FIDUCIARY DUTY UPDATE

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CHAPTER 5

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John A. (Jad) Davis is one of the founders of Davis, Gerald & Cremer, Midland, Texas. He has represented many large public companies and independent oil and gas producers and operators in civil litigation throughout Texas and in New Mexico. He frequently tries lawsuits involving multiple parties and complex factual, legal and procedural issues. Jad is a 1979 graduate of Texas A & M University and a 1982 graduate of Baylor Law School. He is a member of the American College of Trial Lawyers, the American Board of Trial Advocates and the Texas Bar Foundation.

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I. INTRODUCTION

Although routinely litigated in the Texas courts, "fiduciary" concepts remain amorphous under the law and present traps for both plaintiffs and defendants alike. Whether a fiduciary relationship exists and the nature of the duties arising from any such relationship can vary significantly from court to court and from case to case. Part II of this paper explores the formal and informal relationships that typically give rise to fiduciary duties. Part III discusses the consequences that flow from the existence of a fiduciary duty. And Part IV discusses the remedies that are generally available in fiduciary duty cases.

II. EXISTENCE OF A FIDUCIARY RELATIONSHIP

To prevail on a breach of fiduciary duty claim, a plaintiff must first establish the existence of a fiduciary relationship between the plaintiff and the defendant. *Priddy v. Rawson*, 282 S.W.3d 588, 599 (Tex. App.--Houston [14th Dist.] 2009, pet. denied). A person has a fiduciary relationship when he is under a duty, created by law or contract, to act on or give advice for the benefit of another within the scope of their relationship. *Stephanz v. Laird*, 846 S.W.2d 895, 901 (Tex. App.--Houston [1st Dist.] 1993, writ denied). A fiduciary relationship may arise from a formal relationship or an informal relationship in which one person places special confidence in another who, in equity and good conscience, is bound to act in good faith and with due regard for the interest of the person placing the confidence. *See Texas Bank & Trust Co. v. Moore*, 595 S.W.2d 502, 507 (Tex. 1980); *Lacy v. Ticor Title Ins. Co.*, 794 S.W.2d 781, 788 (Tex. App.--Dallas 1990), *writ denied*, 803 S.W.2d 265 (Tex. 1991).

A. Formal fiduciary relationships

Whether parties have a formal fiduciary relationship is a question of law. *Environmental Procedures, Inc. v. Guidry*, 282 S.W.3d 601, 627 (Tex. App.--Houston [14th Dist.] 2009, pet. denied). Texas courts have long recognized the existence (or non-existence) of a formal fiduciary duty in certain relationships. In other relationships, the answer is not so clear.

1. Agents

As a general matter, agents owe a fiduciary duty to their principals. *See Nat'l Plan Adm'rs, Inc. v. National Health Ins. Co.*, 235 S.W.3d 695, 700 (Tex. 2007); *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 200 (Tex. 2002). While an agency relationship imposes certain fiduciary duties on the parties, courts consider all aspects of the parties' relationship "when determining the nature of fiduciary duties flowing between the parties." *Nat'l Plan Adm'rs*, 235 S.W.3d at 700. Thus, when determining the scope of an agent's fiduciary duty to his principal, a court must examine "not only the nature and purpose of the relationship, but also agreements between the agent and principal." *Id.*

In *Johnson*, the Supreme Court approved the Restatement (Second) of Agency in regard to the general duty of an agent: "[u]nless otherwise agreed, an agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency." *Johnson*, 73 S.W.3d at 200. But as the Court subsequently made clear in *National Plan Administrators*, "the duties owed by an agent to his principal may be altered by agreement." *Nat'l Plan Adm'rs*, 235 S.W.3d at 700; *see Wheeler v. Sajovich*, No. 03-09-00367-CV, 2010 WL 2540689, at *9 (Tex. App.--Austin June 23, 2010, no pet.) (mem. op.) (written agreement expressly defining a real estate broker's obligations "limited any fiduciary obligations that might otherwise have existed by virtue of the agency relationship").

Texas law does not presume agency. IRA *Res., Inc. v. Griego*, 221 S.W.3d 592, 597 (Tex. 2007). To establish an agency relationship, a party must prove that that the principal has both (1) the right to assign the agent's task, and (2) the right to control the means and details by which the agent will accomplish the task. *Burnside Air Conditioning and Heating, Inc. v. T.S. Young Corp.*, 113 S.W.3d 889, 895-96 (Tex. App. --Dallas 2003, no writ); *Lyons v. Lindsey Morden Claims Mgmt., Inc*., 985 S.W.2d 86, 90 (Tex. App.--El Paso 1998, no pet.). The right of control is "the supreme test" in establishing an agency relationship. *State Farm Mut. Auto. Ins. Co. v. Traver*, 980 S.W.2d 625, 628 (Tex. 1998); *see McAfee, Inc. v. Agilysys, Inc.*, 316 S.W.3d 820, 829 (Tex. App.--Dallas 2010, no pet.) ("The critical element of an agency relationship is the right to control, and the principal must have control of both the means and details of the process by which the agent is to accomplish his task in order for an agency relationship to exist."). Whether a principal-agent relationship exists under established facts is a question of law for the court. *Ross v. Tex. One P'ship*, 796 S.W.2d 206, 210 (Tex. App.--Dallas 1990, writ denied).

