on." *Id*. The court held that: "Courtney failed to establish a high degree of mental pain and distress that is more than mere

worry, anxiety, vexation, embarrassment, or anger." *Id. See also Onyung v. Onyung,* No. 01-10-00519-CV, 2013 Tex. App. LEXIS 9190 (Tex. App.—Houston [1st Dist.] July 25, 2013, pet. denied) (reversed mental anguish damages because plaintiff did not have sufficient evidence of harm). However, in *Moberg,* the court of appeals affirmed the modest award of $5,000 in mental anguish damages in a breach of fiduciary duty case against a trustee where the evidence showed that the beneficiary: "cried, lost sleep, vomited, and missed work for 'several days'. . ." 2007 Tex. App. LEXIS 4210. These are very fact-specific determinations.

D. Court Enforces Trust Even Though The Trust Document Was Missing

In *Gause v. Gause*, a son brought suit to affirm the existence of a trust established by his father. 496 S.W.3d 913 (Tex. App.—Austin 2016, no pet.). The father had executed a will and a trust document. After his death, a child read the documents to the other children and took the documents to her home. The documents later became missing. A child then procured a deed to real property from the mother that was supposed to be in the trust. Another child sued to hold the deed void and to establish the terms of the trust. The trial court ruled that the trust was effective, set forth its terms, and otherwise voided the deed.

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

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

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

> Bank of America seeks to rely on the account statements that commenced in 1990 as an unambiguous written agreement which the parol evidence rule prohibits from being contradicted or varied by extrinsic evidence. However, the account statements do not evidence the creation of the account, but simply record the information that was transferred to Bank of America's system from University Savings' system. The account statements are not the operative legal document that created the account.

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

Lost documents do provide a wrinkle to the normal burden of proof. One court held that to prove the contents of a lost bank agreement, the plaintiff has the burden to establish same by clear and convincing evidence. *See Bank of America, N.A.*, 37 S.W.3d at 58. In *Phillips v. Ivy*, the court of appeals questioned whether the clear and convincing standard should apply to an agreement that does not involve real property. No. 10-02-00266-CV, 2004 Tex. App. LEXIS 7539, at *5-6 (Tex. App.—Waco Aug. 18 2004, pet. denied). In any event, because the jury instructions submitted the case to the jury on a clear and

convincing evidence standard without objection by the parties, the court of appeals applied that standard. *See id*.

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

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

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

The court of appeals defined spendthrift trusts as

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

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

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

In *In re Green*, a beneficiary filed against a trustee for breach of fiduciary duty and misappropriation of corporate funds. 527 S.W.3d 277 (Tex. App.—El Paso 2016, original proceeding). The defendant filed a motion to transfer venue and filed an affidavit where he "averred that he had never managed the testamentary trusts from an office located in Crane County, and he presented evidence showing that he had administered the trust from his business office located at 418 N. Texas Avenue, Odessa, Texas." *Id*. He also showed that the address on the checking accounts for the trusts was in Odessa, Texas. He also received correspondence at this same address in his capacity as trustee.

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

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

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

Id. The court granted mandamus relief.

G. Court Enforces Release Agreement Between Trustees/Executors and A Beneficiary

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

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

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

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

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

Regarding the underlying facts, the court noted that the beneficiary was of legal age and had capacity. He attended college for several years and studied business. He sought a split of interest in assets that were held in common with the fiduciaries, as well as early distribution of assets. He was represented by counsel that he described as "talented and intelligent" throughout the negotiations of the agreement. He was very involved in the negotiations and suggested many of the terms in the agreement himself. He actively participated in the decisions on the agreement. The releases were disputed and specifically discussed. The agreement clearly and unequivocally released the fiduciaries, in all capacities, from any and all claims, excluding breaches or defaults under the agreement.

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

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

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

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

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

> It follows from finding 11 that the trial court evaluated the issues of breach, causation, and damages under the erroneous assumption

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

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

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

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

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

> While a broker owes his investor-client a fiduciary duty, that duty varies in scope with the nature of their relationship. The nature of the account—whether nondiscretionary or discretionary—is one factor to be considered, as are the degree of trust placed in the broker and the intelligence and qualities of the consumer. A broker's duty is usually restricted to executing the investor's order when the investor controls a nondiscretionary account and retains the ability to make investment decisions. In a nondiscretionary account, the fiduciary relationship is one of principal/agent, and the agency relationship begins when the customer places the order and ends when the broker executes it; the broker's duties in this type of

> account are only to fulfill the mechanical, ministerial requirements of the purchase or sale of the security or futures contracts on the market. As a general proposition, a broker's duty in relation to a nondiscretionary account is complete, and his authority ceases, when the sale or purchase in made and the receipts therefrom accounted for. There is nothing in the record to show that Holmes's account with TD Ameritrade was discretionary or that the broker/client relationship between the two gave rise to anything other than a principal/agent duty to execute the trades ordered. Thus, Holmes has not raised a fact question regarding whether Newman owed him any fiduciary duty other than fulfilling the trades authorized by Newman.
>
> Because Newman's fiduciary duty was satisfied once the trades were made in accordance with Holmes's instructions, it is not the sort of preexisting relationship of trust and confidence that would give rise to a continuing, informal relationship imposing even broader fiduciary duties than Newman held under the prior relationship.

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

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

Indeed, Texas courts have generally held that self-directed accounts are not special deposits that require fiduciary duties between the holder and depositor. *See Lee v. Gutierrez*, 876 S.W.2d 382 (Tex. App.—Austin 1994, no writ); *Sammons v. Elder*, 940 S.W.2d 276 (Tex. App.—Waco 1997, no writ). In one case, the court held that a custodian had no right to approve a transaction, and that the customer had the legal right to transfer assets that were supposed to be in the account. *See Colvin v. Alta Mesa Resources*, 920 S.W.2d 688 (Tex. App.—Houston [14th Dist.] 2001, no pet.).

Notwithstanding, customers have sued financial institutions for doing as directed and not warning the customer of the impact of the directions. In *Sterling Trust Co. v. Adderley*, the Texas Supreme Court remanded an issue back to the trial court due to an improper jury instruction regarding breach of fiduciary duties.

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

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

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

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

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

Id. at 257-58.

J. Court Reversed Summary Judgment For A Client As Against His Financial Advisor

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

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

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

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

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

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

K. Court Refuses To Enforce Arbitration Clause Due To Lack Of Mental Capacity

In *Oak Crest Manor Nursing Home, LLC v. Barba*, a plaintiff sued a nursing home for negligently allowing a patient with mental disorders to leave the facility and jump from a bridge in an attempt to commit suicide. No. 03-16-00514-CV, 2016 Tex. App. LEXIS 12710 (Tex. App.—Austin December 1, 2016, no pet.). The nursing home filed a motion to compel arbitration based on a facility admission

agreement that the patient signed. The plaintiff's response contended that due to the patient's psychological and mental disorders, he lacked capacity to enter into an enforceable contract and, therefore, the agreement and its arbitration provision were unenforceable and void. The court denied the motion to compel, and the defendant sought an interlocutory appeal.

