STRATEGICALLY DEFENDING FIDUCIARIES

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LEGAL EXPERIENCE

Chris is a Shareholder in Langley & Banack's San Antonio Office. His practice is focused on Estates, Trusts, Fiduciary Litigation including will contests, trust contests and contested estate and trust proceedings.

Chris graduated from the University of Texas at Austin in 2002 with a Bachelor's degree in Spanish. He thereafter obtained his Juris Doctorate degree from the St. Mary's University School of Law in 2005 and has been with Langley & Banack since that time. While at St. Mary's, Chris was an Associate Editor on the St. Mary's Law Journal and a member of the Phi Delta Phi academic fraternity.

Chris sits on Langley & Banack's Management and Executive Committees and leads the Firm's partnership with the Association of Corporate Counsel.

BAR ADMISSIONS

- Texas Bar, 2005
- United States District Court, Western District of Texas, 2008

EDUCATION

St. Mary's School of Law, San Antonio, Texas,

- St. Mary's University School of Law, J.D., 2005
- St. Mary's Law Journal, Associate Editor, 2004-2005
- Phi Alpha Delta Law Fraternity Honors, International, 2003-2005

University of Texas, Austin, Texas, 2002

- BA, Spanish, Minor in Business Associations

ACCOLADES

- Martindale – Hubbell, AV
- Best Lawyers in America – Estate and Trust Litigation 2021 – 2024
- Texas Super Lawyer – Estate and Trust Litigation, 2023
- Best Lawyer in San Antonio, Estate and Trust Litigation, San Antonio Scene, 2014-2023
- Texas Super Lawyer - Rising Star - (published by Thomson Reuters), Estate and Trust Litigation, 2009-2010 and 2013-2020
- Top 40 under 40, San Antonio Business Journal, 2016

STATE BAR ASSOCIATIONS

- San Antonio Bar Association
- Texas Real Estate & Probate Institute (T-REP), Member and Fiduciary Litigation Chair
- State Bar of Texas, Real Estate Probate and Trust Law Section (REPTL), Member 2020 – 2023
- State Bar of Texas – San Antonio Young Lawyers Association, Member 2005 – 2015
- Various TexasBarCLE Course Planning Committees
- Texas Bar Foundation, Fellow 2006 – Present

PUBLICATIONS/SPEAKING ENGAGEMENTS

- Speaker, Strategically Defending Fiduciaries, San Antonio Bar Association Probate Docket Call. Feb 2024
- Speaker, TexasBarCLE 18th Annual Fiduciary Litigation Course, Strategically Defending Fiduciaries, Dec. 2023

- Speaker, Caution to the Wind – Financial Elder Abuse with Expanded Agency Powers, San Antonio Bar Association, Probate, Guardianship and Estate Planning Section Meeting, Aug. 2022
- Speaker, Caution to the Wind – Financial Elder Abuse with Expanded Agency Powers, TexasBarCLE 46th Annual Advanced Estate Planning and Probate Course, June 2022
- Speaker, Practical Realities of Estate Planning from a Business Perspective, Association of Corporate Counsel, Feb. 2021
- Co-Author, Alternatives to Tortious Interference with Inheritance, TexasBarCLE 44th Annual Advanced Estate Planning and Probate Course, June 2020
- Speaker, Settlements in Probate and Trust Litigation, Advanced Estate Planning and Probate Seminar, 2019
- Co-Speaker/Author, Fiduciary and Tracing Issues in Probate and Family Law Litigation, State Bar of Texas Annual Meeting, June 2019
- Speaker/Author, Discretionary Distributions, Austin Bar Association, November 2018
- Author, Alternatives to Guardianship and Why they Rarely Work, TexasBarCLE 41st Annual Advanced Estate Planning and Probate Course, June 2017
- Speaker, Fiduciary Litigation Case Law Update, Advanced Estate Planning and Probate Seminar, 2017
- Speaker, Trust Basics 101, annual Texas Guardianship Association conference, 2017
- Speaker, Poison Pills in Fiduciary Litigation, 2016 Fiduciary Litigation Course in Houston Texas. Discussing the Poison Pills in Fiduciary Litigation and covering a range of defensive and strategic planning for fiduciary litigation cases involving trusts and estates
- Speaker, Strategic Planning in Fiduciary Duty Cases, San Antonio Bar Association Brown Bag Lunch, Oct. 2016
- Author, Is Your Will Bullet-Proof After Death? Probably Not – But That's Okay!!!, San Antonio Business Journal, 2016
- Speaker, Guardian Overview, The Chromosome 18: Registry & Research Society, 2016
- Author, Will & Trust Modifications, San Antonio Estate Planners Docket Call, 2016
- Editor, Litigation Involving Fiduciaries: Trial Handbook 2009, Probate and Trust Edition, State Bar of Texas, Annual Advances Estate Planning and Probate Course, 2009
- Co-Author, In's and Out's of Privilege in Probate and Trust Litigation, State Bar of Texas, 30th Annual Advanced Estate Planning and Probate Course, 2006

OTHER ASSOCIATIONS

- Juvenile Diabetes Research Foundation Participant
- Texas Exes Alumni Association, San Antonio Chapter
- Bible Study Fellowship- Substitute Teaching Leader

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INTRODUCTION.

Blacks Law Dictionary defines "Fiduciary Duty" as a duty to act with the highest degree of honesty and loyalty toward another person and in the best interest of the other person. So it's no surprise that fiduciary duties are the highest duties owed under the law. Any case against a fiduciary automatically comes with difficulties and complexities that require specialized knowledge beyond that of a general commercial litigation case. For example, has your fiduciary been sued for a transaction that could be considered self-dealing? If so, here is the Pattern Jury Charge Question you will be faced with at trial:

PJC 104.2 Question and Instruction – Breach of Fiduciary Duty

Defined by Common Law – Burden on Fiduciary

QUESTION _____

Did X comply with his/her fiduciary duty to Y?

Because a relationship of trust and confidence existed between them X owed Y a fiduciary duty. To prove X complied with his/her duty, X must show –

1. The transaction[s] in question [was/were] fair and equitable to Y; and

2. X made reasonable use of the confidence that Y placed on him/her; and

3. X acted in the utmost good faith and exercised the most scrupulous honesty toward Y; and

4. X placed the interests of Y's before his/her own, did not use the advantage of his/her position to gain any benefit for himself/herself at the expense of Y, and did not place himself/herself in any position where his/her self-interest might conflict with his/her obligations as a fiduciary; and

5. X fully and fairly disclosed *all important* information to Y concerning the transaction[s].

ANSWER "Yes" or "No."

ANSWER _____

Can your sued fiduciary meet this burden?

With that in mind, a litigator defending their targeted fiduciary must know as many tips, strategies, and defense mechanics to effectively defend their fiduciary which is what I intend to accomplish with this paper. For a good discussion of many of these topics a complete read of *Mendell v. Scott*, 2023 WL 4712050 (Tex. App.─Hou. [1st Dist.] 2023, mem. opinion).

Below is a checklist of important topics any attorney defending a fiduciary might need to "check off" or just be cognizant of as they begin and continue representation of for their "under the gun" fiduciary.

Checklist:

- ☐ **Section I. INITIAL CONSIDERATIONS**
- ☐ **Section II. WHAT LAW APPLIES?**
- ☐ **Section III. Does the complaining party have STANDING & CAPACITY?**
- ☐ **Section IV. Does the Court have JURISDICTION?**
- ☐ **Section V. What FIDUCIARY DUTIES did your client owe?**
- ☐ **Section VI. Who has the BURDEN OF PROOF?**
- ☐ **Section VII. How are ATTORNEYS' FEES paid?**
- ☐ **Section VIII. What AFFIRMATIVE DEFENSE should be asserted?**
- ☐ **Section IX. OTHER TACTICAL CONSIDERATIONS.**

The Good News: There are Pattern Jury Charges So Use Them: You should be aware of what those require:

"Business" or General Fiduciaries:

- ☐ **PJC 104.1** Question and Instruction - Existence of Relationship of Trust and Confidence.
- ☐ **PJC 104.2** Question and Instruction - Breach of Fiduciary Duty with Burden on Fiduciary (Self-Dealing Transactions/Failure to Disclose)
- ☐ **PJC 104.3** Question and Instruction - Breach of Fiduciary Duty with Burden on Beneficiary.

Trustees:

- ☐ **PJC 235.9** Breach of Duty by Trustee - Other Than Self-Dealing
- ☐ **PJC 235.10** Breach of Duty by Trustee - Self-Dealing - Duties not Modified or Eliminated by Trust
- ☐ **PJC 235.11** Breach of Duty by Trustee - Self-Dealing - Duties Modified but not Eliminated by Trust
- ☐ **PJC 235.12** Breach of Duty by Trustee - Self-Dealing - Duty of Loyalty Eliminated
- ☐ **PJC 235.13** Remedies for Breach of Fiduciary Duty (Comment)
- ☐ **PJC 235.14** Actual Damages for Breach of Trust
- ☐ **PJC 235.15** Exculpatory Clause

I. INITIAL CONSIDERATIONS

A. Do YOU have all the information?

In order to do your job effectively, you need to have all the information. This means all the documents, bank statements, controlling agreements, and correspondence about the issue. If your client is unwilling to agree to all this up front, be aware. The faster you get all of this information, the easier it will be for you to do your job.

B. What's the best long-term goal for the client fiduciary?

Not for you being paid by the client, for the client!!!! Do damage control. Various options are to resign (under the terms of the controlling document, can your client appoint their successor possibly?), stay on and defend the fiduciary, or possibly make a settlement offer. Again, what is best for the client? What are their goals?

More often than not, the beneficiary wants a new fiduciary more than anything else. Even though there may be obvious damages, these suits are costly and time-consuming, often involving expensive accounting work and expert testimony. Even if your fiduciary has caused damage to the beneficiary or the trust, there is a good chance that he or she can escape liability simply by resigning from the fiduciary position.

So, one of the first questions counsel should ask (especially if it means no financial consequences or a low amount of damages) is whether the client is willing to resign in return for a release. If so, then very early in the process, counsel should raise this option with the beneficiary's counsel. Resignation has resolved many fiduciary lawsuits before they got out of hand. Even if this tactic does not work early in the case, it may work later on as the beneficiary grows tired of the fight or the expense. Some of these cases become so expensive and/or time consuming that the beneficiary is relieved to just walk away with a new fiduciary.

One obstacle is that some fiduciaries believe that the position is all about them – they are the boss; they are the anointed one; "the testator picked me"; "this is what my dad wanted"; "I owe it to him"; etc. These fiduciaries are begging for trouble. We have seen millions of dollars awarded by juries against stubborn defendants who persuaded themselves not to settle, due to the conviction that they were doing what the settlor/testator wanted. And what does a lawsuit victory really get the fiduciary anyway? The concept of res judicata offers limited relief when there are ongoing fiduciary duties. See e.g., *Uzell v. Roe*, 2009 WL 1981389 (Tex.App.-Austin, no pet.). Even if the fiduciary wins, a new cause of action arguably accrues the next day, and a jury may not see things so favorably for the fiduciary the next go-round. Each fiduciary decision creates a new opportunity for a beneficiary to sue the fiduciary. Each time the beneficiary sues, the suit probably gets easier (or at least cheaper), especially when the goal is removal.

To be sure, there are situations where the beneficiary's claims are so repetitive and frivolous that subsequent suits become easier for the fiduciary. But who really wants to be in that position? If there is an option to resign in exchange for the release of potential financial liability, that is usually a wise trade.

In some situations, especially trust litigation, the beneficiary may also be satisfied if the trust is terminated. This may be harder to accomplish if there are contingent or residuary beneficiaries. The fiduciary and the lawyer are sometimes faced with a dilemma: save the fiduciary and let the beneficiary loot the trust, or protect the beneficiary from himself and honor the testator's or settlor's wishes? To this writer, it is an easy call. If the fiduciary is sued for damages, he is being attacked personally, and every legitimate legal step should be taken to protect him. If trust termination is an option, it should be considered regardless of what the settlor or testator wanted. It is doubtful that the settlor or testator wanted the fiduciary to be sued or the corpus to be wasted in litigation either. Often, this notion of fulfilling the testator's wishes, or wanting to prevent the beneficiary (or his lawyer) from getting a windfall, will lead counsel to fight to uphold "the intent." While that is a noble fight, it may come at the sacrifice of your client.

C. Is there criminal exposure?

Most fiduciaries have no idea that their conduct can create criminal exposure. The Texas Penal Code has sections that apply specifically to fiduciaries, in particular commercial bribery (Texas Penal Code §32.43) and misapplication of fiduciary funds (Texas Penal Code §32.45). In cases involving only $2,500, both crimes are state jail felonies. Most

fiduciaries do not realize their criminal exposure, and most trial lawyers seem to miss it too. If this is an issue in the case your fiduciary may need to get a criminal defense counsel.

D. Damage Control: What can you fix and please don't make matters worse by retaliating or preventing disclosure.

Consider whether one of the first things your client should do is mitigate the damages – repay the loans, refund the excessive fees, etc. If it is not too late, unwind any potentially damaging self-dealing transactions that the fiduciary entered into with the trust, partnership, etc. Unfortunately, in many cases, when the fiduciary has taken money wrongfully, he has little left to pay back – that's usually why she took it in the first place. Of course, the fiduciary may not want to do any of these. Stress the importance, explain the downside risks, and make sure he understands that his failure to make restitution may make a lawsuit inevitable or even expose him to criminal prosecution. If the money or property is restored, it is much less likely that criminal prosecution will follow, and you probably eliminated the case's attractiveness to a lawyer looking for a contingent fee.

i) Make full disclosure if you haven't already.

Because the fiduciary typically has a duty of full disclosure of all material facts, it is important that he or she make that full disclosure even if it means divulging obvious breaches of fiduciary duty. To most fiduciaries who have messed up, this is unthinkable. They instead look for a way to compound their breach by covering it up or finding a way to keep it hidden.

It is likely that all bad information will come to light in a lawsuit anyway. For the fiduciary it is also extremely difficult, if not impossible, to obtain a release of liability from wrongs that have not been disclosed. That is why he has the duty to disclose. The duty of full disclosure is an "affirmative duty to make a full and accurate confession of all his fiduciary activities, transactions, profits, and mistakes." *Jackson Law Office, P.C. v. Chappell*, 37 S.W.3d 15, 22 (Tex.App.-Tyler 2000, pet. denied) (citing *Montgomery v. Kennedy*, 669 S.W.2d 309, 312–14 (Tex. 1984). The breach of the duty of full disclosure by a fiduciary is tantamount to fraudulent concealment. (*Willis v. Maverick*, 760 S.W.2d 642, 645 (Tex. 1988)).

In making voluntary disclosure (or responding to discovery), the fiduciary must decide whether to assert the attorney-client privilege. While there is no question that the privilege for communications during the litigation must be preserved, the privilege for pre-litigation communication is a different matter. One should consider waiving the attorney-client privilege for communications that occurred pre-litigation, even though *Huie v. DeShazo*, 922 S.W.2d 920 (Tex. 1996), makes clear that the privilege applies to these communications. Protecting the privilege "just because" gives the fiduciary no benefit and probably is a detriment. Everyone assumes that when information is withheld it is damaging; this is especially true for the already-suspicious beneficiary. There is likely very little, if anything, that will be damaging if revealed, whereas asserting a privilege fuels the beneficiary's suspicions and often expands the litigation. In the few cases where we have asserted the privilege, it has never been because of damaging information, but has been dictated by other factors, such as confidential information about other matters which might have become exposed if the privilege was waived.

ii) Meet with the beneficiaries?

By stepping forward and attempting to correct the breaches, or at least acknowledging them, the fiduciary has a better chance of avoiding protracted litigation. To some beneficiaries, the hiding of information, the ducking of their calls, and the fiduciary's indifference are like kerosene on a fire, fueling anger which often triggers litigation. Simultaneously with, or shortly after, the disclosure of information that will inform the beneficiaries of a breach, the fiduciary should meet with the beneficiaries or, at least communicate directly with them. Depending on the type of breach, and whether or not the damages have been mitigated, many beneficiaries are willing to forgive, especially if it is a family member or a close friend and the relationship is still sound. Even if there is significant loss, the beneficiary may not be of a mind to throw good money after bad by pursuing litigation; he may want to avoid the hassle of litigation; or, believe it or not, he may be willing to chalk it up to a mistake or just bad judgment.

In my experience, fiduciary litigation has more often been initiated or expanded because of the lack of communication or miscommunication than by the fiduciary stepping forward with hat in hand. That lack of

communication ultimately leads to an inquiry, usually with the assistance of counsel, and that counsel then exposes more problems. While communication is certainly not the answer to every problem (such as a fiduciary looting all or most of the assets) it will rarely hurt.

E. Don't make matters worse by retaliating.

1. Making it difficult to get information
2. Making them jump through extra hoops for their regular distribution
3. Cutting them off entirely
4. Kicking them out

It is amazing how many fiduciaries fall into these traps. Each of these actions is an additional breach of fiduciary duty. If the fiduciary didn't have a problem before, he is creating one. Some take this step because they think they will beat the beneficiary into submission or scare her off. Others do not want to give the beneficiary the financial resources to take any legal action. Still others may believe that the fiduciary relationship is about them and their role, and not about the beneficiary or the fiduciary's obligation to the beneficiary. Whatever the rationale, these acts usually have the opposite effect of what the fiduciary hopes to accomplish.

1. Making it difficult to get information

The books and records created by the fiduciary are not solely his or hers. They belong to the entity or are held for the benefit of beneficiaries. Often, the fiduciary will try to withhold information from the beneficiary or restrict the beneficiary's access as punishment for bringing a lawsuit. The Supreme Court has confirmed that the fiduciary's duty of disclosure continues even during litigation between the beneficiary and the fiduciary. See, generally, *Huie v. DeShazo*, 922 S.W.2d at 924 (during litigation, information can be sought in an informal fashion rather than through formal discovery). Counsel for some fiduciaries incorrectly take the position that requests for information must be pursued through formal discovery rules rather than under equitable rules. Some trial judges have agreed and have required the information to be formally requested under the Rules of Civil Procedure. No matter how the information is requested, it needs to flow freely. If the beneficiary is already angry enough or suspicious enough to hire a lawyer, withholding information will only make the beneficiary more upset and more suspicious, and the fiduciary can be almost certain that he will repeatedly hear at trial about the difficulties in getting information. Worse, the fiduciary's litigation counsel will have his perceived integrity undermined because he helped the fiduciary withhold or slow-play the information.

2. Making beneficiaries jump through hoops for their regular distribution

Once litigation has been threatened or initiated, some fiduciaries try to restrict the flow of money to their beneficiary. Sometimes this is just a retaliatory tactic because the fiduciary is mad, and sometimes it is designed to restrict the beneficiary's ability to fund the lawsuit. Be sure to counsel your client how she or he should treat a hostile beneficiary. In particular, the regular flow of money to the beneficiary should continue, unless there is a clear and compelling reason to change it.