2. Real estate brokers

Real estate brokers are fiduciaries and are required to exercise fidelity and good faith toward their principal. *Kim v. Harstan, Ltd.*, 286 S.W.3d 629, 634 (Tex. App.--El Paso 2009, pet. denied); *First City Mortgage Co. v. Gillis*, 694 S.W.2d 144, 146 (Tex. App.--Houston [14th Dist.] 1985, writ ref'd n.r.e.). A broker does not, however, have a duty to disclose the contents of a written agreement that the principal is obligated to read before he signs it. *Kim*, 286 S.W.3d at 634.

Further, a real-estate broker is not a general agent. *Wheeler*, 2010 WL 2540689, at *8. Instead, a real-estate broker is a special agent whose authority is generally limited to the powers expressly conferred by the contract with the principal, which typically does not include authority to bind the principal to the terms of a sale. *Id.*; *see Joseph v. James*, No. 03-07-00197-CV, 2009 WL 2682608, at *3 (Tex. App.--Austin Nov. 6, 2009, no pet.) (mem. op.) (agent had no authority to make binding offer on behalf of principals).

3. Escrow agents

An escrow agent owes fiduciary duties to both parties of the escrow contract. *See Trahan v. Lone Star Title Co.*, 247 S.W.3d 269, 287 (Tex. App. --El Paso 2007, pet. denied); *Bell v. Safeco Title Ins. Co.*, 830 S.W.2d 157, 161 (Tex. App. --Dallas 1992, no pet.). An escrow is a written instrument that imports a legal obligation. *Id.* at 160; *see Jones v. Blume*, 196 S.W.3d 440, 448 (Tex. App.--Dallas 2006, pet. ref'd) (defendant-attorney had no duty to act as an escrow agent when statement in memo in which he agreed to distribute settlement funds and a fee sharing agreement did not make the defendant an escrow agent); *Wilson v. Carver Fed. Sav. & Loan Ass'n*, 774 S.W.2d 106, 107 (Tex. App.--Beaumont 1989, no writ) (title company was an escrow agent of the plaintiff based on the existence of an earnest money contract that designated the title company as the escrow agent).

4. Insurance agents

An insurer does not generally owe its insured a formal fiduciary duty. *Rice v. Metropolitan Life Ins. Co.*, 324 S.W.3d 660, 678 (Tex. App.--Fort Worth 2010, no pet.); *E.R. Dupuis Concrete Co. v. Penn Mut. Life Ins. Co.*, 137 S.W.3d 311, 318 (Tex. App.--Beaumont 2004, no pet.); *Wayne Duddleston, Inc. v. Highland Ins. Co.*, 110 S.W.3d 85, 96 (Tex. App.--Houston [1st Dist.] 2003, pet. denied). Under certain circumstances, however, an insurance agent may owe an informal fiduciary duty to his or her client. *See Lee v. Hasson*, 286 S.W.3d 1, 14-19 (Tex. App.--Houston [14th Dist.] 2007, pet. denied) (sufficient evidence supported finding that insurance agent owed a fiduciary duty to his clients because they had an unusually close family relationship predating their business relationship).

5. Spouses and Significant Others

Spouses generally owe a fiduciary duty to one another. *Vickery v. Vickery*, 999 S.W.2d 342, 357 (Tex. 1999); *Boaz v. Boaz*, 221 S.W.3d 126, 133 (Tex. App.--Houston [1st Dist.] 2006, no pet.). This fiduciary duty does not extend to spouses in a contested divorce proceeding. *Boyd v. Boyd*, 67 S.W.3d 398, 405 (Tex. App.--Fort Worth 2002, no pet.).

