Is There A Trustee Get Out Of Jail Free Card? The Use of Exculpatory Clauses In Trust Documents In Texas

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

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

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TABLE OF CONTENTS

I. INTRODUCTION

Settlors, trustees, and beneficiaries in Texas often insert clauses into trust documents that benefit the trustee and free the trustee to take certain actions without potential liability. For example, a settlor may want to limit a trustee's liability for negligent actions, especially where the settlor designates himself or herself as the initial trustee. The beneficiaries may want to relieve the trustee for any risk associated with maintaining a family business or farm as an asset in the trust even though doing so may violate a duty to diversify. There are many different scenarios where parties may want to insert clauses to limit a trustee's duty or liability.

This article is intended to describe the use and enforceability of exculpatory clauses in Texas. The use and enforceability of this type of clause is somewhat controversial in that a trustee owes high fiduciary duties to beneficiaries. Removing liability for certain conduct or removing certain duties may transform a trustee position into something less than a fiduciary relationship. Public policy may not allow that to happen.

This article explores the historical enforcement of exculpatory clauses in trusts in Texas, the current Texas statutes that impact their enforcement, procedural issues that arise in litigating exculpatory clauses, and recent precedent applying those clauses to disputes.[1]

II. TRUSTEES' FIDUCIARY DUTIES

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

[1]This article discusses the use of exculpatory clauses in trust documents that impact a trustee. There is uncertainty in Texas regarding whether an exculpatory clause in a will that purports to protect an executor or administrator of an estate is viewed the same as a trust. *See Devillier v. Leonards*, No. 01-20-00223-CV, 2020 Tex. App. LEXIS 10485 (Tex. App.—Houston [1st Dist.] December 31, 2020) (dissenting opinion on court's refusal to accept a permissive appeal).

uphold its duty of loyalty, a trustee must meet a sole-interest standard and handle trust property solely for the benefit of the beneficiaries. Tex. Prop. Code §117.007; *InterFirst Bank Dallas, N.A. v. Risser*, 739 S.W.2d 882, 898 (Tex. App.—Texarkana 1987, no writ). A trustee has a duty to refrain from self-dealing with trust assets. Tex. Prop. Code Ann. § 113.053(a).

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

A trustee also has a duty of full disclosure of all material facts known to it that might affect the beneficiaries' rights. *Montgomery v. Kennedy*, 669 S.W.2d 309, 313 (Tex. 1984). A trustee also has a duty of candor. *Welder v. Green*, 985 S.W.2d 170, 175 (Tex. App—Corpus Christi 1998, pet. denied). Regardless of the circumstances, the law provides that beneficiaries are entitled to rely on a trustee to fully disclose all relevant information. *See generally Johnson v. Peckham*, 132 Tex. 148, 120 S.W.2d 786, 788 (1938). In fact, a trustee has a duty to account to the beneficiaries for all trust transactions, including transactions, profits, and mistakes. *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996); *see also Montgomery*, 669 S.W.2d at 313. A trustee's fiduciary duty even includes the disclosure of any matters that could possibly influence the fiduciary to act in a manner prejudicial to the principal. *Western Reserve Life Assur. Co. v. Graben*, 233 S.W.3d 360, 374 (Tex. App.—Fort Worth 2007, no pet.). The duty to disclose reflects the information a trustee is duty-bound to maintain as he or she is required to keep records of trust property and his or her actions. *Beaty v. Bales*, 677 S.W.2d 750, 754 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.).

Due to the nature of the fiduciary relationship, there are many other specific duties that a trustee owes to the beneficiaries. It should come as no surprise that the use of trust terms or clauses to limit or narrow these duties or to relieve a trustee of liability for breaching a duty is controversial and complicated.

III. EXCULPATORY CLAUSES ARE ENFORCEABLE BUT ARE STRICTLY CONSTRUED

It is common for settlors to execute trust documents that contain exculpatory clauses. Generally, these types of clauses can be enforceable in Texas and can limit a trustee's duty. Tex. Prop. Code Ann. § 114.007; *Dolan v. Dolan*, No. 01-07-00694-CV, 2009 Tex. App. LEXIS 4487 (Tex. App.—Houston [1st Dist.] June 18, 2009, pet. denied). *See also* 76 Am Jur 2d Trusts § 339. "The Texas Trust Code implicitly authorizes the inclusion of exculpatory clauses in a trust instrument since the Trust Code provides that, as a general rule, the trust instrument will control over the Trust Code and also limits to what extent the settler of a trust can alter the trustee's liabilities and duties under the Trust Code." 1 Texas Estate Planning § 33.07. "In some instances, the trustee may be able to rely on the provisions of an exculpatory clause in the trust document as a shield from liability for what would otherwise be a breach of

fiduciary duty." 4 Texas Probate, Estate and Trust Administration § 84.06.

One commentator states that there are good reasons for the use of exculpatory clauses:

> One argument favoring liberal use of exoneration clauses suggests that, in the absence of such a clause, fiduciaries who fear suit are likely to be overly conservative in their investment and/or distribution policies. Another argument suggests that groundless suits should not be encouraged. Indeed, a client may purposely request the draftsperson to include an exoneration clause in an instrument, in order to persuade a cautious person, or someone with limited experience, to undertake service as a fiduciary, or to induce that person to exercise broader and, hopefully, more beneficial discretion.

Robert Whitman, Exoneration Clauses in Wills and Trust Instruments (1992), UConn Faculty Articles and Papers, 244. The following article has a good recitation of the history of trusts and the development of exculpatory clauses. *Louise L. Hill, Fiduciary Duties and Exculpatory Clauses: Clash of the Titans or Cozy Bedfellows*, 45 U. MICH. J. L. REFORM 829 (2012).

Another commentator explains that a settlor's reduction in the trustee's duties merely lessens the value of the gift:

> Though strictly construed by the courts, exculpatory clauses have been upheld, subject, however, to certain exceptions based upon public policy. The rationale appears to be that the settlor's reduction of the trustee's duties with regard to the degree of care and skill to be exercised in effect merely detracts from the quality of the settlor's gift or makes the gift less valuable. The settlor has the power "to select the agencies by which his bounty should be distributed and to impose the terms and conditions under which it should be done." In nearly all trust arrangements the settlor is making a gift, and it can be argued that because the beneficiaries have no right to demand that any gift be made, they can hardly expect equity to increase the quality or size of a gift made through the establishment of a trust.

BOGERT'S THE LAW OF TRUSTS AND TRUSTEES, § 542.

In Texas, exculpatory clauses are strictly construed, and a trustee is relieved of liability only to the extent to which it is clearly provided that it will be excused. *See Jewett v. Capital Nat. Bank of Austin*, 618 S.W.2d 109, 112 (Tex. App.—Waco 1981, writ ref'd n.r.e.); *Martin v. Martin*, 363 S.W.3d 221, 230 (Tex. App.—Texarkana 2012, pet. dism'd by agr.); *Price v. Johnston*, 638 S.W.2d 1, 4 (Tex. App.—Corpus Christi 1982, no writ) ("When a derogation of the [Texas Trust] Act hangs in the balance, a trust instrument should be strictly construed in favor of the beneficiaries"). *See also* 3 Texas Probate, Estate and Trust Administration § 47.01 "With regard to trust agreements, it has been

held that such clauses are enforceable, but must be strictly construed against the trustee."); 4 Texas Probate, Estate and Trust Administration § 84.06 ("Generally, it is said that the exculpatory clause must be strictly construed, so that the fiduciary is relieved of liability only to the extent explicitly provided in the trust instrument."). For example, a court held that a clause that relieved a trustee from liability for "any honest mistake in judgment" did not forgive the trustee's acts of self-dealing. *Burnett v. First Nat. Bank of Waco*, 567 S.W.2d 873, 876 (Civ. App.—Tyler 1978, ref. n.r.e.).

IV. COMMENTATORS' VIEWS ON EXCULPATORY CLAUSES IN TRUSTS

The Restatement (Third) of Trusts provides:

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

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

> b. Construction of exculpatory provisions. Except as stated in Comments c and d, the terms of the trust can relieve the trustee of liability for breaches of trust. However, these exculpatory provisions are strictly construed; the trustee is relieved of liability only to the extent the provision clearly so provides.
>
> Furthermore, despite similarities of language in various exculpatory clauses, the intent to be attributed to the settlor and the effect to be given to the particular clause may depend on the circumstances of the document's preparation and execution or on the settlor's expectations about the circumstances to which the clause might apply. Thus, the appropriate standard for exemption from liability may depend on expectations about performance, as well as about the skills and facilities, of the trustee contemplated by the settlor, and perhaps on particular risks or concerns

that (even if unexpressed) may have prompted the inclusion of the clause. A clause that apparently was designed, for example, for the settlor's spouse as trustee may be differently applied, or even found inapplicable, to a professional trustee who succeeds the spouse.

c. Effect limited by public policy. Notwithstanding the breadth of language in a trust provision relieving a trustee from liability for breach of trust, for reasons of policy trust fiduciary law imposes limitations on the types and degree of misconduct for which the trustee can be excused from liability. Hence, an exculpatory clause cannot excuse a trustee for a breach of trust committed in bad faith. Nor can the trustee be excused for a breach committed with indifference to the interests of the beneficiaries or to the terms and purposes of the trust--that is, committed without reasonable effort to understand and conform to applicable fiduciary duties. In some situations, courts have, not inappropriately, sought to distinguish between simple and gross negligence, while authorities in analogous contexts have emphasized fiduciaries' sustained inattention to their duty of care. It is not possible to state with precision and uniform applicability the permissible limits of exculpatory relief, especially recognizing that it is appropriate in this regard to take account of what may be reasonable to expect of a particular trustee. See Reporter's Note.

d. Clause improperly included in terms of trust. If the terms of the trust were drafted by the trustee, or if the exculpatory clause was caused to be included in the trust by the trustee, the clause is presumptively unenforceable. Cf. § 78(3) and id., Comments g and h. The presumption is rebuttable, and the clause will be given effect if the trustee proves that the exculpatory provision is fair under the circumstances (including, when applicable, the fiduciary risks to be assumed) and that the existence, contents, and effect of the clause were adequately communicated to or otherwise understood by the settlor. Thus, if a father asks his daughter, a lawyer, to draw a will under which she is to act as trustee, and she includes an exculpatory clause in the will and the father is aware of its existence, nature, and effect when he executes his will, the exculpatory provision is effective.