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

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

Id. The court also held that the patient's mental incompetency made the agreement void: "the supreme court has held that when the issue of mental capacity to contract is raised, 'the very existence of a contract is at issue,' as with other contract-formation issues, and therefore the court's determination that a party lacked the capacity to contract would render that contract non-existent and void rather than merely voidable." *Id.* Finally, the court determined that because there was no contract to begin with, the defendant could not rely on other theories such as direct-benefits estoppel to enforce the arbitration clause. The court affirmed the order denying the motion to compel arbitration.

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

the financial institution should rely on a guardian or power of attorney holder to execute the contract for the customer.

L. Court Refuses To Enforce Arbitration Clause By Financial Advisor

In *Steer Wealth Mgmt., LLC v. Denson*, Denson, in her individual capacity and as executor of her husband's estate, sued Steer Wealth Management, LLC, for causes of action including breach of fiduciary duty, breach of contract and fraud arising out of the alleged improper transfer of assets from several of the Densons' brokerage accounts. No. 01-17-00066-CV, 2017 Tex. App. LEXIS 8525 (Tex. App.—Houston [1st Dist.] September 7, 2017, no pet.). After Mr. Denson's death in 2013, Ms. Denson learned that her husband had allegedly transferred funds out of their joint brokerage accounts into accounts in his name, Tan Tang's name, or in the name of entities controlled by him and Tang. Individuals that started Steer Wealth had a long relationship with Mr. Denson, and there was a contract between the Densons and a prior firm, LPL Financial, that required the arbitration of disputes. Denson asserted causes of action against Steer Wealth—but not against LPL Financial or Steer Wealth's representative Varcados, who used to work with LPL Financial. Steer Wealth moved to compel arbitration and stay all trial court proceedings based on an arbitration clause contained in the contract between the Densons and LPL Financial. The trial court denied the motion. Steer Wealth appealed the order alleging that it could enforce the arbitration clause on the basis of third-party beneficiary status or direct-benefits estoppel.

Steer Wealth argued that it was a third-party beneficiary of the Densons' contract with LPL Financial because the express language of the arbitration agreement provided that it applied to controversies "between [Denson] and LPL and/or your Representative(s)," which, it contended, refers to Steer Wealth and its representative. *Id*. Steer Wealth contended that because it could act only through its sole manager, "[b]y its own terms, the LPL arbitration provision is intended to benefit Steer Wealth which is a DBA for Varcados, the 'Representative' identified in the arbitration provision." *Id*. The court of appeals disagreed:

> Although there is evidence in the record that Varcados uses Steer Wealth to conduct his financial advising business for LPL Financial, there is also evidence in the record that Steer Wealth is a registered domestic limited liability company and is therefore a distinct legal entity from both Varcados and LPL Financial. We thus agree with Denson that Varcados and Steer Wealth cannot be conflated such that references in the Master Account Agreement—and its arbitration provision—to Denson's "Representative" refer to both Varcados and the separate legal entity of Steer Wealth.

Id.

Steer Wealth also argued that it could enforce the arbitration agreement because Ms. Denson, in her claims against Steer Wealth, sought a benefit by holding it liable based on duties imposed by her contracts with LPL Financial, which contain arbitration clauses. The court noted that Texas law "requires a nonparty to arbitrate a claim 'if it seeks, through the claim, to derive a direct benefit from the contract containing the arbitration provision.'" *Id.* If a plaintiff's right to recover and her damages depend on the agreement containing the arbitration provision, the party is relying on the agreement for her claims. If, however, the facts alleged in support of the claim stand alone and are completely independent of the contract containing the arbitration provision, and the claim can be maintained without reference to the contract, the claim is not subject to arbitration. The court held that Denson's claims arose from her own contracts with Steer Wealth and not with LPL Financial:

> In light of Denson's allegations that she and her husband had a contractual relationship with Steer Wealth in which Steer Wealth allegedly agreed to provide financial and investment advice and other services—allegations unrebutted by evidence to the contrary—we conclude that Denson's allegations refer to a separate contractual agreement with Steer Wealth, as opposed to a contractual agreement with LPL Financial…Thus, although Denson's claims against Steer Wealth may "relate to" Denson's contracts with LPL Financial, her breach of contract and other claims against Steer Wealth "arise out of" and "directly seek the benefits of" a separate and independent alleged contract between Denson and Steer Wealth for the provision of financial services to Denson by Steer Wealth.

Id. So, the court of appeals affirmed the trial court's decision to deny the motion to compel arbitration.

M. Court Holds That Lender Did Not Have Standing To Sue An Estate For A Deficiency After Electing That Its Claim Is A Preferred Debt And Lien

In *In re Estate of Chapman*, Peoples Bank (the 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.). The Bank obtained a default judgment against the estate and then filed an action in the probate court seeking to remove the administrator and to enforce its claim against certain funds that might be payable to the estate in a separate lawsuit. After a hearing, the probate court ordered that any funds payable to the estate be paid first to the Bank. The administrator appealed, arguing that the Bank did not have standing to intervene in the lawsuit and obtain an order directing payment to itself that should have gone to the estate.

The court of appeals noted that to have standing in probate cases, the Texas Estates Code "requires the person to qualify as an 'interested person,'" and an "interested person" is "an heir, devisee, spouse, creditor, or any other having a property right in or claim against an estate being administered." *Id.* (citing Tex. Est. Code Ann. § 22.018(1)). The Bank asserted that it was an interested person because it was a creditor. The court of appeals described the process that a secured creditor must follow to assert a claim against an estate:

> Under the Texas Estates Code, if a secured creditor does not elect to have its claim treated as a matured secured claim within a prescribed time period, the creditor has effectively elected that the claim will be a preferred debt and lien against the property securing the indebtedness "and the claim may not be asserted against other assets of the estate." Explaining the effect of the predecessor Probate Code provisions, the Texas Supreme Court has explained that, when a secured creditor elects for its claim to be approved as a matured secured claim, upon any sale of the collateral, the creditor's claim has priority over any other claim, except for claims for funeral and last illness expenses and for the expenses of administering the estate. Further, if the proceeds from the sale of the collateral did not pay off its note, the matured secured claimant can "collect[] the deficiency as an unsecured seventh-class creditor." However, when the secured creditor elects to have its claim approved as a preferred debt and lien, the creditor has priority over all other claims on sale of the collateral, but the preferred debt and lien claimant "forfeit[s] any possibility of collecting a deficiency from the estate."
>
> In other words, the Texas Estates Code provides that, when a secured creditor elects to have its claim approved as a preferred debt and lien claim, if the independent executor defaults in the payment of the debt, the secured creditor may look only to its collateral for the satisfaction of any claim it may have against the estate. By foreclosing on the secured real estate, the Bank satisfied any debt or claim against the Chapman estate and did not have a deficiency claim as asserted in its notice of claim and motion to remove the Administrator. Therefore, the Bank's pleadings do not support its contention that it had a claim against the Chapman estate.