Whether an unmarried couple owes fiduciary duties to one another is more properly determined by the principles governing informal fiduciary relationships (discussed in Part II.B below) and usually turns on the facts. For example, in *In re Marriage of Braddock*, 64 S.W.3d 581 (Tex. App.--Texarkana 2001, no pet.), a married couple divorced, but five years later the man moved in with the woman. *Id.* at 586. For about ten months during this cohabitation period, the man was unemployed, the woman allowed the man to write checks on her bank account, it eventually became a joint checking account, and the woman entrusted the man with her financial affairs. *Id.* The court of appeals held that these facts constituted some evidence of a fiduciary relationship between the man and the woman. *Id.*

In contrast, the court in *Hubbard v. Shankle*, 138 S.W.3d 474 (Tex. App.--Fort Worth 2004, pet. denied), held that a romantic relationship of three months' duration constituted no evidence of a fiduciary relationship between the two persons involved. *Id.* at 479, 483. And even more recently, the court in *Smith v. Deneve*, 285 S.W.3d 904 (Tex. App.--Dallas 2009, no pet.), concluded that an alleged husband failed to raise a genuine issue of material fact as to the existence of a fiduciary relationship with his alleged wife. *Id.* at 912. Although he adduced evidence of a longstanding personal relationship with the woman, he adduced no evidence that he was accustomed to being guided by her judgment and advice, that she ever gave him financial advice, or that she otherwise assumed the role of a fiduciary towards him. *Id.* Moreover, the evidence that they both contributed towards household expenses does not show that he placed any peculiar degree of trust in her because such evidence is "equally consistent with a

mere agreement to share living expenses." *Id.* Similarly, his evidence that he opened a checking account with the woman with right of survivorship may show that he placed some degree of subjective trust in her, but such trust alone does not show the existence of a fiduciary relationship. *Id.*

6. Corporate officers and directors

Corporate officers and directors generally owe fiduciary duties only to the corporations they serve. *Int'l Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567, 576 (Tex. 1963); *see Somers v. Crane*, 295 S.W.3d 5, 11 (Tex. App.--Houston [1st Dist.] 2009, pet. denied) ("A director's fiduciary duty runs only to the corporation, not to individual shareholders or even to a majority of the shareholders.'") (quoting *Hoggett v. Brown*, 971 S.W.2d 472, 488 (Tex. App.--Houston [14th Dist.] 1997, pet. denied)); *see also In re Webber*, 350 B.R. 344, 364 (S.D. Tex. 2006) ("With respect to a formal fiduciary relationship, a corporate officer's fiduciary duty generally runs only to the corporation and not to individual shareholders."); *Scherrer v. Haynes and Boone, L.L.P.*, No. 01-99-01164-CV, 2002 WL 188825 (Tex. App.--Houston [1st Dist.] Feb. 7, 2002, no pet.) (not designated for publication) ("A corporate director's fiduciary duty runs only to the corporation, not to individual shareholders."); *Aitlqaid v. Soussan*, No. 01-98-01017-CV, 2001 WL 301430 (Tex. App.--Houston [1st Dist.] Mar. 29, 2001, no pet.) (not designated for publication) (same); *A. Copeland Enters., Inc. v. Guste*, 706 F. Supp. 1283, 1288 (W.D. Tex. 1989) ("Claims concerning breach of a corporate director's fiduciary duties can only be brought by a shareholder in a derivative suit because a director's duties run to the corporation, not to the shareholder in his own right."). When a corporation is insolvent, however, a fiduciary relationship arises between the officers and directors of a corporation and its creditors. *See Plas-Tex, Inc. v. Jones*, No. 03-99-00286-CV, 2000 WL 632677, at *4 (Tex. App. --Austin May 18, 2000, pet. denied) (not designated for publication).

In contrast, officers and directors "do not generally owe fiduciary duties to individual shareholders unless a contract or confidential relationship exists between them in addition to the corporate relationship." *Cotten v. Weatherford Bancshares, Inc.*, 187 S.W.3d 687, 698 (Tex. App.--Fort Worth 2006, pet. denied). Moreover, "[a] corporate stockholder cannot recover damages personally for a wrong done solely to the corporation, even though he may be injured by that wrong." *Wingate v. Hajdik*, 795 S.W.2d 717, 719 (Tex. 1990). It is "the nature of the wrong, whether directed against the corporation only or against the shareholder personally, not the existence of injury, which determines who may sue." *Faour v. Faour*, 789 S.W.2d 620, 622 (Tex. App. --Texarkana 1990, writ denied).

Thus, in *Wingate*, the Texas Supreme Court held that a shareholder could not sue directly for breaches of fiduciary duties by officers and directors who misappropriated the corporation's assets because any injury was actually suffered by the corporation, each shareholder suffered relatively in proportion to the number of shares he owned, and each shareholder would be made whole if the corporation obtained compensation from the wrongdoer. *Wingate*, 795 S.W.2d at 719. Similarly, in *Faour*, the court concluded that a minority shareholder in a closely held corporation was required to bring a derivative action to recover damages for the malicious suppression of dividends caused by the majority shareholder's alleged mismanagement of the corporation. *Faour*, 789 S.W.2d at 621-22.