In determining whether an exculpatory clause was included in the trust instrument as a result of an abuse of a fiduciary or

> confidential relationship, the following factors (as well as other relevant factors) may be considered: whether the instrument was drawn by the trustee or another acting wholly or in part on behalf of the trustee; whether the trustee prior to or at the time of the trust's creation had been in a fiduciary relationship to the settlor, such as by serving as the settlor's conservator or as the settlor's lawyer in providing the trust instrument or relevant part(s) of it; whether the settlor received competent, independent advice regarding the provisions of the instrument; whether the settlor was made aware of the exculpatory provision and was, with whatever guidance may have been provided, able to understand and make a judgment concerning the clause; and the extent and reasonableness of the provision.
>
> In any event, an exculpatory clause is unenforceable if it is found, by presumption or otherwise, to be the product of undue influence or other improper conduct on the part of the trustee. Furthermore, the terms of a trust are subject to reformation if clear and convincing evidence establishes that the inclusion or content of an exculpatory clause was the result of a mistake.

RESTATEMENT (THIRD) TRUSTS, § 96.

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

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

UNIF. TRUST CODE, § 1008 (2000). One commentator notes that this UTC section "would allow a trustee to retain a profit that the trustee made from the trust even though the profit was derived from a breach of trust, as long as such breach did not arise to the level of one of the exceptions (bad faith or reckless indifference)." *Kevin J. Parker, Trustee Defenses: Statute of Limitations,*

Laches, Self-Executing Accounting Release Provisions, and Exculpatory Clauses, 23 PROB. & PROP., at 53, 53, 55 (2009). And commentary to the UTC states that the trustee's burden with respect to fairness and communication is satisfied if independent counsel represented the settlor." UNIF. TRUST CODE § 1008 cmt. (2010). This is the case even if the settlor's attorney uses the trustee's form. *Id*.

Another commentator provides:

> Trust instruments frequently contain language, called exculpatory provisions, that purport to relieve the trustee of liability for certain kinds of breaches of trust. For example, the governing instrument may provide that the trustee "shall not be liable, except for willful default or gross negligence." Though exculpatory provisions generally are effective to limit the trustee's liability, they may fail to do so, either (1) because the trustee commits a breach of trust that does not fall within the scope of the provision; (2) because the provision is against public policy; or (3) because the provision was improperly included in the trust instrument. Exculpatory provisions are widely used, and, in countless cases, they have relieved trustees of liability for conduct that would otherwise have given rise to surcharges. In general, an exculpatory provision is not against public policy if it merely relieves the trustee of liability for ordinary negligence.

SCOTT AND ASCHER ON TRUSTS, §24.27.1 (5th Edition). Furthermore, it states:

> Though the trustee commits a breach of trust for which the terms of the trust provide relief, the provision is ineffective to provide such relief if the provision itself is against public policy. No matter how broad the provision, the trustee is liable for committing a breach of trust in bad faith or with reckless indifference to the interests of the beneficiaries… There is also authority for the proposition that an exculpatory provision that purports to relieve a trustee from liability for ordinary negligence is against public policy… In the absence of a statute, however, provisions that merely relieve a trustee from liability for ordinary negligence have generally not been considered to be contrary to public policy.

Id. at 24.27.3.

V. DEFINING CLAUSES THAT IMPACT FIDUICARY DUTIES OR LIABILITY FOR BREACHING DUTIES

There are two primary types of clauses that are discussed in this article. The first is an exculpatory clause that relieves a trustee from liability for breaching a duty. This type of clause is typically more general in nature. "[A]n exculpatory clause is '[a] contractual

provision relieving a party from any liability resulting from a negligent or wrongful act.'" Holland A. Sullivan, Jr., *The Grizzle Bear: Lingering Exculpatory Clause Problems Posed By Texas Commerce Bank, N.A. v. Grizzle*, 56 BAYLOR L. REV. 253, 256 (2004) (hereinafter "Grizzle Bear"). "A trustee's breach may give rise to liability, and the exculpatory clause purports to excuse the trustee from that liability." *Id*. This type of clause may state: "The trustee is not liable for any loss to the trust that arises from the trustee's actions or inactions unless done in bad faith or with reckless disregard."

The second is a type of clause that relieves a trustee from a particular duty or directs the trustee to do something that might ordinarily be a breach of duty. It is a more specific type of clause. For example, such a clause may state: "The trustee is relieved of the duty to investigate the actions of any prior trustee and has no duty to bring any claim against any prior trustee."

One commentator has described this type of provision as a "powers clause" and discusses the differences between a broad exculpatory clause and a more narrow powers clause:

> Most trust instruments include powers clauses, granting express authority to the trustee. Authority is "the right or permission to act legally on another's behalf." By defining the trustee's powers, the authority clause implicitly defines all other behavior as unauthorized, unless authorized by statute or unless necessary to carry out the purposes of the trust. If the trustee engages in unauthorized behavior, then that unauthorized behavior constitutes a breach of the trustee's duty to the trust's beneficiary. That breach may make the trustee liable to the beneficiary.
>
> An exculpatory clause does not authorize a trustee to engage in a designated action. Instead, an exculpatory clause is "[a] contractual provision relieving a party from any liability resulting from a negligent or wrongful act." A trustee's breach may give rise to liability, and the exculpatory clause purports to excuse the trustee from that liability.
>
> When an exculpatory clause is applied, a breach has occurred, but liability is excused. In contrast, if a powers clause authorizes an act, no breach of fiduciary duty has occurred. Because the act does not result in a breach, the act cannot give rise to any liability. This is the critical difference between powers and exculpatory clauses.
>
> For example, a trustee engages in behavior that breaches his duty to the beneficiary. The trustee delays in investing the trust property. Then, when faced with liability for that breach, the trustee relies on the exculpatory clause. The exculpatory clause does not cure the breach; instead, the clause purports to excuse liability for the breach.

Grizzle Bear, at 256.

Regarding the distinction between an exculpatory clause and a powers clause, another commentator provides:

> A distinction is to be drawn between provisions in the trust instrument that permits the trustee to do acts that would not otherwise be permissible and a provision that merely relieves the trustee from liability if he does them. Thus by the terms of the trust the trustee may be authorized to invest in securities other than those in which a prudent man would invest. In such a case the powers of the trustee are enlarged by the provision. On the other hand, the trustee may not be authorized to make such investments but it may be provided by the terms of the trust that he shall not be liable for making investments unless he is guilty of an intentional breach of trust or of gross negligence. The effect of a provision enlarging the power of the trustee is to prevent acts from constituting a breach of trust that would otherwise be in breach of trust. The effect of a provision relieving the trustee of liability for breach of trust, however, is not to extend his powers but to restrict his liabilities. Such a provision does not prevent an act by the trustee from being a breach of trust if the act is not within his powers; but it does relieve him to a certain extent from liability for the consequences of his act. The distinction has been recognized in cases in which it has been held that although a trustee who commits a breach of trust may be relieved from liability, yet he cannot recover compensation with respect to the transaction that is in breach of trust.

AUSTIN W. SCOTT AND WILLIAM F. FRATCHER, THE LAW OF TRUSTS (FOURTH EDITION) § 222.1.

VI. PRE-GRIZZLE AUTHORITY: PUBLIC POLICY LIMITS THE ENFORCEMENT OF EXCULPATORY CLAUSES

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

mishandling" of trust funds. The court explained as follows:

> Appellee again directs our attention to the exculpatory language of the trust instrument which relieves a trustee from liability except for gross negligence. Appellee contends that we have in effect held that such exculpatory language is unlawful, thus going contrary to the great weight of authority in this State which has upheld similar exculpatory language in other trust instruments. Our holding is not so broad and should not be so construed. What we have held is that the exculpatory language in the trust instrument here under consideration does not authorize self-dealing by a trustee. In view of the language of Section 10 of the Texas Trust Act, Article 7425b, we further express the opinion that the language of a trust instrument which specifically authorizes self-dealing by a trustee could present a serious question of public policy.

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

In *Corpus Christi National Bank v. Gerdes*, the court of appeals held that an exculpatory clause was not against public policy and was enforceable under the facts of that case. 551 S.W.2d 521 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.). The beneficiaries alleged negligence and gross negligence by the trustee in its handling of the estate properties and sought damages. The trial court awarded the beneficiaries damages, and the trustee appealed. The court of appeals held that generally a trustee's powers are conferred by the instrument and neither the trustee nor the courts can add to or take away from such powers, but must permit it to stand as written and give to it only such construction as the trustor intended. *Id*. The will stated that "No Trustee, Co-Trustee or successor Trustee shall be liable for any mistake or error of judgment or negligence, but shall be liable only for her or its own dishonesty." *Id*. at 523. In distinguishing the *Langford* opinion, the court stated: "It is clear, therefore, that the public policy prohibition is limited to exculpatory clauses which authorize self-dealing, which is not in our case." *Id*. at 525. The court reversed the award of damages against the trustee. *See also Burnett v. First National Bank of Waco*, 567 S.W.2d 873 (Tex. Civ. App.—Eastland 1978, no writ); *Blieden v. Greenspan*, 742 S.W.2d 93 (Tex. App.—Corpus Christi 1987), *rev'd*, 751 S.W.2d 858 (Tex. 1988).

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

> The language of a trust instrument cannot authorize self-dealing by a trustee, because that would be contrary to public policy. This limitation should include any situation in which a trustee used the position of trust to obtain an advantage by action inconsistent with the trustee's duties and detrimental to the trust. Neither can an exculpatory provision in the

> trust instrument be effective to relieve the trustee of liability for action taken in bad faith or for acting intentionally adverse or with reckless indifference to the interests of the beneficiary.

739 S.W.2d 882, 888 (Tex. App.—Texarkana 1987, no writ). The court reviewed the following trust provision: "(f) The Trustee shall never be liable for any action or any failure to act hereunder in the absence of proof of bad faith." *Id*. The court concluded: "Thus, liability of the trustee for breach of trust in the present case must be based upon self-dealing, bad faith, or intentionally adverse acts or reckless indifference toward the interest of the beneficiary." *Id*. at 888.

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

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

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

> contract." Because we have concluded that the evidence bearing directly on Wehe's intent resolves any ambiguity in the language used in the trust instrument, we decline to apply the strict-construction rule referenced above.

