EVALUATING AND LITIGATING FIDUCIARY DUTY CLAIMS

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I. Introduction

Fiduciary duty claims are unique because they are a blend of tort and equity. The standard to which fiduciaries are held is extraordinary. "Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard behavior. As to this there has developed a tradition that is unbending and inveterate." *See Sorrell v. Elsey*, 748 S.W.2d 584, 587 (Tex. App.—San Antonio 1988, (quoting Justice Cardozo in *Meinhard v. Salmon*, 349 N.Y. 458, 164 N.E. 545, 546 (1928)). At the same time, "fiduciary duties are equitable in nature and generally not subject to hard and fast rules." *Nat'l Plan Administrators, Inc. v. Nat'l Health Ins. Co.*, 235 S.W.3d 695, 702 (Tex. 2007).

This article provides an overview of recent case law applicable to fiduciary relationships, discusses how to present these cases to a jury, and addresses available remedies. It also discusses the applicability of the proportionate responsibility scheme under Chapter 33 of the Texas Civil Practice and Remedies Code. We conclude with practical pointers on evaluating whether to accept representation of a client accused of violating a fiduciary duty and issues to keep in mind in litigating these cases.

II. Establishing that a Fiduciary Duty Exists

Texas courts recognize two types of fiduciary relationships. The first is a formal fiduciary relationship, which exists as a matter of law and includes the relationships between attorney and client, principal and agent, partners, and joint venturers. *Insurance Co. of North Am. v. Morris*, 981 S.W.2d 667, 674 (Tex. 1998) (emphasis added). The second is an informal fiduciary relationship, which arises from a "moral social, domestic or purely personal relationship of trust and confidence, generally called a confidential relationship." *Abetter Trucking Co., Inc. v. Arizpe*, 113 S.W.3d 503, 508 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (*quoting Associated Indem. Corp. v. CAT Contracting, Inc.*, 964 S.W.2d 276, 287 (Tex. 1998)).

The question of whether a fiduciary duty exists is usually a question of law. *Nat'l Plan Administrators, Inc. v. Nat'l Health Ins. Co.*, 235 S.W.3d 695, 700 (Tex. 2007). "Where the underlying facts are undisputed, determination of the existence, and breach, of fiduciary duties are questions of law, exclusively within the province of the court." *Meyer v. Cathey*, 167 S.W.3d 327, 330 (Tex. 2005). When the evidence regarding the parties' relationship is disputed, the existence of an informal fiduciary relationship is a question of fact. *Lee v. Hasson*, 286 S.W.3d 1, 14 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).

As set out below, the exact parameters of the duties owed by fiduciaries vary based on the type of relationship and the agreement of the parties. In general, a fiduciary owes a duty of good faith and fair dealing and an additional duty of loyalty by which the fiduciary must place the interest of the beneficiary above his/her own. *Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp.*, 823 S.W.2d 591, 593-94 (Tex. 1992).

A. Formal Fiduciary Relationships

Following is a discussion of some of the formal relationships in which courts have held a fiduciary duty exists as a matter of law.

1. Attorney and Client

Attorneys owe a fiduciary duty of loyalty to their clients as a matter of law on the basis that "the attorney-client relationship is one of 'most abundant good faith,' requiring absolute perfect candor, openness and honesty, and the absence of any concealment or deception." *Goffney v. Rabson*, 56 S.W.3d 186, 193 (Tex. App.—Houston [14th Dist.] 2001, no pet.). "The basic fiduciary obligations are two-fold: undivided loyalty and confidentiality." 2 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 14.1, at 530 (5th ed. 2000).

"Generally, a lawyer's fiduciary duties to a client, although extremely important, 'extend only to dealings within the scope of the underlying relationship of the parties.'" *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 159 (Tex. 2004). In *Joe*, the supreme court held that the shareholder of a law firm, who was also a city council member, did not have a duty to inform a firm client of an upcoming city council meeting in which zoning matters potentially affecting the client's interests would be addressed. *Id.* at 160. The court held that the scope of the law firm's representation did not extend to representation of the client in matters before the city council and thus that there was no duty to inform. *Id.*

2. Partners

Historically, under both Texas common law and the Texas Uniform Partnership Act (TUPA), partners owed each other a fiduciary duty. *See* TEXAS UNIFORM PARTNERSHIP ACT § 21; *Johnson v. Peckham*, 120 S.W.2d 786, 787-788 (1938). Under established Texas common law, partners owe an "obligation of loyalty to the joint concern and of the utmost good faith, fairness, and honesty in their dealings with each other with respect to matters pertaining to the enterprise." *Lifshutz v. Lifshutz*, 199 S.W.3d 9, 18 (Tex. App.—San Antonio 2006, pets. denied) (quoting *Bohatch v. Butler & Binion*, 977 S.W.2d 543, 545 (Tex. 1998). Partners also owe a duty to refrain from usurping corporate opportunities. *Id.*

The Texas Revised Partnership Act (TRPA) has changed Texas statutory law regarding duties between partners. Specifically, the TRPA eliminated the statutory fiduciary duty between partners that was contained in the earlier Texas Uniform Partnership Act (TUPA). The TRPA replaces fiduciary duty with a "duty of loyalty," the definition of which does not include the term "fiduciary." *See* TEX. BUS. ORG. CODE § 152.205 (Vernon Pamphlet 2009).

The duty of loyalty under the TRPA includes three specific duties: (1) Accounting to and holding for the partnership any property, profit, or benefit derived by the partner in the conduct and winding up of the partnership business or from use by the partner of partnership property; (2) Refraining from dealing with the partnership on behalf of a person having an adverse interest to the partnership; and (3) Refraining from competing with the partnership or dealing with the partnership in a manner adverse to the partnership. *Id.* The Act also provides that "[a] partner does not violate a duty or obligation under this [Act] or under the partnership agreement merely because the partner's conduct furthers the partner's own interest." *Id.* § 152.204.

Despite these statutory changes, Texas courts continue to find a fiduciary duty between partners. *See M.R. Champion, Inc. v. Mizell*, 904 S.W.2d 617 (1995) (partners owe each other and their partnership a duty in the nature of a fiduciary duty); *Hughes v. St. David's Support Corp.*, 944 S.W.2d 423, 425 (Tex. App. – Austin 1997, pet. den.) (it is well established that partners are charged with a fiduciary duty). In *M.R. Champion*, the Texas Supreme Court states: "Partners owe each other and their partnership a duty *in the nature of* a fiduciary duty in the conduct and winding up of partnership business, and are liable for breach of that duty." *M.R. Champion*, 904 S.W.2d at 618 (emphasis added).

To the extent there is conflict between the statutory and common law duties applied to partners, that conflict may be the subject of future litigation.