7. Attorneys

Attorneys owe fiduciary duties to their clients as a matter of law. *Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999); *Willis v. Maverick*, 760 S.W.2d 642, 645 (Tex. 1998); *Beck v. Law Offices of Edwin J. (Ted) Terry, Jr., P.C.*, 284 S.W.3d 416, 428-29 (Tex. App.--Austin 2009, no pet.); *McGuire, Craddock, Strother & Hale, P.C. v. Transcontinental Realty Investors, Inc.*, 167 S.W.3d 327, 330 (Tex. App.--Dallas 2008, pet. denied). To impose this duty, an attorney-client relationship must exist between the two parties.

For example, in *Rawhide Mesa-Partners, Ltd. v. Brown McCarroll, L.L.P.*, ___ S.W.3d ___, No. 11-10-00017-CV, 2011 WL 1744089, at *3-4 (Tex. App.--Eastland Apr. 15, 2011, no pet. hist.), the court rejected the notion that there was a fiduciary duty between the law firm and a shopping center partnership when the firm previously represented one of the partnership's partners personally. Because a partnership is a legal entity separate from its partners, the court concluded that "[a] fiduciary duty to [the partner] does not automatically inure to the [the partnership's benefit." *Id.* at *4; *see also Avery Pharm., Inc. v. Haynes and Boone, L.L.P.*, No. 2-07-317-CV, 2009 WL 279334, at *6 & n.20 (Tex. App.--Fort Worth Feb. 5, 2009, no pet.) (mem. op.) (identifying factors to consider when determining the existence of an attorney-client relationship and holding that investor shareholder could not recover on a breach of fiduciary duty claim because he did not

have such a relationship with the law firm that represented the entity the investor was investing in); *Gamboa v. Shaw*, 956 S.W.2d 662 (Tex. App.--San Antonio 1997, no writ) (attorney rendering legal services to corporation does not have a duty to the corporation's shareholders). Similarly, in *Valls v. Johanson & Fairless, L.L.P.*, 314 S.W.3d 624 (Tex. App.--Houston [14th Dist.] 2010, no pet.), the court rejected the argument that the opposing attorneys owed fiduciary duties to him because he supposedly became the "*de facto* client" when he signed a settlement agreement and his interests became aligned with the actual clients by acquiring a financial stake in their lawsuit. *Id.* at 633-34.

8. Law firm associates

Law firm associates owe a fiduciary duty to their employers not to personally profit or realize a financial gain or other advantage from referring or participating in the referral of a matter to another law firm or attorney. *Johnson*, 73 S.W.3d at 202. An associate can, however, refer a case to another firm so long as the associate does not profit from the referral. *Id.*

9. At-Will Employees

Texas courts have long recognized an inherent tension in defining the duties that employees owe to their employers. Employers ought to have the right to demand loyalty from employees, but this right must be tempered by society's legitimate interest in fostering competition. *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 201 (Tex. 2002). If the former is carried to its extreme, it deprives a person of the right to earn a living; conversely, the latter right, if unchecked, could make a mockery of the fiduciary concept, with its concomitants of loyalty and fair play. *Abetter Trucking Co. v. Arizpe*, 113 S.W.3d 503, 510-11 (Tex. App.--Houston [1st Dist.] 2003, no pet.)

Texas courts originally accommodated this tension by imposing fiduciary duties only on certain key employees. *See Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 160 S.W.2d 509, 512-14 (Tex. 1942) (holding that a salesman who was a "trusted employee" of an oilfield tool company occupied a position that required imposition of fiduciary obligations); *see also Herider Farms-El Paso, Inc. v. Criswell*, 519 S.W.2d 473, 477 (Tex. Civ. App.--El Paso 1975, writ ref'd n.r.e.) (holding a manger of a retail poultry and egg outlet occupied a position which gave rise to the duties of a fiduciary).

The modern trend among Texas courts, however, is to impose fiduciary obligations on all employees, trusted or not, for actions taken within the course and scope of their employment duties, but then to craft the scope of those duties according to the particular employee's circumstances. *Nat'l Plan Adm'rs v. Nat'l Health Ins. Co.*, 235 S.W.3d 695, 700 (Tex. 2007); *see also Johnson*, 73 S.W.3d at 203 ("[C]ourts should be careful in defining the scope of the fiduciary obligations an employee owes when acting as the employer's agent in the pursuit of business opportunities."); *Daniel v. Falcon Interest Realty Corp.*, 190 S.W.3d 177, 184-87 (Tex. App.--Houston [1st Dist.] 2005, no pet.) (holding the project manager and on-site superintendent for a construction project was an agent and, therefore, owed his employer a fiduciary duty); *Abetter Trucking Co.*, 113 S.W.3d at 510-11 (holding a employee of a trucking company was an agent and therefore owed his employer a fiduciary duty).