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

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

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

VII. *TEXAS COMMERCE BANK V. GRIZZLE*: TEXAS SUPREME COURT LIBERALIZES THE ENFORCEMENT OF EXCULPATORY CLAUSES

In 2002, the Texas Supreme Court revisited exculpatory clauses and held that a trust document could relieve a trustee of liability for even self-interested transactions under the Trust Code provisions then in effect. In *Texas Commerce Bank v. Grizzle*, the Texas Supreme Court held that public policy as expressed by the legislature in the Trust Code allowed relieving a corporate trustee from liability for self-dealing except for what was specified in sections 113.052 and 113.053. 96 S.W.3d 240, 249 (Tex. 2002). The Court stated that "[w]hile the Trust Code imposes certain obligations on a trustee—including all duties imposed by the common law—the Trust Code also permits the settlor to modify those obligations in the trust instrument." *Id*. at 249. Specifically, the Court held that "the trust Code authorizes a settlor to exonerate a corporate trustee from almost all liability for self-dealing," such as misapplying or mishandling trust funds, including failing to promptly reinvest trust monies. *Id*. at 250. The Court also held that public policy did not bar such exculpatory clauses: "We disagree with the court of appeals' conclusion that public policy precludes such a limitation on liability." *Id*. "The Legislature has expressly authorized the use of exculpatory clauses, stating that they can relieve a corporate trustee from liability except for certain narrow types of self-dealing not at issue here. We therefore decline to hold that a trust instrument cannot exonerate a trustee from liability for failing to promptly reinvest trust monies based on public policy." *Id*.

In *Grizzle*, the Texas Supreme Court based its decision on Section 113.059 of the Texas Trust Code that broadly stated that "a settlor may relieve a corporate trustee from a 'duty, liability, or restriction imposed by this subtitle,' except for those contained in sections 113.052 and 113.053." *Id*. The court held that public policy is reflected by the statutes enacted by the legislature. As a result, it looked solely to the exculpation statutes to determine if the exculpatory provision at issue was enforceable. At that time, the relevant statutes permitted broad exculpatory provisions, including self-dealing provisions that could lead to "harsh results." *Id*. Presuming that the legislature was aware of potential issues with respect to broad exculpatory provisions, the Court permitted the exculpatory provision at issue because it was within the requirements of the statutes. *Id*.

Accordingly, the Texas Supreme Court seemed willing to follow the settlor's intent to forgive even some intentional conduct despite other historic public policy considerations to the contrary. *Id.; see also Clifton v. Hopkins*, 107 S.W.3d 755 (Tex. App.—Waco 2003, no pet.).

VIII. NEW TEXAS TRUST CODE PROVISIONS: LEGISLATURE REVISITS LIMITATIONS ON EXCULPATORY PROVISIONS

A. Introduction

In response to *Grizzle*, the Texas Legislature amended the Texas Property Code in 2005, and it now limits a settlor's ability to exculpate a trustee. 72 Tex. Jur. Trusts § 68. The Texas Legislature repealed Section 113.059 and added Sections 111.0035 and 114.007. Section 111.0035 provides that the terms of a trust may not limit a trustee's duty to respond to a demand for an accounting or to act in good faith. Tex. Prop. Code Ann. §111.035(b)(4). In the bill analysis, the Texas Legislature stated Section 111.0035 "is necessary in light of *Texas Commerce Bank v. Grizzle*, 96 S.W.3d 240 (Tex. 2002)." House Comm. on Judiciary, Bill Analysis, Tex. H.B. 1190, 79th Leg., R.S. (2005). Additionally, new Texas Property Code section 114.007 provides that an exculpatory clause is unenforceable to the extent that it relieves a trustee of liability for breaches done with bad faith, intent, or with reckless indifference to the interests of a beneficiary or for any profit derived by the trustee from a breach of trust. Tex. Prop. Code Ann. §114.007. Further, the Texas Legislature also amended the Property Code regarding management trusts to limit a court's ability to insert exculpatory clauses. Tex. Prop. Code Ann. §142.005(j).

B. Texas Trust Code 114.007(a)

Section 114.007 discusses the two different types of clauses mentioned earlier in this article. Section 114.007(a) provides:

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

Tex. Prop. Code Ann. § 114.007(a).

Section 114.007(a) focuses on a general type of exculpatory clause that provides that a trustee is not liable for any improper action. Section 114.007(a) provides that an

exculpatory clause is not be enforceable if: 1) a trustee breached its duties in bad faith, intentionally, or with reckless indifference to the beneficiary's interests, *or* 2) where the trustee acted with or without negligence where the trustee derived a profit. This provision discusses two different types of events: 1) actions where the trustee does not profit (an exculpatory clause is enforceable where the trustee does not act with "bad faith, intentionally, or with reckless indifference to the beneficiary's interests"; and 2) actions where the trustee does profit (where the exculpatory clause is not enforceable in any event).

C. Definitions For Bad Faith, Intentional Conduct, and Reckless Indifference

If a trustee wants to rely on a broad exculpatory clause, it needs to know what the words "intentional," "bad faith," and "reckless indifference" mean. One court has held that bad faith in the context of trustee's actions is as follows:

> The opposite of "good faith," generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. It has been held that a finding of bad faith requires some showing of an improper motive, and that improper motive is an essential element of bad faith.

InterFirst Bank Dallas, N.A. v. Risser, 739 S.W.2d 882, 888-89(Tex. App.—Texarkana 1987, no writ) (citing Black's Law Dictionary). To the contrary, one Texas court has held that a standard of good faith for an executor is part subjective and part objective. *See Lee v. Lee*, 47 S.W.2d 767, 795 (Tex. App.—Houston [14th Dist.] 2001, pet. denied). A fiduciary acts in good faith when he or she: (1) subjectively believes his or her defense is viable, and (2) is reasonable in light of existing law. *Id*. *See also In re Estate of Nunu*, 542 S.W.3d 67, 81 (Tex. App.—Houston [14th Dist.] 2017, pet. denied).

Intentional acts are typically those that the actor consciously desires to engage in the conduct or cause the result. The Texas Penal Code provides that "A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result." Tex. Pen. Code §6.03(a).

Reckless indifference has been equated to a finding of gross negligence. *Wells Fargo v. Militello*, No. 05-15-01252-CV, 2017 Tex. App. LEXIS 5640 (Tex. App.—Dallas June 20, 2017, no pet.) (finding of gross negligence negated impact of exculpatory clause). "Gross negligence" means an act or omission:

> (A) which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and
>
> (B) of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with

> conscious indifference to the rights, safety, or welfare of others.

Tex. Civ. Prac. & Rem. Code § 41.001(11) (definition of "gross negligence"). The Texas Supreme Court has explained that "gross negligence consists of both objective and subjective elements." *U-Haul Int'l, Inc. v. Waldrip*, 380 S.W.3d 118, 137 (Tex. 2012). The Court also explained:

> Under the objective component, "extreme risk" is not a remote possibility or even a high probability of minor harm, but rather the likelihood of the plaintiff's serious injury. The subjective prong, in turn, requires that the defendant knew about the risk, but that the defendant's acts or omissions demonstrated indifference to the consequences of its acts.

Id. (citations omitted). The Texas Penal Code provides:

> A person acts recklessly, or is reckless, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

Tex. Pen. Code §6.03(c).

D. Texas Trust Code Section 114.007(c)

Section 114.007(c) deals with the second type of clause and deals with specific duties and actions. For example, a trust may specifically provide that a trustee has no duty to investigate the actions of a predecessor trustee. The first place to look regarding a trustee's rights is the trust document itself. Tex. Prop. Code §113.001, 113.051. *See Myrick v. Moody Nat'l Bank*, 336 S.W.3d 795, 801 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (terms of trust instrument may limit or expand trustee powers supplied by the Trust Code). Generally, a trust document's terms govern, and a trustee should follow them. Tex. Prop. Code Ann §§ 111.0035(b), 113.001; RESTATEMENT (THIRD) OF TRUSTS § 76(1) (2007) ("The trustee has a duty to administer the trust … in accordance with the terms of the trust . . . ."); RESTATEMENT (SECOND) OF TRUSTS § 164(a) (1959). "The nature and extent of a trustee's duties and powers are primarily determined by the terms of the trust." RESTATEMENT (THIRD) OF TRUSTS § 90 cmt. B; *Stewart v. Selder*, 473 S.W.2d 3 (Tex. 1971); *Beaty v. Bales*, 677 S.W.2d 750, 754 (Tex. App.—San Antonio 1984, no writ). If the language of the trust instrument unambiguously expresses the intent of the settlor, the instrument itself confers the trustee's powers and neither the trustee nor the courts may alter those powers. *Jewett v. Capital National Bank of Austin*, 618 S.W.2d 109, 112 (Tex. Civ. App.—Waco 1981, writ ref'd n.r.e.); *Corpus Christi National Bank v. Gerdes*, 551 S.W.2d 521, 523 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.).

One commentator has stated:

> The single most important source of rules governing a

> trustee's liability to beneficiaries is the language contained in the document creating the trust. With few exceptions, a settlor of an express trust in Texas may add to or subtract from the statutory and common-law fiduciary obligations imposed on a trustee by expressing a contrary intent in the trust instrument. Texas courts have consistently upheld the settlor's right to control the scope of the trustee's liability, unless the instrument attempts to completely abrogate basic fiduciary duties.

4 Texas Probate, Estate and Trust Administration § 84.03

Section 114.007(c) provides:

> (c) This section applies only to a term of a trust that may otherwise relieve a trustee from liability for a 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: (1) relieving the trustee from a duty or restriction imposed by this subtitle or by common law; or (2) directing or permitting the trustee to do or not to do an action that would otherwise violate a duty or restriction imposed by this subtitle or by common law.

Id. at § 114.007(c). This states that a settlor can relieve a trustee from a specific duty or to allow a trustee to do or not do some action otherwise restricted by law. There are no express restrictions regarding bad faith, intentionally, or with reckless indifference to the beneficiary's interests *or* where the co-trustees acted with or without negligence where the trustee derived a profit.

However, Section 114.007(c) does provide that it applies "except as provided in Section 111.035…" Tex. Prop. Code § 114.007(c). Section 111.035

> (b) The terms of a trust prevail over any provision of this subtitle, except that the terms of a trust may not limit: … (2) the applicability of Section 114.007 to an exculpation term of a trust; … (4) a trustee's duty: … (B) to act in good faith and in accordance with the purposes of the trust . . .

Tex. Prop. Code Arm. § 111.0035. Importantly, this provision states, in part, that a trust term may not limit a trustee's "duty to act in good faith and in accordance with the purposes of the trust." Tex. Prop. Code § 111.0035(b)(4)(B); *Martin v. Martin*, 363 S.W.3d 221, 2012 Tex. App. LEXIS 2146 (Tex. App.—Texarkana Mar. 20, 2012, no pet.) (even though a trust provision allowed the trustee to have conflicts of interest, the provision was not enforceable as a jury found that the trustee did not act in good faith). There is no statutory exception to this duty of good faith. The duty to act in good faith appears to apply at all times to every provision of a trust agreement.