By foreclosing on its collateral, the bank effectively satisfied its claim against the estate, and under Tex. Estates Code Ann. § 403.052 (2014), the bank was forbidden from asserting the claim against any other asset of the estate; by obtaining the deficiency judgment in the district court based on the amount remaining after foreclosure, and seeking to enforce that judgment in the probate court, the bank attempted to do indirectly what the Texas Estates Code forbid it from doing directly. Because neither the bank's pleadings nor the record showed that it was an interested person, it lacked standing to sue on a deficiency.

Id. (internal citations omitted). The court then held that the deficiency judgment was void:

> In this case, the Bank elected to have its claim allowed as a preferred debt and lien against its secured real property, thereby electing to look only to its collateral for the satisfaction of its claim. By foreclosing on its collateral, the Bank effectively satisfied its claim against the estate. Under the Texas Estates Code, the Bank was forbidden from asserting the claim against any other asset of the estate. By obtaining the Deficiency Judgment in the District Court based on the amount remaining after foreclosure, and seeking to enforce that judgment in the Probate Court, the Bank attempted to do indirectly what the Estates Code forbids it from doing directly. Under these circumstances, the Deficiency Judgment is void and does not constitute a claim against the estate.

Id. (internal citations omitted).

N. Court Rejects Claim That Mortgage Lender Owed Fiduciary Duties To Borrower And Addressed The Discovery Rule For The Statute of Limitations

In *Wakefield v. Bank of Am., N.A.*, a borrower stopped paying on her mortgage because she felt she was assisting in a fraud. No. 14-16-00580-CV, 2018 Tex. App. LEXIS 545 (Tex. App.—Houston [14th Dist.] January 18, 2018, no pet.). She later sued the lender for breach of fiduciary duty, and the lender filed a motion for summary judgment based on the statute of limitations, which the trial court granted. The court of appeals discussed the discovery rule in the context of a breach of fiduciary duty claims:

> The limitations period for fraud and breach of fiduciary duty is four years. "As a general rule, a cause of action accrues and the statute of limitations begins to run when facts come into existence that authorize a party to seek a judicial remedy." A cause of action "accrues when a wrongful act causes a legal injury, regardless of when the plaintiff learns of that injury or if all resulting damages have yet to occur." There is, however, a "very limited exception" to the general rule for determining accrual of the cause of action. "The discovery rule exception defers accrual of a cause of action until the plaintiff knew or, exercising reasonable diligence, should have known of the facts giving rise to the cause of action." Under the discovery rule, accrual may be deferred if "the nature of the injury incurred is inherently undiscoverable and the evidence of injury is objectively verifiable." "An injury is inherently undiscoverable if it is, by its nature, unlikely to be discovered within the prescribed limitations period despite due diligence." The issue of when a cause of action accrues is a question of law. And, whether an injury is inherently undiscoverable is a legal question "decided on a categorical rather than case-specific basis; the

> focus is on whether a type of injury rather than a particular injury was discoverable."
>
> ….
>
> In the context of a fiduciary relationship, "the nature of the injury is presumed to be inherently undiscoverable, although a person owed a fiduciary duty has some responsibility to ascertain when an injury occurs." The rationale for this presumption is that fiduciaries are presumed to possess superior knowledge, meaning the injured party is presumed to possess less information than the fiduciary. Consequently, the Supreme Court of Texas has repeatedly "held a fiduciary's misconduct to be inherently undiscoverable." If a fiduciary relationship exists, "a person to whom a fiduciary duty is owed is relieved of the responsibility of diligent inquiry into the fiduciary's conduct."

Id. The court then addressed whether the mortgage lender owed fiduciary duties to the borrower and held that it did not:

> Generally, the relationship between a borrower and a lender does not create a fiduciary duty. "[T]he great weight of authority is that while the relationship between the mortgagor and mortgagee is often described as one of trust, technically it is not of a fiduciary character." "A special relationship does not usually exist between a borrower and lender, and when Texas courts have found one, the findings have rested on extraneous facts and conduct, such as excessive lender control or influence in the borrower's business activities." Not every relationship involving a high degree of trust and confidence gives rise to an informal fiduciary duty, and for an informal fiduciary duty to arise in a business transaction, "the relationship must exist prior to, and apart from, the agreement made the basis of the suit." Wakefield did not allege an informal fiduciary relationship; in her pleadings she based her breach-of-fiduciary-duty claim on her status as "lendee" and did not plead any facts to support the existence of an informal relationship.

Id. After holding that the lender did not owe fiduciary duties, the court held that there was no presumption that the claim was undiscoverable and affirmed the summary judgment based on the statute of limitations.

O. Court Held That Estate Beneficiary Did Not Have Standing To Assert Forfeiture Or Breach Claim Against Executrix's Attorneys, That An Executrix Had No Authority To Pay Her Attorney's Fees In The Interim In Defending A Removal Action, And That The Trial Court Erred In Refusing A Motion To Compel Distribution Of The Estate

In *In re Nunu*, an estate beneficiary sued the executrix to have her removed due to alleged breaches of fiduciary duty and also sought to have the court refuse to pay her attorneys in representing her in a removal action and/or sought to have those fees forfeited. No. 14-16-00394-CV, 2017 Tex. App. LEXIS 10306 (Tex. App.—Houston [14th Dist.] November 2, 2017, pet. filed). Texas Estates Code section 404.0037 provides: "[a]n independent executor who defends an action for the independent executor's removal in good faith, whether successful or not, shall be allowed out of the estate the independent executor's necessary expenses and disbursements, including reasonable attorney's fees, in the removal proceedings." *Id.* (citing Tex. Est. Code Ann. § 404.0037(a)). The executrix used estate funds to pay at least some of the attorneys' fees incurred in her defense in this suit. The beneficiary challenged the payment of the attorneys' fees by (a) arguing that the attorneys were professionally negligent and breached fiduciary duties they owed to the executrix and to the estate, or perhaps to the beneficiaries, and that as a result of this misconduct, their fees should be forfeited; (b) seeking declaratory judgment that the fees should be forfeit or disallowed; and (c) arguing that the requirements of section 404.0037 for payment of attorneys' fees from estate have not been met.

The court of appeals first held that the beneficiary had no standing to assert a fee forfeiture claim against the attorneys in his personal capacity because he had no attorney/client relationship with the attorneys. The court also held that the beneficiary had no standing to assert a breach claim against the executrix's attorneys. The fact that the attorneys owed fiduciary duties to the executrix and that the executrix owed fiduciary duties to the beneficiary, did not mean that the attorneys owed duties to the beneficiaries. The court held: "These are separate relationships, however, and the distinction between them cannot be ignored." *Id.*

The court then addressed the declaratory judgment claims. Texas Civil Practice and Remedies Code Section 37.005(3) allows declaratory relief "to determine any question arising in the administration" of an estate. The court, however, held that "although section 37.005(3) does not limit 'the types of questions' that a litigant may ask, it does not remove the limitations on the questions that the trial court can answer." *Id.* "A declaratory judgment requires a justiciable controversy as to the rights and status of parties actually before the court for adjudication, and the declaration sought must actually resolve the controversy." *Id.* The court held that a declaration that the fees "should be" forfeited would not actually result in fee forfeiture because Section 37.006(a) provides that when declaratory relief is sought, all persons who have or claim any interest that would be affected by the declaration must be made parties and the attorneys were not parties. Further,

even though Texas Civil Practice and Remedies Code Section 37.005(4) allows declaratory relief "to determine rights or legal relations of an independent executor . . . regarding fiduciary fees and the settling of accounts," the court held that this provision dealt with the compensation of the executrix, not her attorneys. *Id.*