Employees thus owe the traditional fiduciary duties that agents owe their principals, including the duty to act primarily for the benefit of the employer, the duty not to compete with the principal "on his own account" in matters relating to the subject matter of the agency, and the duty to deal fairly and openly with the principal. *Daniel*, 190 S.W.3d at 285; *Abetter Trucking Co.*, 113 S.W.3d at 510.

Nonetheless, employees can often do things that would not necessarily be permissible in other fiduciary contexts. For instance, an employee may make certain preparations for a future business venture that would compete directly with his current employer without violating any fiduciary duties. *Abetter Trucking*, 113 S.W.3d at 511. Thus, "[a]n at-will employee may properly plan to compete with his employer, and may take active steps to do so while still employed." *Id.* An employee has no general duty to disclose his plans and may secretly join with other employees in the endeavor without violating any duty to the employer. *Id.* There is nothing legally wrong in engaging in such competition or in preparing to compete before the employment terminates. *Id.*

Further, an at-will employee may, in some circumstances, be able to divert business to other companies, so long as the employee does not personally profit in the process. *See Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 203 (Tex. 2002) (holding an associate at a law firm could refer a potential client to another firm).

Something still remains, however, of the older "key employee" doctrine. Certain employees who occupy special positions of trust and responsibility

within the employer will not be given the same latitude in their dealings with employers. For instance, while a key employee would still be permitted to set up businesses that might compete with his employer, he would not be permitted to act with the specific intent to "destroy the business" he is departing. *Abetter Trucking Co.*, 113 S.W.3d at 512.

10. Trustees and executors

Trustees and executors owe a fiduciary duty to the beneficiaries of the trust or estate. *See Ditta v. Conte*, 298 S.W.3d 187, 191 (Tex. 2009) (trustee); *Humane Society v. Austin Nat'l Bank*, 531 S.W.2d 574, 577 (Tex. 1975) (executor); *Stromberger v. McCamish*, No. 04-06-00752-CV, 2007 WL 2778924, at *3 (Tex. App.--San Antonio Sept. 26, 2007, no pet.) (mem. op.).

The Texas Trust Code dictates that a trust is created "only if the settlor manifests an intention to create a trust." TEX. PROP. CODE § 112.002; *see Hubbard v. Shankle*, 138 S.W.3d 474, 484 (Tex. App. --Fort Worth 2004, pet. denied) ("We look to the settlor's intent to determine whether a trust was created."). Under Texas law, "[a] court cannot impose a trust where the parties have contemplated another relationship." *Hubbard*, 138 S.W.3d at 484; *see Chapman Children's Trust v. Porter & Hedges, L.L.P.*, 32 S.W.3d 429, 438 (Tex. App.--Houston [14th Dist.] 2000, pet. denied) (concluding that law firm which received settlement funds pursuant to a settlement agreement was not a trustee of the settlement funds as a matter of law when the agreement contained no language indicating an intent to create a trust); *Spiritas v. Robinowitz*, 544 S.W.2d 710, 715 (Tex. Civ. App.--Dallas 1976, writ ref'd n.r.e.). Ordinarily, an express trust does not arise unless the owner of property has shown an unequivocal intention to create a trust. *See Alexander v. Botsford*, 439 S.W.2d 414, 417 (Tex. Civ. App.--Dallas 1969, writ ref'd n.r.e.). Likewise, a trust by implication may only arise where the intent to create a trust appears reasonably clear from the terms of the instrument, construed in light of the surrounding circumstances. *See Perfect Union Lodge No. 10 v. Interfirst Bank of San Antonio, N.A.*, 748 S.W.2d 218, 220 (Tex. 1988).

11. Securities brokers and investment advisors

A broker dealing with a customer's non-discretionary account -- in which the customer must approve of all transactions before they are affected -- owes fiduciary duties only as the result of the broker's status as the customer's agent, and thus the broker's only fiduciary duties are to faithfully carry out his client's instructions and not make unauthorized trades. *Hand v. Dean Witter Reynolds Inc.*, 889 S.W.2d 483, 492 n.5 (Tex. App.--Houston [14th Dist.] 1994, writ denied).