Section 114.007(c) expressly discusses two types of powers clauses: those that eliminate a duty that generally exists and those that allow a trustee to do some act that ordinarily it cannot do. The first type of powers clause

(eliminating a duty), would seemingly be enforceable even if the trustee failed to take some act in bad faith. A trustee cannot breach a duty, even in bad faith, that the trustee does not owe. For example, if a trust states that the trustee has no duty to investigate or raise claims against a prior trustee, can a trustee be liable for failing to do so in bad faith? What if the trustee knows that the prior trustee stole assets from the trust, is a friend or relative of the prior trustee, and intentionally refuses to sue the prior trustee for breaching fiduciary duties? In this circumstance, can a beneficiary hold the trustee liable despite the trust clause to the contrary?

As described in more detail below, at least one court has held that trustees can rely on a broad powers clause relieving them of the duty to sue prior trustees even where they a conflict of interest. *Benge v. Roberts*, No. 03-19-00719-CV, 2020 Tex. App. LEXIS 6335 (Tex. App.—Austin August 12, 2020, no pet. history). The court disagreed with the beneficiary's argument that the trustees could be held liable for proceeding while they had a conflict of interest, i.e., acting in bad faith or with intent:

> Benge contends that cause exists for the co-trustees' removal because they have "actual conflicts of interest" due to their participation in the Consolidated Matter, rendering them incapable of "impartially evaluat[ing]" whether to "continue to fight" Benge in the appeal of the Consolidated Matter and incur attorney's fees, depleting the Trust. She contends that removal of the co-trustees because of their conflict of interest is a distinct claim from one alleging that they have liability for Missi's alleged breaches of fiduciary duty and, therefore, is not subject to the exculpatory clause.
>
> We reject this argument because it directly conflicts with the broad language in the exculpatory clause relieving the co-trustees from any "duty, responsibility, [or] obligation" for the "acts, defaults, or omissions" of Missi. While ordinarily a successor trustee has the duty to "make a reasonable effort to compel a redress" of any breaches by a predecessor, see Tex. Prop. Code § 114.002(3)—which presumably would include impartially evaluating whether to "fight" Benge in the appeal of the Consolidated Matter—the exculpatory clause in the Trust relieves the co-trustees of that duty, as permitted by the Trust Code. *See id*. §§ 111.0035(b), 114.007(c). The co-trustees cannot as a matter of law have a conflict of interest due to allegedly lacking the ability to be "impartial" about deciding whether or how to redress Missi's alleged breaches when they have no duty to redress such breaches in the first instance.

Id.

The other type of powers clause is the type that allows a trustee to do something that it ordinarily cannot do. For example, a trust

may allow a trustee to purchase property from the trust. The trustee ordinarily cannot enter into a self-dealing transaction with the trust, but this type of provision would allow a trustee to do so. However, the trustee would have to do so in good faith. So, if the trustee paid only half the market value for the property, or it did the transaction via a loan and provided a below market interest rate or with under secured collateral, then the trustee may not be in good faith and may not be able to take advantage of the powers clause.

E. Exculpatory Clauses Improperly Inserted By Trustees Are Not Enforceable

There are circumstances where a trustee should not be allowed to rely on an exculpatory clause that the trustee inserted into the controlling document due to an improper act. The Texas Trust Code provides:

> (b) A term in a trust instrument relieving the trustee of liability for a breach of trust is 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 or confidential relationship with the settlor.

Tex. Prop. Code Ann. § 114.007(b). *See also* 9 Texas Transaction Guide--Legal Forms § 50C.24.

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

If the terms of the trust were drafted by the trustee, or if the exculpatory clause was caused to be included in the trust by the trustee, the clause is presumptively unenforceable. The presumption is rebuttable, and the clause will be given effect if the trustee proves that the exculpatory provision is fair under the circumstances (including, when applicable, the fiduciary risks to be assumed) and that the existence, contents, and effect of the clause were adequately communicated to or otherwise understood by the settlor. Thus, if a father asks his daughter, a lawyer, to draw a will under which she is to act as trustee, and she includes an exculpatory clause in the will and the father is aware of its existence, nature, and effect when he executes his will, the exculpatory provision is effective.

In determining whether an exculpatory clause was included in the trust instrument as a result of an abuse of a fiduciary or confidential relationship, the following factors (as well as other relevant factors) may be considered: whether the instrument was drawn by the trustee or another acting wholly or in part on behalf of the trustee; whether the trustee prior to or at the time of the trust's creation had

> been in a fiduciary relationship with the settlor, such as by serving as the settlor's conservator or as the settlor's lawyer in providing the trust instrument or relevant part(s) of it; whether the settlor received competent, independent advice regarding the provisions of the instrument; whether the settlor was made aware of the exculpatory provision and was, with whatever guidance may have been provided, able to understand and made a judgment concerning the clause; and the extent and reasonableness of the provision.

RESTATEMENT (THIRD) TRUSTS, § 96 cmt. (1)(d).

Another commentator provides:

> An exculpatory provision may be ineffective to relieve the trustee of liability if it was inserted in the trust instrument by the person named as trustee and if, in inserting it, he or she was guilty of an abuse of a fiduciary or confidential relationship with the settlor. The mere fact that the person named as trustee drafted the trust instrument does not necessarily make the provision ineffective. But if the person so named was already in a fiduciary relationship with the settlor, for example, the settlor's attorney, and inserted the provision without bringing it to the settlor's attention, knowing that the settlor did not understand it, it is ineffective. The mere fact that the person named as trustee was not yet trustee at the time the instrument was executed does not change the result. Many cases have held that an attorney who drafts a will containing a bequest to himself or herself must explain the circumstances and show that the testator made the bequest freely, because, without such proof, the trier of fact is justified in finding undue influence. Similarly, the court may properly call upon an attorney who drafts a will or other instrument naming the attorney as trustee, and inserts a provision relieving the attorney of liability for breach of trust, to show that the settlor freely and knowingly consented to inclusion of the provision.

SCOTT AND ASCHER ON TRUSTS, §24.27.4 (5th Edition). Accordingly, a court may ignore exculpatory provisions if the trustee is found to improperly insert them in a trust.

IX. DUTY TO DISCLOSE WHERE EXCULPATORY CLAUSES APPLY

Where a trustee breaches a duty, but is not liable in damages due to an exculpatory clause, does the trustee have a duty to disclose that conduct to a beneficiary? What if the trustee never breaches a duty due to the wording of a powers clause, but its

actions are detrimental to the interests of a beneficiary, does it have a duty to disclose?

Once again, a trustee has a duty of full disclosure of all material facts known to it that might affect the beneficiaries' rights. *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996); *Montgomery v. Kennedy*, 669 S.W.2d 309, 313 (Tex. 1984). A trustee has a duty of candor. *Welder v. Green*, 985 S.W.2d 170, 175 (Tex. App—Corpus Christi 1998, pet. denied). Regardless of the circumstances, the law provides that beneficiaries are entitled to rely on a trustee to fully disclose all relevant information. *See generally Johnson v. Peckham*, 132 Tex. 148, 120 S.W.2d 786, 788 (1938). In fact, a trustee has a duty to disclose mistakes. *Montgomery*, 669 S.W.2d at 313. Under this general precedent, a cautious trustee should disclose the controversial activities.

It should be noted, however that in Grizzle, the court of appeals held that the summary judgment evidence raised a fact question about whether the trustee's failure to disclose the contested action amounted to a misrepresentation. *Texas Commerce Bank v. Grizzle*, 96 S.W.3d at 246. The Texas Supreme Court held, however, that the trustee was not liable for a failure to disclose or a fraud claim where there was no clause in the trust requiring the specific disclosure and the failure did not amount to bad faith or gross negligence:

> While we recognize that Grizzle has a strong interest in protecting her daughter's trust assets, the Grizzle Trust contains no provision requiring such disclosures and options. And we decline to read such a provision into the trust. Accordingly, the trustee's failure to provide such disclosures and options does not amount to gross negligence, bad faith, or fraud.
>
> …
>
> Further, Grizzle does not complain about TCB becoming the new trustee except for the fact that she was not informed of the consequences that flowed from that change. As we have said, those consequences, and the Frost and TCB defendants' failure to inform her of them, do not constitute gross negligence, bad faith, or fraud.

Id. at 253-55. This precedent would support the position that where a trustee is not liable due to a valid exculpatory clause, it is likewise not liable for failing to disclose the underlying issue. Though the Texas Legislature amended the Trust Code post-*Grizzle* to address the enforceability of exculpatory clauses, it did not address the duty to disclose.[2]

[2]It should be noted that in 2005, the Texas Legislature enacted Texas Property Code Section 113.060 that imposed on trustees a duty to keep beneficiaries reasonably informed concerning the trust's administration and "the material facts necessary for the beneficiaries to protect [their] interests." in 2007, the Texas Legislature repealed Section 113.060 stating: "The enactment of Section 13.060 was not intended to repeal any common-law duty to keep a beneficiary reasonably informed, and the repeal of this Act of Section 113.060 does not repeal any common-law duty to keep a beneficiary

X. EXCULPATORY CLAUSES MAY NOT IMPACT REQUESTS FOR NON-MONETARY RELIEF

There is an argument that exculpatory clauses that relieve a trustee from liability (but not breach) may not prevent a beneficiary from seeking non-monetary relief. One commentator provides in part that: "Although an exculpatory clause may relieve the trustee from liability for damages, there may be other remedies available to the beneficiary, for example, removal of the trustee, enjoining the trustee from committing an improper act, of denial or reduction of the trustee's compensation." BOGERT, TRUSTS & TRUSTEES (SECOND ED. REV.) § 542. Another commentator states:

> The effect of a provision relieving the trustee of liability for a breach of trust is not to extend the trustee's powers but to limit the trustee's liability. Such a provision does not prevent an act or omission from being a breach of trust, even if it does relieve the trustee of liability for the consequences of committing a particular act or omission. The courts have sometimes recognized this distinction in determining, for example, that although a trustee who has committed a breach of trust is not subject to liability for the consequences, the trustee may nonetheless not be entitled to compensation with respect to any transaction that was in breach of trust…

There is, however, reason to believe that the significance of the distinction between a provision enlarging the trustee's powers and an exculpatory provision may sometimes be dramatically overstated, if not in fact badly abused. It is sometimes said that because an exculpatory clause merely relieves the trustee of liability for committing a breach of trust, a trustee who does exactly what an exculpatory clause contemplated can (and perhaps should) be denied all compensation, or even removed, for having committed the very breach of trust contemplated in the exculpatory provision. Certainly the courts have (and should have) broad discretion in respect of trustee compensation and removal. Likewise, the commission of a breach of trust is (and should be) among those factors that a court may properly consider in deciding the appropriate level of trustee compensation or whether to remove a trustee. But particularly with respect to a narrowly drafted exculpatory provision that contemplates a particular breach of trust, the very inclusion of the provision in the governing instrument may well have been simply the settlor's way of inviting the trustee to do the act in question.