The court next turned to Texas Estate's Code Section 404.0037, which states that if an independent executor defends a removal action in good faith that the reasonable and necessary attorney's fees for the defense "shall be allowed out of the estate." *Id.* (citing Tex. Est. Code Ann. § 404.037(a)). The court noted that good faith is an issue on which the independent executor bears the burden of proof. The court held:

> "[A]n executor acts in good faith when he or she subjectively believes his or her defense is viable, if that belief is reasonable in light of existing law." Good faith is established as a matter of law if reasonable minds could not differ in concluding from the undisputed facts that the person in question acted in good faith. Because it is an incontrovertible fact that Paul nonsuited his removal action against Nancy with prejudice, whether Nancy defended the action in good faith is a question of law. As a matter of law, "a dismissal or nonsuit with prejudice is 'tantamount to a judgment on the merits.'" Moreover, a party who voluntarily nonsuits his claims generally cannot obtain reversal of the order on appeal. And where, as here, the party seeking the executor's removal voluntarily and unilaterally nonsuits all such claims with prejudice on the third day of a jury trial, reasonable minds could not differ in concluding that the executor's "efforts cause[d] [her] opponents to yield the playing the field." Thus, when Paul irreversibly conceded his claim for Nancy's removal, the viability and reasonableness of Nancy's defense were established as a matter of law. Although Paul points out that the trial court made no finding that Nancy resisted her removal in good faith, a finding is unnecessary if a matter is established as a matter of law. Paul now attempts to resurrect the same grounds on which he sought Nancy's removal as grounds for challenging Nancy's good faith in defending the action; in essence, he contends that Nancy could not have resisted her removal in good faith because Paul would have prevailed on the merits. Those arguments must fail because his voluntary nonsuit of his removal claims with prejudice constitutes a judgment against him on the merits, and he does not (and cannot) challenge that portion of the judgment on appeal.

Id.

The court held that the executrix had no authority to pay her attorneys from estate funds in the interim and before the court allowed such an award after the removal issue was resolved:

> There is no such order in the record, and the trial court could not properly have approved payments made before the removal action had been decided. *See Klein v. Klein*, 641 S.W.2d 387, 387 (Tex. App.—Dallas 1982, no writ) (dismissing an executor's claims for attorneys' fees and expenses as premature because the removal action was still pending).... Although Nancy appears to have assumed that she could pay her legal fees without first obtaining findings that the fees were both necessary and reasonable, the statute does not authorize such a procedure."

Id. The court sustained the beneficiary's issue in part and remanded to the trial court the determination of the amount to be paid from the estate for the executrix's "necessary expenses and disbursements, including reasonable attorney's fees, in the removal proceedings." *Id*.

Finally, the beneficiary challenged the trial court's denial of his two motions to compel the executrix to distribute the estate. "A person interested in an estate may petition the court for an accounting and distribution any time after the expiration of two years from the date the court clerk first issued letters testamentary or letters of administration to any personal representative of the estate." *Id*. (citing Tex. Est. Code § 405.001(a)). "Unless the court finds a continued necessity for administration of the estate, the court shall order its distribution by the independent executor to the persons entitled to the property. If the court finds there is a continued necessity for administration of the estate, the court shall order the distribution of any portion of the estate that the court finds should not be subject to further administration by the independent executor." *Id*. The court held that the trial court did not abuse its discretion in denying the first motion because it was filed before the removal issue was resolved, and there were still issues continuing for the administration of the estate. However, the court held that the trial court should have granted the second motion, which was filed after the removal action was nonsuited. The court "reverse[d] this portion of the judgment, and remand the cause to the trial court (1) to determine the amount of Nancy's reasonable and necessary attorneys' fees and expenses to be paid from the Estate; (2) to authorize Nancy to pay that amount from Estate funds (and, if necessary, to order her to reimburse the Estate for excess legal fees and expenses already paid without authorization); and (3) to order distribution of the Estate." *Id*.

V. Federal Court Cases

A. Magistrate Recommends Denying Motion To Dismiss Against Bank For Aiding and Abetting Breach Of Fiduciary Duty Claim

In *Schmidt v. JP Morgan Chase Bank, N.A.*, the plaintiff's employee opened credit cards in the employer's name, used those credit cards for the employee's own personal use, and paid those credit card bills with funds from the employer's operating account and/or through advances from the employer's line of credit. No. H-17-0532, 2018 U.S. Dist. LEXIS 43665 (S.D. Tex. February 2, 2018). The

employer sued the bank for money had and received, for aiding and abetting a breach of fiduciary duty, and for negligence for the amounts the employer lost as a result of the employee's conduct. The defendant filed a motion to dismiss for failure to state a claim. The magistrate recommended granting it in part and denying it in part. The magistrate suggested that the motion should be granted as to the money had and received claim due to the wording of the account agreements. The magistrate suggested denying motion on the negligence claim as such a claim could theoretically be pled. Regarding the aiding and abetting claim, the court stated:

> "Under Texas law, 'where a third party knowingly participates in the breach of duty of a fiduciary, such third party becomes a joint tortfeasor with the fiduciary and is liable as such.' To establish a claim for knowing participation in a breach of fiduciary duty, a plaintiff must assert: (1) the existence of a fiduciary relationship; (2) that the third party knew of the fiduciary relationship; and (3) that the third party was aware that it was participating in the breach of that fiduciary relationship."
>
> Here, Schmidt alleges, in a conclusory fashion, that Defendants "knowingly participated" in Rhodes' breach of fiduciary duty, and that they "allowed" Rhodes to open credit card accounts in Schmidt's name without his authorization, and "allowed" Rhodes to obtain a cashier's check from Schmidt's account. While Schmidt does not allege that Defendants knew Rhodes was acting without Schmidt's authorization, and does not allege that Defendants were aware of Rhodes' fiduciary duty to Schmidt and her breach of that duty, Schmidt could arguably do so if there are facts that would support such allegations. On this record, therefore, Schmidt should be allowed an opportunity to include such allegations in an amended pleading that conforms with the requirements of FED. R. Civ. P. 11(b) in an attempt to state a plausible claim for aiding and abetting a breach of fiduciary duty.

Id.

Interesting Note: The court cites to knowing participation cases in discussing the plaintiff's aiding and abetting claim. The Texas Supreme Court has not expressly adopted an aiding and abetting claim for breach of fiduciary duty. It has adopted a knowing participation claim. The law in Texas is ambiguous regarding whether knowing participation and aiding and abetting are the same or different theories, and if they are different, how they are different. This opinion certainly blurs the distinction between the two theories.