When a broker takes on the duty of advising clients and monitoring their investments, the scope of a broker's fiduciary obligations is less clear. At least one Texas court has held the relationship between investor and advisor is fiduciary in nature as a matter of law, and includes such duties as ensuring that recommended investments are appropriate for the client and in line with the client's investment strategy. *W. Reserve Life Assurance Co. of Ohio v. Graben*, 233 S.W.3d 360, 373 (Tex. App.--Fort Worth, 2007, no pet.). But a Texas federal district court has held that the question whether such broader fiduciary duties would arise between investor and client would depend upon the facts of their particular relationship.. *Escalon v. World Group Sec., Inc.*, No. 5:07-CV-214-C-ECF, 2008 WL 5572823, at *6 (N.D. Tex. Nov. 14, 2008).

12. Banks and Lenders

Banks do not owe fiduciary duties to their customers. *Fleming v. Texas Coastal Bank*, 67 S.W.3d 459, 461 (Tex. App.--Houston [14th Dist.] 2002, pet. denied); *Victoria Bank & Trust Co. v. Brady*, 779 S.W.2d 893, 902 (Tex. App.--Corpus Christi 1989), *rev'd in part on other grounds*, 811 S.W.2d 931 (Tex. 1991). Likewise, no fiduciary relationship ordinarily exists between a lender and a borrower. *Jones v. Thompson*, ___ S.W.3d ___, No. 08-08-00245-CV, 2010 WL 3157145, at *8 (Tex. App.--El Paso Aug. 11, 2010, pet. denied); *Manufacturers Hanover Trust Co. v. Kingston Investors Corp.*, 819 S.W.2d 607, 610 (Tex. App.--Houston [1st Dist.] 1991, no writ). To prove the existence of a fiduciary relationship in such context, "the plaintiff must show extraordinary circumstances such as excessive control and influence by the lender of the borrower's business." *In re Absolute Resource Corp. v. Hurst Trust*, 76 F. Supp. 2d 723, 724 (N.D. Tex. 1999); *Greater Southwest Office Park, Ltd. v. Texas Commerce Bank Nat'l Ass'n*, 786 S.W.2d 386, 391 (Tex. App.--Houston [1st Dist.] 1990, writ denied).

13. Mineral rights owner

The holder of the executive interest owes a fiduciary duty or duty of utmost good faith to the holder of a nonparticipating royalty interest. *See Manges v. Guerra*, 673 S.W.2d 180, 183 (Tex. 1984).

The owner of the mineral fee has a possessory estate in the land and the exclusive power to lease the land to another for mineral development or to develop the minerals itself. *Dearing v. Spiller*, 824 S.W.2d 728, 732 (Tex. App.--Fort Worth 1992, writ denied). In contrast, the holder of a nonparticipating royalty interest has no possessory estate in the land, and thus no right to lease the land to another for mineral development or to produce the minerals itself. *Id.* As a result, the holder of a nonparticipating royalty interest "must depend upon the mineral fee owner for the enjoyment of [its] interests." *Id.*

Because of this relationship, the Texas Supreme Court has long recognized that an executive owes a duty of utmost good faith in exercising its rights to lease or develop the minerals. *Schlittler v. Smith*, 101 S.W.2d 543, 545 (Tex. 1937); *see Manges*, 673 S.W.2d at 183 ("The duty of utmost good faith owed by an executive has been settled since *Schlittler*."); *Dearing*, 824 S.W.2d at 732 ("Texas courts have generally accepted the standard of 'utmost good faith' to apply to one who exercises executive rights to lease or develop minerals."). More recently, however, the Supreme Court in *Manges* described this duty of "utmost good faith" as a "fiduciary duty." *Manges*, 673 S.W.2d at 183. Other Texas appellate courts have likewise recognized that "a fiduciary relationship exists between the owner of the executive right and the royalty owner" and that "the executive owner owes a duty of utmost good faith to the royalty owner." *Hawkins v. Twin Montana, Inc.*, 810 S.W.2d 441, 445 (Tex. App.--Fort Worth 1991, no writ); *accord Mims v. Beall*, 810 S.W.2d 876, 879 (Tex. App.--Texarkana 1991, no writ).

This "fiduciary duty arises from the relationship of the parties and not from the contract." *Manges*, 673 S.W.2d at 183. "While a contract or deed may create the relationship, the duty of the executive arises from the relationship and not from express or implied terms of the contract or deed." *Id.* The executive's duty requires it to "acquire for the non-executive every benefit that [it] exacts for [it]self." *Id.*

In light of the duty described above, an executive interest owner may be held liable to the nonparticipating royalty owner if it accepts a lease containing inferior terms. For example, in *Dearing*, the court held that the executive "had a duty to manage the executive interest by obtaining the highest royalty possible" and that it breached its duty by executing a lease to a family-owned corporation that "did not provide for at least the fair market royalty prevalent in the surrounding area at that time." *Dearing*, 824 S.W.2d at 733. Similarly, in *Hawkins*, the court concluded that the executive breached its duty to the royalty owners by leasing the property for a one-eighth royalty instead of accepting a previously offered lease for a one-fourth royalty. *Hawkins*, 810 S.W.2d at 445-46; *see also Mims*, 810 S.W.2d at 878-81 (executives breached duty to nonparticipating royalty owners by leasing land to their son for a one-eighth royalty rather than to a third party for a three-sixteenths royalty).