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informed. The common-law before January 1, 2006, is continued and in effect."

SCOTT AND ASCHER ON TRUSTS, §24.27.1 (5th Edition)

The Texas Trust Code provides many different forms of relief and remedies other than monetary damages. For example, Texas Trust Code section 114.008 allows a court to compel a trustee to act, enjoin a trustee from breaching a duty, compel a trustee to redress a prior breach, order a trustee to account, appoint a receiver, suspend the trustee, remove the trustee, reduce or deny compensation, void an act of the trustee, impose a lien or a constructive trust, or order any other appropriate relief. Tex. Prop. Code Ann. § 114.008. Trust Code Section 113.082 provides that a court may remove a trustee if: the trustee materially violated a term of the trust or attempted to do so and that resulted in a material financial loss to the trust; the trustee fails to make an accounting that is required by law or by the terms of the trust; or the court finds other cause for removal. *Id*. § 113.082. Court may reduce or deny a trustee compensation for breaches of duty. *Id*. §§ 114.008, 114.061. A plaintiff only needs to prove a breach (and not causation or damages) when she seeks to forfeit some portion of trustee compensation. *Longaker v. Evans*, 32 S.W.3d 725, 733 n.2 (Tex. App.—San Antonio 2000, pet. withdrawn). Texas Trust Code section 114.064 provides: "In 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." *Id*. § 114.064. The Texas Trust Code allows for judicial approval, declarations, and instructions regarding the administration of a trust. Tex. Prop. Code Ann. §115.001. The Texas Civil Practice and Remedies Code also allows a court to declare the rights or legal relations regarding a trust and to direct a trustee to do or abstain from doing particular acts or to determine any question arising from the administration of a trust. Tex. Civ. Prac. & Rem. Code Ann. § 37.005.

Thus, depending on the wording of the trust, a beneficiary may be able to introduce evidence that the trustee breached a duty even if an exculpatory clause protects the trustee from liability for actual damages for the breach. *See Frank N. Ikard, Jr., Exculpatory Clauses, Trial of a Fiduciary Litigation Case*, State Bar of Texas, 2009.

XI. POST-STATUTORY AMENDMENT PRECEDENT

A. *Dolan v. Dolan*

In *Dolan v. Dolan*, a beneficiary sued a trustee for investing trust funds into the trustee's needlepoint business. No. 01-07-00694-CV, 2009 Tex. App. LEXIS 4487 (Tex. App.—Houston [1st Dist.] June 18, 2009, pet. denied). The terms of the trust provided: "The trustee shall in no case be liable for loss to the trust estate, except for his willful breach of trust, bad faith, or gross negligence, nor for any other error of judgment in the exercise of good faith . . . ." *Id*. The court reviewed the evidence and determined that the jury had sufficient evidence to support a finding of gross negligence: "Viewing the evidence in the light most favorable to the judgment and indulging every reasonable inference that supports the judgment, we conclude that this evidence would enable reasonable and fair-minded people to reach the conclusion that George acted with gross negligence with regard to the trust funds that he advanced to Needlepoint." *Id*. at *17.

B. *Martin v. Martin*

In *Martin v. Martin*, the court of appeals discussed the new statutory provisions and their impact on *Grizzle* and found that an exculpatory clause in the trust document at

issue was not enforceable to protect the trustee from actions where he had a conflict of interest. 363 S.W.3d 221 (Tex. App.—Texarkana 2012, pet. denied). *See also* Jerry Bullard and David F. Johnson, Texas Courts Of Appeals Update--Substantive, 24 App. Advoc. 697 (Summer 2012). In *Martin*, a company was jointly managed for over twenty years by Ruben Martin and Scott Martin. They each created an irrevocable trust for the health, education, and welfare of their children and grandchildren. The brothers were the trustees of each other's trust. Thereafter, a power struggle over the control of the company arose between Ruben and Scott.

Section R of the trust agreement stated:

> R. Transactions with Beneficiaries and Fiduciaries. The Trustee is authorized to purchase from, sell to, lend funds to, or otherwise deal with the Trustee or with the Trustee as a partner, member or officer in any partnership, limited liability company, corporation or other entity, or as executor, administrator, or guardian of the estate of any person, or with an affiliate of the Trustee, or with a director, officer, employee, employer, partner, or other business associate of the Trustee or the Trustee's affiliate, or with a relative of the Trustee, or with any beneficiary of any trust created hereunder or with any partnership, corporation, trust or other entity in which the Trustee may have an interest to the same extent and manner and for the same investment purposes as herein provided in respect of transactions with disinterested parties, except to the extent that the Texas Trust Code (or its successor statute) may expressly prohibit Settlor from authorizing any corporate Trustee serving hereunder from engaging in any such transaction. The provisions of this paragraph are made in full realization that said Trustee may be a partner, officer, director, member, or stockholder in any such entity or an executor, administrator or guardian of an estate, and no principle or rule relating to self-dealing or divided loyalty shall be applied to any act of said Trustee, but said Trustee shall be held to the same standard of liability in respect of such transactions as in respect of transactions with disinterested persons.

Id. Additionally, Section S of the trust agreement limited Scott's liability with the exception of willful misconduct or personal dishonesty:

> S. Liability of Trustee. No individual Trustee shall be liable for negligence or error of judgment, but shall be liable only for such Trustee's willful misconduct or personal dishonesty.

Id. Ruben's children filed a lawsuit to remove Scott as the trustee of their trust and alleged breaches of fiduciary duty. Ultimately, the jury found for Ruben's children and ordered over a million dollars

in damages to each of them as against Scott. Scott appealed and argued that he had no fiduciary duty of loyalty based on a provision of the trust releasing Scott of fiduciary duties except those imposed by a statute.

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

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

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

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

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

C. *Wells Fargo v. Militello*

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

allowing the trustee to remain in that position.

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

The beneficiary sued, and the trial court held a bench trial in 2012. Later, the trial court awarded Militello: $1,328,448.35 past economic damages, $29,296.75 disgorgement of trust fees, $1,000,000.00 past mental anguish damages, $3,465,490.20 exemplary damages, and $467,374.00 attorney's fees. In the court of appeals, the court largely affirmed the damage findings.

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

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

Id. The trustee contended that the property code "expressly allows exculpatory clauses to shield a trustee from ordinary negligence." *Id*. (citing Tex. Prop. Code § 114.007). It also argued that it "used good faith and ordinary care" in selecting its agents, including "(1) the law firm that prepared the erroneous deeds, (2) Leonard, who prepared the mineral interest valuation used by the bank, and (3) Harrell, who prepared erroneous tax returns, and consequently is not liable for errors made by those agents." *Id*.

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

Earlier in the opinion, the court of appeals affirmed the punitive damages award based on a finding of gross negligence. Gross negligence consists of both objective and subjective elements. Under the objective component, "extreme risk" is not a remote

possibility or even a high probability of minor harm, but rather the likelihood of the plaintiff's serious injury. *Id*. The subjective prong, in turn, requires that the defendant knew about the risk, but that the defendant's acts or omissions demonstrated indifference to the consequences of its acts. The court of appeals held that the evidence in the case supported the trial court's findings:

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

> about sales from the Grantor Trust, to obtain a "current evaluation of the property prepared by a competent engineer" before the sales, to explain the valuation to Militello and discuss the tax consequences of a sale, to market the properties to more than one buyer, to negotiate to get the best price possible for the properties, to negotiate a written purchase and sale agreement, to convey correct information to the attorneys preparing the deeds for the sales, to notify the oil and gas producers of the change in ownership, and to create a separate account after the sales, instead commingling the proceeds received "for a period of up to three years." . . . Under our heightened standard of review, we conclude the trial court could have formed a firm belief or conviction that Wells Fargo's conduct involved an extreme degree of risk, and Wells Fargo was consciously indifferent to that risk. We also conclude that Militello offered clear and convincing evidence to support the trial court's finding that Wells Fargo was grossly negligent, and therefore met her burden to prove the required predicate under section 41.003(a).

Id.

D. *Kohlhausen v. Baxendale*

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

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

Id. After the mother died, Kelley exercised his right to become the sole trustee of his

trust. After Kelley died, his estranged daughter received control of the trust's assets. She then died. Her executor then sued her father's executor for the father allegedly breaching his fiduciary duty by: (1) failing to disclose information; (2) engaging in self-dealing, i.e., gifting himself trust assets in excess of his support needs; (3) failing to make any distributions to his daughter or consider her support needs; (4) failing to consider his other sources of support and his own station in life before making distributions to himself; (5) commingling trust assets with personal assets; (6) pledging trust assets as collateral in violation of the will's terms; and (7) failing to document his activity as trustee.

The father's executor filed a motion for summary judgment and argued that the claims should be dismissed because the will's exculpatory clause relieved the trustee from liability for any actions or omissions "if done in good faith and without gross negligence." *Id*. After a hearing, the trial court granted the motion.

The court of appeals held that an exculpatory clause argument is an affirmative defense. "A defendant urging summary judgment on an affirmative defense is in the same position as a plaintiff urging summary judgment on a claim," and that the party asserting an affirmative defense has the burden of pleading and proving it. *Id*. The court held that after the trustee established the existence of the exculpatory clause, the burden shifted to the non-movant to bring forward evidence negating its applicability. The court stated:

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

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

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

E. *Goughnour v. Patterson*

In *Goughnour v. Patterson*, a beneficiary sued a trustee based on a failed real estate investment. No. 12-17-00234-CV, 2019 Tex. App. LEXIS 1665 (Tex. App.—Tyler March 5, 2019, pet. denied). In 2007, the trustee of four trusts invited his mother, the primary beneficiary, and his siblings, also beneficiaries, to participate in a real estate investment that he created by allowing the use of trust funds. They all agreed, and the trustee transferred a total of $2.1 million from the four trusts to the real estate investment entity. The project failed, and the trusts lost the $2.1 million. In 2011, the trustee filed suit to resign and obtain a judicial discharge. A sister filed a breach of fiduciary duty claim based on this failed investment.