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

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

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

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

The court noted that there was no dispute that defendant owed a fiduciary duty to the company as he was the sole shareholder of a company that was having major financial issues and was in the "vicinity of insolvency" at the time the settlement agreement was executed, which was a few months before the company filed for bankruptcy. The court concluded:

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

C. Court Holds That Members of LLC May Owe Each Other Fiduciary Duties

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

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

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

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

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

Regarding the breach of fiduciary duty exception to dischargeability, the court noted that "A discharge under section 727 ... does not discharge an individual debtor from any debt … for fraud or defalcation while acting in a fiduciary

capacity, embezzlement, or larceny." Id. (citing 11 U.S.C. § 523(a)(4)). The court stated: "This subsection is intended to address situations where 'debts are incurred through abuses of fiduciary positions and through active misconduct whereby a debtor has deprived others of their property by criminal acts.'" The court held that:

> [O]nce the Plaintiffs establish a breach of fiduciary duty under Texas law, they still have the burden of proof to "demonstrate the existence of the requisite elements of 11 U.S.C. § 523(a)(4)," such as the existence of the fiduciary duty prior to Fritz's breaches. Thus, to establish their claim under § 523(a)(4), the Plaintiffs must prove Fritz "engaged in fraud or defalcation while acting in a fiduciary capacity." "Defalcation is the neglect of a fiduciary duty."
>
> Turning first to the existence of a fiduciary duty, the Complaint summarily states that "Fritz remained an owner, officer, and director of [the Company], and therefore owed fiduciary duties to both the [C]ompany and to Hill." As discussed above, the Court has deemed the factual allegations in the Plaintiffs' Complaint as true. However, the Plaintiffs' statement that Fritz owes a fiduciary duty to the Company and Hill is a conclusion of law, not a factual allegation. Conclusions of law are the purview of the Court and, as such, the Court does not accept this legal conclusion as true. Accordingly, the Court must independently determine whether Fritz owed a fiduciary duty to Hill and/or the Company.
>
> Taking these in order, for Hill to succeed on his § 523(a)(4) claim, he must first prove that Fritz owed him a fiduciary duty. Although the Complaint generally alleges that Fritz owed a fiduciary duty to Hill, it does not explain the basis for such a duty. Based upon the record before it, the Court can only infer that the alleged fiduciary duty is based upon Hill's and Fritz's positions as co-shareholders of the Company. Under Texas law, however, "a co-shareholder in a closely held corporation does not as a matter of law owe a fiduciary duty to his co-shareholder." Because Hill has failed to prove that Fritz owed him a fiduciary duty, Hill's § 523(a)(4) claim for fraud or defalcation while acting in a fiduciary capacity fails.

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

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

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

E. Court Holds That Attorneys Acted As An Escrow Agent And Could Be Sued For Breach Of Fiduciary Duty By A Non-Client

In *Alexander O&G, LLC v. Nomad Land & Energy Res., LLC*, Nomad entered into a Purchase and Sale Agreement ("PSA") with Alexander O&G, LLC ("AOG") for the sale of oil and gas interests. No. H-16-2065, 2017 U.S. Dist. LEXIS 130415 (S.D. Tex. August 16, 2017). The PSA provided that AOG would deposit earnest money into an escrow account:

> Upon execution and delivery of the Agreement, [AOG] shall tender [Nomad], in an agreed escrow agent's account, an earnest money deposit of $100,000.00 to help ensure [AOG's] performance hereunder, which deposit shall be non-refundable, except in the event that [Nomad] shall be unwilling or unable to perform his obligations hereunder, in which case the entirety of the earnest money deposit, and any interest or any additions thereto, shall be refunded to [AOG].

Id. AOG later informed Nomad that it was terminating the PSA, and Nomad requested that AOG's counsel release the $100,000 deposit they held in escrow pursuant to the terms of the PSA. AOG's counsel responded that it had returned the funds to its client, AOG, as it was the owner of those funds. Nomad then sued AOG and AOG's counsel, and alleged that AOG's counsel breached fiduciary duties as an escrow agent. AOG's counsel filed a motion to dismiss the complaint.

The federal district court denied the motion to dismiss regarding the claims against the attorneys. The court first determined whether the attorneys acted as an escrow agent. The court held that to create an escrow relationship "the parties to the underlying transaction need only to deposit instruments or funds with a third party and to agree to the terms in which the third party would deliver the items deposited." *Id*. "There must be a valid underlying contract to support the escrow agreement. However, in the absence of a contract, a fiduciary relationship may still exist." *Id*. The court held that "[e]ven where no formal escrow agreement exists, a party that receives money accompanied by specific instructions on how to apply the money has the duties of an escrow agent." *Id*.

The court then held that Nomad sufficiently pled the existence of a fiduciary relationship by alleging that "the PSA between AOG and Nomad is a valid,

underlying contract in which the parties agreed to clear and definite escrow terms." *Id*. Further, "Nomad also alleged that the Counter-Defendants were counsel to AOG for the PSA, and therefore should have been on notice of the instructions to the escrow agent." *Id*. The court concluded that "these facts create a more than plausible basis that the Counter Defendants were on notice of the explicit instructions to the escrow agent in the PSA and assumed a fiduciary duty to Nomad when they accepted the $100,000 earnest money deposited into Jones Gill's IOLTA account" and that a fiduciary relationship existed between the attorneys and Nomad.

The court noted that in Texas an escrow agent owes the duty of loyalty, the duty to make full disclosure, and the duty to exercise a high degree of care to conserve the money and pay it only to those entitled to receive it. *Id*. Thereunder, the court found that Nomad alleged facts that the attorneys breached their fiduciary duty because the earnest money was returned to the wrong party and that such breach resulted in injury. The court denied the motion to dismiss.

F. Federal Courts Hold That Lenders Do Not Owe Fiduciary Duties To Borrowers

In *Hagood v. Countrywide Home Loans, Inc.*, a borrower sued a lender for several claims, including breach of fiduciary duties. No. A-17-CA-00784-SS, 2017 U.S. Dist. LEXIS 165943 (W. D. Tex. October 6, 2017). The defendant filed a motion to dismiss for failure to state a claim, and the district court granted same:

> Without providing details, Plaintiff contends Defendants breached their fiduciary duties to him. However, "[u]nder Texas law, a mortgage lender or servicer generally does not owe a fiduciary duty to a borrower." Plaintiff has failed to allege extraordinary circumstances giving rise to a fiduciary duty owed to him in this case. To the extent Plaintiff relies on fiduciary duties between Defendants themselves, such claims also fail because Plaintiff himself was owed no duty.

Id.

In *Adams v. United States Bank, N.A.*, a borrower sued a former lender for breaching fiduciary duties in assigning the loan to another lender. No. 3:17-cv-723-B-BN, 2017 U.S. Dist. LEXIS 165378 (N.D. Tex. October 1, 2017). The plaintiff contended that the first lender breached a fiduciary duty by either assigning the loan to the new lender or selecting it as the mortgage servicer because the first lender had "knowledge of the pattern and practice of [U.S. Bank's] disregard of applicable law in the servicing of mortgage loans, and should not have attempted to assign ownership and/or servicing of the Loan to [U.S. Bank], thus jeopardizing Plaintiff's ownership and use of the Property." Id.