3. Agents

"An agency relationship imposes certain fiduciary duties on the parties. But even in an agency relationship such as employer-employee, courts take all aspects of the relationship into consideration when determining the nature of fiduciary duties flowing between the parties." *Nat'l Plan Administrators, Inc. v. Nat'l Health Ins. Co.*, 235 S.W.3d 695, 700 (Tex. 2007). Thus although an agent is considered a fiduciary of the principal as a matter of law, fact questions may be presented on the question of (1) whether an agency relationship exists in the first place, and (2) the scope of the relationship and the nature of the fiduciary duties flowing therefrom.

An agency relationship cannot be presumed, and the burden of proof is on the party asserting the existence of the relationship. *Id.* For there to be an agency relationship, there must be some act constituting an appointment of a person as an agent; it is a consensual relationship. *Carr v. Hunt*, 651 S.W.2d 875, 879 (Tex. App.—Dallas 1983, writ ref'd n.r.e.).

An agent is one who consents to the control of another to conduct business or manage some affair for the other, who is the principal. *Schott Glas v. Adame*, 178 S.W.3d 307, 315 (Tex. App.—Houston [14th Dist.] 2005, pet. denied) (reversing agency finding where no evidence of control over means and details of work); *West v. Touchstone*, 620 S.W.2d 687, 690 (Tex. App.—Dallas 1981, writ ref'd n.r.e.) (reversing summary judgment because fact issue existed as to whether real estate agent was fiduciary of property owner). The defining feature of the agency relationship is the principal's right to control the actions of the agent. *Schott Glas*, 178 S.W.3d at 315. This right to control includes not only the right to assign tasks but the right to dictate the means and details of how the agent will complete these tasks. *Id.* It is this level of control that distinguishes an agent from an independent contractor. *Id.*

The supreme court has adopted section 8.07 from the Restatement (Third) of Agency, which states that the scope of the agent's fiduciary duties should be defined by the contract between principal and agent:

> This section makes the basic point that an agent's duties of performance to the principal are subject to the terms of any contract between them. The Restatement's position and our prior cases are consistent in respecting the right of persons to define the terms of their business relationships.

Nat'l Plan Administrators, 235 S.W.3d at 700. Thus parties may contractually limit the scope of any duties owed by fiduciaries, at least in the context of agency relationships.

4. Trustees and executors

The duty of a trustee is to administer the estate or trust for the benefit of the beneficiaries. *Huie v. DeShazo*, 922 S.W.2d 920, 924 (Tex. 1996). This duty is a fiduciary duty, which arises as a matter of law and encompasses a range of specific obligations owed by a trustee to the trust's beneficiaries. *See Meyer v. Cathey*, 167 S.W.3d 327, 330 (Tex. 2005). An executor of an estate also owes a fiduciary duty to the estate beneficiaries as a matter of law. *FCLT Loans, L.P. v. Estate of Bracher*, 93 S.W.3d 469, 481 (Tex. App.—Houston [14th Dist.] 2002, no pet.). The executor holds the estate in trust for the benefit of those who have acquired a vested right to the decedent's property under the will. *Id.* The executor does not, however, owe a fiduciary duty to the creditors of the estate. *Id. But see Ertel v. O'Brien*, 852 S.W.2d 17, 21 (Tex. App.—Waco 1993, writ denied) (describing the relationship between the executor and a creditor as fiduciary).

"The executor of an estate is held to the same high fiduciary duties and standards in the administration of a decedent's estate as are applicable to trustees." *Ertel*, 852 S.W.2d at 20. These duties have been generally described as follows:

> It is a well-settled rule that a trustee can make no profit out of his trust. The rule in such cases springs from his duty to protect the interests of the estate, and not to permit his personal interest to in any wise conflict with his duty in that respect. The intention is to provide against any possible selfish interest exercising an influence which can interfere with the faithful discharge of the duty which is owing in a fiduciary capacity.

Humane Society of Austin and Travis Cty. v. Austin Nat'l Bank, 531 S.W.2d 574, (Tex. 1975).

Trustees and executors owe two fundamental duties to the beneficiaries: (1) a duty of care; and (2) a duty of loyalty. *Neuhaus v. Richards*, 846 S.W.2d 70 (Tex. App.—Corpus Christi 1992, writ granted). However, except in the case of self-dealing transactions, the terms of the trust instrument may modify the trustee's exact duties. *Id.*

The Texas Property Code imposes a number of specific duties on trustees, all of which would be significant in determining the exact obligations owed by a trustee or executor in a particular case. *See generally* TEX. PROP. CODE ANN. § 113.051 *et. seq.* In addition, the common law imposes a number of specific duties on trustees. *See, e.g.*, *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (imposing "a fiduciary duty of full disclosure of all material facts known to [the trustee] that might affect the beneficiaries' rights."); *Herschbach v. City of Corpus Christi*, 883 S.W.2d 720, 735 (Tex. App.—Corpus Christi 1994, writ denied) (imposing a duty of good faith, fair dealing, loyalty and fidelity); *Neuhaus*, 846 S.W.2d at 74 ("[O]ne of the most basic duties of a trustee is to make the assets of the trust productive while at the same time preserving the assets.").

5. Other fiduciary relationships

There are a number of other fiduciary relationships under Texas law. Some are imposed by statute. See *Nat'l Plan Administrators, Inc. v. Nat'l Health Ins. Co.*, 235 S.W.3d 695, 700 (Tex. 2007) (collecting statutes imposing fiduciary duties on parties such as third-party administrators of insurance plans). Others arise under the law or due to the contractual relationship between the parties.

An escrow agent owes "the duty of loyalty, the duty to make full disclosure, and the duty to exercise a high degree of care to conserve the money and pay it only to those persons entitled to receive it." *City of Fort Worth v. Pippen*, 439 S.W.2d 660, 665 (Tex. 1969). Law firm associates owe a fiduciary duty to their employers not to profit from referring a matter to another law firm or lawyer. *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 202 (Tex. 2002). Spouses generally owe each other a fiduciary duty. *Boaz v. Boaz*, 221 S.W.3d 126, 133 (Tex. App.—Houston [1st Dist.] 2006, no pet.). And brokers may owe fiduciary duties to their clients, depending on the scope of their agency. *Hand v. Dean Witter Reynolds Inc.*, 889 S.W.2d 483, 492 n.5 (Tex. App.—Houston [14th Dist.] 1994, writ denied).