3. Cutting them off entirely.

Cutting off distributions virtually guarantees a lawsuit and will definitely make the case more appealing to a plaintiff's lawyer. In rare cases, such as where the beneficiary is too weak, tired, or afraid to stand up to the fiduciary, this strategy could work, but it is risky. The more likely result is that this type of retaliation becomes the subject of a new claim, and the beneficiary and his lawyer become eager to drag the retaliating fiduciary before a jury, with an ugly result for the fiduciary usually following.

4. Kicking them out

I have also seen cases where, in retaliation for asking questions, the beneficiary is removed as a co- trustee, from a trust committee, from the family business, or from a similar position. These are equally bad ideas. There is no question that when tension has arisen between a fiduciary and a beneficiary, a "divorce" is a great idea, but it is almost always the better course to wait for a resolution that includes a separation, as compared to forcing it down the throat of a disgruntled beneficiary or partner.

F. Look for and preserve insurance coverage and the right to indemnification.

Your client probably will not have insurance but it must not be overlooked. Insurance for breach of fiduciary duty claims can be found in fiduciary liability policies, D&O coverage, professional liability policies, and, occasionally, commercial general liability policies. Applicability of coverage may be an issue and is probably barred if the covered events include intentional acts or bad faith, etc. But the carrier will often tender a defense, with the question of coverage to be resolved later. If the fiduciary has insurance covering his actions, the policy most likely has a "notice of suit provision" requiring the fiduciary to notify the insurance carrier of any lawsuit or potential claim. The purpose of a "notice of suit provision" in an insurance policy is to enable the insurer to investigate the circumstances of the policy-invoking incident so that the insurer has adequate time to prepare to defend against claims. See *Blanton v. Vesta Lloyds Ins. Co*., 185 S.W.3d 607, 611-12 (Tex.App.- Dallas 2006, no pet.) (citing *Employers Cas. Co. v. Glens Falls Ins. Co.,* 484 S.W.2d 570, 575 (Tex. 1972)). Failure to notify can result in the insurance carrier denying coverage, which will probably result in yet another lawsuit. The crucial inquiry in determining whether an insurer was prejudiced as a matter of law is whether the insurer's ability to defend against the claim was irreparably impaired by the insured's failure to comply with the notice-of-suit provision. See id. at 612 (citing 13 Couch on Insurance §186:14 (3d ed. 2005)). To protect himself, the fiduciary should notify his insurance carrier as soon as possible, even if the fiduciary believes the claim is frivolous.

Indemnification is another protection that may be found in the trust instrument, the partnership agreement, or even corporate bylaws. There are also some indemnification rights in partnership and corporation statutes. It is rare that insurance and indemnification will be of help where the fiduciary has simply stolen the money; but when arguments can be made that the conduct was negligent (like a self- dealing loan gone bad), insurance or indemnification may help.

II. WHAT "LAW" WILL APPLY TO YOUR CASE?

The nature and scope of the fiduciary's "duties", the potential affirmative defenses, the types of damages and potential for other "equitable" relief will vary depending on the type of fiduciary involved, the language of the instrument (if any) under which the-fiduciary operates, the language of the statutory law applicable to the case and/or any judicial precedents applicable to the situation. *Never assume that the "law" applicable to one fiduciary defendant will be equally applicable to the next defendant.*

A. Sources of Fiduciary Law

There are three primary sources of "law" applicable to breach of fiduciary duty cases in Texas:

1) The instrument creating the relationship. (i.e., the Trust, the Will, the Partnership Agreement, Corporate By-Laws);

2) Statutes applicable to the specific type of fiduciary (Estates Code; Texas Trust Code; Bus. Orgs. Code);

3) The "common law" of fiduciary liability to the extent it has not been altered or superseded by the instrument or by statute. *See* Tex. Estates Code § 351.001; Tex. Prop. Code 111.005 and 113.051; Bus. Orgs. Code Section 152.003.

B. Priorities in Application

In most cases, all three of these sources will be involved; in many cases they may seem to require different results. The general rules of priority in the event of a "conflict" are as follows:

1) "Creation Document" The terms of the instrument control, unless to do so would be against "public policy." See, e.g. Tex. Prop. Code 111.002, 111.0035, and 112.031 (setting default rules and restrictions on modification of duties, and providing that obligation to act in "good faith" and in accordance with the purpose of the trust cannot be modified or eliminated), see, Bus. Orgs. Code Section 152.002 (placing restrictions on the partners right to alter the statutory obligations of care, loyalty and good faith by agreement).

2) "Applicable Statute" If there is no "instrument," or if it is silent on a particular subject, the provisions of any applicable statute will control. Statutes are also considered to be ultimate (or current) expression of "public policy."

3) "Common Law" To the extent not expressly altered by either the instrument or by statute, the "common law" will apply.

C. Beware of Modification of Fiduciary Duties

In some situations, the governing instrument will modify the usual powers and duties of the fiduciary. For example, in *Dallas Services for Visually Impaired Children, Inc. v. Broadmoor II*, 635 S.W.2d 572, 576 (Tex. App. ─Dallas 1982, writ ref'd n.r.e.), the court held that where the will contains language granting the executor all the rights, powers and privileges that are given to trustees under the Texas Trust Code, the independent executor will have authority to sell estate property as is "necessary, desirable or advisable" for carrying out any of the other powers specified in the instrument.

A trust instrument may limit a trustee's duty to diversify, permit the trustee to retain inception assets, or even authorize highly speculative or risky investments. Although Tex. Trust Code § 111.0035 sets out certain statutory duties and obligations that cannot be modified by the settlor, the settlor still has pretty broad authority to modify a trustee's duties.

For instance, the Trust Code provides that the following duties cannot be modified:

Trust Code §111.0035. Default and Mandatory Rules; Conflict Between Terms and Statute

(a) Except as provided by the terms of a trust and Subsection (b), this subtitle governs:

(1) the duties and powers of a trustee;

(2) relations among trustees; and

(3) the rights and interests of a beneficiary.

(b) The terms of a trust prevail over any provision of this subtitle, except that the terms of a trust may not limit:

(1) the requirements imposed under Section 112.031;

(2) **the applicability of Section 114.007 to an exculpation term of a trust;**

(3) the periods of limitation for commencing a judicial proceeding regarding a trust;

(4) a trustee's duty:

(a) with regard to an irrevocable trust, to respond to a demand for accounting made under Section 113.151 if the demand is from a beneficiary who, at the time of the demand:

(i) is entitled or permitted to receive distributions from the trust; or

(ii) would receive a distribution from the trust if the trust terminated at the time of the demand; and

(b) **to act in good faith and in accordance with the purposes of the trust;**

(5) the power of a court, in the interest of justice, to take action or exercise jurisdiction, including the power to:

(A) modify, reform, or terminate a trust or take other action under Section 112.054;

(B) **remove a trustee under Section 113.082;**

(C) exercise jurisdiction under Section 115.001;

(D) require, dispense with, modify, or terminate a trustee's bond;

(E) adjust, deny, or order disgorgement of a trustee's compensation if the trustee commits a breach of trust; or

(F) make an award of costs and attorney's fees under Section 114.064; or

(6) the applicability of Section 112.038.

(c) **The terms of a trust may not limit any common-law duty to keep a beneficiary of an irrevocable trust who is 25 years of age or older informed at any time during which the beneficiary**:

(1) is entitled or permitted to receive distributions from the trust; or

(2) would receive a distribution from the trust if the trust were terminated

Trust Code - § 113.082. Removal of Trustee

(a) A trustee may be removed in accordance with the terms of the trust instrument, or, on the petition of an interested person and after hearing, a court may, in its discretion, remove a trustee and deny part or all of the trustee's compensation if:

(1) the trustee materially violated or attempted to violate the terms of the trust and the violation or attempted violation results in a material financial loss to the trust;

(2) the trustee becomes incapacitated or insolvent;

(3) the trustee fails to make an accounting that is required by law or by the terms of the trust; or

(4) the court finds other cause for removal.

(b) A beneficiary, co-trustee, or successor trustee may treat a violation resulting in removal as a breach of trust.

(c) A trustee of a charitable trust may not be removed solely on the grounds that the trustee exercised the trustee's power to adjust between principal and income under Section 113.0211.

The court may remove a trustee on grounds that the court, in its discretion, deems necessary and proper. *Akin v. Dahl*, 661 S.W.2d 911, 913 (Tex.1983). If an issue of fact exists concerning alleged improper conduct of a trustee, however, that issue is properly submitted to the jury. *Beaty v. Bales*, 677 S.W.2d 750, 758 (Tex.App.—San Antonio 1984, writ ref'd n.r.e.); *Yturri v. Yturri*, 504 S.W.2d 809 (Tex.Civ.App.—San Antonio 1973, no writ) (reversing summary judgment denying removal of trustee because issues of material fact existed). *Novak v. Schellenberg*, 718 S.W.2d 822, 824 (Tex. App. 1986)

Some governing instruments modify the duty of loyalty, which can have profound impact on the case as a whole. For instance, an instrument may permit the fiduciary to self-deal by entering into contracts or having dealings with itself in its individual capacity or as a personal representative or trustee of another estate or trust. If there is such a provision, then the duty of loyalty has been modified. The fiduciary still has a duty to act in good faith and in accordance with the purposes of the trust. Tex. Trust Code § 111.0035(b)(4)(B). However, the trustee's burden of proof to overcome a breach of the duty of loyalty claim is much more manageable. Compare Texas Pattern Jury Charge 235.10 to 235.11 and 235.12.

III. DOES THE COMPLAINING PARTY HAVE STANDING AND CAPACITY?

Defending a fiduciary who has been sued, one of your initial inquiries should be whether the plaintiff has standing and capacity to sue. A plaintiff must have both *standing* and *capacity* to file a lawsuit. *Coastal Liquids Trans. L.P. v. Harris County. App. District,* 46 S.W. 3d 880, 884 (Tex. 2001). Standing "focuses on whether a party has a sufficient relationship with the lawsuit so as to have a 'justiciable interest' in its outcome." *Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845, 848 (Tex. 2005). Capacity is "a procedural issue dealing with the personal qualifications of a party to litigate." *Austin Nursing Center, Inc. v. Lovato,* 171 S.W.3d 845, 848 (Tex. 2005). "A plaintiff has *standing* when it is personally aggrieved, regardless of whether it is acting with legal authority; a party has *capacity* when it has the legal authority to act, regardless of whether it has a justiciable interest in the controversy." *Id.* (quoting *Nootsie, Ltd. v. Williamson Cty. Appraisal Dist.*, 925 S.W.2d 659, 661 (Tex. 1996)). A

plaintiff lacks capacity when, as pertinent here, he "is not entitled to recover in the capacity in which he sues." TEX. R. CIV. P. 93(2).

If the Plaintiff does not have both standing and capacity, the lawsuit cannot continue because the trial court lacks subject-matter jurisdiction of the case. The procedural pleadings required to challenge this are discussed below. Your knowledge of these issues, particularly at the outset of any ligation involving a fiduciary is critical to your representation of that fiduciary.

A. <u>Standing</u>:

Standing is a constitutional prerequisite to maintaining a suit under Texas law. *See Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443–44 (Tex. 1993). Each analysis of standing is done on a case-by-case basis given the governing instrument and current circumstances of the beneficiaries. The test for constitutional standing in Texas requires that there be a "real controversy between the parties, which ... will be actually determined by the judicial declaration sought." *Id.* at 446. This issue focuses on whether a party has a sufficient relationship with the lawsuit so as to have a "justiciable interest" in its outcome. *Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845, 848 (Tex. 2005). Constitutional standing is required for the court to have subject-matter jurisdiction; thus, it cannot be waived and may be raised by a party or a court at any time, including on appeal. *See Tex. Ass'n of Bus.*, 852 S.W.2d at 445. To demonstrate standing, the plaintiff is required to allege facts that affirmatively demonstrate the court's jurisdiction to hear the cause. *Id.* at 446.

Standing "focuses on whether a party has a sufficient relationship with the lawsuit so as to have a 'justiciable interest' in its outcome." *Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845, 848 (Tex. 2005). "The general test for standing in Texas requires that there '(a) shall be a real controversy between the parties, which (b) will be actually determined by the judicial declaration sought.'" *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993). To have standing, a plaintiff must be personally aggrieved, and his alleged injury must be concrete and particularized, actual or imminent and not hypothetical. *Inman* at 304 and 307. "If injury is only hypothetical, there is no real controversy." *DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 307 (Tex. 2008).

Standing involves the Plaintiff's justiciable interest in a controversy. See *Esty v. Beal Bank S.S.B.,* 298 S.W.3d 280 (Tex. App.—Dallas 2009, no pet); *(citing Nootsie, Ltd. v. Williamson County App. Dist.,* 925 S.W.2d 659 (Tex.1996); *Town of Fairview v. Lawler,* 252 S.W.3d 853, 855 (Tex. App.—Dallas 2008, no pet.)). It is a request of subject matter jurisdiction and a prerequisite to bringing a lawsuit under Texas law. *See Tex. Ass'n of Bus. v. Tex. Air Control Bd.,* 852 S.W.2d 440, 444-45 (Tex.1993). Absent a wrong against a legal right belonging to a plaintiff, plaintiff has no standing to litigate. *See Id. (citing Cadle Co. v. Lobingier,* 50 S.W.3d 662, 669-70 (Tex. App.—Fort Worth 2001, pet. denied)).

<u>Three elements to standing:</u>

First, is the determination of whether the plaintiff has been *personally* injured. *Meyers v. JDC/Firethorne, Ltd.,* 548 S.W.3d 477, 485 (Tex. 2018). **Second**, the plaintiff's alleged injury must be "fairly traceable" to the defendant's conduct because "a court [can] act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." *Id*. The second inquiry requires the showing of a causal connection between the plaintiff's injury and the defendant's conduct. *Id*. **Third**, the "redressability" requirement, requires a plaintiff to "show that there is a substantial likelihood that the requested relief will remedy the alleged injury." *Id*.

Executor maintains exclusive standing for the estate. It is well-settled that the personal representative of the estate of a decedent is ordinarily the only person entitled to sue for the recovery of property belonging to the estate. Tex. Estates Code § 351.054(a) ("an executor or administrator may sue to recover property, debts, or damages."); *see also Shepherd v. Ledford*, 962 S.W.2d 28, 31 (Tex. 1998); *Frazier v. Wynn*, 472 S.W.2d 750, 752 (Tex. 1971); *Chandler v. Welborn*, 156 Tex. 312, 318, 294 S.W.2d 801, 806 (1956); *Ford Motor Co. v. Cammack*, 999 S.W.2d 1, 4 (Tex. App.—Houston [14th Dist.] 1998, pet. denied). **This is the same rule for a trustee of a trust, they are the only one withstanding to sue on behalf of the trust.**

Standing in Trust Matters:

In the trust world, "statutory standing" is conferred in TEX. PROP. CODE § 115.011(a), which states that an "interested person" may bring an action under § 115.001. TEX. PROP. CODE § 115.011(a).

An "interested person" is defined in the Property Code as:

> "A trustee, beneficiary, or any other person having an interest in or claim against the trust. Whether a person, excluding a trustee or named beneficiary, is an interested person may vary from time to time and must be determined according to the particular purposes and matter involved in the proceeding." TEX. PROP. CODE § 111.004(7).

When it comes to standing in trust matters, a detailed analysis of these statutes and the trust in trust documents at issue must take place. For instance, in *Berry v. Berry,* S.W.3d 516 (Tex. 2022) the Texas Supreme Court provided a detailed analysis of the statutes, governing document provision, in light of the claims being brought to determine standing of the Plaintiff.

So in any case against a fiduciary, as defense council, you need to analyze whether the Plaintiff has standing and whether that standing is vested.

B. <u>Contingent Beneficiaries:</u>

The Supreme Court in *Berry v. Berry,* 646 S.W.3d 516 (Tex. 2023) cleared up the rights of that particular contingent interest holder to sue the fiduciary:

In *Berry*, the parties disputed whether the plaintiff fit within the definition of "interested person" under Section 115.001 of the Trust Code. They explained that "'standing' has historically not always been used in its 'proper, jurisdictional sense.'" *Id.* (quoting *Pike v. Tex. EMC Mgmt., LLC,* 610 S.W.3d 763, 774 (Tex. 2020)). "To have standing in the 'proper, jurisdictional sense,' a plaintiff must allege, among other things, a concrete, particularized injury in fact." Id. (citing *Heckman v. Williamson Cnty*., 369 S.W.3d 137, 154 (Tex. 2012)). The Court noted that the parties focused their arguments "exclusively on whether [the plaintiffs] fall within the class of persons statutorily authorized to bring the causes of action they have asserted," not on whether the plaintiffs had satisfied their burden to allege a concrete, particularized injury, as is required for constitutional standing. *Id.* Because the parties raised only a statutory-interpretation question, the Court confined its inquiry to that issue. *Id.*

Resolving the question of whether the plaintiffs fell within the class of persons statutorily authorized under Section 115.001 to bring the causes of action asserted "may overlap with, but does not necessarily implicate, questions of standing bearing on subject-matter jurisdiction." *Id.* (citing *Pike*, 610 S.W.3d at 775). For instance, the Court explained, "the statutory inquiry into whether an unnamed beneficiary is an 'interested person' may resemble in some respects the jurisdictional inquiry into whether the unnamed beneficiary has alleged a concrete injury, and in that context it may be addressed in a jurisdictional plea." *Id. at 527 n.3*. But the Court emphasized that these two "are nevertheless distinct inquiries." *Id*.; see also *Tex. Bd. of Chiropractic Exam'rs v. Tex. Med. Ass'n,* 616 S.W.3d 558, 566–67 (Tex. 2021). The question whether a plaintiff has established his right to go forward with [his] suit or satisfied the requisites of a particular statute pertains in reality to the right of the plaintiff to relief rather than to the [subject-matter] jurisdiction of the court to afford it. Thus, a plaintiff does not lack standing in its proper, jurisdictional sense simply because he cannot prevail on the merits of his claim; he lacks standing [when] his claim of injury is too slight for a court to afford redress."

In *Pike*, the Court reasoned, that although a contingent interest, by definition, is conditioned on the occurrence of an event that may or may not take place, this does not mean that every suit involving a contingent interest is unripe. Rather, the Trust Code allows "interested person[s]" to sue concerning a trust, and an interest can be "any interest, whether ... present or future, vested or contingent." TEX. PROP. CODE §§ 115.011(a), 111.004(6).