An executive also may be held liable for breaching its duty to a nonparticipating royalty owner when it engages in a transaction designed to circumvent the royalty owner's interest. Thus, in *Comanche Land & Cattle Co. v. Adams*, 688 S.W.2d 914 (Tex. App.--Eastland 1985, no writ), the court held that the owner of the executive right breached its duty of utmost good faith when it "purposely entered into an agreement that was calculated to defeat the rights of the royalty owners" by wording the agreement "so as to preclude any royalty payment." *Id.* at 915-16. And in *Portwood v. Buckalew*, 521 S.W.2d 904 (Tex. Civ. App.--Tyler 1975, writ ref'd), the court concluded that the executive breached its duty by negotiating and entering into a lease whereby she, as the surface owner, received extravagant overriding royalties which she labeled as "surface damages," and thereby defeated the right of the non-executive mineral interest owners to participate in the royalties. *Id.* at 911-14; *see also Kimsey v. Fore*, 593 S.W.2d 107, 113 (Tex. Civ. App.--Beaumont 1979, writ ref'd n.r.e.) (executive violated duty of fair dealing by negotiating lease provisions that created economic incentive to delay drilling until after expiration of the plaintiffs' nonparticipating term royalty interests).

14. Joint Venturers

Joint venturers owe a fiduciary duty to each other in dealings within the scope of the joint venture. *See Rankin v. Naftalis*, 557 S.W.2d 940, 944 (Tex. 1977); *Fitz-Gerald v. Hull*, 237 S.W.2d 256, 264-65 (Tex. 1951). For example, joint venturers for the development of a particular oil and gas lease owe fiduciary duties to each other arising from the relationship of joint ownership of the mineral rights of the lease. *Dernick Resources, Inc. v. Wilstein*, 312 S.W.3d 864, 877 (Tex. App.--Houston [1st Dist.] 2009, no pet.). Similarly, if there is a joint venture between the operating owner of an interest in oil and gas well drilling operations and the non-operating interest owners, the operating owner owes a fiduciary duty to the non-operating interest owners. *Id.* The scope of the fiduciary duties raised by a joint venture

relationship does not extend beyond the development of the particular lease and activities related to that development. *Id.*

15. Class Representatives

The class representative in class action lawsuit owes a fiduciary duty to the class members. *See Glassell v. Ellis*, 956 S.W.2d 676, 683-84 (Tex. App.--Texarkana 1997, pet. dism'd).

16. Co-Shareholders

A shareholder in a closely held corporation does not owe a fiduciary duty to another shareholder. *Pabich v. Kellar*, 71 S.W.3d 500, 504 (Tex. App.--Fort Worth 2002, pet. denied); *see Hoggett v. Brown*, 971 S.W.2d 472, 488 (Tex. App.--Houston [14th Dist.] 1997, pet. denied) ("A co-shareholder in a closely held corporation does not as a matter of law owe a fiduciary duty to his co-shareholder."). Thus, in *Pabich*, the court held that the jury should not have been instructed that one shareholder owed the other a fiduciary duty as a matter of law. *Pabich*, 71 S.W.3d at 504-06. A shareholder who "dominates control over the business," however, may owe a fiduciary duty to the minority shareholder. *Hoggett*, 971 S.W.2d at 488 n.13; *see Willis v. Donnelly*, 199 S.W.3d 262, 277 (Tex. 2006) (assuming without deciding that a majority shareholder could owe a fiduciary duty to a minority shareholder, but declining to recognize the existence of any such duty based on the evidence that the plaintiff never actually became a shareholder).

17. Partners

Texas courts have long recognized that "[t]he relationship between . . . partners . . . is fiduciary in character." *Bohatch v. Butler & Binion*, 977 S.W.2d 543, 545 (Tex. 1998); *see M.R. Champion, Inc. v. Mizell*, 904 S.W.2d 617, 618 (Tex. 1995); *Fitz-Gerald v. Hull*, 237 S.W.2d 256, 264-65 (Tex. 1951); *Hughes v. St. David's Support Corp.*, 944 S.W.2d 423, 425 (Tex. App.--Austin 1997, writ denied); *Brazosport Bank v. Oak Park Townhomes*, 889 S.W.2d 676, 683 (Tex. App.--Houston [14th Dist.] 1994, writ denied) ("The relationship between partners in a general partnership is fiduciary in nature."). Further, Texas courts have repeatedly observed that managing partners owe their copartners the highest fiduciary duty recognized in the law. *Huffington v. Upchurch*, 532 S.W.2d 576, 579 (Tex. 1976); *Hughes*, 944 S.W.2d at 425. And in the limited partnership context, courts have concluded that the general partner stands in the same fiduciary capacity to the limited partners as a trustee stands to the beneficiaries of a trust. *Hughes*, 944 S.W.2d at 425-26; *Crenshaw v. Swenson*, 611 S.W.2d 886, 890 (Tex. Civ. App.--Austin 1980, writ ref'd n.r.e.).