Corporate officers and directors owe fiduciary duties to the corporation, but do not owe fiduciary duties to the individual shareholders absent a special contract or confidential relationship. *Cotten v. Weatherford Bancshares, Inc.*, 187 S.W.3d 687, 694-95 (Tex. App.—Forth Worth 2006, pet. denied). "Three broad duties stem from the fiduciary status of corporate officers and directors: namely, the duties of loyalty, obedience, and due care." *Loy v. Harter*, 128 S.W.3d 397, 407 (Tex. App.—Texarkana 2004, pet. denied). Corporate fiduciaries must not allow their personal interest to prevail over the interests of the corporation, and they may not usurp corporate opportunities for personal financial gain. *Id.*

An operator under a joint operating agreement does not owe fiduciary duties to the working interest owners unless the parties are also joint venturers. *Castle Texas Prod. Ltd. Partnership v. The Long Trusts*, 134 S.W.3d 267, 277 (Tex. App.—Tyler 2003, pets. denied). The law does imply an obligation to develop land subject to an oil and gas lease after oil and gas are discovered in paying quantities. *In re Bass*, 113 S.W.3d 735, 743 (Tex. 2003). This implied covenant to develop is not a fiduciary duty. *Id.* In addition, absent execution of a lease, a mineral estate owner does not owe a fiduciary duty to non-participating royalty interest owners to develop the mineral estate. *Id.* at 744. It is becoming more common for leases to include language imposing a fiduciary duty on operators. This will likely be a trend of future litigation.

B. Establishing an Informal Fiduciary Relationship

1. The general requirements for establishing an informal fiduciary relationship

Texas courts have occasionally found that a fiduciary relationship exists despite the lack of a formal fiduciary relationship between the parties. *Thigpen v. Locke*, 363 S.W.2d 247, 253 (Tex. 1962). This informal fiduciary relationship is disfavored because "it imposes extraordinary duties and require the fiduciary to put the interests of the beneficiary ahead of its own if the need arises." *ARA Auto. Group v. Cent. Garage, Inc.*, 124 F.3d 720, 723 (5th Cir. 1997).

"An informal fiduciary relationship exists 'where, because of family relationship or otherwise, [one party] is in fact accustomed to be guided by the judgment or advice' of the other. . . Stated another way, a party fails to comply with his fiduciary duty 'where influence has been acquired and abused, and confidence has been reposed and betrayed.'" *Lee v. Hasson*, 286 S.W.3d 1, 14 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (citations omitted).

"To impose an informal fiduciary duty in a business transaction, the special relationship of trust and confidence must exist prior to, and apart from, the agreement made the basis of the suit." *Meyer*, 167 S.W.3d at 331. "Mere subjective trust alone does not . . . transform arm's-length dealing into a fiduciary relationship." *Id.* (declining to find an informal fiduciary relationship existed based on parties' business relationship and their history as friends and frequent dining partners).

In evaluating whether an informal relationship exists, courts consider whether there is evidence in the record that one of the parties relied on the other for "moral, financial, or personal support or guidance." *Lee*, 286 S.W.3d at 15 (quoting *Trostle v. Trostle*, 77 S.W.3d 908, 915 (Tex. App.—Amarillo 2002, no pet.). The nature and length of the relationship between the parties is important – a familial relationship may give rise to a fiduciary relationship, but a mere friendship often will not. *Id.* In *Lee*, the record evidence revealed an unusually close personal relationship between the parties, a long-standing business relationship, and there was significant evidence that the plaintiff had relied on the defendant for both financial and personal guidance over the years. On those specific facts, the court found there was legally sufficient evidence of a fiduciary relationship. *Id.* at 19 ("[T]he extraordinary facts of this case present a rare example of the type of close personal relationship of trust and confidence that gives rise to a legally cognizable fiduciary duty.").

2. Establishing an informal attorney-client relationship

An attorney-client relationship is ordinarily created by an express agreement between the parties. *See, e.g.*, *Sutton v. McCormick*, 47 S.W.3d 179, 182 (Tex. App.—Corpus Christi 2001, no pet.). However, the attorney-client relationship can also be implied based on the parties' conduct. *See Banc One Capital Partners Corp. v. Kneipper*, 67 F.3d 1187, 1198 (5th Cir. 1995); *Parker v. Carnahan*, 772 S.W.2d 151, 156 (Tex. App.—Texarkana 1989, writ denied). In *Parker*, the Texarkana Court of Appeals described the standard as follows:

> The legal relationship of attorney and client is purely contractual and results from the mutual agreement and understanding of the parties concerned, based upon the clear and express agreement of the parties as to the nature of the work to be undertaken and the compensation agreed to be paid therefor. The contract of employment may be implied by the conduct of the two parties. All that is required is that the parties explicitly or by their conduct manifest an intention to create the attorney-client relationship.

Parker, 772 S.W.2d at 156.

Courts apply an objective standard, examining what the parties said and did, in order to determine if there was a meeting of the minds with respect to the creation of an attorney-client

relationship. *Sutton*, 47 S.W.3d at 182. The client's subjective belief that an attorney-client relationship existed is not, in and of itself, sufficient to establish an attorney-client relationship. *See Vinson & Elkins v. Moran*, 946 S.W.2d 381, (Tex. App.—Houston [14th Dist.] 1997, writ dism'd by agrt.) ("To determine if there was an agreement or meeting of the minds, one must use objective standards of what the parties said and did and not look to their subjective states of mind.").

The attorney-client relationship does not depend upon the payment of a fee, but may exist as a result of rendering services gratuitously. *Parker*, 772 S.W.2d at 157. However, the mere fact that services are rendered does not mean that an attorney-client relationship existed. For example, it is possible that an attorney may act as a mere scrivener between two parties in drafting documents for a transaction. *Sutton*, 47 S.W.3d at 184; *In re Bivins*, 162 S.W.3d 415, 420 (Tex. App.—Waco 2005, no pet.).

In the absence of evidence that the attorney knew that the parties assumed he or she was representing them in a matter, the attorney has no affirmative duty to inform the parties otherwise. But an attorney can be liable when the circumstances would lead the non-client to believe the attorney has undertaken the representation and the attorney fails to warn the non-client that this is not the case. *See Cantu v. Butron*, 921 S.W.2d 344, 351 (Tex. App.—Corpus Christi 1996, writ denied) (recognizing that gaining trust and confidence can establish a relationship); *Byrd v. Woodruff*, 891 S.W.2d 689, 700 (Tex. App.—Dallas 1994, writ denied); *Perez v. Kirk & Carrigan*, 822 S.W.2d 261, 265-66 (Tex. App.—Corpus Christi 1991, writ denied). Such liability would be imposed if "the attorney was aware or should have been aware that his conduct would have led a reasonable person to believe that the attorney was representing that person." *Burnap v. Linnartz*, 914 S.W.2d 142, 148-49 (Tex. App.—San Antonio 1995, no writ).

In a litigation context, an attorney declining representation can avoid this problem by: (1) stating in writing to a person whom the attorney has declined to represent that the attorney is not taking the person's case; and (2) urging that person in writing to obtain other counsel immediately because of the possibility of problems with the statute of limitations.