Further from *Berry*, contingent beneficiaries are sufficiently "interested" to bring a claim concerning a trust under section 115.001 of the Trust Code. *Berry,* 529-30. *Berry* held that an unnamed member of a class of "descendants" who is a contingent beneficiary can sue trustees for an alleged breach of fiduciary duty that reduces funds flowing into the trust. The "contingent status" of an interest cannot render it insufficient because that conclusion "would essentially undo the [Trust Code's] express grant of rights to parties with 'contingent' interests." *Id*. at 529. It would make no sense to hold that the Legislature, in enacting the Trust Code, gave trial courts jurisdiction over suits they can never hear because the nature of a contingent beneficiary's interest renders them categorically unripe. Rather, chapters 111 and 115 of the Trust Code indicate that the mere involvement of contingent interests does not necessarily render a case unripe.

There are good reasons that the Trust Code authorizes contingent beneficiaries to sue: they have present as well as future rights that may be affected by a particular dispute. Among these are the right to sue for an accounting by the trustee, see TEX. PROP. CODE § 115.001(a)(9), and the right to sue to remove a trustee. See id. § 115.001(a)(3). Each case requires a distinct analysis of standing if a contingent beneficiary is involved.

Procedure to raise lack of standing.

How do you challenge standing? "Subject matter jurisdiction is a power that exists by operation of law only, and cannot be conferred upon any court by consent or by waiver." *Dubai Petroleum Co. v. Kazi,* 12 S.W.3d 71, 76 (Tex. 2000). Standing is implicit in subject matter jurisdiction, which is essential to the court's authority to decide a case. *Tex. Ass'n of Bus. v. Tex. Air Control Bd*., 852 S.W.2d 440, 443 (Tex. 1993). Standing is challenged by a ***plea to the jurisdiction*** or other procedural devices, and a plea to the jurisdiction is a challenge to the court's authority to decide the case. *Sneed v Webre*, 465 S.W.3d 169, 180 (Tex. 2015).

C. <u>Is Standing Vested?</u>

Does the plaintiff have a *vested* interest which provides from standing? Beneficiaries of an estate or trust and shareholders and partners of a business entity have a vested interest that gives them sufficient standing to pursue claims. *In re Townley Bypass Unified Credit Trust,* 252 S.W.3d 717 (Tex. App.—Texarkana 2008, pet. denied) (remainder vests when conditions precedent exist other than termination of prior estates). There are various ways that standing can be lost- satisfaction of an interest, revocability of a trust or other interest, or exercise of a power of appointment.

D. <u>Potential Divestment of Standing:</u> Can standing be lost by future events or actions? Yes, pertinent points in this regard are as follows:

- Is the trust revocable by its grantor(s) or anyone else? Revocability of the trust may divest the plaintiff of standing.
- Does the trust agreement contain a provision that would allow a potential party to strip the plaintiff of his or her standing?
- Does the governing document contain a provision that would allow a potentially adverse party to call the plaintiff's interest based on a value, such as book value, that would not include the alleged claims?
- Does the governing document have a power of appointment that could divert a potential interest?
- If the case involves a challenge to estate planning documents or other documents with a no-contest clause, has the beneficiary otherwise accepted benefits under the document. If so, Texas law is now clear that they lack standing to pursue such a challenge. *Estate of Johnson, 631 S.W.3d 51* (Tex. 2001).

A remainder beneficiary of a revocable trust has been held to lack standing to pursue claims regarding such trust. *See Moon v. Lesikar,* 230 S.W.3d 800 (Tex. App.—Houston [14th Dist.] 2007, pet. denied). But the ability to revoke the trust is not the only consideration. Trust agreements should also be reviewed to determine if a beneficiary's interest can be divested through a power of appointment vested in the potential defendant or third party. The beneficiary has what is known as a vested remainder interest, subject to divestment. *Grohn v. Marquardt,* 487 S.W.2d 214, 215 (Tex. Civ. App.—San Antonio 1972, writ ref'd n.r.e.).

E. Can a Person Acquire Standing?

Just as a potential plaintiff's standing can be lost, there are also times that standing can be gained. For example, an interest in an entity may be *transferred/assigned* to the individual as a result of a purchase, gift, the exercise of a power of appointment, or even under a settlement arrangement. Assuming the interest was validly acquired, standing maybe obtained even though the person didn't have it before the transaction.

What if the fiduciary refuses to act? For instance, what if the fiduciary refuses to bring a claim on behalf of the estate or trust (or partnership……..). A potential plaintiff may acquire standing when the fiduciary refuses to act. In *Interfirst Bank—Houston, N.A. v. Quintana Petroleum Corp.* (see below), the appellate court noted that a beneficiary of a trust generally lacks standing to pursue a claim against someone other than the trust. But, the beneficiary may be able to pursue a claim when the fiduciary refuses to do so. *See* 699 S.W.2 d at 874; *see also Grinnell v. Munson,* 137 S.W.3d 706, 714 (Tex. App.—San Antonio 2004, no pet) (stating that "[a] beneficiary is authorized to enforce an action when the trustee cannot or will not enforce it").

F. Derivative Claims.

Generally speaking, only a trustee has standing to bring suit on behalf of a trust; nevertheless, if the trustee fails or refuses to bring a suit, a beneficiary may have standing to bring a derivative action on behalf of the trustee. In line with that, a court may not interfere with the exercise of a trustee's discretionary powers and substitute its discretion for that of the trustee, except where there is fraud, misconduct, or clear abuse of discretion. *In re XTO Energy, Inc.*, 471 S.W.3d at 131; *DeRouen v. Bryan*, 2012 WL 4872738 at 4; *Di Portanova v. Monroe*, 229 S.W.3d 324, 330 (Tex. App.─Houston [1st Dist.] 2006, pet. denied); *Beaty v. Bales*, 677 S.W.2d 750, 754 (Tex. App.─San Antonio 1984, writ ref'd n.r.e.*); Corpus Christi Bank & Trust v. Roberts*, 597 S.W.2d 752, 754 (Tex. 1980).

A trustee may manage trust property as the trustee considers proper. Tex. Prop. Code § 113.006. By statute and common law, a trustee is given a wide measure of discretion in the prudent operation of a trust. *Tomlinson v. Tomlinson*, 960 S.W.2d 337,339 (Tex. App. ─Corpus Christi-Edinburg 1997, writ denied). The terms of the trust instrument may limit or expand trustee powers supplied by the Trust Code. *See In re XTO Energy, Inc*., 471 S.W.3d 126, 130 (Tex. App.─Dallas 2015, no pet.).

Notwithstanding the breadth of discretion granted to a trustee in the terms of a trust instrument, including the use of terms such as "absolute," "sole," or "uncontrolled," the trustee must exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries. Tex. Trust Code § 113.029(a). While that is the general rule, a Court may grant a beneficiary or other interested person standing to sue on behalf of a trust or other entity where the trustee subverts the "intent of the settlor."

On of the most cited cases on this is *Interfirst Bank-Houston v. Quintanilla Petroleum Corporation*, 699 S.W.2d 864 (Tex.App.—Houston [1st Dist.] 1985, writ den.). The Houston Appellate Court held that it is a right and responsibility of the testamentary trustee to assure that all property willed into a trust is properly conveyed by the executor of the settlor's estate. It is only when the trustee wrongfully cannot or will not enforce the cause of action that he has against the third person that a beneficiary is allowed to enforce it. In general, a derivative suit may be brought where (i) the trusteeship is vacate; (ii) the trustee has been absent for many years, (iii) the trustee has an adverse interest, (iv) the trustee refuses to bring the suit after demand or simply fails to act, (v) the trustee is held estop to sue the third party, or (vi) the trustee cannot be subject to the jurisdiction of the court.

However, not every potential derivative claim can be brought by the beneficiary. In *re: XTO Energy, Inc.*, 2015 WL 4524197 (Tex.App.—Dallas 2015, no pet.), the appellate court held that a beneficiary of a trust may not bring an action on behalf of the trust simply because the trustee has declined to do so. The trustee's refusal to act must be wrongful for the beneficiary to be allowed to step into his shoes. So not every potential derivative claim requested by a beneficiary will be a viable claim and stand up to scrutiny by the court.

In determining the issue of whether the trustee abused discretion in exercising or failing to exercise a power, the following circumstances may be relevant: (1) the extent of the discretion conferred upon the trustee by terms of the trust; (2) the purposes of the trust; (3) the nature of the power; (4) the existence or non-existence, the definiteness or indefiniteness, of any external standard by which the reasonableness of the trustee's conduct can be judged; (5) the

motives of the trustee in exercising or refraining from exercising the power; and (6) the existence or nonexistence of an interest in the trustee conflicting with that of the beneficiaries. Keep in mind that the burden of proving this derivative standing….that the fiduciary is refusing to act, is on the beneficiary.

When an Estate Beneficiary Can Bring Derivative Suit Against Third Party

Generally, only the personal representative of an estate is entitled to sue to recover estate property. *Austin Nursing Center, Inc. v. Lovato*, 171 S.W.3d 845, 850 (Tex. 2005); *Shepherd v. Ledford*, 962 S.W.2d 28, 31-32 (Tex. 1998); *Frazier v. Wynn*, 472 S.W.2d 750, 752 (Tex. 1971). However, there are a few exceptions.

An heir at law can maintain a suit on behalf of an estate during the four-year period allowed by law for instituting administration proceedings if they allege and prove that there is no administration pending and none is necessary. *Id*. Further, when an estate administration has closed, an heir can file suit to recover property of the estate. *Jordan v. Lyles*, 455 S.W.3d 785, 790-91 (Tex. App. ─Tyler 2015, no pet.). Additionally, a family agreement regarding the disposition of the estate's assets can support the assertion that no administration of the decedent's estate is necessary. *Lovato*, 171 S.W.3d at 851. And where an order admits a will to probate as a muniment of title, and the order contains express findings that there are no unpaid debts owing the estate and there is no necessity of administration of the estate, that is the functional equivalent of the closing of an independent administration and the heirs will have standing to sue on behalf of the estate. *Jordan v. Lyles*, 455 S.W.3d 785, 790-91 (Tex. App. ─Tyler 2015, no pet.).

Further, heirs may bring suit when the personal representative cannot, or will not, bring the suit or when the personal representative's interests are antagonistic to those of the estate. *Mayhew v. Dealey*, 143 S.W.3d 356, 370-71 (Tex. App. ─Dallas 2004, pet. denied) citing *Chandler v. Welborn*, 156 Tex. 312, 318, 294 S.W.2d 801, 806 (Tex. 1956). However, "expectancy" alone is not enough. "An expectant heir has no present interest or right in property that he may subsequently inherit and consequently he cannot maintain a suit for the enforcement or adjudication of a right in the property." *Davis v. First National Bank of Waco,* 139 Tex. 36, 161 S.W.2d 467, 472 (Tex. 1942).

G. Capacity:

Capacity is "a procedural issue dealing with the personal qualifications of a party to litigate." *Austin Nursing Center, Inc. v. Lovato,* 171 S.W.3d 845, 848 (Tex. 2005). "When capacity is contested, Rule 93(2) requires that a verified plea be filed anytime the record does not affirmatively demonstrate the plaintiff's or defendant's right to bring suit or be sued in whatever capacity he is suing." *Sneed v. Webre*, 465 S.W.3d 169, 188 (Tex. 2015)(citing Tex. R. Civ. P. 93(2)).

Whether the issue is a standing or capacity issue is of great importance. If it is a standing issue, the lack of standing can be raised at any time, even for the first time on appeal, and the issue cannot be waived. *Austin Nursing Center, Inc. v. Lovato*, 171 S.W.3d 845, 849 (Tex. 2005). If standing is lacking, the trial court is deprived of subject-matter jurisdiction and the case must be dismissed. *Pike v. Texas EMC Management, LLC*, 610 S.W.3d 763, 773-774 (Tex. 2020).

If the issue is a capacity issue, the issue must be raised through a **verified denial**, or it is likely waived. *Sixth RMA Partners, L.P. v. Sibley,* 111 S.W.3d 46, 56 (Tex. 2003). Capacity, in contrast with standing, exists when a party has the legal authority to act, regardless of whether it has a justiciable interest in the controversy. Because capacity does not implicate a court's subject-matter jurisdiction, it may be waived.

In *Pledger v. Schoellkopf*, the Texas Supreme Court held that the question whether a claim brought by a shareholder actually belongs to the corporation is a matter of capacity. 762 S.W.2d 145, 146 (Tex. 1988). "When capacity is contested, Rule 93(2) requires that a ***verified plea*** be filed anytime the record does not affirmatively demonstrate the plaintiff's ... right to bring suit ... in *whatever* capacity he is suing." *Id.* Because the defendants did not file a plea contending that the plaintiff's claims were owned by the corporation, we concluded the plaintiff was entitled to recover on those claims and it was unnecessary to determine who owned them. *Id.* at 145–46.19 Requiring a defendant to raise this "wrong plaintiff" problem by verified plea allows the plaintiff an opportunity to correct the problem if possible, such as through assignment or joinder, and signals whether the parties need to develop and present evidence on the issue at trial. *See CHCA E. Hous., L.P. v. Henderson*, 99 S.W.3d 630, 633–34 (Tex. App.—Houston [14th Dist.]

2003, no pet.) Absent such a plea, "[j]ust how [the plaintiff] acquired the cause of action is not before [the] Court." *Van Voorhies v. Hudson*, 683 S.W.2d 809, 811 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.).

For instance, the question of whether the claims of partnership belong to the partners or the partnership is a matter of capacity because it is a challenge to the partner's legal authority to bring the suit. *See Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845, 848 (Tex. 2005) (explaining that capacity "is conceived of as a procedural issue dealing with the personal qualifications of a party to litigate").

For further, in depth discussion, of Standing, Capacity, and Derivative Claims see Lauren Davis Hunt's *Standing and Capacity in Estate and Trust Litigaiton* paper from the 46th Annual Advanced Estate Planning & Probate Course.

IV. JURISDICTION OF THE COURT?

With a separate section on Standing and Capacity, this jurisdictional section will just focus on jurisdiction as it relates to the proper court. Always question whether or not the Court has the appropriate jurisdiction of the case. For instance, if an executor is being sued, it almost always has to be in the estate proceeding where original jurisdiction of the probate lies. As discussed below, the jurisdiction of a statutory probate court to hear "ancillary" matters is very broad, so always consider whether you should try to have the case "pulled" or "transferred" into the probate court. These are strategies that are best made at the outset of any case.

A. Estate Proceedings:

All "probate proceedings" must be filed and heard in a court exercising "original probate jurisdiction." Tex. Est. Code § 32.001(a). In the Estates Code, the terms "probate matter," "probate proceedings," "proceeding in probate," and "proceedings for probate" are synonymous and include a matter or proceeding relating to a decedent's estate. Tex. Est. Code § 22.029. In Texas, there are generally three types of courts that exercise original jurisdiction over probate proceedings: Constitutional County Courts (also referred to as County Courts), County Courts at Law (also referred to as Statutory County Courts) and Statutory Probate Courts. District Courts sometimes exercise probate jurisdiction over contested probate matters that originated in the Constitutional County Court.

1. Jurisdiction over a "probate proceeding"

Any court exercising original probate jurisdiction has jurisdiction over "probate proceedings." Tex. Est. § 32.001(a). The Estates Code defines a "probate proceeding," as including:

(a) The probate of a will, with or without administration of the estate;
(b) The issuance of letters testamentary and of administration
(c) An heirship determination or small estate affidavit, community property administration, and homestead and family allowances;
(d) An application, petition, motion, or action regarding the probate of a will or an estate administration, including a claim for money owed by the decedent;
(e) A claim arising from an estate administration and any action brought on the claim;
(f) The settling of a personal representative's account of an estate and any other matter related to the settlement, partition or distribution of an estate; and
(g) A will construction suit; and
(h) A will modification or reformation proceeding under Subchapter J, Chapter 255 of the Estates Code.

Jurisdiction over "matters related to the probate proceeding"

There are many types of cases that do not fall within the § 31.001 definition of a "probate proceeding," but that are matters that relate in some way to an existing "probate proceeding." Depending on the type of court hearing the probate proceeding, the matters related to the probate proceeding may or may not be heard by that court. Tex. Est. Code § 32.001 determines whether a "matter related to a probate proceeding" can be heard in the particular type of court in which the underlying probate is pending.

Importantly, a probate proceeding must be pending in the court before a court can exercise its probate jurisdiction

over matters related to the probate proceeding. *Valdez v. Hollenbeck,* 465 S.W.3d 217, 223 (Tex. 2015), *citing Frost Nat'l Bank v. Fernandez,* 315 S.W.3d 494, 506 (Tex. 2010); *Mortensen v. Villegas,* 630 S.W.3d 355 (Tex. App.—El Paso 2021, no pet.). If a probate proceeding is not pending in a court exercising probate jurisdiction, then a matter that would be related to a probate proceeding if a probate proceeding existed, can be brought in any other court of proper jurisdiction. *See Garza v. Rodriguez*, 18 S.W.3d 694, 699 (Tex. App.—San Antonio 2000, no writ).

Any cause of action "related to a probate proceeding" must be brought in a Statutory Probate Court unless the jurisdiction of the Statutory Probate Court is concurrent with the jurisdiction of a District Court as provided by Section 32.007 or with the jurisdiction of any other court. Tex. Est. Code § 32.005(a).

Statutory Probate Courts has concurrent jurisdiction with Texas District Courts. Under Tex. Est. Code § 32.007, a Statutory Probate Court has concurrent jurisdiction with the District Court in:

(1) a personal injury, survival, or wrongful death action by or against a person in the person's capacity as a personal representative;
(2) an action by or against a trustee;
(3) an action involving an inter vivos trust, testamentary trust, or charitable trust,

a. County Courts at Law and "matters related to the probate proceeding"

In counties where there is no Statutory Probate Court, but there is a County Court at Law exercising original probate jurisdiction, the County Court at Law has jurisdiction over "matters related to a probate proceeding," that are listed in "Section A" and "Section B" of Tex. Est. Code § 31.002, but not those matters listed in "Section C." Tex. Est. Code § 31.002(b). Such jurisdiction is in addition to jurisdiction over "probate proceedings," as defined in Tex. Est. Code § 31.001, and "pendant and ancillary jurisdiction" under Tex. Est. Code § 32.001(b).

Once a probate proceeding is pending in a County Court at Law, that court has dominant jurisdiction over "matters related to a probate proceeding" that are listed in Section A and Section B of Tex. Est. Code § 31.002. *See Green v. Watson,* 860 S.W.2d 238, 243 (Tex. App.—Austin 1993, no writ).

b. Constitutional County Court and "matters related to the probate proceeding"

In addition to having jurisdiction over "probate proceedings," as defined in Tex. Est. Code § 31.001, and "pendant and ancillary jurisdiction" under Tex. Est. Code § 32.001(b), Constitutional County Courts have jurisdiction over certain "matters related to the probate proceeding" as defined by Tex. Est. Code § 31.002.