The defendant filed a motion to dismiss for failure to state a claim, and the magistrate recommended that it be granted:

> Texas recognizes two types of fiduciary relationships. “The first is a formal fiduciary relationship,” such as “the relationship of an attorney-client, principal-agent, or trustee-beneficiary relationship.” The second is an informal fiduciary relationship — that is, a confidential relationship “where one person trusts and relies on another, whether the relation is a moral, social, domestic or purely personal one.” The Texas Supreme Court has recognized that “confidential relationships may arise not only from the technical fiduciary relationships such as attorney-client, trustee-cestui que trust, partner and partner, etc. - which as a matter of law are relationships of trust and confidence — but may arise informally from moral, social, domestic or purely personal relationships.” “The existence of the fiduciary relationship is to be determined for the actualities of the relationship between the parties involved.” Texas courts have consistently held that the mortgagor-mortgagee relationship is not a special relationship that generally gives rise to a fiduciary duty.
>
> . . .
>
> Courts have therefore only entertained the notion that a mortgage lender or service might owe a mortgagee a fiduciary duty where its relationship to the mortgagee was such that the mortgagee could reasonably expect the lender or service to act in his or her best interest. “‘[A] person is justified in placing confidence in the belief that another will act in his or her best interest only where he or she is accustomed to being guided by the judgment or advice of the other party, and there exists a long association in a business relationship as well as personal friendship.’” The parties’ special relationship must also have existed prior to and apart from the agreement in the suit.
>
> Ms. Adams alleges that Guild breached a fiduciary duty to her by either assigning the Loan to U.S. Bank or selecting it as the mortgage service even though it knew of U.S. Bank’s alleged issue with complying with the law. But she fails to provide any explanation in her complaint or in her brief as to why she was “justified in placing confidence in the belief that” Guild would act in her best interest in the first place. She has not suggested that she had some long-standing relationship with Guild — separate from its relationship to the Property. Nor is there any other indication in her pleadings that Ms. Adams had some objective reason to believe that she would be justified in placing her confidence in Guild or its employees to act in her best interest. The State Court Petition, at

> most, suggests that Ms. Adams may have had some subjective, unspecified belief that she could trust Guild. But Plaintiff's "subjective trust and feelings of trust and confidence [are] not ... enough to create a fiduciary relationship."
>
> Ms. Adams's claim for breach of fiduciary duty should be dismissed. But — because it is not yet clear that Ms. Adams has pleaded her best case — the dismissal should be without prejudice.

Id. Therefore, the magistrate recommended that the district court grant the motion to dismiss without prejudice.

G. Court Held That Power-Of-Attorney Holder Was Not Authorized To Name Himself As A Beneficiary Of The Principal's Insurance Policy, But Could Name His Sister

In *Transamerica Life Ins. Co. v. Quarm*, Thomas Quarm obtained a life insurance policy and designated his mother as his beneficiary and his brother, Nicholas, as the alternate beneficiary. No. EP-16-CV-295-KC, 2017 U.S. Dist. LEXIS 192192 (W.D. Tex. November 13, 2017). Quarm later purchased an annuity product with the same beneficiaries. When the mother died, Nicholas became the primary beneficiary. Thomas then signed a durable power of attorney naming his son, Christian, as his agent with the authority to act on his behalf. Among the powers delegated to Christian was the power to perform any act Thomas could do regarding "[i]nsurance and annuity transactions," which included the power to "modify . . . any [existing] annuity or [insurance] policy." *Id*. It also empowered Christian to "engage in any transaction he . . . deems in good faith to be in [the principal's] interest, no matter what the interest or benefit to [the] agent." *Id*. Christian sent the power of attorney and a beneficiary change form naming himself as the primary beneficiary and his sister, Sarah, the as the contingent beneficiary. The insurance company determined that this form changed the beneficiary designation for both the policy and the annuity. After Thomas died, Christian and Nicholas made competing claims to the benefits under the policy and the annuity. The insurance company filed an interpleader in federal court, and Christian and Nicholas filed competing claims for the proceeds and each filed motions for summary judgment.

The district court first analyzed whether Christian's action in naming himself was a self-interested transaction that was a breach of fiduciary duty. The court stated the law concerning self-interested transactions thusly:

> While an agent who benefits from a transaction carried out on behalf of his principal bears the burden of showing that the transaction was fair, he can meet that burden by showing that the transaction was authorized by the principal. The grant of a power of attorney creates an agency relationship, which is a fiduciary relationship as a matter of law. A fiduciary owes his principal a high duty of good faith, fair dealing, honest performance, and

> strict accountability. Multiple courts have noted that the fiduciary relationship does "no more than cast upon the profiting fiduciary the burden of showing the fairness of the transactions." The court in Vogt found it "worth repeating that fiduciary status does not prohibit the beneficiary from giving the fiduciary gifts or bequests; instead, it insures that the fiduciary will be prepared to prove the transaction was conducted with scrupulous fairness." One way to establish decisively that a transaction was fair to the principal is to show that the principal consented to it. Texas courts have recognized the significance of the principal's consent in determining whether a transaction by a profiting agent was fair or constituted self-dealing. "Unless otherwise agreed, an agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency." Accordingly, "absent the principal's consent, an agent must refrain from using his position or the principal's property to gain a benefit for himself at the principal's expense."

Id. (internal citation omitted).

The court noted that the power-of-attorney document specifically authorized Christian to act for his own benefit: "My agent may buy any assets of mine or engage in any transaction he or she deems in good faith to be in my interest, no matter what the interest or benefit to my agent." *Id*. The court held that this language established that Christian was authorized to benefit from his use of the power of attorney and mentioned that Texas courts regularly look for such language in determining whether a profiting agent violated his fiduciary duty. The court held that Christian's beneficiary change did not breach his fiduciary duty or constitute self-dealing.

The court then analyzed whether Christian acted in good faith as required by the power-of-attorney document. The court held that Christian provided evidence establishing that he acted fairly and in good faith when he changed the beneficiary and Nicholas failed to present contrary evidence. The court noted that because the proceeds only became available after Thomas's death, it is undisputed that Christian's change of beneficiary did not deprive Thomas of anything during his lifetime, reducing the potential for unfairness to Thomas. "Nevertheless, if Christian did not in good faith consider the change to be in the Decedent's interest, he acted unfairly and outside of the scope of the Power of Attorney, rendering the change invalid." *Id*. Christian provided evidence that he believed the change of beneficiary to be in Thomas's interest in that Thomas described his four-month stay to care for Thomas during his prolonged illness. Christian also stated that Thomas made it known that Thomas wished for Christian to be designated as the beneficiary. This was corroborated by Thomas's sister. The court stated: "This evidence, combined with the language in the Power of Attorney granting Christian the authority to benefit from transactions on Decedent's behalf, sufficiently establishes that Christian believed in good faith that it was in the Decedent's interest for Christian to be the designated beneficiary of the Policy and Annuity Contract." *Id*.