III. Proving a Fiduciary Duty Was Breached

1. Elements of a Breach of Fiduciary Duty Claim

The elements of a breach of fiduciary duty claim depend on whether actual damages are sought. In the typical case, where the plaintiff seeks to recover actual damages, the elements are: (1) a duty; (2) a breach of that duty; (3) the breach proximately caused injury; and (4) damages resulted. *Abetter Trucking Co. v. Arizpe*, 113 S.W.3d 503, 508 (Tex. App.—Houston [1st Dist.] 2003, no pet). However, when the plaintiff seeks a disgorgement or fee forfeiture remedy, the plaintiff does not have to prove causation or damages. *See Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999) (forfeiture); *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 160 S.W.2d 509, 513 (Tex. 1942) (disgorgement). In those cases, the elements are characterized as follows: (1) a duty; (2) a breach of that duty; (3) that resulted in a benefit to the defendant. *Kelly v. Gaines*, 181 S.W.3d 394, 414 (Tex. App.—Waco 2005), *rev'd on other grounds*, 235 S.W.3d 179 (Tex. 2007).

Fiduciary duty claims are also unique in that the allocation of the burden of proof depends on the facts of the particular case. In situations where the fiduciary and the plaintiff participated in a business deal or where the fiduciary was self-dealing in a transaction, the defendant actually bears the burden of proof on the second element—whether the attorney breached a fiduciary duty. *See, e.g., Stephens County Museum, Inc. v. Swenson*, 517 S.W.2d 257, 260 (Tex. 1974) (where a fiduciary business advisor was an officer/director of a museum but was also advising his sisters to donate their estate to the museum, there was a presumption of unfairness that the fiduciary needed to rebut); *International Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567, 576 (Tex. 1963) (holding the burden on the fiduciaries to prove fairness where the fiduciaries were engaging in transactions for their personal profit).

In these situations, "a 'presumption of unfairness' automatically arises and the burden is placed on the fiduciary to prove (a) that the questioned transaction was made in good faith, (b) for a fair consideration, and (c) after full and complete disclosure of all material information to the principal." *Jackson Law Office, P.C. v. Chappell*, 37 S.W.3d 15, 22 (Tex. App.—Tyler 2000, pet. denied). The factors considered in evaluating the fairness of a transaction are: (1) whether there was full disclosure; (2) whether the consideration was adequate; (3) whether the beneficiary had the benefit of independent advice; (4) whether the fiduciary benefited at the expense of the beneficiary; and 5) whether the fiduciary significantly benefited from the transaction as viewed in light of circumstances existing at the time. *Lee*, 286 S.W.3d at 21.

However, the fact that the defendant bears the burden of rebutting the presumption of unfairness does not relieve the plaintiff of the burden to prove causation and damages in a traditional (non-disgorgement/forfeiture) case. *MacFarlane v. Nelson*, No. 03-04-00488-CV, 2005 WL 2240949, at *9 (Tex. App.—Austin Sept. 15, 2005, pet. denied) (mem. opinion) (upholding a directed verdict on a breach of fiduciary duty claim where the plaintiff did not carry his burden on damages, and rejecting plaintiff's argument that the defendant had to disprove damages when the transaction involved self dealing).

B. Fracturing and the Difference Between Negligence and Breach of Fiduciary Duty Claims

1. The fracturing principle as applied to claims against lawyers

In the context of claims against lawyers, Texas law draws a line between traditional legal malpractice (professional negligence) claims and breach of fiduciary duty claims. Legal malpractice claims are based on a breach of the attorney's duty to exercise ordinary care, whereas fiduciary duty claims are based on a breach of the duty of loyalty. *Kimleco Petroleum, Inc. v. Morrison & Shelton*, 91 S.W.3d 921, 923 (Tex. App.—Fort Worth 2002, pet. denied) (holding that malpractice claims are based on "an attorney's alleged failure to exercise ordinary care" and breach of fiduciary duty claims are based on an attorney improperly benefiting from the attorney-client relationship). *See also Archer v. Medical Protective Group of Fort Wayne*, 197 S.W.3d 422, 427-28 (Tex. App.—Amarillo 2006, n.p.h.) (concluding that a plaintiff's allegations that an attorney neglected the case and failed to communicate with his clients were malpractice claims, whereas his claims that the attorney pursued his own interests over the interests of the client were breach of fiduciary duty claims).

Texas law prohibits the "fracturing" of a legal malpractice claim into other types of claims, such as breach of fiduciary duty, when the true nature of the allegations are that the attorney's representation was negligent. See *Murphy v. Gruber*, 241 S.W.3d 689, 696 (Tex. App.—Dallas 2007, pet. denied) (concluding that where allegations of conflict essentially go to the quality of legal representation, they support a professional negligence claim and not a claim for breach of fiduciary duty). This is the case even when the breach of fiduciary duty claims are couched in terms of "conflicts of interest", "failure to disclose," and even "self-dealing." For example, in *Duerr v. Brown*, the Houston Court of Appeals (14th District) upheld a summary judgment dismissing breach of fiduciary duty claims brought against attorneys who had represented the plaintiff in a class action suit for defective hip replacement implants. *Duerr v. Brown*, 262 S.W.3d 63, 71-75 (Tex. App.—Houston [14th Dist.] 2008, no pet.). The plaintiff had alleged that his lawyers promised him a larger recovery than he ultimately received and had a conflict of interest because they settled his claims along with the claims of four other plaintiffs who were less severely injured. The court of appeals reviewed the pleadings and the plaintiff's complaints as stated in his deposition testimony, and concluded:

> Duerr [plaintiff] contends his interests were compromised by the failure to deliver a promised level of recovery attributable to his lawyer's inattention to his benefit requests and appeal. That is a malpractice claim as a matter of law.

Id. at 74.

Similarly, in *Beck v. Terry*, the Austin Court of Appeals upheld a summary judgment dismissing breach of fiduciary duty claims brought against a lawyer that, although couched in terms of "failure to disclose" and "conflict of interest," were really complaints about the quality of legal services provided. *Beck v. Terry*, 284 S.W.3d 416 (Tex. App.—Austin May 1, 2009, no pet.). The plaintiff in *Beck* complained that his former divorce lawyers had breached their fiduciary duties to him by: (1) failing to disclose that one of the attorneys had substance abuse problems; and (2) failing to disclose that a conflict existed between the plaintiff and his corporations. The plaintiff claimed that, as a result of this conduct, he received less in the mediated property division than he was entitled to receive. On the substance abuse complaint the court of appeals held: "[a] complaint that a lawyer 'failed to disclose' such a condition or situation . . . would go to the lawyer's competence or ability and, ultimately, to the quality of legal services the lawyer provided" and therefore is a professional negligence claim. *Id.* at 432.

The court also held that the plaintiff's conflict-of-interest allegations were improperly fractured professional negligence claims:

> [T]he focus of appellants' 'conflict-of-interest' complaint is simply that the Terry Defendants failed to advise Beck . . . that the interests of these entities diverged from his own personal interests and that he should obtain separate counsel for these entities. '[T]hese allegations complain about the quality of the [Terry Defendants'] representation, specifically, [their] failure to properly advise, inform, and communicate with the [clients], which are claims of professional negligence. Although appellants urge that the Terry Defendants, by their omissions, stood to obtain attorneys' fees that a separate counsel otherwise would

> have received . . . both the *Murphy* and *Floyd* courts characterized such a complaint, standing alone, as a negligence claim.