Where there is no Statutory Probate Court or County Court at Law exercising probate jurisdiction in the county, a Constitutional County Court has jurisdiction of all "matters related to the probate proceeding" that are listed in "Section A" of Tex. Est. Code § 31.002. The Constitutional County Court does not have jurisdiction over matters related to the probate proceeding that are listed in Sections B or C of § 31.002, which notably include matters related to testamentary trusts created by the decedent, or inter vivos trusts created by the decedent. If these types of issues arise and the probate proceeding is before the Constitutional County Court, those matters will need to be heard by the District Court in a separate proceeding.

Once a probate proceeding is pending in a County Court at Law, that court has dominant jurisdiction over "matters related to a probate proceeding" that are listed in Section A of Tex. Est. Code § 31.002. *See Green v. Watson,* 860 S.W.2d 238, 243 (Tex. App.—Austin 1993, no writ).Note that there are special jurisdiction provisions related to contested probate matters brought in Constitutional County Courts. *See* section II(E) below for more discussion.

Contested Probate Matters in Constitutional County Court in county without County Court at Law

If a matter in a probate proceeding being heard by the Constitutional County Court becomes contested, and if the county does not have a Statutory Probate Court or a County Court at Law exercising original probate jurisdiction, then

the judge of the Constitutional County Court may, on the judge's motion, or shall, on the motion of any party to the proceeding, either request the assignment of a Statutory Probate Court judge to hear the contested matter or transfer the contested matter to the District Court. Tex. Est. Code § 32.003.

Plea in Abatement and Plea to the Jurisdiction

If a suit is brought in one court when another court has exclusive jurisdiction, then a party should challenge the issue of exclusive jurisdiction by filing a plea to the jurisdiction in the court that does not have jurisdiction. See *In re Puig*, 351 S.W.3d 301, 306 (Tex. 2011)

When two courts have concurrent jurisdiction to determine inherently intertwined issues, a party should file a plea in abatement in the court where the second suit is commenced to draw a court's attention to another court's possible dominant jurisdiction. *In re Puig*, 351 S.W.3d 301, 306 (Tex. 2011) (the filing of a plea to the jurisdiction rather than a plea in abatement was inappropriate where the party wished to challenge a court's interference with another court having dominant jurisdiction rather than exclusive jurisdiction).

B. Attorney-in-Fact Jurisdiction

Statutory probate courts and district courts have as concurrent jurisdiction with regard to: 1) Actions against an agent or former agent under a power of attorney arising out of the agent's performance of the duties of an agent; and 2) Actions to determine the validity of a power of attorney or to determine an agent's rights, powers, or duties under a power of attorney. Tex. Estates Code § 32.007. But if it relates to a probate proceeding, the statutory probate court may have exclusive jurisdiction of all applications, petitions, and motions regarding probate or administrations. See TEX. ESTATES CODE § 32.005(a).

C. Trust Jurisdiction.

The jurisdiction applicable to trusts is set out in Texas Property Code Chapter 115 and Texas Estates Code Chapter 32.

a. District Courts generally have original and exclusive jurisdiction over all proceedings by or against a trustee, including the following:

(1) Construe a trust instrument;
(2) Determine the law applicable to a trust instrument;
(3) Appoint or remove a trustee; and
(4) Liability of a trustee;
(5) Ascertain beneficiaries;
(6) Make determinations of fact affecting the administration, distribution, or duration of a trust;
(7) Determine a question arising in the administration or distribution of a trust;
(8) Relieve a trustee from any or all of the duties, limitations, and restrictions otherwise existing under the terms of the trust instrument or of this subtitle;
(9) Require an accounting by a trustee, review trustee fees, and settle interim or final accounts; and
(10) Surcharge a trustee. TEX. PROP. CODE § 115.001(a)(1)-(10)(emphasis added).

See also TEX. PROP. CODE § 110.004(18) ("'Trustee" means person holding property in trust, including original, additional, or successor trustee, whether or not person is appointed or confirmed by a court.") But there are some exceptions. The district court's exclusive jurisdiction may be concurrent with or in some cases be secondary to: (1) Statutory probate court; (2) Ct that creates a trust under Section 1301 of the Texas Estates Code; (3) Court that creates a trust under Section 142.005; (4) Justice court under Chapter 27, Government Code; or (6) County court at law. TEX. PROP. CODE § 115.001(d).

b. Statutory Probate Courts Jurisdiction:

Statutory probate courts' jurisdiction is generally concurrent with the district courts regarding trusts. Texas Estates Code § 32.007.

And, with regard to trusts, Texas Estates Code Section 32.006 provides that a statutory probate court has jurisdiction of:

(1) Action by or against a trustee;

(2) Action involving an inter vivos trust, testamentary trust, or charitable trust.

V. WHAT FIDUCIARY DUTIES DID YOUR CLIENT OWE?

The classic definition of "fiduciary" conduct was penned by Justice Cardozo in the case of *Meinhard v. Salmon,* 249 N.Y. 458, 164 N.E. 545-546, 62 A.L.R. 1 (1928):

> "Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A (fiduciary) is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions.... Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd...."

See also: Langford v. Shamburger, 417 S.W.2d 438 (Tex. Civ. App.-Fort Worth 1967, writ ref'd n.r.e.). There are no hard and fast rules defining what "duties" are required of a fiduciary, and, to a great extent, the duties will vary depending on the type of fiduciary involved, the terms of the "creation document" and applicable statutes. Generally speaking, however, the duties of a "fiduciary' may be roughly categorized under four main headings (below) with an overriding obligation to act in "good faith." [Caveat-these are the "common law" concepts which may be modified and in some cases eliminated by the "creation" document.]

Whether a particular duty exists in a given case is usually a *question of law* to be determined by the Court. *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 200-202 (Tex. 2002) (discussion of factors to consider before the Court should impose a particular fiduciary duty on an associate of a law firm); and, *Porter v. Denas,* 2006 WL 1686515 (Tex. App.—San Antonio, 2006, mem op.) (Decedent's nephew and grandniece had acted as attorneys and accountants in connection with her will and finances were held to be fiduciaries as a matter of law, with a fiduciary duty to give the decedent legal advice within the "scope" of the relationship).

Not all fiduciary relationships have the same duties. The plaintiff must plead and prove that the duty he claims was breached was a duty that was *actually* imposed on the particular fiduciary in his case. See, *Jochec v. Clayburne,* 863 S.W.2d 516 (Tex. App.—Austin 1993, writ denied). Be cognizant of whether the duty has been modified by the trust agreement. In a trust case, the duties of the trustee will be determined by the trust agreement as well as the Texas Trust Code, and in some cases the common law. Tex. Trust Code §§ 111.0035 and 111.005. Therefore, a claim for breach of a duty by a Trustee should be plead, proved and submitted to the jury using the terms of the "trust instrument" and/or the Trust Code. If a plaintiff assets claims related to duties that do not exist in your defense situation you should challenge such claims with a summary judgment or at pre-trial motion under TRCP 166(g).

A. Was the Alleged Breach of Duty Within the Scope of the Relationship?

Many fiduciary relationships are limited in "scope," whether by *time* or by *subject matter*. If the "relationship" in question is limited in scope, the party relying on the fiduciary relationship will need to prove that the duty existed and the transaction in question fell within the scope of the relationship. See, e.g., *Rankin v. Naftalis,* 557 S.W.2d 940 (Tex. 1977) (Plaintiffs failed to prove that transaction by one joint venturer was within the limited business purpose of the joint venture.); *Home Loan Corp. v. Tex. American Title Co.,* 191 S.W.3d 728, (Tex. App.— Houston [14th Dist.] 2006, no pet.) (agent's duty to disclose was limited to fact regarding matters dealt with at closing).

- The Duty of Competence - generally a fiduciary is required to act as an ordinary prudent person would act in the conduct of his affairs. An "expert" or professional fiduciary may be held to a somewhat higher standard of care. Note: the duty of competence is often addressed and modified in documents and agreements creating the fiduciary relationship or by statute.

- The Duty to Reasonably Exercise Discretion - any fiduciary decision must be made based on due diligence and reasonable information. Decisions should not be arbitrary. No "discretion" is absolute no matter what the document says. *Corpus Christi Bank & Trust v. Roberts,* 597 S.W.2d 752, 754 (Tex. 1980) A fiduciary may seek court instructions if in doubt. *American Nat 'I Bank of Beaumont v. Biggs,* 274 S.W.2d 209, 211 (Tex.Civ.App.-Beaumont 1954 writ ref d n.r.e.).

- The Duty of Loyalty - The duty of loyalty demands that the fiduciary at all times place the interests of the beneficiary above his own. Strictly applied, the duty of loyalty prohibits the fiduciary from using the advantage of his position to gain any benefit for himself at the expense of the beneficiary and prohibits him from even placing himself in any position where his self interest will or may conflict with his obligations as a fiduciary. *Slay v. Burnett Trust,* 187 S.W.2d 377 (Tex. 1945). Any transaction where the fiduciary utilizes or takes the trust property for his own benefit is considered to be "self-dealing". Any self-dealing by a fiduciary; whether it be acquiring an interest in "trust" property, making a side-profit or fee in a transaction involving the trust property, accepting a" gift" from the beneficiary, or taking advantage of an opportunity that presents itself as a direct or indirect result of the fiduciary relationship, will give rise to a *"presumption of unfairness"* and likely result in the imposition of a harsh liability standard against the fiduciary. *Texas Bank and Trust Co. v. Moore,* 595 S.W.2d 502 (Tex. 1980); *Pace v. McEwen,* 574 S.W.2d 792 (Tex. Civ. App.-San Antonio 1978, writ ref'd n.r.e.). Indeed, the mere "aura" of self-dealing may be sufficient to sustain a finding of breach of fiduciary duty, even if the trust has suffered no damages, *City of Fort Worth v. Pippen,* 439 S.W.2d 660 (Tex. 1969), *and* even if the fiduciary has acted in good faith. *Slay v. Burnett Trust,* 187 S.W.2d 377 (Tex. 1945).

Although historically it was felt to be contrary to "public policy" to authorize a fiduciary to "self-deal", the Texas Supreme Court changed this "rule" in *Texas Commerce Bank v. Grizzle,* 96 S.W.3rd 240 (Tex. 2003) when it held that the "public policy" of Texas did not prohibit self-dealing by trustees if expressly authorized by the settlor of the trust. [The legislature then responded to Grizzle with the '"limits" now found in Tex. Prop. Code § 111.0035 (Mandatory Rules) and Section 114.007 (Exculpation of Trustee). As a result, today Trustees can be authorized to engage in self- dealing transactions but cannot be exculpated from liability for breach of fiduciary duty if committed in bad faith, intentionally, or with reckless indifference to the interest of a beneficiary. Texas Property Code § 114.007(a).]

Partners can also be permitted to self-deal to a certain extent by the terms of the partnership agreement. See Texas Bus. Orgs. Code § 152.205; 152.002(b)(2). Indeed, Tex. Bus. Orgs. Code Section 152.204(c) expressly provides that "a partner does not violate a duty under [the statute] or the partnership agreement merely because the partner's conduct furthers to the partner's own interest.

- The Duty of Full Disclosure - A fiduciary has much more than the traditional obligation not to make any material misrepresentations, he has an affirmative duty to make a full and accurate confession of all his fiduciary activities, transactions, profits, and mistakes--even when, and especially if, it hurts. *Montgomery v. Kennedy*, 669 S.W.2d 309 (Tex. 1984); *Kinzbach Tool Co., Inc. v. Corbett-Wallace Corp*., 160 S.W.2d 509 (Tex. 1942*); City of Fort Worth v. Pippen,* 439 S.W.2d 660 (Tex. 1969). The breach of the duty of full disclosure by a fiduciary is tantamount *to fraudulent concealment*. *Willis v. Maverick,* 760 S.W.2d 642 (Tex. 1988). The beneficiary is not required to prove the elements of fraud, *Archer v. Griffith*, 390 S.W.2d 735 (Tex. 1965); *Langford v. Shamburger*, 417 S.W.2d 438, (Tex. Civ. App.-Fort Worth 1967, writ ref'd n.r.e.), and need not even prove that he "relied" on the fiduciary to disclose the information. *Johnson v. Peckham*, 120 S.W.2d 786, 788 (Tex. 1938); *Miller v. Miller,* 700 S.W.2d 941,947 (Tex. App.-Dallas 1985, writ ref'd n.r.e.). Equity implies constructive fraud in such situations, even if the beneficiary suffered no actual damages, and even if the fiduciary acted in "good faith". *Slay v. Burnett Trust*, 187 S.W.2d 377 (Tex. 1945); *City of Fort Worth v. Pippen*, *supra*. The fiduciary duty of full disclosure operates before and after litigation has been filed and is in addition to any obligations of disclosure imposed by the "discovery" provisions of the Texas Rules of Civil Procedure. *Huie v. DeShazo*, 922 S.W.2d 920 (Tex. 1996); *Montgomery v. Kennedy*, 669 S.W.2d 309 (Tex. 1984).

- The Obligation of "Good Faith" - although the legislature has given substantial freedom to partners, settlers of trusts and others creating "fiduciary" relationship by written document to modify and/or eliminate most of the common law fiduciary duties, no "agreement" can eliminate the requirement that the fiduciary act in good faith. See e.g. Tex. Prop. Code § 111.0035 (b)(4) (B) (Trustees) and Bus. Orgs. Code § 152.002 (b)(4) (Partners).

VI. WHO HAS THE BURDEN OF PROOF AT TRIAL?

A. It Depends on the Issue Presented

In fiduciary litigation, the burden of proof will shift, depending on which duties are involved: therefore, it is helpful to categorize the fiduciary duties into two main groups, each with two primary duties:

1. (a) The duty of competence; and (b) the duty to reasonably exercise discretion (corresponding to the principle that *"fiduciary law does not demand absolute perfection in judgment*; and,

2. a) The duty of loyalty; and (b) the duty of full disclosure (corresponding to the principle that *"fiduciary law does demand absolute loyalty and absolute honesty*".)

- In cases falling within the ***first category*** (breach of the duty of competence or the duty to reasonably exercise discretion) the defendant fiduciary is *not* usually placed in a posture at trial which is significantly different from other non-fiduciary defendants - the burden of proof remains on the plaintiff.
- In the ***second category,*** however, (breach of the duty of loyalty or breach of the duty of full disclosure) the defendant fiduciary will face a trial "turned upside down," because in this category the burden of proof to *negate* the "breach" is placed on the fiduciary.

B. Specific Questions

- Existence of Relationship - does a fiduciary duty exist under the facts of the case? The burden is on the plaintiff to prove the relationship is a "fiduciary" one.

- Duty of Competence - every fiduciary has a general duty to manage or invest the fiduciary property in a reasonable and prudent manner. In a claim based on negligent handling or management- the plaintiff has burden to show fiduciary *failed to comply* with his duty.

- Duty of Loyalty - a fiduciary is generally prohibited from benefitting from his fiduciary service at the expense of the fiduciary estate in a "self-dealing" transaction, the presumption of unfairness arises and the burden shifts *to the fiduciary* to *prove he complied with his duty.*

- Duty of Full Disclosure- in general the fiduciary has a duty to disclose to the "beneficiary" all material information which effects the beneficiary's interest.

Who has the burden on this question can be complicated.

a. Was the non-disclosed information a material fact affecting the beneficiary's interest? Some would argue this burden is on the plaintiff, but it is not clear.

b. If the fact is clearly material, then burden is on fiduciary to prove full disclosure. [Safer Route: the defending fiduciary should always be prepared to show that whatever he did not disclose was not a material fact which needed to be disclosed to this particular beneficiary.]

1. Duty of Good Faith.

Since this usually arises in connection with a self-dealing transaction the burden will be on the fiduciary- but if part of a "'negligence" or competence question, the burden of proof should be on the plaintiff.

2. Abuse of Discretion.

If disputed, the plaintiff has the burden to plead and prove the proper scope of discretion. This pleading/proof requirement is usually satisfied if the Plaintiff pleads the terms of the instrument creating the fiduciary relationship which grant the discretion to the fiduciary.

3. The Duty to Make (Full) Disclosure.

A fiduciary has a duty to make "full disclosure of all *material* facts known to him which might affect the beneficiary's interests in the subject matter of the fiduciary relationship." See, *Huie v. De Shazo,* 922 S.W.2d 920, 923 (Tex. 1996) (trustees and executors); *Montgomery v. Kennedy,* 669 S.W.2d 309, 313 (Tex. 1984) (trustees and executors).

The Plaintiff must plead facts and supporting evidence to show that:

a. the fiduciary had actual or constructive knowledge of the facts he failed to disclose;

b. the particular facts related to the subject matter of the fiduciary relationship (e.g. the trust, estate, partnership, etc.); and,

c. why the beneficiary's interest in the subject matter of the fiduciary relationship is affected.

Texas Pattern Jury Charges: PJC 105.4 (common law fraud). Once the Plaintiff meets this burden of pleading facts, the burden shifts to the fiduciary to present evidence to:

a. negate the existence of the duty (by showing that he did not know of the information; the information related to issues or property outside of the scope of the fiduciary relationship; or that the information was not "material" to the beneficiary's interests). See, *Joe v. Two Thirty Nine Joint Venture,* 145 S.W.3d 150, 159-160 (Tex. 2004) (attorney had no duty to disclose facts regarding matters outside the scope of his engagement); *Home Loan Corp. v. Texas American Title Co.,* 191 S.W.3d 728, 735 (Tex.App.—Houston [14fil Dist.] 2006, pet. denied) (because plaintiff did not conclusively establish that undisclosed information was "material" to him, trial court's summary judgment was reversed); or

b. to show that a good faith effort to provide all material information to the beneficiary was made (*Stephens County Museum Inc. v. Swenson*, 517 S.W.2d 257, 261 (Tex. 1975) (good faith effort to provide information).

4. Duty of Loyalty/Self-Dealing Claims

The Plaintiff has the burden of alleging facts to demonstrate that the fiduciary has engaged in a "self-dealing" transaction where the fiduciary has *benefitted* or *profited* from the transaction.

To shift the burden of proof, the Plaintiff must then also show that the fiduciary "benefitted" from the transaction. *Rockford Life Ins. Co. v. Tschiedel,* 61 S.W.2d 536, 538 (Tex. Civ. App.—San Antonio 1933, writ ref'd.). When the plaintiff alleges the existence of a confidential relationship and the obtaining of an advantage by the defendant, a *presumption of unfairness arises* and the duty then dissolves on the defendant to show that his dealings were, open, fair and honest."

The failure of the fiduciary to present any evidence to rebut the "presumption unfairness" will support a judgment against him even though the claimant fails to submit a jury question inquiring if a fiduciary duty was breached. *Texas Bank & Trust Co. v. Moore,* 595 S.W.2d 502, 509 (Tex. 1980).