After a bench trial, the court rendered judgment approving the trust accounting, approving the trustee's administration, and holding that the trustee, individually and in his capacity of trustee, was "completely discharged and relieved of all duties" and was "fully and completely released and discharged from any and all claims, duties, causes of action or liabilities (including taxes of any kind) relating to any and all actions or omissions in connection with his administration of the DPH Trust." Id. The court ordered that the successor trustee pay all outstanding legal and accounting fees incurred by the trust, appointed a successor trustee, and relieved the successor trustee of any and all duty, responsibility, or authority to investigate the actions or inactions of the trustee as prior trustee. The court further ordered that the sister take nothing on all her

claims and ordered her to pay attorney's fees for the trustee. The sister appealed.

The court of appeals also affirmed the trustee's affirmative defense of an exculpatory clause in the trust, which negated his liability:

> Generally, subject to the Trustee's duty to act in good faith and in accordance with the purposes of the Trust, the terms of the Trust prevail over provisions of the Texas Trust Code. A term of a Trust exculpates a Trustee from liability if the Trustee's breach of trust is not committed in bad faith, intentionally, or with reckless indifference to the interest of a beneficiary. Paragraph C(5) of the Trust provided that the Trustee shall not "at any time be held liable for any action or default of himself or his agent or of any other person in connection with the administration of the trust estate, unless caused by his own gross negligence or by a willful commission by him of an act in breach of trust." Such an exculpatory clause has been held effective in exonerating a trustee from liability for losses when no evidence of gross negligence was shown.
>
> To prove gross negligence, a plaintiff must show (1) an act or omission that, when viewed objectively from the defendant's standpoint at the time it occurred, involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others and (2) that the defendant had an actual, subjective awareness of the risk but proceeded with conscious indifference to the rights, safety, and welfare of others. Under the first element, an "extreme risk is not a remote possibility of injury or even a high probability of minor harm, but rather the likelihood of serious injury to the plaintiff." To determine if acts or omissions involve extreme risk, we analyze the events and circumstances from the defendant's perspective at the time the harm occurred, without resorting to hindsight. Under the second element, "actual, subjective awareness" means that "the defendant knew about the peril, but its acts or omissions demonstrated that it did not care." Circumstantial evidence is sufficient to prove either element.

Id. The court of appeals affirmed the trial court's summary judgment on this ground due to the trustee's testimony about his due diligence about the investment, the history of doing successful real estate investments, the consent of the other beneficiaries, his capacity as beneficiary and his loss associated with the investment: "There is no evidence that Robert had an actual, subjective awareness of the risk of a coming financial crisis but nevertheless proceeded with conscious indifference to the rights, safety, and welfare of the Trust, his mother, or his sisters. Thus, there is no evidence of

gross negligence or a willful commission by Robert of a breach of trust. We conclude that Robert showed as a matter of law that Deborah's claims were barred by the Trust instrument's exculpatory clause." *Id*.

F. *In re Estate of Bryant*

In *In re Estate of Bryant*, a couple set up three trusts for their three children, Bill, Leslie, and Jane. No. 07-18-00429-CV, 2020 Tex. App. LEXIS 2131 (Tex. App.—Amarillo March 11, 2020, no pet.). After the couple had both passed away, their son Bill assumed the role of trustee of three trusts: Irrevocable Trust, the Children's Trust, and the Family Trust. Under the terms of the three trusts, following the couple's deaths, trust assets were to be distributed to the three siblings equally, with the partial exception of the Family Trust assets. Under the Family Trust, Bill and his sister Leslie were to each receive one million dollars, after which any remaining assets would be distributed equally among all three children. This provision of the Family Trust, known to the parties as the "Advancement Clause," stated:

> During Settlors' lifetimes, Settlors have made numerous gifts to their daughter, Jane A. Bryant, totaling at least One Million Dollars ($1,000,000). Settlors consider these gifts to be advancements on any property Jane would have received upon Settlors' deaths from any trust created herein. Therefore, notwithstanding any previous provision herein, my Trustee shall consider and account for the advancements made to Jane in the amount of One Million Dollars ($1,000,000) before making any further distribution to Jane from any trust created herein.

Id. Bill then received three checks from life insurance companies: one, for $500,041.00, was payable to the Children's Trust and two, totaling $510,938.82, were payable to the Family Trust. The insurance proceeds ended up in the Family Trust and Bill distributed $500,000 in Family Trust funds to himself and $500,000 in Family Trust funds to his sister Leslie.

Jane made a written demand that no further distributions be made until she was provided with documentation of her parents' and the Family Trust's assets, liabilities, income, and distributions. Jane then sued Bill, alleging breaches of fiduciary duty and seeking to remove him from his roles as executor of Harvey's estate, trustee of the Family Trust, and co-trustee of the Jane A. Bryant Trust. Jane also sued Leslie and sought to remove her as successor trustee. Bill and Leslie filed counterclaims against Jane. Following a bench trial, the trial court entered its final judgment, from which all of the parties appealed.

The court addressed Bill's issue concerning the trial court's holding that he breached his fiduciary duties as trustee to the Children's Trust and Irrevocable Trust when he distributed $500,000 each to himself and to Leslie from the Family Trust. To avoid an exculpatory clause, the trial court held that Bill acted with reckless indifference in doing so, rather than distributing them under the terms of the Children's Trust and Irrevocable Trust. Bill argued that his conduct was protected by an advice of counsel defense:

> Bill contends that there was no "reckless distribution" because he was relying on

> advice of counsel… As the trustee of the three trusts, Bill had a fiduciary duty to Jane, a trust beneficiary. A fiduciary has the duty to avoid self-dealing, bad faith, intentional adverse acts, and reckless indifference about the beneficiary and her best interest, and cannot be relieved of liability for such conduct, even in cases where a trust instrument includes exculpatory language. Moreover, "[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." The trial court found that Bill's purported reliance on the advice of counsel did not excuse his conduct, because of Bill's "abject failure to provide appropriate information to counsel." … The evidence at trial showed that when Bill received the insurance checks, he called Nelson, who represented Bill in the probate of Harvey's will, for instructions on distributing the funds… Nelson testified that she did not know that the Children's Trust and Irrevocable Trust existed and, if she had, she would have instructed Bill to deposit the checks into the trusts to which they were made payable…This evidence shows that, although Bill sought the advice of counsel in determining how to handle the insurance proceeds, he did so knowing that the attorney did not have critical information that could influence her instruction. Despite his knowledge that Nelson was unaware of the existence of the two other trusts, which had terms of distribution that differed from the Family Trust, Bill chose not to reveal those trusts to Nelson. "[G]ood faith is no defense where the trustee has arbitrarily overstepped the bounds of his authority, or where he has not exercised diligence or has acted unreasonably, or has been guilty of such gross neglect as no reasonably intelligent person would consider proper." On this record, the trial court, as factfinder, could reasonably conclude that Bill did not exercise the care and diligence required of him as a fiduciary and that his claim of alleged good faith reliance on counsel was not reasonable. We therefore conclude that Jane adduced sufficient evidence to prevail on her claim that Bill failed to comply with his fiduciary duty to her in his handling of the insurance proceeds.

Id. (internal citations omitted).

Bill also argued that a term of the Children's Trust allowed him to make the transfers. The court stated:

> Even if we were to assume that this provision authorized

> Bill to transfer funds from the Children's Trust or Irrevocable Trust to the Family Trust, the provision does not relieve Bill of his fiduciary duty to Jane. As a fiduciary, Bill was obligated to act with integrity and fidelity, and to deal fairly and in good faith. Even a transaction that is legally permissible can give rise to a breach of fiduciary claim, as such a transaction may not be in the beneficiary's best interest. As Justice Cardozo put it, "A trustee is held to something stricter than the morals of the market place [sic]."

Id. (internal citations omitted).

G. *Benge v. Roberts*

In *Benge v. Roberts*, a beneficiary sued co-trustees for breaching duties by not considering claims against a former trustee. No. 03-19-00719-CV, 2020 Tex. App. LEXIS 6335 (Tex. App.—Austin August 12, 2020, no pet.). The co-trustees filed a motion for summary judgment based on a clause in the trust that provided:

> No successor Trustee shall have, or ever have, any duty, responsibility, obligation, or liability whatever for acts, defaults, or omissions of any predecessor Trustee, but such successor Trustee shall be liable only for its own acts and defaults with respect to the trust funds actually received by it as Trustee.

Id. The beneficiary appealed, and the court of appeals affirmed. The court stated that these types of clauses are generally enforceable: "The Trust Code expressly permits such clauses." *Id*.

The beneficiary argued that a cause exists for the co-trustees' removal because they have "actual conflicts of interest" due to their participation with the former trustee. She contended that removal of the co-trustees because of their conflict of interest was a distinct claim from one alleging that they have liability for the former trustee's alleged breaches of fiduciary duty and, therefore, was not subject to the exculpatory clause.

The court disagreed:

> We reject this argument because it directly conflicts with the broad language in the exculpatory clause relieving the co-trustees from any "duty, responsibility, [or] obligation" for the "acts, defaults, or omissions" of Missi. While ordinarily a successor trustee has the duty to "make a reasonable effort to compel a redress" of any breaches by a predecessor, see Tex. Prop. Code § 114.002(3)—which presumably would include impartially evaluating whether to "fight" Benge in the appeal of the Consolidated Matter—the exculpatory clause in the Trust relieves the co-trustees of that duty, as permitted by the Trust Code. See id. §§ 111.0035(b), 114.007(c). The co-trustees cannot as a matter of law have a conflict of

> interest due to allegedly lacking the ability to be "impartial" about deciding whether or how to redress Missi's alleged breaches when they have no duty to redress such breaches in the first instance. Accordingly, we hold that the trial court properly granted summary judgment on the basis of the Trust's exculpatory clause.

Id.

The court also held that the construction and application of the exculpatory clause was a question of law that the trial court had to determine:

> [T]he trial court did not abuse its discretion in denying the motion because the effect of the exculpatory clause on the facts alleged—that is, whether it relieves the co-trustees of any duties vis à vis Missi's alleged breaches—is a legal question that we review de novo, and thus the trial court had no discretion but to determine that summary judgment was proper on the basis of the clause. *See Nowlin v. Frost Nat'l Bank*, 908 S.W.2d 283, 286 (Tex. App.—Houston [1st Dist.] 1995, no writ) ("Construction of a trust instrument is a question of law for the trial court when no ambiguity exists."); *see also Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding) ("A trial court has no discretion in determining what the law is or in applying the law to the facts."); *Clifton*, 107 S.W.3d at 760-61 (holding that because exculpatory clause was valid, and based on facts alleged, there was no issue of fact about whether trustee was exculpated).