The court, however, held that even though it was not a breach of fiduciary duty, Christian could not be a beneficiary of the policy and annuity. The court held that Christian's use of the power of attorney was subject to the restrictions imposed by the Texas Estates Code. At the time that the power of attorney was executed, the Code provided that "The language conferring authority with respect to insurance and annuity transactions in a statutory durable power of attorney empowers the attorney in fact or agent to . . . change the beneficiary of an insurance contract or annuity." *Id.* (citing Tex. Est. Code Ann. § 752.108(a)(10)). The court noted that this power was strictly limited where the agent attempts to designate himself as beneficiary: "An attorney in fact or agent may be named a beneficiary of an insurance contract or an extension, renewal, or substitute for the contract only to the extent the attorney in fact or agent was named as a beneficiary under a contract procured by the principal before executing the power of attorney." *Id.* (citing Tex. Est. Code Ann. § 752.108 (b)). Further, "Unless the principal has granted the authority to create or change a beneficiary designation expressly . . . an agent may be named a beneficiary of an insurance contract . . . only to the extent the agent was named as a beneficiary by the principal." *Id.*

The court held that as Christian had not previously been named as beneficiary, he was not authorized to name himself beneficiary of the policy or annuity. However, the court noted that his designation of his sister Sarah as the contingent beneficiary was authorized by both the statute and the power of attorney: "Christian was therefore authorized to remove Nicholas as a beneficiary of the Policy and designate anyone but himself as a beneficiary in his place… Barker is the proper beneficiary of the Policy and is legally entitled to collect the remaining Policy funds." *Id.*

Finally, the court held that Nicholas's cross-claims for breaches of various fiduciary duties, conversion, trespass to chattels, violation of the Theft Liability Act, and tortious interference with inheritance failed because Nicholas did not have standing to assert them. The court held:

> To bring these claims, Nicholas must show that he has standing as the principal in a fiduciary relationship with Christian or demonstrate that he was deprived of a legitimate property interest. He can do neither. As the discussion above establishes, while Christian's designation of himself as beneficiary of the Policy was not authorized by statute, his actions did not constitute self-dealing or breach any duty he held as fiduciary. Furthermore, Christian was authorized by statute to designate Sarah as the contingent beneficiary of the Policy and the Annuity Contract. Accordingly, Christian acted lawfully in removing Nicholas as the beneficiary of the Policy and Annuity Contract, and Nicholas cannot recover against him for it.

Id. Therefore, the court held that neither Christian or Nicholas were entitled to the proceeds, Christian's sister was entitled to those funds.

Interesting Note: The court also held that "Texas courts apply the law that was in place at the time the power of attorney was executed rather than the current law." *Id*. (citing *Wise v. Mitchell,* 2016 WL 3398447, at *8 (Tex. App. 2016) (applying sections of Probate Code—now Estates Code—that were in place "at the time the Power of Attorney was executed"); *Cole v. McWillie*, 464 S.W.3d 896, 898 (Tex. App. 2015) (finding that power of attorney was not durable under the Probate Code that "was in effect at the time of the execution of the power of attorney"); *cf. Randall v. Kreiger*, 90 U.S. 137, 138-39, 23 L. Ed. 124 (1874) (holding that a power of attorney that was invalid at the time it was made was validated by a curative act only because the act was explicitly retroactive)). The court noted that in September 2017, the Texas Estates Code was amended to read, "Unless the principal has granted the authority to create or change a beneficiary designation expressly . . . an agent may be named a beneficiary of an insurance contract . . . only to the extent the agent was named as a beneficiary by the principal." Tex. Est. Code Ann. § 752.108(b). Accordingly, because the power of attorney was executed in October 2015, the court applied the 2015 statute and not the 2017 amendment.

VI. Fiduciary Litigation Practice Tip: Streamlining Discovery To Threshold Legal Issues

Litigation can unfortunately be a costly endeavor. This is as true with fiduciary litigation as with any other type of litigation. The parties have to exchange documents, take depositions, retain experts, conduct legal research on many issues, prepare dispositive motions and respond to same, prepare for trial, prepare lengthy jury instructions, etc. However, there are often certain threshold issues that, if determined early in a case, may streamline the disposition of the case. For example, there are a number of issues in fiduciary cases that may make the rest of the case moot: personal jurisdiction, forum issues, the statute of limitations, exculpatory and/or release clauses, whether fiduciary duties are owed, etc. When a case has a threshold issue, it would make sense to bifurcate discovery and allow the threshold issue to be resolved before the remainder of the case is fully litigated.

Of course, plaintiffs often fight these attempts. Plaintiffs see the cost of litigation as a leverage tool to pressure a more friendly settlement. They also do not want to limit their discovery as they may believe that egregious facts on liability or damages may impact the way a court will view a threshold issue. There may be some truth to those beliefs. However, for most cases, it really is better for all parties, and certainly the court system, to streamline the case and have an orderly and thoughtful schedule for its resolution.

So, what is a defendant to do when it wants to advocate for a streamlined scheduling order? What discretion does a trial court have to enter such an order?

Texas Rule of Civil Procedure 166 provides that a district court has discretion to determine what issues need to be decided and in what order. Tex. R. Civ. P. 166. The Rule states:

> In an appropriate action, to assist in the disposition of the case without undue expense or burden to the parties, the court may in its discretion direct the attorneys for the parties and the parties or their duly authorized agents to appear before it for a conference to consider: … (c) A discovery schedule; … (e) Contested issues of fact and the simplification of the issues;… (g) The identification of legal matters to be ruled on or decided by the court; … (p) Such other matters as may aid in the disposition of the action. The court shall make an order which recites the action taken at the pretrial conference, the amendments allowed to the pleadings, the time within which same may be filed, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions, agreements of counsel, or rulings of the court; and such order when issued shall control the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pretrial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or extend it to all actions.

Tex. R. Civ. P. 166. The purpose of Rule 166 is to assist in the disposition of the case without undue expense or burden to the parties. *Walden v. Affiliated Computer Servs., Inc.*, 97 S.W.3d 303, 2003 Tex. App. LEXIS 314 (Tex. App.—Houston [14th Dist.] 2003, pet. denied). Rule 166(g) expressly allows a trial court to use a pretrial conference to consider the identification of legal matters to be ruled on or decided by the court. *Id*.

Moreover, in Texas, a court has discretion to stay discovery on issues that may be mooted by a threshold issue. In discovery, a trial court is granted latitude in limiting or tailoring discovery. Tex. R. Civ. P. 192.4. Generally, a trial court should limit discovery methods to those which are more convenient, less burdensome, and less expensive, or when the burden or expense of the proposed discovery outweighs its likely benefit. *In re Alford Chevrolet—Geo*, 997 S.W.2d 173, 182-83 (Tex. 1999) (orig. proceeding). *See also* Tex. R. Civ. P. 192.4. Discovery requests themselves must be reasonably tailored to matters relevant to the case at issue. *In re Xeller*, 6 S.W.3d 618, 626 (Tex. App.—Houston [14th Dist.] 1999, orig. proceeding). Consequently, the trial court has broad discretion to limit discovery requests by time, place, and subject matter. *Texaco, Inc. v. Sanderson*, 898 S.W.2d 813, 815 (Tex. 1995). Specifically, the Texas Rules of Civil Procedure expressly allow a trial court to protect a party from inappropriate or untimely discovery requests:

> To protect [a party filing a motion for protection] from undue burden, unnecessary expense, harassment, annoyance, or invasion of personal, constitutional, or property rights, the court may make any order in the

> interest of justice and may – among other things – order that: . . . (3) the discovery not be undertaken at the time or place specified.