C. Tracing Comingled Funds

In cases where the "self-dealing" consists of the fiduciary commingling estate/trust funds or property with his own funds or property, the burden will be on the fiduciary to trace and segregate the funds. To the extent that the fiduciary fails or is unable to do so, the *entire* fund will be presumed to belong to the trust (or the beneficiary/estate). *Eaton v. Husted,* 172 S.W.2d 493, 500 (Tex. 1943); *Meyers v. Baylor University in Waco,* 6 S.W.2d 393, 395 (Tex. Civ. App.—Dallas 1928, writ ref'd). Further, in tracing the funds, whatever has been paid out (or lost) will be presumed to have belonged to the fiduciary so that what is left will go to the trust. *General Ass'n. of Davidian S.D.A. v. General*

Ass'n. Etc., 410 S.W.2d 256, 259 (Tex. Civ. App.—Waco 1966, writ ref'd n.r.e.). Similarly, if the transaction was a "positive" then that will be deemed to benefit the beneficiary (or trust or estate) before the fiduciary.

When a fiduciary engages in a transaction with a beneficiary, the burden shifts to the fiduciary to prove the fairness of the transaction. *E.g., Keck Mahin & Cate v. Nat'l Union Fire Ins. Co*., 20 S.W.3d 682, 699 (Tex. 2000) (release agreement between attorney and client); *Tex. Bank & Trust Co. v. Moore*, 595 S.W.2d 502, 504, 509 (Tex. 1980) (gifts of property from elderly beneficiary to fiduciary); *Archer v. Griffith*, 390 S.W.2d 735, 738, 739 (Tex. 1964) (deed of real property from client to attorney as compensation for legal services); *see also* PJC Business 104.2 cmt ("When a fiduciary profits or benefits in any way from a transaction with a beneficiary, a presumption of unfairness arises that shifts the burden of persuasion to the fiduciary or the party claiming the benefits of the transaction to show that the transaction was fair and equitable to the beneficiary.").

The reason behind the burden shift is the "presumption of unfairness to transactions between a fiduciary and a party to whom he owes a duty of disclosure." *Lee v. Hasson*, 286 S.W.3d 1, 21 (Tex. App.—Houston [14th Dist.] 2007, pet. denied); *see also Tex. Bank*, 595 S.W.2d at 509 ("[A] presumption arises that a gift from the principal to the fiduciary is unfair and invalid.").

D. Other Burden of Proof Considerations:

There is some question whether the burden also can shift to the fiduciary when there is no transaction involving the fiduciary. Some courts have held a transaction is required. "[W]here there is no transaction between the fiduciary and principal, there is no presumption of unfairness, and the burden of proof does not shift to the fiduciary." *Navigant Consulting, Inc. v. Wilkinson*, 508 F.3d 277, 295 (5th Cir. 2007); *see also Amwest Sav. Ass'n v. Statewide Capital, Inc*., 144 F.3d 885, 891 (5th Cir. 1998) (holding that the burden is on the beneficiary to prove breach of fiduciary duty when there is no transaction between fiduciary and beneficiary); *Lemons v. Davis*, 306 S.W.2d 224, 227 (Tex. App.—Fort Worth, writ ref'd n.r.e.) (holding that burden was on beneficiary, not fiduciary, to prove misuse or waste of funds).

In contrast, the comment to PJC 104.2 suggests a broader standard: "[a] presumption of unfairness arises, and the burden of proof shifts to the fiduciary if the fiduciary places himself *in a position in which his self-interest might conflict with his obligations as a fiduciary*." PJC 104.2 cmt. (emphasis added). In support, the Committee cited *Stephens Cnty. Museum, Inc. v. Swenson*, 517 S.W.2d 257, 260 (Tex. 1974). But *Stephens* noted a presumption of unfairness in connection with a transaction—a fiduciary's gift his beneficiaries' funds to a museum for which the fiduciary was a director and officer. *Id*. at 260. The alternate standard articulated in the PJC comment—a fiduciary who places himself in a position in which his self-interest might conflict with his obligations as a fiduciary—may be stated too broadly.

Where there is a fact question about whether the fiduciary profited or benefited from a transaction with the beneficiary, a jury question may be necessary to answer that question. PJC-Business 104.2 cmt. The PJC does not provide a sample question for the fact issue that decides whether the burden flips. *Id*. But it does suggest that the jury should be instructed to answer one of two alternate breach questions—one that places the burden on the fiduciary and another that places the duty on the beneficiary—depending on the jury's answer to the fact question that decides whether the burden flips. *Id*.

VII. HOW ARE ATTORNEYS' FEES PAID/RECOVERED?

With Trust and Estate litigation, the payment or assessment of attorney's fees and expenses is a substantial consideration. Certain statutes and limited common law allow for recovery or assessment of fees and expenses among the parties:

- TEX. ESTATES CODE § § 352.051, 352.052. Attorney's fees and expenses relating to estates.
- TEX. PROP. CODE § § 114.063, 114.064. Attorney's fees and expenses relating to trusts.
- TEX. CIV. PRAC. & REM. CODE § 38.001, et seq. Breach of contract.
- TEX. CIV. PRAC. & REM. CODE § 37.001, et seq. Declaratory judgment action.
- Recovery for a common fund. *See City of Dallas v. Arnett,* 762 S.W.2d 942, 954 (Tex. App.—Dallas

1988, writ denied) *(citing Trustees v. Greenough,* 105 U.S. 527, 26 L.Ed. 1157 (1881); *Knebel v. Capital National Bank,* 518 S.W.2d 795, 799-801 (Tex.1974)).

- TEX. R. CIV. P. 167.1, et seq. Offer of settlement; award of litigation costs.

Keep in mind that fees need to be segregated per claim *See A.G. Edwards v. Beyer,* 235 S.W.3d 704 (Tex. 2007) (remanded for new trial because plaintiff who prevailed on claims against brokerage firm, breach of a fiduciary duty, was required to segregate attorney fees between her breach of contract and tort causes of action) (citing *Tony Gullo Motors v. Chapa,* 212 S.W.3d 29 (Tex. 2006).

Before trial, weigh the benefit of asserting your attorney fee claim – how does it make your fiduciary look to the jury? One of the benefits of being a fiduciary is the prospect of paying for the cost of defense from the trust or estate. Is that really a good idea? This decision can have a major impact on the case. The advantage of paying the cost of defense from the fiduciary fund is obvious, but the advantages are potentially much more than the financial relief it gives your client. If your client has been sued for abusing his/her power as the fiduciary and relief is sought against them individually, is it a good idea to pay defense costs out of the fiduciary fund? You have to ask yourself, as the litigator, how is this going to look to the jury at the end of the case if I have to justify my client fiduciary having paid me XXX while at the same time being sued for breaching his/her duty as that fiduciary.

For many beneficiaries, seeing their own funds – or even just the potential of it – will cause them to get cold feet or settle. With the continuing drain on the fund imposed by the fiduciary's legal fees, the beneficiary may be more willing to live with a quick fiduciary resignation and a release rather than pursue damages.

Whether to charge the estate/trust/partnership with the cost of defense is a tough decision. Many times litigation expense is one of the most important factors that precipitate a settlement. On the other hand, a fiduciary who has breached his fiduciary duty and continues to use the assets to defend his conduct may be committing a new breach of fiduciary duty. In some situations it is best, if the fiduciary can afford it, to pay the fees personally to avoid additional breaches and avoid escalating the litigation. All of the factors and the circumstances must be carefully analyzed to make the best decision for your defense of the fiduciary.

Here are some other considerations about how attorneys' fees are paid. One exception to the general rule that the "estate pays" is where an ***executor*** is unsuccessful in defending a will, and has also failed to obtain a finding that he or she acted in "good faith" and "with just cause" in offering or defending the will for probate. In such cases, the executor may be required to personally reimburse the estate for any attorney's fees and expenses previously paid by him or her from the estate. *In re Estate of Lynch*, 395 S.W.3d 215, 228 (Tex. App.—San Antonio 2012, pet. denied). Another exception is where the order allowing payment of the attorney's fees is reversed on appeal – in which case, the ***attorney*** receiving the fees may be required to personally reimburse such fees to the estate. *See*, *Drake v. Trinity Universal Ins. Co.*, 600 S.W.2d 768, 769-770 (Tex. 1980) (Attorney who had previously had claim allowed and paid from estate for his services rendered to Administratrix in unsuccessfully contesting the application to probate a foreign will was required to reimburse fees to the estate once order approving them was overturned. Fact that he had "earned" his fee was irrelevant.).

If the request for recovery of attorney's fees incurred in connection with a will contest proceeding is NOT made in the original action, the claim may be barred by the doctrine of *res judicata*. *See*, *Huff v. Huff*, 124 S.W.2d 327, 329 (Tex. 1939) (even though a finding of "undue influence would not preclude an award of fees if there was a finding of "good faith" in the original proceeding, "where a person named as an executor in a will is found guilty of exercising undue influence … and the probate of the will is denied, and the costs taxed against such executor, which judgment becomes final, he should not have the right in a subsequent proceeding to be allowed payment out of the estate of such court costs and reasonable attorney's fees."). Accord, *Russell v. Moeling,* 526 S.W.2d 533, 536 (Tex. 1975) (rejecting a subsequent claim for fees: "[w]e think that the better rule is to have the questions of good faith and just cause determined in the original probate of the will when all relevant information has been placed before the finder of facts...This result is more in line with the rule of res judicata…"); and, *Wich v. Fleming*, 652 S.W.2d 353, 355 (Tex. 1983) (an executor's suit for recovery of fees must be brought in the original will contest).

A. Estate Proceedings:

(i) What is "Good Faith" and "Just Cause"?

With one possible exception, a finding by the trier of fact that the action was brought by the party seeking expenses and fees in "good faith" and with "just cause" is a prerequisite to recovering fees under Section 352.052. The issue of good faith is a question of fact to be determined under all of the circumstances of the case. *Harkins v. Crews*, 907 S.W.2d 51, 62 (Tex. App.—San Antonio 1995, writ denied). For purposes of Section 352.052 good faith is typically defined as an "action which is prompted by honesty of intention, or a reasonable belief that the action was probably correct." *Ray v. McFarland,* 97 S.W.3d 728, 730 (Tex. App.—Fort Worth 2003, no pet.); *see also*, *Matter of Estate of Hanson*, 2015 WL 1967448, at *9 (Tex. App.—Eastland Apr. 30, 2015, no pet.) (mem. op.). With "just cause" means that the actions were based on reasonable grounds and there was a fair and honest cause or reason for the action. *Ray*, 97 S.W.2d at 730; *Matter of Kam*, 484 S.W.3d 642, 654 (Tex. App.—El Paso 2016, pet. denied). The definitions for "good faith" and "just cause" that are included in the instructions to Tex. PJC 250.3 "Attorney's Fees and Costs --- Will Prosecution or Defense" are drawn from these and other cases cited in the comment to that section.

Estates Code Section 352.052 has also been limited to proceedings involving the defense or prosecution of a will. The Court in *In re Estate of Wilcox*, 193 S.W.3d 701 (Tex. App.—Beaumont 2006, no pet.), had no trouble concluding that a beneficiary, who was sued as an "alternate co-executor" of testator's estate, on numerous other causes of action including fraud, negligent misrepresentation, and civil conspiracy, was not entitled to recover attorney's fees for fees incurred in connection with his personal defense under Probate Code Section 243. Stating that "[t]o hold otherwise would be contrary to the plain meaning of Section 243." *Id*. at 704.

(ii) For Executors who succeed – the award is mandatory.

As evidenced by the use of the word "*shall"* in subsection (a) of Section 352.052, "designated" executors who are successful in having a will admitted to probate or in defending a will that has previously been admitted to probate, and who obtain a finding from the fact finder that he or she has acted in "good faith and with just cause," are statutorily entitled to the reimbursement of their "reasonable and necessary" fees and expenses. *See*, *In re Estate of Lynch*, 350 S.W.3d 130, 140-141 (Tex. App.—San Antonio 2011, pet. denied). In fact, if the designated executor is successful in defending the will or in having it admitted to probate, a finding of "good faith and just cause" may not be deemed unnecessary. *See Miller v. Anderson*, 651 S.W.2d 726, 728 (Tex. 1983) (good faith and just cause components of attorney's fees analysis is "inapplicable" where the will is actually admitted to probate); and, *Matter of Kam*, 484 S.W.3d 642, 655 (Tex. App.—El Paso 2016, pet. denied) (where trial court's judgment denying application to probate will on grounds of undue influence was overturned on appeal and would result in admission of the will to probate, designated executor's good faith and just cause was "conclusively established" and she was entitled to award of fees even without a fact finding on these issues.).

What is covered?

Section 352.052(b) only provides for the recovery of necessary expenses and disbursements in "those proceedings," referring to the offer or defense of a will or alleged will. Therefore, any fees incurred in prosecuting or defending other claims, such as breach of fiduciary duty, fraud, tortious interference, etc. are not recoverable under Section 352.052(b) and must be segregated in accordance with the general rules on attorney's fees.

The Award is not mandatory.

The use of the word "may" in Subsection (b) of Section 352.052, makes it clear that an award of fees and expenses to "designated devisees and beneficiaries" is *discretionary* with the court, even if a finding of good faith and just cause has been made. Although it would be unusual for a court to refuse to make the award if the other conditions of Section 352.052 have been met, it might occur in those cases where the fees incurred in connection with the will contest were – even though reasonable and necessary in the jury's estimation – nonetheless excessive or out of proportion given the size or value of the estate, or where the contestant's interest in the estate is minimal compared to the interests of other devisees and legatees.

(iii) Personal representative's right to reimbursement of "reasonable and necessary" attorney's fees incurred in estate administration.

"On proof satisfactory to the court" a personal representative of a decedent's estate has *the right to be reimbursed* for a "necessary and reasonable expenses incurred by the personal representative" in administering the estate, including "reasonable attorney's fees necessarily incurred in connection with the proceedings and management of the estate." Texas Estates Code Section 352.051. Although an independent executor need not get prior court approval for the payment of attorney's fees incurred in connection with the estate administration, if challenged, similar rules will be applied to his or her "reimbursement" right, and excessive or improper fees may be the subject of a surcharge or disgorgement proceeding. To avoid a situation where the personal representative agrees to pay more in fees than the probate court ultimately allows, one court has suggested that all fee contracts should provide that the fees will be set by the probate court. *Ullrich v. Estate of Anderson,* 740 S.W.2d 481, 483 (Tex. App.—Houston [1st Dist.] 1987, no writ).

Estates Code Section 352.051 (or its predecessor, Probate Code Section 242) has been construed to include the recovery of expert witness fees incurred by an executor in as the result of a lawsuit filed by a beneficiary. *Magana V. Citibank*, 454 S.W.3d 667, 686 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). It also includes fees incurred by a personal representative when not recovered from an adversary pursuant to another statute. *Jones v. Coyle,* 451 S.W.3d 486, 489 (Tex. App.—Dallas 2014, no pet.).

But Estates Code Section 352.051 does not allow a personal representative to be reimbursed for attorney's fees that are due to the personal representative's wrongdoing, including his persistence in pursing litigation "to chase facts that did not exist and that he had no reasonable basis to think existed." *In re Estate of Bessire*, 399 S.W.3d 642, 650 (Tex. App.—Amarillo 2013, pet. denied). Fees may also not be allowed for legal work performed in correcting errors made by the executor, including a failure to timely file proper inventories and accountings. *Garcia v. Garcia*, 878 S.W.2d 678, 680 (Tex. App.—Corpus Christi 1994, no writ). As in other cases, expert testimony is necessary to establish the reasonableness and necessity of the attorney's fees for which reimbursement is sought. *Barrett v. Parchman*, 675 S.W.2d 289, 291(Tex. App.—Dallas 1984, no writ).

(iv) Estates Code Section 405.003 -- Independent Executor's Application for Judicial Discharge.

Estates Code Section 405.003 provides a method by which an Independent Executor may "file an action for declaratory judgment under Chapter 37, Civil Practice and Remedies Code" seeking to obtain a judicial discharge "from any liability involving matters relating to the past administration of the estate that have been fully and fairly disclosed." Section 405.003(a). However, rather than default to the attorney's fees rules provided in Section 37.009 of the declaratory judgment act, Section 405.003(e) provides that, except as ordered by the court, the independent executor seeking a judicial discharge is entitled to pay "legal fees, expenses, or other costs incurred in relation" to the discharge proceeding from the estate, subject to being personally liable to refund or reimburse the estate for any such "fees, expenses or other costs" not approved by the court as a proper charge against the estate. There is no provision in Estates Code Section 405.003 for an award of fees to any beneficiary of the estate who may contest the application for judicial discharge. Since it is unclear whether Estates Code Section 405.003(e) is in addition to or in lieu of the attorney's fees provisions set forth in Section 37.009 of the declaratory judgment act, the beneficiary's request for fees may be subject to challenge.

(v) Estates Code Sections 404.0037 and 351.003 -- Removal of Independent Executor and/or Compelling Compliance with Statutory Duty.

Estates code Section 404.0037 covers the assessment and award of attorney fees and costs related to the removal of independent executors:

> *(a) An 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.*

(b) Costs and expenses incurred by the party seeking removal of an independent executor appointed without bond, including reasonable attorney's fees and expenses, may be paid out of the estate.

Under Estates Code Section 404.0037, the award of fees to an independent executor who defends the removal proceeding in "good faith" is mandatory (whether successful or not), while the recovery of fees to the party seeking removal does not require a finding of good faith, and is permissive.

Thus, even if the executor is removed, if he defended the removal in good faith, he is still entitled to fees. *Lee v. Lee*, 47 S.W.3d 767, 795 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (where executor was removed but trial court disregarded jury's finding that the executor defended his removal in "bad faith," the court upheld the trial court's action by applying a definition of good faith which combined both objective and subjective tests that it concluded "should protect all but the plainly incompetent executors or those who willfully breach their fiduciary duties."); *Paul v. Merrill Lynch Trust Co. of Texas*, 183 S.W.3d 805, 813 (Tex. App.—Waco 2005, no pet.) ("[A[n] executor acts in good faith when [it] subjectively believes [its] defense is viable, if that belief is reasonable in light of existing law").

Conversely, if the independent executor is not removed, but the court nonetheless concludes that he did not defend the removal action in "good faith" it may refuse to award him fees. *Kanz v. Hood*, 17 S.W.3d 311, 314 (Tex. App.—Waco 2000, pet. denied). The burden to prove that the removal is being defended in good faith is on the independent executor. *In re Estate of Anderegg*, 360 S.W.3d 677, 681 (Tex. App.—El Paso 2012, no pet.) *See also*, PJC 233.2 (Removal of Independent Executor) and PJC 250.7 (Attorney's Fees and Costs—Defense for Removal of Independent Personal Representative).

Whether to award attorney's fees to the party seeking removal of the independent executor is solely within the trial court's discretion and will not be reversed absent a clear abuse of that discretion. *Sammons v. Elder*, 940 S.W.2d 276, 284 (Tex. App.—Waco 1997, no writ). In either case, the fees awarded pursuant to Estates Code Section 404.0037 are assessed against the estate, not against the other party.