Id. at 439 (citing to *Floyd v. Hefner*, 556 F.Supp.2d 617, 662 (S.D. Tex. 2008); and *Murphy*, 241 S.W.3d at 698)).

In sum, the trend in recent cases has been to look beyond the pleadings and focus on the true nature of the allegations in order to determine whether a claim is for professional negligence or breach of fiduciary duty. Unless the plaintiff alleges that the lawyer obtained an improper benefit as a result of the misconduct, the claim will likely be treated as solely a professional negligence cause of action.

2. Does fracturing apply to claims against non-lawyers?

It does not appear that the fracturing rule has been applied to distinguish between negligence and breach of fiduciary duty claims in the context of non-lawyers. Most breach of fiduciary duty cases filed against non-lawyers are based on a violation of the duty of loyalty, and thus allegations of disloyalty or self-serving conduct instead of negligence. *See, e.g.*, *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 203 (Tex. 2002) (law associate had fiduciary duty to not profit from referring legal services to different law firm but because no self-interest existed, the court found there was no breach); *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 160 S.W.2d 509, 513 (Tex. 1942) (agent breached fiduciary duty by failing to disclose his self-interest in a business deal and failed to disclose fact that adverse party in which employee had self-interest would have accepted $20,000 for product instead of the $25,000 employer paid); *Daniel v. Falcon Interest Realty Corp.*, 190 S.W.3d 177, 186 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (construction project manager breached fiduciary duty by failing to disclose self-interest in a contracting company and by profiting from that company's business with employer); *Abetter Trucking Co. v. Arizpe*, 113 S.W.3d 503, 512 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (court found no breach of fiduciary duty but stated that employee has duty of loyalty to not solicit business away from employer or unfairly take away employer's employees when employee starts his own competing business).

However, some cases do suggest that a breach of fiduciary duty claim could be brought against a non-lawyer based on allegations of negligent conduct, *i.e.*, breach of the standard of care. *See, e.g.*, *Texas First Nat'l Bank v. Ng*, 167 S.W.3d 842 (Tex. App.—Houston [14th Dist.] 2005, pet. granted, judgm't vacated w.r.m.) (holding a former corporate officer liable for breaching his fiduciary duty of care when that officer usurped power from the CEO and did nothing to prevent a vice-president from recklessly losing the company substantial sums of money); and *Ertel v. O'Brien*, 852 S.W.2d 17, 21 (Tex. App.—Waco 1993, writ denied) ("A trustee commits breach of trust not only where he violates a duty in bad faith, or intentionally although in good faith, or negligently but also where he violates a duty because of a mistake.").

This potential melding of duties is onerous considering the extraordinary penalties that can be imposed on fiduciaries under Texas law. As discussed below, fiduciaries can be held liable for disgorgement, fee forfeiture, constructive trust, and actual damages. Further, in the context of transactions between the fiduciary and client, the burden is on the fiduciary to

disprove that he/she breached a duty. This would be even more difficult if a fiduciary could be held liable even for innocent mistakes.[1]

IV. Submitting Breach of Fiduciary Duty Claims to the Jury

A. Example Jury Questions on Breach of Fiduciary Duty

Question on Existence of Duty

As discussed above, the question of whether an informal relationship of trust and confidence existed between the parties is often a question of fact. In such a case, the PJC has provided a form question that would be presented to the jury in order to determine whether a fiduciary duty is owed. This question would need to be answered in the affirmative before liability questions are reached.

PJC 104.1

Question No. __

Did a relationship of trust and confidence exist between Defendant and Plaintiff?

A relationship of trust and confidence existed if Plaintiff justifiably placed trust and confidence in Defendant to act in Plaintiff's best interest. Plaintiff's subjective trust and feelings alone do not justify transforming arm's-length dealings into a relationship of trust and confidence.

Answer: __________

Questions on Breach of Fiduciary Duty

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[1] Federal case law addressing the fiduciary duties of ERISA plan administrators supports an argument that a distinction should be made between breach of fiduciary duty and negligence claims brought against non-lawyers. ERISA plan administrators have a statutory fiduciary duty to administer the plan with the "care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." *See Christensen v. Quest Pension Plan*, 376 F. Supp. 2d 934, 943 (D. Neb. 2005) (*citing* 29 U.S.C. § 1104(a)). But numerous courts have found that a mistake, without a showing of bad faith, will not constitute a breach of the plan administrator's fiduciary duties. *See Id.* at 944; *Burke v. Latrobe Steel Co*., 775 F.2d 88, 91-92 (3d Cir. 1985) (to prove fiduciary duty violation, bad faith must be shown); *Fitch v. Chase Manhattan Bank, N.A*., 64 F. Supp. 2d 212, 229 (W.D.N.Y. 1999) (erroneous benefit estimates due to honest mistake does not constitute breach of fiduciary duty when defendants did not actively or knowingly mislead plaintiffs and did not act in bad faith); *Easa v. Florists' Transworld Delivery Ass'n*, 5 F. Supp. 2d 522, 529-530 (E.D. Mich. 1998) (clerical error in calculating anticipated retirement benefits by actuary for pension plan was not breach of fiduciary duty because there was no deliberate misrepresentation but simply a mistake); *Gramm v. Bell Atl. Mgt*., 983 F. Supp. 585, 593 (D. N.J. 1997) (error in calculating pension benefits does not constitute willful misconduct or bad faith sufficient to support breach of fiduciary duty claim under ERISA); *Kuehl v. Chrysler Pension Plan*, 895 F.Supp. 1147, 1155 (E.D. Wis. 1995) (mistake in calculating pension benefits not breach of fiduciary duty under ERISA in absence of willful or bad faith conduct).

The PJC provides a sample question on breach of fiduciary duty. This question is directed to the situation where the fiduciary and client have entered into a transaction together, and thus the burden of proof is on the fiduciary to disprove any breach.

PJC 104.2

QUESTION ______

Did Defendant comply with his fiduciary duty to Plaintiff in any of the following ways?

Because a relationship of trust and confidence existed between them, as [Plaintiff's attorney] *or* [Plaintiff's partner], *or* [etc.], Defendant owed Plaintiff a fiduciary duty. To prove he complied with his duty, Defendant must show:

a. The transaction in question was fair and equitable to Plaintiff;
b. Defendant made reasonable use of the confidence that Plaintiff placed in him;
c. Defendant acted in the utmost good faith and exercised the most scrupulous honesty toward Plaintiff;
d. Defendant placed the interests of Plaintiff before his own, did not use the advantage of his position to gain any benefit for himself at the expense of Plaintiff, and did not place himself in any position where his self-interest might conflict with his obligations as a fiduciary; and
e. Defendant fully and fairly disclosed all important information to Plaintiff concerning the transaction.