Tex. R. Civ. P. 192.6(b). A court can stay discovery – put it on hold – if it is untimely. Id. For example, the Texas Supreme Court stated: "courts may limit discovery pending resolution of threshold issues like venue, jurisdiction, forum non conveniens, and official immunity." *In re Alford Chevrolet-Geo*, 997 S.W.2d at 181. For example, one court has repeatedly stayed discovery pending the resolution of a special appearance motion. *Lattin v. Barrett*, No. 10-03-287-CV, 2004 Tex. App. LEXIS 177 (Tex. App.—Waco January 5, 2004, no pet.); *Lacefield v. Electronic Fin. Group*, 21 S.W.3d 799, 800 (Tex. App.—Waco 2000, no pet.) (stayed proceedings pending disposition of special appearance appeal).

A court has the power to stay discovery until it determines the outcome of threshold issues. *See Nat'l Union Fire Ins. Co. v. CBI Indus., Inc.*, 907 S.W.2d 517, 520-21 (Tex. 1995) (affirming summary judgment granted by trial court based on interpretation of unambiguous contract provision and rejecting the argument that summary judgment was inappropriate because it was decided before the plaintiff had the opportunity to conduct discovery); *Davis v. Star-Telegram,* No. 05-98-00088-CV, 2000 Tex. App. LEXIS 4526, at *16-17 (Tex. App.—Dallas July 7, 2000, pet. denied) (holding that the trial judge did not abuse his discretion in staying discovery pending a ruling on a motion for summary judgment). In fact, a court can stay the entire case pending a motion for summary judgment. *See In re Messervey*, No. 04-00-00700-CV, 2001 Tex. App. LEXIS 430, 2001 WL 55642, at *3 (Tex. App.—San Antonio July 24, 2001, orig. proceeding) (not designated for publication) ("[The court] has the authority to stay the case temporarily while he considers the motion for summary judgment and determines whether the discovery sought by Messervey is relevant and necessary for Messervey to contest the issues raised by Northbrook."); *Ho v. Univ. of Tex. at Arlington*, 984 S.W.2d 672, 693-94 (Tex. App.—Amarillo 1998, pet. denied) (no abuse of discretion for trial court to continue trial date sua sponte pending ruling on summary judgment). For example, a court of appeals affirmed a trial court's refusal to allow discovery where an immunity issue was pending on summary judgment. *Barnes v. Sulak*, No. 03-01-00159-CV, 2002 Tex. App. LEXIS 5727, at *16-17 (Tex. App.—Austin 2002, pet. denied). *See also Elgohary v. Lakes on Eldridge N. Cmty. Ass'n*, No. 01-14-00216-CV, 2016 Tex. App. LEXIS 8876, at *21-22 (Tex. App.—Houston [1st Dist.] Aug. 16, 2016, no pet.); *Doe v. Roman Catholic Archdiocese of Galveston-Houston ex rel. Dinardo*, 362 S.W.3d 803, 809, 812 (Tex. App.—Houston [14th Dist.] 2012, no pet.).

Courts in the Fifth Circuit routinely stay discovery that will be mooted by dispositive motions. *See, e.g., Whalen v. Carter*, 554 F.2d 1087, 1098 (5th Cir. 1992); *Montgomery v. United States*, 933 F.2d 348, 350 (5th Cir. 1991); *Williamson v. United States Department of Agriculture*, 815 F.2d 368, 382 (5th Cir. 1987); *Drake v. Nat'l Broadcasting Co., Inc.*, No. 3-04-CV-0652-R, 2004 U.S. Dist. Lexis 25090, at *3-5 (N.D. Tex. 2004) (granting a stay of discovery under federal law pending the outcome of a motion to dismiss and noting that such a

stay is particularly appropriate when the disposition of a motion "might preclude the need for discovery altogether, thus saving time and expense"); *Tschirn v. Kurzweg*, No. 03-0369, 2003 U.S. Dist. LEXIS 8294 (E. D. La. May 8, 2003) (magistrate's opinion); *Leclerc v. Webb,* No. 3-664, 2003 U.S. Dist. LEXIS 7569 (E. D. La. May 1, 2003). *See also Young v. Burks,* 849 F.2d 610 n.6 (6th Cir. 1988); *Spencer Trask Software & Info. Servs., LLC v. RPost Int'l Ltd.*, 206 F.R.D. 367, 368 (S.D.N.Y. 2002); *Veniard v. NB Holdings Corp.*, 2000 U.S. Dist. LEXIS 20518 (M.D. Fla. August 8, 2000), *vacated in part on other grounds*, 2001 U.S. Dist. LEXIS 22907 (August 27, 2001); *Richmond v. W.L. Gore & Assocs.*, 881 F.Supp. 895 n.13 (S.D. N.Y. 1995); *International Graphics, Div. of Moore v. United States,* 3 Cl. Ct. 715, 717-18 (1983); *Blair Holdings Corp. v. Rubinstein*, 159 F.Supp. 14, 15 (S.D.N.Y. 1954).

For example, in *Landry v. Air Line Pilots Ass'n Int'l*, the Fifth Circuit affirmed a district court's order limiting discovery pending the resolution of a summary judgment motion. 901 F.2d 404, 435-36 (5th Cir. 1990). The court stated:

> "Upon motion by a party or by the person from whom discovery is sought, and for good cause shown," a district court is authorized to "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." F.R.Civ.P. 26(c). In their motions for protective orders, the defendants gave several reasons why this discovery was not needed prior to the resolution of the summary judgment motions which, if granted, would preclude the need for the discovery altogether.
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> . . . .
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> Discovery is not justified when cost and inconvenience will be its sole result. On the record before it, the trial court had to reach the decision that it did reach. The procedural posture of the case and the showings of the parties left it little choice. Whether the trial judge surmised that pilots would not be able to defeat the summary judgment motions or whether he, like us, saw sufficient disputed facts to preclude summary judgment is irrelevant. Under the circumstances, there was no abuse of discretion in the order staying discovery until the summary judgment motions were resolved.

Id.

Therefore, in state and federal court in Texas, a court has discretion to rule on whether threshold issues should be determined in a particular order and may stay discovery on other issues that may be mooted by the determination of threshold issues. That makes sense as every case should be reviewed for its particular needs and courts should enter orders to save parties from needless expense. Once again, as the Texas Supreme Court held, "a trial court should limit discovery methods to those which are more convenient, less burdensome,

and less expensive, or when the burden or expense of the proposed discovery outweighs its likely benefit." *In re Alford Chevrolet—Geo,* 997 S.W.2d at 182-83. Courts should exercise their discretion to do just that.

VII. Conclusion

This paper was intended to provide an update of recent legal issues in the complex areas of financial institution and fiduciary litigation. For more information, please visit txfiduciarylitigator.com.