If recovery of fees is sought under Estates Code Section 351.003 (formerly Probate Code Section 245), which allows for the recovery of "reasonable attorney's fees" incurred in removing the personal representative, or, in obtaining compliance regarding any statutory duty the personal representative has neglected, the fees may be assessed against the personal representative in his or her individual capacity and in favor of the person bringing the action. *In re Estate of Hawkins* 187 S.W.3d 182, 185 (Tex. App.—Ft. Worth 2006, no pet.) (assessing fees against an administrator who failed to timely distribute assets of the estate. "[T]hese costs are appropriate assessments against the personal representative when she neglects her duties, as opposed to penalizing the estate.).

Even though Section 351.003 is not expressly made applicable to independent executors it has been applied against such representatives. *See*, *In re Estate of Varna*, 335 S.W.3d 322, 327 (Tex. App.—San Antonio 2010, pet. denied) (Court could assess reasonable attorney's fees against the independent executor in favor of the beneficiaries, including conditional appellate fees); and, *Lee v. Lee*, 47 S.W.3d 767, 796 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (trial court erred in refusing to order the independent executor to reimburse the estate for fees incurred by the plaintiff's seeking compliance with statutory duties).

B. <u>Trust Proceedings</u>.

(i) <u>Trust Code Section 114.064 – recovery of costs and "reasonable and necessary attorney's fees" for proceedings "under [the Trust] code."</u>

Section 114.064 of the Trust Code is short and (presumably) simple. Entitled "Costs" it provides that *"[i]n any proceeding under this code the court may make such award of costs and reasonable and necessary attorney's fees as may seem equitable and just."*

<u>Trust Code Section 114.064 is not a "prevailing party" statute.</u>

Winning is not required for an award of attorney's fees under Section 114.064. *Hachar v. Hachar,* 153 S.W.3d 138, 143 (Tex. App.—San Antonio 2004, no pet.) (The award of fees is within the discretion of the court. While a party's

success may be considered it is not required). Thus either party, or both parties, or none of the parties may end up with an award of attorney's fees under Section 114.064. *See*, *Lesikar v. Moon*, 237 S.W.3d 361, 375-76 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (The court may conclude that it is not equitable or just to award fees, even if found reasonable by the jury).

Whether an award of fees is "equitable and just" is a question of law for the Court.

While the question of what is a "reasonable and necessary fee" is one that must be submitted to the jury (*See* Tex. PJC 250.4 "Attorney's Fees –Trust"), the question of whether any award would be "equitable and just" is a question of law for the Court. *See*, e.g. *Riley v. Alpert*, 2012 WL 3042991 *7 (Tex. App.—Houston [1st Dist.] 2012, pet. denied) (mem. op.) and cases cited therein. As that phrase has been construed in connection with other identical statutory fee provisions, whether "it is equitable and just to award attorney's fees depends on the concept of fairness, in light of all of the surrounding circumstances." *Ridge Oil Co., Inc., v. Guinn Investments, Inc*., 148 S.W.3d 143, 162 (Tex. 2004).

An award of fees against a trust beneficiary may be offset against his interest under Trust Code Section 114.031.

Trust Code Section 114.031(a)(1) provides that a beneficiary is liable for loss to the trust if the beneficiary "misappropriated or otherwise wrongfully dealt with the trust property." Section 114.031(b) provides that, unless the terms of the trust provide otherwise, a trustee is authorized to "offset a liability of the beneficiary to the trust estate against the beneficiary's interest in the trust estate, regardless of a spendthrift provision in the trust." At least one court of appeals has upheld a decision by a trial court awarding attorney's fees in favor of a trust against a beneficiary and ordering that they be offset against her interest in the trust pursuant to Section 114.031. *See*, *Courtade v. Gloria Lopez Estrada Family Trust*, 2016 WL 1164159 *6 (Tex. App.—Ft. Worth 2016, no pet.).

A claim for reimbursement of attorney's fees may be predicated on unfavorable section 114.064 findings.

In some cases Trustees have been known to try to avoid potentially adverse findings under section 114.064 by simply ignoring the provision while paying attorney's fees for their defense of breach of fiduciary duty claims from the trust. If the beneficiary is aware of the fact that the Trustee is paying his defense costs from the trust, and no request for fees under section 114.064 has been made by the trustee, the beneficiary should make a claim for reimbursement of the fees to the Trust *except to the extent found reasonable and necessary by the jury and equitable and just by the court.* This should be done even if the Trust document provides that defense costs and fees for the trustee may be paid from the trust as those provisions may be considered merely an interim "source of payment" rule, with the final decision still subject, as a matter of public policy, to the Court pursuant to the requirements of Trust code Section 114.064. *See*, Trust Code Section 111.0035(b)(5) prohibiting a settlor of a trust from limiting "the power of a court, in the interests of justice, to take action or exercise jurisdiction" under Section 115.001.

Practice note: Unless there is a pleading expressly requesting the reimbursement a jury question on the whether the fees paid from the trust by the trustee were "reasonable and necessary" may not be submitted. And, if you are the attorney representing a trustee who is paying his fees from the trust in a breach of fiduciary duty case, be sure that the Trustee executes your engagement letter in his or her individual capacity as well as in his or her capacity as Trustee or run the risk that you may end up not getting paid.

Trust Code Section 113.018 – the authority to retain counsel is not necessarily the authority to pay fees from the trust.

Trust Code Section 113.018 provides that "A trustee may employ attorneys …. reasonably necessary in the administration of the trust estate." This would include the retention of counsel to represent the trustee in connection with his right to "compromise, contest, arbitrate or settle claims of or against the trust estate or the trustee" as provided in Trust Code Section 113.019. In exercising his discretion in the retention of trust counsel, however, the trustee should be mindful that he may be personally liable for any mistakes made by those he hires, unless he can show that he has exercised care and prudence in selecting the agents and that he has not been guilty of any personal negligence or fault. *See*, *Ewing v. Wm. L. Foley, Inc*., 280 S.W. 499, 500 (Tex. 1926) (holding that a trustee who has exercised care and prudence may be entitled to indemnity or reimbursement from the trust for any damages assessed against him).

The trustee should also be mindful that his exercise of discretion in deciding to retain attorneys *and in determining how much to pay them*, is always subject to judicial review for reasonableness and necessity. *See e.g.*,

Corpus Christi Bank & Trust v. Roberts, 597 S.W.2d 752, 754 (Tex. 1980) (Trustee's actions in hiring agents was subject to review for abuse of discretion.). While an individual spending his own money is free to pay whatever he pleases for legal representation, a trustee is not. Since neither Trust Code Section 113.018 or 113.109 expressly authorizes a trustee to pay legal fees from the trust, unless there is a provision in the trust instrument expressly authorizing the payment of legal fees from the trust, the trustee must rely on other provisions of the Texas Trust Code for that purpose.

Trust Code Section 114.063 – seeking fees under the Trustee's "General Right to Reimbursement."

Section 114.063(a)(1) and (2) allows a trustee to "discharge or reimburse himself" from the trust for "advances made for the convenience, benefit or protection of the trust or its property" or, for "expenses incurred while administering or protecting the trust or because of the trustee's holding or owning any of the trust property". The wording of Section 114.063 puts the burden of proving that the expenses incurred were for one of the permitted purposes set out in the statute and that they were "reasonable and necessary" on the Trustee.

Section 114.063 should not be relied upon as authorization for a trustee to retain counsel, at trust expense, to defend the trustee in his individual capacity against claims of breach of fiduciary duty. Even though a "reimbursement" theory was used by a trustee seeking payment of attorney's fees he incurred in defending his actions in administering a trust in *American Nat'l Bank v. Biggs*, 274 S.W.2d 209 (Tex. App.—Beaumont 1954, writ ref'd n.r.e.), the court in that case (which was decided prior to the enactment of Trust Code Section 114.064) considered the reimbursement request on "equitable grounds" and held that recovery would depend on the circumstances, including consideration of the trustee's good faith and the reasonableness of his actions. *Id.* at 222. These equitable considerations have now been incorporated into Trust Code Section 114.064.

Practice note: Fees paid by the Trustee to prosecute or defend third party litigation.

While the Trustee is not an insurer of success in third party litigation, the potential for the recovery of fees by the trust and the assessment of fees incurred by the opposing party against the trust should certainly be a key consideration for any Trustee contemplating litigation. If fees are recoverable from an opposing party, the trustee should seek recovery of such fees in that litigation, otherwise the Trustee may be later sued by a beneficiary for failing to do so, on the grounds that it is not "reasonable and necessary" for the trust to bear the costs of litigation that could have been recovered from a third party. If the trustee is unsuccessful in recovering fees from a third party, either because he did not prevail, or because the jury or court found that all or part of the fees were not "reasonable and necessary" or "equitable and just", counsel for the beneficiaries should consider a possible demand for reimbursement to the trust on the grounds that these conditions precedent are also required for discharge or reimbursement of fees under Trust Code Section 114.063, and have not been met.

VIII. WHAT AFFIRMATIVE DEFENSES SHOULD BE ASSERTED?

Although the usual list of defenses are often available to a fiduciary, their duty of disclosure can limit his ability to use them. In almost every instance, the caselaw, and even some statutes, require full and complete disclosure of material facts. *See e.g. Montgomery v. Kennedy*, 669 S.W.2d 309, 313 (Tex. 1984); Texas Property Code § 114.005 (a beneficiary acting "on full information" may relieve a trustee). Thus, in addition to meeting the regular burden of proof for a fiduciary's defenses, one must usually prove that the fiduciary disclosed all material facts. Here are some of the customary affirmative defenses that may be applicable to your defense situation:

A) Waiver and Ratification – In a fiduciary case, the defendant not only must meet his regular burden of proof on the waiver defense, he must further prove that he furnished all necessary information to his principal so that an intelligent decision could be made. *Lang v. Lee,* 777 S.W.2d 158 (Tex. App.-Dallas 1989, no writ); *but see, Williams v. Moores,* 5 S.W.3rd 334 (Tex.App.- Texarkana 1999, pet. denied) (held beneficiary's silence or inaction for ten (10) years, coupled with proof of her knowledge of her rights was such an unreasonable period of time as to be sufficient to "proven waiver). A similar burden of proof is required to establish that a principal ratified the actions of his fiduciary. *Burnett v. First Nat. Bank of Waco,* 536 S.W.2d 600 (Tex.Civ.App.-Eastland 1976, writ ref'd n.r.e.); *Lang v. Shell Petroleum Corp.,* 159 S.W.2d 478 (Tex. 1942); *Gaynier v. Ginsberg,* 715 S.W.2d 749 (Tex. App.-Dallas 1986, writ ref'd n.r.e.); see also *Lifshutz v. Lifshutz,* 199 S.W.3d 9, 21-22 (Tex.App.-San Antonio 2006, pet. denied) (ratification is effective only when

the corporate officer has fully disclosed all material facts to the Board of Directors or shareholders) and *Karnes v. Fleming,* 2007 WL 4191894 (S.D. Tex. 2007) (defendant fiduciary has burden of proof on all these elements of ratification defense). There are, however, at least two cases which indicate that ratification is not available to condone a corporate officer or director's disloyalty or fraud. *General Dynamics v. Torres,* 915 S.W3d 45, 51 (Tex.App.-El Paso 1995, writ denied) and *Herider Farms-El Paso, Inc. v. Criswell,* 519 S.W.2d 473, 47778 (Tex.Civ.-El Paso 1975, writ ref'd n.r.e.).

Significantly, the general rule that "a party is bound by what he signs" is *not* applicable in a fiduciary relationship. *Miller v. Miller,* 700 S.W.2d 941 (Tex. App.-Dallas 1985, writ ref'd. n.r.e.); *Ginther v. Taub,* 570 S.W.2d516 (Tex.App.-Waco 1978, writ ref'd n.r.e.); *Gaynier v, Ginsberg,* 715 S.W.2d 749 (Tex. App.-Dallas 1986, writ ref'd n.r.e.).

Waiver, like ratification, invoke the same factual elements: (1) there must be full knowledge of the known right which vitiates a prior act, and (2) there must be an intentional relinquishment of the known right, or intentional recognition of the prior act, depending upon the user's choice of words. While to relinquish is the gist of "waiver" and to approve is the gist of "ratification," to relinquish a known right is to give validity to the prior act and to approve a prior act is to relinquish a known right. *Caldwell* v. *Callender Lake Prop. Owners Imp. Ass 'n,* 888 S.W.2d 903, 910 (Tex.App.—Texarkana 1994, writ denied) quoting *Jordan* v. *City of Beaumont,* 337 S.W.2d 115, 118 (Tex.Civ.App.—Beaumont 1960, writ ref'd n.r.e.)).

B. **Consent and Ratification** ─ The Texas Trust Code § 114.005 provides that a beneficiary acting on full information may relieve a trustee from any duty, responsibility, restriction, or liability. *Burnett v. First Nat. Bank of Waco*, 536 S.W .2d 600, 602 (Tex.Civ.App.—Waco 1976, writ ref d n.r.e.) is an example of ratification where a competent adult beneficiary signed off on the act complained of. In *Burnett*, letters and instruments delivered to the trustee bank by an adult beneficiary of a revocable trust established the beneficiary's consent, acquiescence, ratification, and release of the trustee's loans from the trust to entities controlled by the beneficiary and to persons associated with the beneficiary, the trustee bank was not liable to the beneficiary for the alleged failures to perform discretionary functions in making the loans.

"Ratification is the adoption or confirmation by a person, with knowledge of all material facts, of a prior act that did not then legally bind that person and which that person had the right to repudiate." *Avary v. Bank of America, NA.*, 72 S.W.3d 779, 788 (Tex.App.—Dallas 2002, pet. denied).

C. **Laches** ─ The affirmative defense of "laches" may be available to a fiduciary if he can establish that, *after full disclosure* of all facts, the beneficiary delayed in enforcing his rights until the position of the fiduciary had, in good faith, become so changed that he could not he restored to his former status if the beneficiary's rights were then enforced. *Culver v. Pickens*, 176 S.W.2d 167 (Tex. 1944); *Gaynier v. Ginsberg*, 715 S.W.2d 749 (Tex. App.-Dallas 1986, writ ref'd n.r.e.). What is required is *detrimental* reliance by the fiduciary on the inaction of the beneficiary, *and* a change in circumstances (e.g. the intervention of third-party rights). *Culver v. Pickens*, *supra* at 170-171; *Fitz-Gerald v. Hull*,237 S.W.2d 256 (Tex. 1951); *Gaynier v. Ginsberg*, 715 S.W.2d 749 (Tex. App.- Dallas 1986, writ ref'd n.r.e.).

D. **Confession and Avoidance** ─ If the fiduciary wishes to interpose an affirmative defense in the nature of "confession and avoidance", TRCP 94 requires that it be affirmatively plead. See e.g. *Sorrell v. Elsey,* 748 S.W.2d 584 (Tex.App.-San Antonio 1988, writ denied) (the court held that two nephews who were in a fiduciary relationship with their elderly aunt had waived their right to claim that certain property was deeded by her to them as a "gift" because they failed to affirmatively plead the gratuitous nature of the transfer as an affirmative defense). One example of an "avoidance" defense would be that the defendant, even if negligent, was protected by an exculpatory clause limiting his liability to "grossly negligent" acts. (See No. 10 below.)

E. **Statute of Limitations** ─ There is a four year statute of limitations for a breach of fiduciary duty cause of action. Tex.Civ.Prac. & Rem. Code § 16.004. The "Discovery Rule" applies in breach of fiduciary duty actions, *S.V. v. R.V.*, 933 S.W.2d 1 (Tex. 1996), although, as a result of the fiduciary duty of full disclosure, the beneficiary has no affirmative duty to investigate for possible violations of trust until he has actual knowledge of facts sufficient to excite inquiry. *Slay v. Burnett Trust*, 187 S.W.2d 377 (Tex. 1945); *accord, Johnson v. Buck*, 540 S.W.2d 393, 412-414 (Tex. Civ. App.-Corpus Christi 1976, writ ref'd n.r.e.) (Co-partner who relied on managing partner for explanation of representations

made by managing partner concerning state of business had no legal duty to use means allegedly available to discover fraud.)

As the Dallas Court of Appeals explained in *Lang v. Lee,* 777 S.W.2d 158 (Tex.App.-Dallas 1989, no writ), the modem "discovery rule" in a "fiduciary" statute of limitations defense makes certain "allowances" for the beneficiary:

> In an arm's length transaction, knowledge of facts that would have excited inquiry in the mind of a reasonably prudent person, which if pursued by him with reasonable diligence would lead to the discovery of the fraud, is equivalent to knowledge of the fraud as a matter of law… *In a confidential relationship, however, diligence on the part of the defrauded party does not exact as prompt and as searching an inquiry into the conduct of the other party as where the parties were strangers or dealing with strangers…* Where there is a relationship of trust or confidence… the defendant is under a duty to make a full disclosure of the facts so that the fraud may be discovered. The trust and confidence in the relationship are *evidentiary matters* bearing on the issue of whether the defrauded party acted as would a person of ordinary prudence in discovering the fraud.

Lang v. Lee, 777 S.W.2d at 164 (emphasis added) (citations omitted).

However, even though a fiduciary's conduct may be "inherently undiscoverable", due to the beneficiary's inability to inquire into the trustee's actions or his unawareness of the need to do so, when a fact of misconduct becomes apparent it can no longer be ignored regardless of the fiduciary nature of the relationship. *S.V. v. R.V.,* 933 S.W.2d 1, 8 (Tex. 1996). At that point, limitations will begin to run. *See, Poth v. Small, Craig & Werkenthin*, 967 S.W.2d 511 (Tex.App.-Austin 1998, writ denied); *Estate of Fawcett*, 55 S.W.3rd 214 (Tex.App.-Eastland 2001, pet. denied).

F. **Constructive Notice** ─ Important to note that in the case of *In the Estate of McGarr*, 10 S.W.3d 377 (Tex.App.—Corpus Christi 2000, pet. denied), the appellate court held that the beneficiaries of a probate estate were barred by the statute of limitations from bringing suit against a former executor and guardian because the facts related to his self-dealing were revealed to them in the guardianship inventories, the estate inventories, and the deeds which were on file in the deed records. The appellate court reasoned that because of the public filings of all of these documents, the beneficiaries were on constructive notice of these transactions. Conversely, information not revealed in an accounting or which is false will not bar a later suit by the beneficiary. *Thomas v. Hawpe*, 80 S.W. 129, Tex.Civ.App.—Dallas 1904). Accordingly, it is critical that the accounting contain the most accurate information as possible so as to begin the limitations period. For independent executors, the accounting procedure is found in Chapter 405 of the Texas Estates Code.