Answer: _______________

Obviously, this question is not suitable for the more typical breach of fiduciary duty case, where no there was no transaction between the fiduciary and client and where the burden rests with the plaintiff. The PJC suggests that, in such cases, its question should be reworked to shift the burden of proof back to the plaintiff. But merely rewording the PJC question to shift the burden may not be enough. An example of a reworded question that shifts the burden of proof but does not substantively change the applicable elements follows:

QUESTION ______

Did Defendant *fail to* comply with its fiduciary duty to Plaintiff?

Because a relationship of trust and confidence existed between them, as [Plaintiff's attorney] *or* [Plaintiff's partner], *or* [etc.], Defendant owed Plaintiff a fiduciary duty. To prove Defendant *failed to comply with his duty*, *Plaintiff* must show:

a. the transaction in question was *not* fair and equitable to Plaintiff;

b. Defendant *failed to make* reasonable use of the confidence that Plaintiff placed in him;

c. Defendant *failed to act* in the utmost good faith and *failed to exercise* the most scrupulous honesty toward Plaintiff;

d. Defendant *failed to place* the interests of Plaintiff before his own, *used* the advantage of his position to gain any benefit for himself at the expense of Plaintiff, *or placed himself* in a position where his self-interest might conflict with his obligations as a fiduciary; *or*

e. Defendant *failed to fully and fairly disclose* all important information to Plaintiff concerning the transaction.

Answer: _______________

The above question includes a number of elements that may not be applicable outside the context of a transaction between the parties. For example, subpart (e) asks whether Defendant failed to fully and fairly disclose all important information to Plaintiff concerning the transaction. This does not make sense when there was not a relevant transaction. Further, the requirement that "all important information" be disclosed is ambiguous and potentially imposes an unreachable burden on fiduciaries. *Compare Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (imposing "a fiduciary duty of full disclosure of all material facts known to [the trustee] that might affect the beneficiaries' rights.").

Thus although the PJC is a useful guide in structuring fiduciary duty questions, the appropriate question should be structured so as to specifically address the nature of the fiduciary relationship, any applicable statutory duties, any duties imposed or excluded by the contract between the parties, and the circumstances of the relationship.

B. Chapter 33 Applies as a Defense to Fiduciary Duty Claims

The proportionate responsibility rules in Chapter 33 apply to breach of fiduciary duty claims. Chapter 33 expressly applies to all claims that sound in tort, including intentional torts. TEX. CIV. PRAC. & REM. CODE § 33.002(a)(1); *JCW Electronics, Inc. v. Garza*, 257 S.W.3d 701, 704 (Tex. 2007). Breach of fiduciary duty claims are torts. *See Lesikar v. Rappeport*, 33 S.W.3d 282, 311 (Tex. App.—Texarkana 2000, pets. denied). Chapter 33 therefore clearly is applicable.

No cases have expressly resolved how to submit a plaintiff's contributory negligence to the jury in the context of a breach of fiduciary duty claim. However, one recent opinion suggests that this should be done via submission of a separate question on the plaintiff's negligence. *See Western Reserve Life Assurance Co. of Ohio v. Graben*, 233 S.W.3d 360, 379 (Tex. App.—Fort Worth 2007, no pet.). In *Graben*, the court addressed the issue of the trial court failing to charge the jury on proportionate responsibility. *Id*. The fiduciaries attempted to have some percentage of responsibility assigned to their clients. The court held that the clients could not be assigned a

percentage of liability because "there was no negligence or other liability cause of action jury question proffered. . . The statutory scheme for determining the percentage of responsibility—that is, the proportionate responsibility finding—contemplates that before the percentage responsibility question is submitted, a cause of action liability finding has been made by the jury." *Id.* at 380 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 33.003(a) (Vernon Supp. 2006)); *see also Romero v. KPH Consolidation, Inc.,* 166 S.W.3d 212, 225 (Tex. 2005).

Therefore in fiduciary duty cases when the plaintiff's conduct raises a potential contributory negligence defense, the defendant should request submission of a separate question on the plaintiff's negligence. The proportionate fault question would then be (presumably) submitted as follows:

> If you answered "Yes" to Questions [breach of fiduciary duty and negligence] for more than one of those named below, then answer the following question.
>
> Otherwise, do not answer the following question.
>
> Assign percentages of responsibility only to those you found caused or contributed to cause the occurrence or injury. The percentages you find must total 100 percent. The percentages must be expressed in whole numbers. The percentage of responsibility attributable to any one is not necessarily measured by the number of acts or omissions found. The percentage attributable to any one need not be the same percentage attributed to that one in answering another question.
>
> QUESTION ______
>
> For each person you found caused or contributed to cause the occurrence or injury, find the percentage of responsibility attributable to each:
>
> a. Fiduciary/Defendant __ %
> b. Plaintiff/Client __ %
> c. Any settling parties or other defendants __ %
> d. Any responsible third parties __ %
>
> Total 100 %

V. Damages and Other Remedies

A. Actual Damages

Plaintiffs can recover the actual damages that they have suffered as a result of the breach of fiduciary duty. *See Western Reserve Life Assur. Co. v. Graben*, 233 S.W.3d 360, 377 (Tex. App.—Fort Worth 2007, no pet.) (upholding a jury award of actual damages for financial losses suffered by plaintiffs). Typically, these damages would reflect direct actual damages for economic loss suffered by the plaintiff, such as out-of-pocket losses. *See, e.g.*, *Duncan v. Lichtenberger*, 671 S.W.2d 948, 953 (Tex.App.—Fort Worth 1984, writ ref'd n.r.e.) (return of

plaintiff's financial investment in corporation). They could also reflect recovery for consequential damages, such as lost profits. *Kahn v. Seely*, 980 S.W.2d 794, 799 (Tex. App.—San Antonio 1998, pet. denied) (discussing the level of proof required to prove lost profits).

It is unclear whether benefit-of-the-bargain damages are recoverable as a remedy for breach of fiduciary duty. "Texas law recognizes two measures of direct damages for *common-law fraud*: the out-of-pocket measure and the benefit-of-the-bargain measure." *Baylor Univ. v. Sonnichsen*, 221 S.W.3d 632, 636 (Tex. 2007); *Formosa Plastics Corp. v. Presidio Engineers and Contractors*, 960 S.W.2d 41, 49 (Tex. 1998). The out-of-pocket measure awards the difference between the value paid and the value received. *Formosa Plastics Corp.*, 960 S.W.2d at 49. The benefit-of-the-bargain measure awards the difference between the value as represented and the value received. *Id.*

The Austin Court of Appeals has held that benefit-of-the-bargain damages are not recoverable for breach of fiduciary duty. *See Nat'l Plan Administrators, Inc. v. Nat'l Health Ins. Co.*, 150 S.W.3d 718, 739 (Tex. App.—Austin 2004), *rev'd on other grounds*, 235 S.W.3d 695 (Tex. 2007) ("The 'benefit-of-the-bargain' is a measure of contract damages, not tort."). However, breach of fiduciary duty claims are often referred to as "constructive fraud" cases, so it is possible that a court might allow benefit-of-the-bargain damages in certain breach of fiduciary duty cases that closely resemble fraud.