Id.

XII. PROCEDURAL ISSUES IN LITIGATING EXCULPATORY CLAUSES

A. Pleading and Asserting Exculpatory Clause Defenses At Trial and Via Summary Judgment

There are procedural differences between general exculpatory clauses and powers clauses. An exculpatory clause is an affirmative defense in that a defendant/trustee does not argue that it has not breached a fiduciary duty, it argues that is it relieved from any liability for such a breach. *Kohlhausen v. Baxendale*, No. 01-15-00901-CV, 2018 Tex. App. LEXIS 1828 (Tex. App.—Houston [1st Dist.] March 13, 2018, no pet.) (general exculpatory clause is an affirmative defense). It assumes that the plaintiff can prove all of the elements of a breach of fiduciary duty claim and should prevail because of this independent reason. David F. Johnson, *Can a Party File a No-Evidence Motion for Summary Judgment Based upon an Inferential Rebuttal Defense?*, 53 BAYLOR L. REV. 763 (2001). One commentator describes an affirmative defense as follows:

> An avoidance denial, more commonly called an affirmative defense, is not a denial of an element of the plaintiff's claim; rather, it sets forth an independent reason

> why the plaintiff should not recover even though all of the elements of the plaintiff's claim may be established. 30Link to the text of the note An affirmative defense allows a defendant to avoid liability for a plaintiff's claim although all of the plaintiff's claim's elements are proven. Examples of affirmative defenses are: (1) a statute of limitations, (2) proportionate responsibility or contributory negligence, and (3) estoppel. In other words, even though a party may be able to establish every element of his claim or defense, there is some independent reason that the party should not be entitled to recover under his claim or be protected by his defense.

Id. at 769 (internal citations omitted).

Importantly, "At trial the party alleging an affirmative defense has the burden of persuasion and production to support such." *Id*. Once again, the commentator states:

> The burden of proof has two separate components. First, the burden of proof means the burden of persuasion, i.e., the burden to persuade the trier of fact that evidence supports a proposition. This burden of persuasion remains with the same party throughout the trial and never shifts. Secondly, the burden of proof means the burden of production, i.e., the burden to go forward and produce sufficient evidence in order to meet a prima facie case. The burden of production can shift back and forth between the parties depending upon the evidence that is produced. Normally, the burden of persuasion and the burden of production both fall on the same party at the beginning of a trial, and the burden of persuasion does not shift; however, the burden of production may shift back and forth as each side produces evidence.

Id. at 774-75.

A party asserting an affirmative defense, like an exculpatory clause, has the duty to plead that defense, submit evidence to support it, and make sure that there is a submission in the charge to support it. *Id*. An affirmative defense can be its own question in the charge or can be submitted as an instruction. *Id*. Moreover, the party wanting the affirmative defense submitted has the burden to request, in substantially correct wording, a charge question or instruction. Tex. R. Civ. P. 278-79. If the party fails to submit a question or instruction, and it is not otherwise partially submitted, then the party waives the defense. Tex. R. Civ. P. 279. If the defense is partially submitted, then the parties can expressly request that the court find the omitted elements or such elements will be presumed found in favor of the judgment. *Id*.

Further, a party asserting an exculpatory clause can file a traditional motion for summary judgment and argue that it is entitled to judgment as a matter of law because the uncontradicted evidence attached to the motion proves the application of the exculpatory clause. *See Goughnour v. Patterson*, No. 12-17-00234-CV, 2019 Tex.

App. LEXIS 1665 (Tex. App.—Tyler March 5, 2019, pet. denied) (sustaining summary judgment for a trustee on an exculpatory clause defense where the trustee produced evidence that he did not act with gross negligence); *Kohlhausen v. Baxendale*, 2018 Tex. App. LEXIS 1828 ("A trustee may file a traditional motion for summary judgment establishing the exculpatory clause as an affirmative defense.").

However, because it is a defense upon which the defendant has the ultimate burden of proof (burden of production and persuasion), the trustee cannot file a no-evidence motion on an exculpatory clause defense. Tex. R. Civ. P. 166a(i). The no-evidence summary judgment rule states, and Texas courts have held, that a party is not allowed to file a no-evidence motion for summary judgment based upon a claim that it is allocated the burden of proof, i.e., that party's own affirmative defense. *Id*.

A powers clause defense, however, is much more akin to an inferential rebuttal defense. An inferential defense is a hybrid between an affirmative defense and a direct denial defense:

> An inferential rebuttal issue is somewhere between a direct denial and an avoidance denial. It is a defensive theory that, if decided in the party's favor, would disprove by inference the existence of an essential element of one of the opposing party's grounds of recovery. Therefore, it is a defensive issue that is contradictory of the opposing party's claim. Basically, an inferential rebuttal issue is an independent set of facts that acts to disprove the existence of one of the elements of the opposing party's claim.…
>
> Argumentative denials rather than direct negatives, because they disprove by establishing the truth of a positive factual theory that is inconsistent with the existence of some factual element of the ground of recovery or defense relied upon by the opponent; they are to be distinguished from a flat denial, a negative response to the disputed question.

Id. at 770 (internal citations omitted).

In a powers clause defense the trustee argues that the plaintiff's breach of fiduciary duty claim is not valid because one of the elements of the claim is missing due to a clause in the trust. For example, the trustee argues that the plaintiff's claim fails because the trustee had no duty to diversify assets due to a clause allowing the trustee to retain all assets originally funded into the trust.

An inferential rebuttal defense is procedurally different from an affirmative defense. *Id*. Most courts correctly hold that a party has no duty to plead an inferential rebuttal, and a general denial is sufficient to support it: "because the inferential rebuttal theory does not set forth independent grounds but rather attacks the opposing party's prima facie case, it is not an affirmative defense and Texas Rule of Civil Procedure 94 does not require a party to plead an inferential rebuttal before relying upon it in trial." *Id*. at 273. However, in an abundance of caution, a party should still plead inferential rebuttals defenses because of older precedent. *Id*. Moreover, a party is not entitled to a jury question on an inferential rebuttal defense, they can only

request that such a defense be submitted as an instruction. *Id*.

Further, the burdens of production and persuasion are split for an inferential rebuttal defense:

> The party that is relying on the inferential rebuttal has the burden of production with regards to that theory and he is not automatically entitled to an inferential rebuttal instruction as he must present some evidence to support it. However, a party always has the burden of persuasion on each element of his claim during a trial. Therefore, as an inferential rebuttal defense attacks an element of a party's claim, the party that opposes the inferential rebuttal theory has the burden of persuasion on the inferential rebuttal theory once it has been raised by sufficient evidence. Stated another way, a party has the burden of persuasion on a negative issue when that negative issue is essential to establishing his cause of action, i.e., the accident was not caused by an act of God.

Id. at 775-76. Accordingly, a trustee has the initial burden of production to produce some evidence to support a powers clause defense, i.e., produce the trust document, and at that point the plaintiff has the burden of persuasion to convince the fact finder that that the evidence support's his or claim. Once the trustee does produce the trust document and evidence of a power clause defense, then the plaintiff has both the burden of production, which shifts to him or her, and the constant burden of persuasion.

In the charge, the trustee has the burden to submit an instruction, in substantially correct wording, that instructs the jury on the powers clause argument. If the trustee fails to submit such an instruction, then the trustee may waive such a defense.

Further, a trustee may file a traditional motion for summary judgment on a powers clause defense as it would attach evidence and take on the burden of proving such a defense as a matter of law. There is some dispute or argument as to whether a trustee can file a no-evidence motion for summary judgment on a powers clause defense. David F. Johnson, *Can a Party File a No-Evidence Motion for Summary Judgment Based upon an Inferential Rebuttal Defense?*, 53 BAYLOR L. REV. 763 (2001). As the commentator states:

> One argument is that Texas has long made too much out of inferential rebuttal theories, and that a party should be entitled to file a no-evidence motion upon any ground that the movant does not have the affirmative duty to plead under Texas Rule of Civil Procedure 94. Following this argument, a party should be able to file a no-evidence motion upon his own inferential rebuttal theory because: (1) he is not required to specifically plead it, (2) the theory contradicts an element of the nonmovant's claim or defense upon which the non-movant has the burden of production, and (3) the non-movant has the burden of persuasion to

> contradict the inferential rebuttal.

Id. at 777-778. However, that commentator ultimately argued that a defendant that had the initial burden of production on an inferential rebuttal defense could not file a no-evidence motion because the rule expressly states that only a party without the burden of proof can file such a motion. *Id*.

When that article was written in 2001, the no-evidence summary judgment rule was only four years old. Since that time, some courts have held that a party can rely on his own evidence in filing a no-evidence motion. There is an argument that if the plaintiff attaches the trust document to his or her petition or it is otherwise stipulated to, and the trust document contains the powers clause, then the initial burden of production is satisfied, and the trustee can file a no-evidence motion on the powers clause defense because the plaintiff has the ultimate burden of production and the initial burden of production has already shifted to the plaintiff.

For example, in *Kohlhausen v. Baxendale*, the trustee simply attached the trust document and the court of appeals held that the beneficiary had the burden to produce evidence to show that the trustee acted in bad faith. 2018 Tex. App. LEXIS 1828. The Court held: "After the trustee establishes the existence of the exculpatory clause, the burden shifts to the nonmovant to bring forward evidence negating its applicability." Id. at *6. The court held:

> In this case, Baxendale pleaded the exculpatory clause and attached a copy of the Will containing the clause to his summary judgment motion. The Will plainly states that Kelley is not liable for any acts or omissions so long as such conduct was done "in good faith and without gross negligence." Because Baxendale established that he was entitled to summary judgment as a matter of law on all of Kohlhausen's claims based on the plain language of the Will, Kolhausen was required to bring forth more than a scintilla of evidence creating a fact issue as to the applicability of the clause, i.e., evidence that Kelley's acts or omissions were done in bad faith or with gross negligence.

Id. at *7. It is questionable whether this analysis is correct regarding a general exculpatory clause, but it should be correct regarding a party filing a no-evidence motion on a powers clause inferential rebuttal defense.