G. **Estoppel** ─ There are several cases in which beneficiaries have been held to be estopped from asserting a claim against a trustee because of the beneficiary's conduct. *See e.g., Beaty* v. *Bales,* 677 S.W.2d 750 (Tex.App.—San Antonio 1984, writ ref'd n.r.e.) and *Langford* v. *Shamburger,* 417 S.W.2d 438 (Tex.Civ.App.—Fort Worth 1967, writ ref' d n.r.e.). The fiduciary duty of full disclosure requires the fiduciary defendant to prove that any acquiescence in his actions by the beneficiary for "estoppel" purposes *occurred after, and in spite of, "full and complete disclosure" by the defendant. Langford v. Shamburger*, 417 S.W.2d 438, 446-447 (Tex. Civ. App.-Fort Worth 1967, writ ref'd n.r.e.); *Gaynier v. Ginsberg*, 715 S.W.2d 749 (Tex. App.-Dallas 1986, writ ref'd n.r.e.). *See also, Montgomery v. Kennedy*, 669 S.W.2d 309 (Tex. 1984) (fiduciary could not establish estoppel defense in absence of showing that principal had knowledge of fraud prior to accepting benefits under settlement agreement.), *but see, Tharp v. Blackwell*, 570 S.W.2d 154 (Tex.Civ.App.-Texarkana 1978, no writ history)(guardian on final accounting was entitled to all benefits received by ward - even if not supported by vouchers or prior court order - where ward admitted receipt of such expenditures). Here are the different types of estoppel:

a) *Promissory Estoppel*

The elements of promissory estoppel are: (1) a promise, (2) foreseeability of reliance by the promisor, (3) substantial and reasonable reliance by the promise to its detriment, and (4) enforcing the promise is necessary to avoid injustice. *Sipco Servs. Marine v. Wyatt Field Serv. Co.,* 857 S.W.2d 602, 605 (Tex.App.—Houston [1st Dist.] 1993, no writ).

b) *Equitable Estoppel*

The elements of equitable estoppel requires (1) a false representation or concealment of material facts; (2) made with knowledge, actual or constructive, of those facts; (3) with the intention that it should be acted on; (4) to a party without knowledge or means of obtaining knowledge of the facts; (5) who detrimentally relies on the representations. *Johnson & Higgins of Texas, Inc. v. Kenneco Energy, Inc.,* 962 S.W.2d 507, 515-16 (Tex. 1998).

c) *Quasi-Estoppel*

This defense precludes a person from asserting, to another's disadvantage, a right inconsistent with a position previously taken. *Lopez v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 864 (Tex. 2000); *see Schauer v. Von Schauer*, 138 S.W. 145, 149-50 (Tex.Civ.App.—Austin 1911, writ ref'd) ("Where a person has, with knowledge of the facts, acted or conducted himself in a particular manner, or asserted a particular claim, title, or right, he cannot afterwards assume a position inconsistent with such act, claim or conduct to the prejudice of another."). The doctrine applies when it would be unconscionable to allow a person to maintain a position inconsistent with one in which he acquiesced. *Lopez*, 22 S.W.3d at 864; *Atkinson Gas Co. v. Albrecht*, 878 S.W.2d 236, 240 (Tex.App.—Corpus Christi 1994, writ denied); *Vessels v. Anschutz Corp.*, 823 S.W.2d 762, 765-66 (Tex.App.—Texarkana 1992, writ denied). Unlike equitable estoppel, quasi-estoppel does not require a showing of a *false representation* or detrimental reliance. *Steubner Realty 19, Ltd. V. Cravens Road 88, Ltd.*, 817 S.W.2d 160, 164 (Tex.App.—Houston [14th Dist.] 1991, no writ).

H. **Consent/Release** ─ A release is an agreement or contract in which one party agrees that a duty or obligation owed by the other party is discharged immediately on the occurrence of a condition. *Nat'l Union Fire Ins. Co. v. ins. Co. of N. Am*, 955 S.W.2d 120, 127 (Tex.App.—Houston [14th Dist.] 1997), *aff'd sub nom*, 20 S.W.3d 692 (Tex. 2000); *see also Dresser Indus. Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 508 (Tex. 1993); *Williams v. Glash*, 789 S.W.2d 261, 264 (Tex. 1990). Keep in mind that if the fiduciary negotiated the release with the beneficiary, he must usually show more than just the existence of a release. In *Keck*, 20 S.W.3d at 699, the court held that it was the fiduciary's burden to prove that the release agreement he negotiated was fair and reasonable, and that the beneficiary was informed of all material facts relating to the release.

In some situations, it may be appropriate for the trustee or executor to seek the beneficiary's consent to the fiduciary's proposed action. In such case, the fiduciary must fully disclose all material facts to the beneficiary before seeking the beneficiary's consent.

If the fiduciary is sued for breach of fiduciary duty after the beneficiary signed a consent or release, the fiduciary can raise the affirmative defenses of estoppel, waiver, consent, release or ratification. *Burnett v. First Nat'l Bank of Waco*, 536 S.W.2d 600 (Tex. Civ. App. ─Eastland 1976, writ ref'd n.r.e.) (A beneficiary may, by his consent, acquiescence or ratification, be estopped to complain of a trustee's failure to diversify if the beneficiary had full knowledge of all material facts).

In some instances, a beneficiary's acceptance of a benefit can also preclude a beneficiary's claim. However, before a beneficiary's acceptance of a benefit can be established as estoppel, ratification or waiver, it must be shown that the benefit was accepted with knowledge of all material facts. *McAdams v. McAdams*, No. 07-99-0082-CV, 2000 WL 329578 (Tex. App. ─Amarillo 2000, no pet.) citing *Frazier v. Wynn*, 472 S.W.2d 750, 753 (Tex. 1971).

Although consents and releases can be effective in the estate context, it is important to keep in mind that an independent executor may not require a waiver or release from the distributee as a condition of delivery of property to a distributee. Tex. Est. Code § 405.002(b).

In the trust context, under Tex. Prop. Code § 114.005, a beneficiary who has legal capacity and is acting on full information may relieve a trustee from any duty, responsibility, restriction or liability as to the beneficiary that would otherwise be imposed on the trustee, including liability for past violations. Under § 114.0032, a written agreement between a trustee and a beneficiary, including a release, consent, or other agreement relating to a trustee's duty, power, responsibility, restriction, or liability, is final and binding on the beneficiary and any person represented by the beneficiary if: (1) the instrument is signed by the beneficiary; (2) the beneficiary has legal capacity to sign the instrument; and (3) the beneficiary has full knowledge of the circumstances surrounding the agreement. Tex. Trust Code § 114.0032.

One important case that has come out this year related to releases in the fiduciary context is *Austin Tr. Co. as Tr. of Bob & Elizabeth Lanier Descendants Trusts for Robert Clayton Lanier, Jr. v. Houren*, 664 S.W.3d 35 (Tex. 2023) where the Texas Supreme Court reasoned that a statute allowing a beneficiary to release a trustee from any duty that would otherwise be imposed under the Trust Code applied to the releases in the settlement agreement. This applied even though the releases were executed by the trustee of the descendant's trusts. The statute allowing a beneficiary to relieve a trustee from any duty under the Trust Code also applied to the releases in the agreement, despite the fact that the husband was already deceased when the agreement was executed. It was established that, under the statute allowing a beneficiary to relieve a trustee from any duty under the Trust Code, the children had full information at the time they signed the settlement agreement.

I. **Exculpation** ─ An exculpatory clause is a provision that relieves a fiduciary for financial liability for breach of fiduciary duty. Exculpatory clauses are valid in Texas. *Corpus Christi National Bank v. Gerdes*, 551 S.W.2d 521 (Tex.Civ.App─Corpus Christi 1977, writ ref'd n.r.e.); *lnterfirst Bank of Dallas, NA. v. Risser*, 739 S.W.2d 882 (Tex.Civ.App.─Texarkana 1987, no writ). Prior to the limitations codified in the Texas Trust Code, an exculpatory clause could not relieve a trustee from liability for actions taken in bad faith or with reckless indifference to the beneficiaries' interests. *Neuhaus v. Richards*, 846 S.W.2d 70 (Tex. App.─Corpus Christi 1992, jmt. set aside by agrmt., 871 S.W.2d 182). When reviewing exculpatory clauses in trusts, the Court strictly construes such clauses, and the trustee is only relieved of liability to the extent it is clearly provided in the clause. *See Martin v. Martin*, 363 S.W.3d 221 (Tex. App.─Texarkana 2011) (citing *Jochec v. Clayburne***,** 863 S.W.2d 516, 520 (Tex. App.─Austin 1993, writ denied)). Here are two very simple examples of exculpatory clauses:

> *"The trustee shall be saved harmless from any liability for any action he or she may take, or for the failure of such trustee to take any action, if done in good faith and without gross negligence."*
>
> *"Except for willful misconduct or fraud, a Trustee shall not be liable for any action, omission, loss, damage, or expense arising from the performance of his, her or its duties under this Trust Agreement."*

As Texas law has developed, the Legislature has imposed some limitations on the settlor's ability to exculpate or limit the duties and liabilities of a trustee through the provisions of a trust.

Historically, exculpatory clauses have been a beneficial tool to limit the liability of a fiduciary and discourage litigation; most professional fiduciaries require them before even considering an appointment. For purposes of flexibility and potential future changes in the fiduciary role, an exculpatory clause should always be considered when drafting a will, a trust, or other fiduciary documents. These clauses are favored when a settlor may want to limit a trustee's liability for negligent actions, especially where the settlor designates himself, or a close family relative as trustee or executor. While these protections are helpful to a fiduciary, Texas courts and the legislature have limited the scope of exculpatory provisions and carved out certain actions which cannot be insulated from liability. These carve-outs, and the history surrounding them, will be discussed later in this paper.

Generally, under Texas law, the specific terms of the trust prevail over the Texas Trust Code and the settlor may "expressly" relieve the trustee from a duty or restriction imposed by the Texas Trust Code or common law, or direct or permit the trustee to perform or refrain from an action that would otherwise violate a statutory or common law duty or restriction. *See* TEX. PROP. CODE §§ 111.0035; 114.007. Utilizing these statutory and common-law rules, exculpatory clauses attempt to limit the liabilities of a fiduciary, while other specific provisions may modify or eliminate the typical statutory or common-law duties of a fiduciary.

Keep in mind § 114.007 of the Property Code which prohibits the enforcement of an exculpatory clause that would relieve a trustee of liability for a breach of trust committed **in bad faith, intentionally or with reckless indifference to the interest of the beneficiary**. *See* TEX. TRUST. CODE § 114.007. Furthermore, the amendment makes clear that an exculpatory clause may not relieve the trustee of liability for any profit derived by the trustee from a breach of trust. *Id*. §114.007 provides:

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

a. A breach of trust committed:

i. In bad faith;
ii. Intentionally;
iii. With reckless indifference to the interest of a beneficiary; or

b. Any profit derived by the trustee from a breach of trust.

(b) A term in a trust instrument relieving the trustee of liability for a breach of trust in ineffective to the extent that the term is inserted in the trust instrument as a result of an abuse by the trustee of a fiduciary duty to confidential relationship with the settler.

(c) This section applies only to a term of a trust that may otherwise relieve a trustee from liability for breach of trust. **Except as provided in Section 111.0035, this section does not prohibit the settlor, by the terms of the trust, from expressly;**

a. Relieving the trustee from a duty or restriction imposed by this subtitle or by common law; or

b. Directing or permitting the trustee to do or not to do an action that would otherwise violate ad duty or restriction imposed by this subtitle or by common law.

Under the rules of statutory construction, the specific provisions of section 114.007(c), permit a trust to relieve a trustee of specific duties which would otherwise be imposed by the Texas Trust Code or common law, and control over the general provisions of the Texas Trust Code, including Section 111.0035. *See Dallas County v. Coutee*, 233 S.W.3d 542, 545 (Tex. App.─Dallas 2007, pet. denied).

Exculpatory clauses are strictly construed, and the trustee is relieved of liability only to the extent that the trust instrument clearly provides that he shall be excused. A provision relieving the trustee from losses resulting from investment in speculative stocks does not absolve the trustee from liability for its failure to diversify investments. *Jewett v. Capital Nat'l Bank*, 618 S.W.2d 109 (Tex.App.─Waco 1981, writ ref'd n.r.e). Thus, if the settler is seeking to exculpate a fiduciary for a specific duty, that duty should be specifically spelled out.

Specific duties and liabilities which are not listed in section 111.0035, can still be waived under the provisions of the Texas Trust Code. Cases generally recognize that no matter how broad the trust instrument's provisions are, the trustee will remain liable for a breach of trust committed in bad faith, intentionally or with reckless indifference to the interest of the beneficiary, or situations where a trustee has profited from a breach of trust. *See* TEX. TRUST CODE § 114.007. As with the self-dealing waivers, the scope of presence of an exculpatory clause effects the level of protection it affords a fiduciary, and the questions that must be answered by the finder of fact if an action is challenged.

The different types of exculpatory clauses, or the absence of a clause altogether, change the burdens of proof. The presence of a broad exculpatory provision would be helpful to combat claims of negligence related to investments or distributions: "No Trustee appointed by or in accordance with the provisions of this Agreement shall be liable for any mistake or error in judgment, but such Trustee shall be liable only in cases of bad faith or personal dishonesty." However, a general clause like this does not act to relieve the trustee of liability for intentional self-dealing without the presence of a separate self-dealing waiver.

If a trustee's actions fall within the parameters of a valid exculpatory clause, the beneficiary may not be able to collect any damages. An exculpatory clause does not interfere with the court's power to remove a trustee or deny a trustee's compensation if the trustee commits a breach of trust. Tex. Trust Code § 111.0035(6)(5). Further, the beneficiary should still be entitled to seek injunctive relief, a receivership, construction or instruction, and an accounting.

However, a beneficiary should know going into a lawsuit that an exculpatory clause could significantly limit the beneficiary's recovery.

To be on the safe side, defendants should always affirmatively plead any exculpatory language found in the operative documents and any language modifying statutory or common law duties of any kind. This is in the nature of a "confession and avoidance" defense which must be affirmatively plead under TRCP 94.

IX. OTHER TACTIAL CONSIDERATIONS

A. JUDICIAL DISCHARGE OF A FIDUCIARY:

Judicial discharge is essentially a court releasing a trustee or personal representative for any further duty to act as a fiduciary on the matter in the future. For a *personal representative*, the road to a judicial discharge starts with the filing of a final account for the estate – the purpose of this is to give the court and the beneficiaries a record of the transactions which took place in the estate. In most cases, a court approval of a final accounting is not a finding that the fiduciary properly administered the estate nor is a release of liability for the fiduciary. *Texas State Bank v. Amaro*, 87 S.W.3d 538, 544-545 (Tex. 2002) (Court's approval of an accounting does not necessarily adjudicate trustee's liability). Nevertheless, if the beneficiaries are given notice and an opportunity to object to the accounting and to raise claims during the approval of process, the approval of the final accounting will be considered *res judicata* of all issues actually litigated and considered by the court. *Coble Wall Trust Co., Inc. v. Palmer*, 859 S.W.2d 475, 480-481 (Tex.App.—San Antonio 1993, writ denied).

There is no "specific" statutory authority which allows for the judicial discharge of trustees; however, the right of a trustee to obtain a judicial discharge from past and future liability is recognized by our courts. *See* Bogards Trusts and Trustee, Section 974. The Texas Trust Code acknowledges this right by providing that a court may *determine the powers, responsibilities, duties, and liability of a trustee*. Under Texas Trust Code 115.001, that court may also require an accounting by the trustee, review trustee fees, and settle in term or final accounts. *See* Texas Trust Code §115.001(a)(9, 10). Additionally, Texas Trust Code § 113.081 provides that if a trustee seeks to resign from his position as trustee, the court may accept his resignation and discharge the trustee from the trust on the terms and conditions necessary to protect the rights of other interested persons.

B. RESIGNATION

Always consider whether your fiduciary should resign. If they have screwed up, for possible damage control be sure to be aware of what the will, trust, or partnership agreement provides in terms of resignation and designation of a successor fiduciary. Could it be a situation where a successor (executor or trustee) with (close to) exclusive standing to bring suit on behalf of the estate/trust might not bring suit against your fiduciary (as opposed to the complaining beneficiary or other interested party).

C. HAS THE FIDUCIARY SCREWED UP? TRCP 167. OFFER OF SETTLEMENT

As the attorney for the fiduciary, you need to determine if they have screwed up. If they have, you might consider an offer of settlement under TRCP 167. These rules are intended to avoid or dissuade protracted litigation. You should know them and use them.

167.1 Generally. Certain litigation costs may be awarded against a party who *rejects* an offer made substantially in accordance with this rule to settle a claim for monetary damages—including a counterclaim, crossclaim, or third-party claim.

167.2 Settlement Offer:

(a) *Defendant's declaration a prerequisite; deadline.* A settlement offer under this rule may not be made until a defendant—a party against whom a claim for monetary damages is made—files a **declaration** invoking this rule. When a defendant files such a declaration, an offer or offers may be made under this rule to settle only those claims by and against that defendant. The declaration must be filed no later than 45 days before the case is set for conventional trial on the merits.

(b) *Requirements of an offer.* A settlement offer must:

(1) be in writing;

(2) state that it is made under Rule 167 and Chapter 42 of the Texas Civil Practice and Remedies Code;

(3) identify the party or parties making the offer and the party or parties to whom the offer is made;
(4) state the terms by which all monetary claims—including any attorney fees, interest, and costs that would be recoverable up to the time of the offer—between the offeror or offerors on the one hand and the offeree or offerees on the other may be settled;
(5) state a deadline—no sooner than 14 days after the offer is served—by which the offer must be accepted;
(6) be served on all parties to whom the offer is made.

167.4 Awarding Litigation Costs.

(a) *Generally.* If a settlement offer made under this rule is rejected, and the judgment to be awarded on the monetary claims covered by the offer is **significantly less favorable** to the offeree than was the offer, the court must award the offeror litigation costs against the offeree *from the time the offer was rejected to the time of judgment*.

(b) *"Significantly less favorable" defined.* A judgment award on monetary claims is significantly less favorable than an offer to settle those claims if:

(1) the offeree is a claimant and the judgment would be *less than 80%* of the offer; or
(2) the offeree is a defendant and the judgment would be *more than 120%* of the offer.

(c) *Litigation costs.* Litigation costs are the expenditures actually made and the obligations actually incurred—directly in relation to the claims covered by a settlement offer under this rule—for the following:

(1) court costs;
(2) reasonable deposition costs, in cases filed on or after September 1, 2011;
(3) reasonable fees for not more than two testifying expert witnesses; and
(4) *reasonable attorney fees.*

(d) *Limits on litigation costs.*

(1) In cases filed before September 1, 2011, the litigation costs that may be awarded under this rule must not exceed the following amount:

a. the sum of the noneconomic damages, the exemplary or additional damages, and one-half of the economic damages to be awarded to the claimant in the judgment; minus
b. the amount of any statutory or contractual liens in connection with the occurrences or incidents giving rise to the claim.