B. Disgorgement of Profits

"A fiduciary must account for, and yield to the beneficiary, any profit he makes as a result of his breach of fiduciary duty." *Daniel v. Falcon Interest Realty Corp.*, 190 S.W.3d 177, 187 (Tex. App.—Houston [1st Dist.] 2005, no pet.). *See also International Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567, 577 (Tex. 1963). The basis for this remedy is that a fiduciary who has violated his relationship of trust should not be permitted to hold onto any secret gain or benefit he received as a result. *See Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 160 S.W.2d 509, 514 (Tex. 1942) ("It is the law that . . . if the fiduciary 'takes any gift, gratuity, or benefit in violation of his duty, or acquires any interest adverse to his principal, without a full disclosure, it is a betrayal of his trust and a breach of confidence, and he must account to his principal for all he has received.").

A plaintiff does not need to prove that it was harmed to recover disgorgement damages. *Johnson v. Brewer & Pritchard*, 73 S.W.3d 193, 200 (Tex. 2002). To get a disgorgement award, the plaintiff needs to prove that the fiduciary improperly benefited from the breach of fiduciary duty. *See Daniel*, 190 S.W.3d at 187 (upholding the award of profits a fiduciary improperly received regardless of whether the plaintiff suffered harm).

C. Attorney Fee Forfeiture

In 1999, the Texas Supreme Court decided *Burrow v. Arce*, in which it recognized for the first time the equitable remedy of fee forfeiture for an attorney's breach of fiduciary duty. *Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999). Like disgorgement, this remedy is significant because it does not require a showing of causation or damages in order for a client to recover all or part of the attorney's fee. Rather, fee forfeiture is available when the trial court determines

that the breach was sufficiently "clear and serious" to justify forfeiture in furtherance of the public interest in preserving the integrity of the attorney-client relationship.

In *Arce*, the Texas Supreme Court cited to a number of factors from section 49 of the proposed Restatement (Third) of the Law Governing Lawyers that should be applied in determining whether a breach was sufficiently clear and serious to warrant fee forfeiture. These factors include "the gravity and timing of the violation, its willfulness, its effect on the value of the lawyer's work for the client, any other threatened or actual harm to the client, and the adequacy of other remedies." In addition, the court added another factor that was to be given great weight: "the public interest in protecting the integrity of the attorney-client relationship." *Id.* at 245.

D. Constructive Trust

A constructive trust is an equitable remedy imposed to prevent unjust enrichment. *Medford v. Medford*, 68 S.W.3d 242, 249 (Tex. App.—Fort Worth 2002, Rule 53.7(f) motion granted). The elements of a constructive trust are: (1) breach of a special trust, fiduciary relationship, or actual fraud; (2) unjust enrichment of the wrongdoer; and (3) tracing to an identifiable *res*. *Everett v. TK-Taito, L.L.C.*, 178 S.W.3d 844, 859 (Tex. App.—Fort Worth 2005, no pet.).

In *Wheeler v. Blacklands Prod. Credit Ass'n*, the Fort Worth Court of Appeals described the scope and purpose of a constructive trust as follows:

> In general, whenever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentations, concealments, or through undue influence, duress, taking advantage of one's weakness or necessities, or through any other similar means, or under any other similar circumstances which render it unconscionable for the holder of the legal title to retain and enjoy the beneficial interest, <u>equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same</u> . . . and a court of equity has jurisdiction to reach the property either in the hands of the original wrong-doer, or in the hands of any subsequent holder, until a purchaser of it in good faith and without notice acquires a higher right, and takes the property relieved from the trust. The forms and varieties of these trusts . . . are practically without limit. The principle is applied wherever it is necessary for the obtaining of complete justice, <u>although the law may also give the remedy of damages against the wrong-doer</u>.

Wheeler v. Blacklands Prod. Credit Ass'n, 627 S.W.2d 846, 849 (Tex. App.—Fort Worth 1982, no writ) (emphasis added). "There is no unyielding formula to which a court of equity is bound in decreeing a constructive trust, since the equity of the transaction will shape the measure of relief granted." *Meadows v. Bierschwale*, 516 S.W.2d 125, 131 (Tex. 1974) (holding that although a constructive trust on unidentifiable cash proceeds of a sale is inappropriate, the award of a cash judgment to fully compensate the plaintiff was appropriate).

E. Other Equitable Remedies

The supreme court has held that trial courts should be afforded broad discretion in fashioning equitable relief as a remedy for a breach of fiduciary duty. *Int'l Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567, 584 (Tex. 1963) ("The limits beyond which equity should not go in its exactions are discoverable in the facts of each case which give rise to equitable relief."). A range of other equitable remedies are therefore potentially available depending on the facts of each case. Such remedies could include: rescission (*Miller v. Miller*, 700 S.W.2d 941, 949 (Tex. App.—Dallas 1985, writ ref'd n.r.e.)); an accounting (TEX. PROP. CODE § 113.151 (providing for accountings to the beneficiary of a trust)); or a receivership (*General Ass'n of Davidian 7th Day Adventists, Inc. v. General Ass'n of Davidian 7th Day Adventists*, 410 S.W.2d 256, 259 (Tex. App.—Waco 1966, writ ref'd n.r.e.)).

F. Mental Anguish

Mental anguish damages are probably not recoverable in breach of fiduciary duty cases. In *Douglas v. Delp*, the supreme court determined that mental anguish awards were not proper as a matter of law in legal malpractice cases. *Douglas v. Delp*, 987 S.W.2d 879, 885 (Tex. 1999). The court acknowledged that the existence of a special fiduciary relationship has been held to justify mental anguish awards in the context of physician-patient relationships "'because most physicians' negligence also causes bodily injury.'" *Id.* However, because an attorney's negligence typically results only in economic loss, the court held:

> [Consistent] with the policy goals set forth in *Likes* and by the majority of the courts that have thus far addressed this issue, and in keeping with the well-established principle that a plaintiff should receive an amount of damages sufficient to make her whole, we hold that when a plaintiff's mental anguish is a consequence of economic losses caused by an attorney's negligence, the plaintiff may not recover damages for that mental anguish.