B. Proving Good Faith By Advice of Counsel

When a trustee faces the difficult situation of proving good faith or the lack of bad faith, the trustee may point to evidence regarding the advice of counsel. Advice of counsel may provide protection that the trustee is complying with all legal requirements to avoid conflicts with governmental authorities. Further, advice of counsel may be a defense in any claim raised by a beneficiary. *In re Estate of Boylan*, No. 02-14-00170-CV, 2015 Tex. App. LEXIS 1427, 2015 WL 598531 (Tex. App.—Fort Worth Feb. 12, 2015, no pet.). The Restatement provides:

> The work of trusteeship, from interpreting the terms of the

> trust to decision making in various aspects of administration, can raise questions of legal complexity. Taking the advice of legal counsel on such matters evidences prudence on the part of the trustee. Reliance on advice of counsel, however, is not a complete defense to an alleged breach of trust, because that would reward a trustee who shopped for legal advice that would support the trustee's desired course of conduct or who otherwise acted unreasonably in procuring or following legal advice. In seeking and considering advice of counsel, the trustee has a duty to act with prudence. Thus, if a trustee has selected trust counsel prudently and in good faith, and has relied on plausible advice on a matter within counsel's expertise, the trustee's conduct is significantly probative of prudence.

RESTATEMENT (THIRD) OF TRUSTS § 77 cmt. b(2), c. Therefore, following the advice of counsel can be evidence to show that a trustee acted prudently, though it, by itself, does not show prudence as a matter of law. However, advice of counsel may not be a defense where the client does not provide sufficient information or provides incorrect information to the attorney. *In re Estate of Bryant*, No. 07-18-00429-CV, 2020 Tex. App. LEXIS 2131 (Tex. App.—Amarillo March 11, 2020, no pet. history). To obtain the "silver bullet" defense, a trustee should seek instructions from a court. *Id*. § 93 cmt. c.

It should be noted that if a trustee asserts an advice of counsel defense, the trustee would likely waive any right to maintain privilege for those communications. If a party introduces any significant part of an otherwise privileged matter, that party waives the privilege. *See* Tex. R. Evid. 511. *See also Mennen v. Wilmington Trust Co.*, 2013 Del. Ch. LEXIS 238, 2013 WL 5288900 (Del. Ch. Sept. 18, 2013). For example, in *Mennen*, a trustee was sued for breach of fiduciary duty. *Mennen*, at *3. One of the trustee's defenses was that he received legal advice from counsel. *See id*. at *5. The trustee attempted to block production of the alleged bad advice from counsel, citing attorney-client privilege. *See id*. The court was unpersuaded by the trustee's invocation of privilege, stating that "a party's decision to rely on advice of counsel as a defense in litigation is a conscious decision to inject privileged communications into the litigation." *Id*. at *18 (citing *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 486 (3rd Cir. 1995).

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

Litigation can unfortunately be a costly endeavor. This is as true with fiduciary litigation as with any other type of litigation. The parties have to exchange documents, take depositions, retain experts, conduct legal research on many issues, prepare dispositive motions and respond to same, prepare for trial, prepare lengthy jury instructions, etc. However, there are often certain threshold issues that, if determined early in a case, may streamline the disposition of the case. Exculpatory clauses may be one of these type of threshold issues that may streamline a case. When a case has a threshold issue, it would make sense to bifurcate discovery and allow the threshold

issue to be resolved before the remainder of the case is fully litigated.

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

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

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

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

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

Moreover, in Texas, a court has discretion to stay discovery on issues that may be mooted by a threshold issue. In discovery, a trial court is granted latitude in limiting or tailoring discovery. Tex. R. Civ. P. 192.4. Generally, a trial court should limit discovery methods to those which are more

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

> To protect [a party filing a motion for protection] from undue burden, unnecessary expense, harassment, annoyance, or invasion of personal, constitutional, or property rights, the court may make any order in the interest of justice and may – among other things – order that: . . . (3) the discovery not be undertaken at the time or place specified.

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

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

Eldridge N. Cmty. Ass'n, No. 01-14-00216-CV, 2016 Tex. App. LEXIS 8876, at *21-22 (Tex. App.—Houston [1st Dist.] Aug. 16, 2016, no pet.); *Doe v. Roman Catholic Archdiocese of Galveston-Houston ex rel. Dinardo*, 362 S.W.3d 803, 809, 812 (Tex. App.—Houston [14th Dist.] 2012, no pet.).

Courts in the Fifth Circuit routinely stay discovery that will be mooted by dispositive motions. *See, e.g., Whalen v. Carter*, 554 F.2d 1087, 1098 (5th Cir. 1992); Montgomery v. United States, 933 F.2d 348, 350 (5th Cir. 1991); *Williamson v., United States Department of Agriculture*, 815 F.2d 368, 382 (5th Cir. 1987); *Drake v. Nat'l Broadcasting Co., Inc*., No. 3-04-CV-0652-R, 2004 U.S. Dist. Lexis 25090, at *3-5 (N.D. Tex. 2004) (granting a stay of discovery under federal law pending the outcome of a motion to dismiss and noting that such a stay is particularly appropriate when the disposition of a motion "might preclude the need for discovery altogether, thus saving time and expense"); *Tschirn v. Kurzweg*, No. 03-0369, 2003 U.S. Dist. LEXIS 8294 (E. D. La. May 8, 2003) (magistrate's opinion); *Leclerc v. Webb*, No. 3-664, 2003 U.S. Dist. LEXIS 7569 (E. D. La. May 1, 2003). *See also Young v. Burks*, 849 F.2d 610 n.6 (6th Cir. 1988); *Spencer Trask Software & Info. Servs., LLC v. RPost Int'l Ltd.*, 206 F.R.D. 367, 368 (S.D.N.Y. 2002); *Veniard v. NB Holdings Corp*., 2000 U.S. Dist. LEXIS 20518 (M.D. Fla. August 8, 2000), *vacated in part on other grounds*, 2001 U.S. Dist. LEXIS 22907 (August 27, 2001); *Richmond v. W.L. Gore & Assocs*., 881 F.Supp. 895 n.13 (S.D. N.Y. 1995); *International Graphics, Div. of Moore v. United States*, 3 Cl. Ct. 715, 717-18 (1983); *Blair Holdings Corp. v. Rubinstein*, 159 F.Supp. 14, 15 (S.D.N.Y. 1954).

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

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

> the summary judgment motions were resolved.

Id.

Therefore, in state and federal court in Texas, a court has discretion to rule on whether threshold issues should be determined in a particular order and may stay discovery on other issues that may be mooted by the determination of threshold issues. That makes sense as every case should be reviewed for its particular needs and courts should enter orders to save parties from needless expense. Once again, as the Texas Supreme Court held, "a trial court should limit discovery methods to those which are more convenient, less burdensome, and less expensive, or when the burden or expense of the proposed discovery outweighs its likely benefit." *In re Alford Chevrolet—Geo*, 997 S.W.2d at 182-83.

XIII. DRAFTING CONSIDERATIONS

Though commonly found in trust documents, a settlor should be cautious when considering to use an exculpatory clause and how such a clause should be drafted. One commentator advises:

> Exculpatory provisions should be used with extreme care and should never constitute boiler plate provisions in wills and trusts. The threshold question to consider in evaluating the use of this type of clause is whether the exculpator would want the objects of his bounty to suffer material economic loss in order to protect the fiduciary from liability. Even if the answer to this question is "yes," there remains a question regarding the degree of protection that the exculpatory would want the fiduciary to have.

Consideration of the use of any exculpatory clause should begin with the question: "If the fiduciary breaches his trust and as a consequence thereof causes damages to the estate/trust, then who would the testator/settlor want to bear the loss?" Would the answer to this question be different if the fiduciary committed intentional malfeasance rather than negligence?

A law firm that includes an exculpatory clause as boilerplate in its estate planning documents is courting disaster. This is especially true when the fiduciary is an entity with whom the law firm has a pre-existing relationship (such as a bank the law firm represents on a regular basis). Also, if the fiduciary is a corporation charging a full fee for its services as a fiduciary, then exculpation of the fiduciary from liability is hard to justify. In fact, a traditional reason for appointing a corporate fiduciary was the financial resources of a corporate fiduciary to make good any loss they caused the estate of trust.

Frank N. Ikard, Jr., Exculpatory Clauses, Trial of a Fiduciary Litigation Case, State Bar of Texas, 2009.

For example, common exculpatory clauses may state:

> "Notwithstanding anything to the contrary herein, my Trustee shall, to the greatest extent permitted by Texas law at the time this clause is construed, be exculpated from any liability whatsoever for any alleged abuse of discretion, tort, breach of fiduciary duty and/or breach of trust caused by any act or omission in the administration of this trust. As a consequence, no person, firm or corporation ever serving as my trustee shall ever be held personally liable to any other person, firm or corporation for any damages directly or indirectly arising out of any act or omission committed in the administration of this trust. This exculpation shall not, however, protect my trustee from any liability for a breach of trust committed in bad faith, intentionally, or with reckless indifference to the interest of a beneficiary; or any profit derived by the trustee from a breach of trust. Even if this exculpation clause shall not protect my trustee because of the foregoing sentence, in no event shall my trustee ever be liable for any punitive or exemplary damages for any act or omission committed in the administration of this trust regardless of whether such act or omission constituted a breach of trust committed in bad faith, intentionally, or with reckless indifference to the interest of a beneficiary; or any profit derived by the trustee from a breach of trust."
>
> "The trustee shall be saved harmless from any liability for any action he or she may take, or for the failure of such trustee to take any action, if done in good faith and without gross negligence."
>
> "Except for willful misconduct or fraud, a Trustee shall not be liable for any act, omission, loss, damage or expense arising from the performance of his, her or its duties under this trust agreement."
>
> "The Trustee may rely on the advice of counsel and shall not be liable for any damage arising from any act done in reliance on the advice of counsel."
>
> "The trustee shall be protected and saved harmless in making any distribution made in good faith."

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

capacity and executes this Trust with this clause free of any influence of any person."

XIV. CONCLUSION

A general exculpatory clause is effective in Texas to forgive a trustee's negligent actions that do not benefit the trustee. If the trustee's conduct was negligent, but the trustee benefited from its conduct, then an exculpatory clause should not be enforceable. Where the trustee does not benefit from the conduct, however, such a clause can protect a trustee from negligent acts that fall short of being done in bad faith, intentional, or with reckless indifference.

However, there should be fewer limitations on the enforcement of specific powers clauses that eliminate a trustee's duty to act or expressly allows a trustee to do an act that it normally would not be able to do.

There are procedural and evidentiary issues that impact any litigation where an exculpatory clause is being litigated. This article has attempted to address these issues and to provide an up to date recitation of Texas precedent on exculpatory clauses.