(2) In cases filed on or after September 1, 2011, the litigation costs that may be awarded to any party under this rule *must not exceed the total amount that the claimant recovers* or would recover before adding an award of litigation costs under this rule in favor of the claimant or subtracting as an offset an award of litigation costs under this rule in favor of the defendant.

167.6 Evidence Not Admissible.

Evidence relating to an offer made under this rule is not admissible except for purposes of enforcing a settlement agreement or obtaining litigation costs. The provisions of this rule may not be made known to the jury by any means.

D. SHOULD THE FIDUCIARY FILE FIRST?

If a lawsuit is inevitable, weigh the advantages of filing the lawsuit first. Consider filing a declaratory judgment, petition to approve accounting, request for a judicial discharge, or other action to begin the process. There are many reasons to file first, a few are as follows:

1. The right to open and close at a trial.

- The fiduciary may have that opportunity anyway if he has the burden of proof.

2. Pick a more favorable venue – especially if there are multiple venue options. In trust cases where there is a single non-corporate trustee, trust venue statutes allow the suit to proceed in (1) any county in which the trust situs has been maintained in the previous four (4) years, or (2) the county of the trustee's residence. So you may have an opportunity in your choice of venue to avoid a traditionally damage-happy county.

3. What Court? Might consider a statutory probate court, if one is available in any of the venue-appropriate counties. These courts generally have a judge with more experience with fiduciary.

E. DECLARTORY JUDGMENT

Texas Civil Practice and Remedies Code Section 37.005 allows a court to render declaratory judgments "relating to a Trust or Estate". Section 37.009 of that Act provides that *"[i]n any proceeding under this chapter, the court may award costs and reasonable and necessary attorney's fees as are equitable and just."*

Who can bring the action?

Almost any person who is "interested" in an estate or trust can bring an action under Section 37.005. This includes "[a] person interested as or through an executor or administrator, including an independent executor or administrator, a trustee, a guardian, other fiduciary, creditor, devisee, legatee, heir, next of kin, or *cestui que trust* in the administration of a trust or of the estate of a decedent, an infant, mentally incapacitated person, or insolvent….".

What is covered?

Actions may be brought to obtain a 'declaration of rights or legal relations in respect to the trust or estate:

a) to ascertain any class of devisees, legatees, heirs, next of kin or others;
b) to direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity;
c) to determine any question arising in the administration of the trust or estate, including questions of construction of wills and other writings; or
d) To determine the rights or legal relations of an independent executor or independent administrator regarding fiduciary fees and the settling of accounts.

Given this broad range of topics, it is not uncommon for fees in a probate or trust case to be sought under the Declaratory Judgment Act as well as under the Trust Code or Estates Code. *See e.g., San Antonio Area Found. v. Lang*, 35 S.W.3d 636 (Tex. 2000) (use of Declaratory Judgment Act to construe language in a Will); *In re Ray Ellison Grandchildren Trust*, 261 S.W.3d 111, 126-127 (Tex. App.—San Antonio 2008, pet. denied) (In suit to construe language used in a Trust agreement, attorney's fees were sought under Tex. Trust Code Section 114.064 and under the Declaratory Judgment Act. Section 37.009); *Donihoo v. Lewis*, 2010 WL 1240970 at *14-16 (Tex. App.—Houston [1st Dist.] 2010, pet. denied) (mem. op.) (in suit to determine whether promissory note owned by testator at his death was his separate property or community property, fees sought under Section 37.009 of Declaratory Judgement Act); *Estate of Gibbons*, 451 S.W.3d 115 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) (Declaratory Judgment action brought to determine validity of insurance policy beneficiary designations and declaration regarding "no contest clause" in a will were appropriate and were not brought solely for the purpose of obtaining attorneys fees); and *Dudley v. Jake and Nina Kamin Foundation,* 2014 WL 298270 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (mem. op.) (Declaratory Judgment sought on issue of partial intestacy.).

Basis upon which fees are awarded.

The language in Tex. Civ. Prac. & Rem. Code section 37.009 is virtually identical to the language used in Texas Trust Code Section 114.064: "the court may award costs and reasonable and necessary attorney's fees as are equitable and just." Section 37.009 is not a "prevailing party" statute, even losers can be awarded fees. *Scottsdale Ins. Co. v. Travis*, 68 S.W.3d 72, 77 (Tex. App.—Dallas 2001, pet. denied). The amount of reasonable and necessary attorney's fees will be determined by the jury, but how much of those fees will be awarded (under an equitable and just standard) is up to the discretion of the court. *Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998) ("Unreasonable fees cannot be

awarded, even if the court believed them just, but the court may conclude that it is not equitable or just to award even reasonable and necessary fees.").

F. IS ARBITRATION AVAILABLE?

Arbitration is sometimes a great option if it is available. There have been several situations where arbitration produced surprisingly good results for fiduciaries who obviously breached their fiduciary duties. Arbitration also seems to have a chilling effect on the expectations of plaintiffs, which may also make the case easier to settle. More and more arbitration clauses are turning up in wills, trusts, and partnership agreements, among other contracts. In *Rachal v. Reitz*, 403, S.W.2d 804 (Tex. 2013) the Texas Supreme Court found that an arbitration process in a trust was valid and enforceable. I believe we will see more and more arbitration clauses in estate and trust documents.

G. ARE THERE ANY LIABLE THIRD PARTIES?

Here are some of the causes of actions against those third parties to try and shift liability away from your client:

Knowing Participation in Breach of Fiduciary Duty

The elements of knowing participation in breach of fiduciary duty are: (1) the existence of a fiduciary relationship; (2) the third party knew of the fiduciary relationship; and (3) the third party was aware that it was participating in the breach of that fiduciary relationship. *Meadows v. Hartford Life Ins. Co.,* 492 F.3d 634, 639 (5th Cir. 2007). Plaintiff thus must establish and obtain a finding that the fiduciary breached its fiduciary duty to the plaintiff. The plaintiff then must obtain a finding in the affirmative to a question such as the one that follows:

> Did _____ knowingly participate in _____'s breach of fiduciary duty to beneficiary?
>
> You are instructed that "knowingly" means actual awareness, at the time of the conduct, that _____ owed beneficiary a fiduciary duty, and that _____ was breaching that fiduciary duty. Actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness.

See JSC Neftegas-Impex v. City Bank, N.A., 365 S.W.3d 387, 411 (Tex.App.—Houston [1st Dist.] 2011, no pet.).

Aiding and Abetting in Breach of Fiduciary Duty:

The elements 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 *citing to Juhl v. Arrington,* 936 S.W.2d 640, 644 (Tex. 1996).

Designate Your Responsible Third Parties

Pursuant to Chapter 33 of the Texas Civil Practice and Remedies Code, a defendant may designate a responsible third party in tort or deceptive trade practice actions for purposes of submitting their percentage responsibility to the jury. The defendant may make this designation on motion without joining the responsible third party.

If an objection is timely filed to the designation, the court shall grant leave to designate a responsible third party unless the objecting party establishes (1) that the defendant did not plead sufficient facts concerning the alleged responsibility of the person to satisfy the pleading requirements of the rules, or (2) after having been granted leave to replead, the defendant failed to plead sufficient facts. Percentages of responsibility are determinative as to the ultimate judgment including whether joint or several liability exists for the damages recoverable by the claimant.

H. IS THERE A FORFEITURE/IN TERROREM/NO CONTEST CLAUSE?

And, should you, on behalf of your fiduciary assert a violation of it?

These clauses generally fall into "two" categories — (1) litigation prevention and (2) lifestyle control. Most of the cases and commentators focus on forfeiture clauses contained in wills, but they are also applicable in a trust. Texas courts have opined with trust forfeiture clauses as if they are valid. *See* e.g. *Lesikar v. Moon,* 237 S.W.3d 361 (Tex. App.—Houston [14th Dist.] 2007, writ denied); *Conte v. Conte,* 56 S.W.3d 830 (Tex. App.—Houston [1st Dist.] 2001, no writ).

Bear in mind that no matter what or how broad this forfeiture clause is, Texas case law dictates that they do not apply to the following actions:

a) To **recover an interest in devised property** – *Upham v. Upham*, 200 S.W.2d 880, 883 (Tex. App.-Eastland, 1947, writ refused);

b) To **compel an executor to perform duties** – *Bethurum v. Browder*, 216 S.W.2d 992, 992 (Texas App.-El Paso, 1948, writ refused);

c) To **ascertain a beneficiary's interest under a will** – *Roberts v. Chisum*, 238 S.W.2d 822, 825 (Tex. App.-Eastland, 1951);

d) To **compel the probate of a will** – *McGaffey v. Walker*, 379 S.W.2d 390 (Tex. App.- Eastland, 1964, writ refused);

e) To **recover damages for conversion of estate assets** – *Dulak v. Dulak*, 496 S.W.2d 776, 779-80 (Tex. App.-Austin, reversed on other grounds 513 S.W.2d 205);

f) To **construe a will's provisions** – *Reed v. Reed*, 569 S.W.2d 645, 645 (Tex. App.-Dallas, writ refused n.r.e.);

g) To **request an estate accounting or distribution** – *In re the Estate of Minnick*, 653 S.W.2d 503, 507-08 (Tex. App.- Amarillo, 1983, no writ.);

h) To **contest a deed conveying a beneficiary's interest** – *Veltmann v. Damon*, 696 S.W.2d 241, 246 (Tex. App.- San Antonio, 1985, affirmed in part, reversed in part 701 S.W.2d 247);

i) To **determine the effect of a settlement** – *In re the Estate of Hodges*, 725 S.W.2d 265, 268 (Tex. App.-Amarillo, 1986, no writ.);

j) To **challenge an executor appointment** – *In re Estate of Newbill*, 781 S.W. 2d 727, 729 (Tex. App.—Amarillo 1989, no writ);

k) To **seek redress from executors who breach fiduciary duties** – *McLendon v. McLendon*, 862 S.W. 3d 662, 679 (Tex. App.—Dallas 1993, writ denied); and

l) Presenting **testimony in a will contest brought by other beneficiaries** – *Hazen v. Cooper*, 786 S.W.2d 519, 520 (Tex. App.—Houston [14th Dist.] 1990, no writ).

This is a typical forfeiture clause designed to prevent a will contest:

> If any person, either directly or indirectly, attempts to oppose or set aside the probate of this Will or to impair or invalidate any of the provisions of the will, any devise or other provision I have made to or for that person under this Will is revoked.

Here is a broader forfeiture clause designed to prevent litigation in many different areas:

> No Contest Clause. If any beneficiary under this will in any manner, either directly or indirectly, contests, attacks, or calls into question this will or any of its provisions, or impairs the administration of my estate, any share or interest in my estate given to or for the benefit of that beneficiary and her descendants under this will is revoked and shall be disposed of in the same manner provided herein as if that beneficiary had predeceased me without ascendants or descendants. If either "Mark" or "Sarah" makes any claim against my Estate of any purpose, then any gift to or for such person, including without limitation the "Mark" TRUST and the "Sarah" TRUST, is revoked and shall be disposed of in the same manner provided herein as if such person had predeceased me.

Here is a forfeiture proven to protect fiduciaries:

It is my desire that there shall be not a controversy whatever among the members of his family, or any of them concerning this Trust Agreement or the administration of the trusts created hereunder, and in order, if possible, to prevent such controversy, it is my will and he hereby expressly provides and makes it a condition precedent to the taking, vesting, receiving or enjoying of any interest in any property or income under or by virtue of the trusts created hereunder that no person or party hereunder shall in any manner contest the trusts created herein or question or contest any provision or recital herein or the operation thereof or any distributions made by the Trustee or any actions taken by the Trustee. I hereby further direct and provide that should any person or party so contest or question, or bring suit, or in any manner whatever directly or indirectly aid in any such contest or questioning, or suit, he or she shall thereupon lose and forfeit all benefits to him or her under the provisions hereof as if the person so contesting or questioning the trust created hereunder or aiding therein had died and such trust of which such person was a beneficiary shall be administered as if such person had died.

Asserting Violation of the No-Contest Clause at Trial? Should You?

If you're defending a fiduciary in a will contest or other contest which potentially violates an in terrorem clause, what should you do? Could you use the in terrorem clause against the beneficiary in the litigation? Whenever I'm defending a fiduciary and there is a no contest or in terrorem clause, I'm always cognizant of the fact that using that clause against a beneficiary who is complaining about what the fiduciary has done might have the opposite effect in a jury trial of making the fiduciary look greedy or assisting in the beneficiary's case.

It is the beneficiary's burden under Texas Estates Code 254.005 to receive a favorable finding on whether or not they have bought the action with just cause and in good faith. This is also true in the trust context. If they don't seek that finding and they lose the case, they have in effect violated the forfeiture provision. So be careful when defending the fiduciary or alleged wrongdoer in blatantly asserting violation of these forfeiture provisions because it can turn out in the end to have a negative impact at trial.

I. EXPERTS IN FIDUCIARY LITIGATION

Three types of experts can be particularly helpful. A fiduciary expert is the most important but also the most problematic. The cases are mixed on whether a fiduciary expert can testify, and more courts say "no" to fiduciary experts than "yes". But a fiduciary expert can help if the court will allow it. Even if the court is not likely to allow an expert, it may be helpful to have one for guidance and also to help soften the plaintiff beneficiaries. For example, if you have an expert who says there was no breach, or that the breach was only negligent as opposed to grossly negligent, then he may be able to take some of the wind out of the plaintiff's sail.

Accounting and damage experts are crucial. You need to be able to show that all of the money and property are accounted for, and you need to be able to respond to the plaintiff's damage expert with your own, more conservative calculation of damage (or better yet, an opinion of no damage at all).

J. TCPA:

Every time a new case comes out in the fiduciary world dealing with the anti-SLAPP statute (Tex. Civ. Prac. & Rem. Code Ann. § 27.001(6)), The law gets more and more confusing. As a litigator in this area, you at least need to be aware of what the law is in fiduciary litigation area so that in the event you encounter one of these cases you know where to turn to deal with it. Here is a general synopsis:

As an anti-SLAPP statute, the TCPA "protects citizens who petition or speak on matters of public concern from retaliatory lawsuits that seek to intimidate or silence them." *In re Lipsky*, 460 S.W.3d 579, 584 (Tex. 2015) (orig. proceeding). Under the TCPA, subject to certain exemptions, '[i]f a legal action is based on or is in response to a party's exercise of the right of free speech, right to petition, or right of association or arises from any act of that party in furtherance of the party's communication or conduct described by Section 27.010(b), that party may file a motion to dismiss the legal action." Tex. Civ. Prac. & Rem. § 27.003(a). However, a court "may not' dismiss the legal action "if the party bringing [it] establishes by clear and specific evidence a prima facie case for each essential element of the claim in question." *Id.* § 27.005(c). Notwithstanding section 27.005(c), "the court shall dismiss a legal action against the

moving party if the moving party establishes an affirmative defense or other grounds on which the moving party is entitled to judgment as a matter of law." *Id.*, § 27.005(d).

To be entitled to dismissal under the TCPA, the defendant has the initial burden to show by a preponderance of the evidence that the plaintiff's claim "is based on, relates to, or is in response to" the defendant's exercise of the right to petition, association, or speech. *See In re Lipsky*, 460 S.W.3d 579, 586 (Tex. 2015); A court may determine the basis of the legal action by looking to the plaintiff's allegations, not by considering the defendant's admissions or denials. *See Hersh v. Tatum*, 526 S.W.3d 462, 467 (Tex. 2017).

If the defendant satisfies this initial burden, the burden shifts to the plaintiff to establish by clear and specific evidence a prima facie case for each essential element of the claim in question. *See ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 899 (Tex. 2017). To establish a prima facie case, a plaintiff must provide enough detail to show the factual basis for its claim. *In re Lipsky*, 460 S.W.3d at 591.

An "exercise of the right to petition" means, among other things, "a communication in or pertaining to ... a judicial proceeding." Tex. Civ. Prac. & Rem. Code § 27.001(4)(A)(i). An "exercise of the right of association" means "a communication between individuals who join together to collectively express, promote, pursue, or defend common interests." *Id.* § 27.001(2). A "communication" is broadly defined as "the making or submitting of a statement or document in any form or medium." *Id.* § 27.001(1); *see also Youngkin v. Hines*, 546 S.W.3d 675, 680 (Tex. 2018).

In deciding whether a legal action should be dismissed, courts consider the pleadings and affidavits. Tex. Civ. Prac. & Rem. Code § 27.006(a). Whether the parties have met their respective burdens is a question of law that we review de novo. *Nunu v. Risk*, No. 14-19-00564-CV, 2020 WL 6203193, at *10 (Tex. App.—Houston [14th Dist.] Oct. 22, 2020, no pet. h.) (citing *Dall. Morning News, Inc. v. Hall*, 579 S.W.3d 370, 377 (Tex. 2019)).

The purpose of the TCPA is to "encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, to protect the rights of a person to file meritorious lawsuits for demonstrable injury." Tex. Civ. Prac. & Rem. Code § 27.002. Thus, the purpose is to dispose of lawsuits that are designed to chill First Amendment rights, not to dismiss meritorious claims. *In re Lipsky*, 460 S.W.3d at 589. The TCPA should be construed liberally to effectuate its purpose. Tex. Civ. Prac. & Rem. Code § 27.001(b).

Here are some of the TCPA rulings in this area of the law:

- *Roach v. Roach,* 2023 WL 6056994 (Tex. App.- Dallas, 2023), Defendant's claims for declaratory judgment and filing of lis pendens related to in terrorem clause was not in violation to TCPA.
- *Marshall v. Marshall*, 2021 WL 208459 (Tex. App.─ Houston [14th Dist.], rev. denied). Declaratory judgment claims based on an in terrorem clause were barred under TCPA, however, breach of fiduciary duty claims were now.
- *Estate of Gleghorn*, 2022 WL 16842932 (Tex. App. – Tyler, 2002, review denied), dealing with jurisdictional issues of the dismissal of will contest claims pursuant to TCPA and ruling that dismissal under TCPA was interlocutory and not appealable.
- *In re Panchakarla*, 602 S.W.3d 536 (Tex. 2020) in TCPA cases, the Legislature has expressly constrained trial-court authority over TCPA orders in a very limited way: by making interlocutory orders denying TCPA dismissal motions immediately appealable and automatically staying all trial court proceedings until a perfected interlocutory appeal has been concluded. *See id.* § 51.014(a)(12), (b). But the TCPA is silent about a trial court's authority to reconsider either a timely issued ruling granting a TCPA motion to dismiss or a timely order denying such a motion when no interlocutory appeal is pending. Construing the statutory scheme as a whole, and giving weight to the language the Legislature included and excluded, we hold that the TCPA does not impose a 30-day restriction on a trial court's authority to vacate a ruling on a TCPA motion to dismiss.

- *Hodge v. Carter*, 2022 WL 14989763 (Tex. App.- Austin, 2022, appeal ongoing), ruling consistent that the granting of a TCPA motion to dismiss relating to estate administration which does not resolve the entire controversy is interlocutory.