Id. The court declined, however, to decide whether mental anguish awards could be awarded upon a heightened culpability showing. *Id.*

G. Exemplary Damages

Exemplary damages may be recovered for breach of fiduciary duty on a showing that the defendant's breach was intentional. *See Holloway*, 368 S.W.2d at 583-84; *Brousseau v. Ranzau*, 81 S.W.3d 381 (Tex. App.—Beaumont 2002, pet. denied). "The 'intent' issue concerning exemplary damages for breach of fiduciary duty is whether the one with a fiduciary duty intended to gain an additional unwarranted benefit." *Brousseau*, 81 S.W.3d at 396. *See also Lesikar v. Rappeport*, 33 S.W.3d 282, 311 (Tex. App.—Texarkana 2000, pets. denied) ("A defendant's intentional breach of fiduciary duty is a tort for which a plaintiff may recover punitive damages.").

Interestingly, the *Brousseau* opinion does not address whether its "intentional" standard for the recovery of exemplary damages is consistent with the statutory standard outlined in Chapter 41 of the Texas Civil Practice and Remedies Code. *See* TEX. CIV. PRAC. & REM. CODE § 41.002 (a) ("This chapter applies to any action in which a claimant seeks damages relating to a

cause of action."); *Id.* § 41.003(a) (". . . exemplary damages may be awarded only if the claimant proves by clear and convincing evidence that the harm with respect to which the claimant seeks recovery of exemplary damages results from: (1) fraud; (2) malice; or (3) gross negligence.").

Similarly, cases addressing the recovery of exemplary damages in the fiduciary duty context allow for the recovery of exemplary damages irrespective of whether actual damages were also awarded. *See Holloway*, 368 S.W.2d at 584 (holding that exemplary damages may be awarded when the only other award was a disgorgement remedy). These cases also arguably conflict with Chapter 41. *See* TEX. CIV. PRAC. & REM. CODE §§ 41.004 (". . . exemplary damages may be awarded only if damages other than nominal damages are awarded."); 41.008 (tying the limitations on exemplary awards to the amount of economic damages awarded by the jury). *But see Lesikar v. Rappeport*, 33 S.W.3d 282, 310 (Tex. App.—Texarkana 2000, pets. denied) ("Generally there must be an award of actual damages in tort before an award of punitive damages is proper. But the Supreme Court has authorized the recovery of punitive damages in actions sounding in equity, even where there is no award of typical actual damages.").

VI. Aiding and Abetting Liability

Aiding and abetting breach of fiduciary duty claims are based on the supreme court's holding in *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, which states:

> It is settled as the law of this State that where a third party knowingly participates in the breach of duty of a fiduciary, such third party becomes a joint tortfeasor with the fiduciary and is liable as such.

Kinzbach, 160 S.W.2d 509, 574 (Tex. 1942). Texas cases have recognized aiding and abetting fiduciary breach claims when individuals knowingly participate with a fiduciary, such as a trustee, in breaching the fiduciary duty owed to another. *See Kinzbach*, 160 S.W.2d at 574 (third party assisted an employee in breaching a fiduciary duty owed his employer and thereby became a joint tortfeasor with the employee); *Tinney v. Team Bank*, 819 S.W.2d 560, 563 (Tex. App.—Fort Worth 1991, writ denied) (applying the doctrine in the context of a third party dealing with the executor of an estate).

It is unclear whether lawyers can be held liable for aiding and abetting a breach of fiduciary duty. A recent federal court opinion applied the *Kinzbach* aiding and abetting claim to lawyers, holding that such a claim was available despite the fracturing rule and was a separate and distinct claim from a conspiracy claim. *Floyd v. Hefner*, 556 F.Supp.2d 617, 659-60 (S.D. Tex. 2008). However, the opinion did not address whether such a claim, which would allow a non-client to impose fiduciary duty liability on an attorney, would violate the privity rule.

By contrast, the Texas appellate courts that have analyzed *Kinzbach* in the context of claims against attorneys have generally declined to apply the claim to lawyers due to the privity doctrine. *See*, *e.g.*, *Kastner v. Jenkens & Gilchrist*, 231 S.W.3d 571, 580 (Tex. App.—Dallas 2007, no pet.) ("The supreme court has not extended the reach of *McCamish* to include an aiding and abetting breach of fiduciary duty claim asserted by a non-client based upon the rendition of legal advice to a tortfeasor client."); *Thompson v. Vinson & Elkins*, 859 S.W.2d 617, 624 (Tex. App.—Houston [1st Dist.] 1993, writ denied) ("However, neither *Kinzbach* nor *Kirby* involved a

beneficiary bringing a fiduciary duty claim against the fiduciary's attorney. We believe that allowing . . . such a claim . . . would, under the facts of this case, conflict with the privity rule.").

The supreme court also recently expressed skepticism about whether such a claim may even be brought against attorneys:

> Finally, the jury found that [attorney] knowingly participated, aided, or assisted [client] in breaching his duty to his former wife. *Assuming such a claim exists and is somehow different from a conspiracy to breach his fiduciary duty*, it too is excluded . . . for the reasons noted above.

Chu v. Hong, 249 S.W.3d 441, 447 (Tex. 2008) (emphasis added). Thus it appears at this time that the privity doctrine remains a defense to non-client claims for aiding and abetting breach of fiduciary duty.

VII. Conclusion and Practical Pointers

The context out of which a fiduciary relationship arises – a special relationship of trust and confidence – is often riddled with personal conflict. For example, breach of fiduciary duty cases often arise out of difficult family relationships and in the estate-planning context. In these situations, it is important to keep in mind that family members and/or other beneficiaries will not always act logically. There may be other emotional issues that will play heavily in the litigation.

In addition, fiduciary duty cases are tar babies. They can be difficult to get rid of on summary judgment unless there is a strong duty argument. But lawyers defending fiduciaries in sensitive cases want to be careful not to inflame the jury by alleging no duty was owed when it was clear that the beneficiary relied on the fiduciary's counsel. Judges may be particularly sensitive about dismissing fiduciary duty claims at the summary judgment stage given the extraordinary high level of duty that is owed. It is important to be aware of these risks when advising clients about potential fiduciary litigation.

Due to the high financial and emotional cost of a fiduciary duty lawsuit, this litigation needs to be very carefully evaluated before a suit is filed. Informal discovery is available with fiduciary duty issues. Clients have the right to obtain the file from their attorney.[2] Estate administrators and trustees can be ordered to provide accountings.[3] And partners have the right to review the partnership's books and records.[4]

Recent case law does indicate a trend toward limiting the scope of a fiduciary duty based on the contractual relationship of the parties. Thus potential fiduciaries should take care to expressly address the nature of their fiduciary obligations, if any, in their agreements with their clients.

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[2] *See In re George*, 28 S.W.3d 511 (Tex. 2000).

[3] *See, e.g.*, Tex. Probate Code §§ 134 (temporary administrator), 149A and 149B (independent executor), 168 (surviving spouse regarding community property), 399 and 405 (personal representative), 489B (attorney-in-fact or agent under durable power of attorney).

[4] TEX. BUS. ORG. CODE § 152.212.