Although there are numerous Texas opinions describing the "fiduciary" duties of a partner, it is difficult to reconcile these opinions with the Texas Revised Partnership Act ("TRPA") -- which is now codified in the Texas Business Organizations Code -- because the TRPA does not impose any *fiduciary* duties on partners. Notably, in describing the duties owed by partners, section 4.04 of the TRPA does not "use the term 'fiduciary.'" TEX. REV. CIV. STAT. art. 6132b-4.04(a) & cmt (Vernon 2009). Rather, the comments to the TRPA explicitly provide that "partner duties . . . are not to be expanded by loose use of 'fiduciary' concepts from other contexts or by the rhetoric of some prior cases." *Id.* art. 6132b-4.04 cmt. Thus, under the Texas statutory scheme governing partnerships, "[t]he term 'fiduciary' is inappropriate when used to describe the duties of a partner because a partner, unlike a true trustee, may legitimately pursue the partner's own self interest and not solely the interests of fellow partners or the partnership." *Id.*

Nonetheless, without discussing the TRPA, Texas courts continue to use the "fiduciary" rhetoric from prior cases to describe the duties owed by partners. *See Darocy v. Abildtrup*, ___ S.W.3d ___, No. 05-10-00369-CV, 2011 WL 2043666, at *6 (Tex. App.--Dallas May 26, 2011, no pet. hist.) ("As the managing partner, OGMP owed the other partners fiduciary duties of loyalty that are among the highest duties recognized in the law.") (citing *Huffington*); *Graham Mortgage Corp. v. Hall*, 307 S.W.3d 472, 479 (Tex. App.--Dallas 2010, no pet.) ("As general partner of a limited partnership, Douglas Properties, Inc. owed a fiduciary duty to the limited partners.") (citing *Brazosport Bank*); *Flores v. Star Cab Co-op. Ass'n, Inc.*, No. 07-06-0306-CV, 2008 WL 3980762, at *3 n.8 (Tex. App.--Amarillo Aug 28, 2008, pet. denied) (mem. op.) ("[P]artners stand in a fiduciary relationship with one another.").

Regardless of the resolution of this threshold legal issue, "fiduciaries may contract with one another" under Texas law, and a party's fiduciary duty "does not extend so far as to create duties in derogation of the express terms" of the parties' agreement." *AON Props., Inc. v. Riveraine Corp.*, No. 14-96-00229-CV, 1999 WL 12739, at *10 (Tex. App.--Houston [14th Dist.] Jan. 14, 1999, no pet.) (not designated for publication); *John Masek Corp. v. Davis*, 848 S.W.2d 170, 174 (Tex. App.--Houston [1st Dist.] 1992, writ denied). Thus, in *AON Properties*,

the court held that a joint venturer's exercise of its contractual right to terminate the joint venture was not a breach of fiduciary duty. 1999 WL 12739, at *10. Similarly, in *John Masek*, the court recognized that the majority owner of a partnership could not be held personally liable to its co-owners for breach of fiduciary duty when the partnership agreement granted the owner the unilateral right to withdraw its capital. 848 S.W.2d at 174. And in *Deauville Corp. v. Federated Department Stores, Inc.*, 756 F.2d 1183, 1194 (5th Cir. 1985), the Fifth Circuit concluded that, where a joint venture partner had a contractual right to withdraw from the joint venture, it did not breach any fiduciary duty to its partner by withdrawing. A court therefore must enforce partnership agreements as written, without subjecting a partner to liability for acts that are permitted or required by the agreement.

Texas law also permits a fiduciary to "contract for the limitation of his liability." *Grider v. Boston Co.*, 773 S.W.2d 338, 343 (Tex. App.--Dallas 1989, writ denied). For example, in *Grider*, ten limited partners in several oil and gas limited partnerships sued the general partner for recovery of allegedly excessive administrative and professional fees charged to the partnerships. *Grider*, 773 S.W.2d at 339. The partnership agreements provided that "the General Partner . . . shall have control over the management and affairs of the Partnership" and "complete and unrestricted authority and discretion to expend the funds of the Partnership." *Id.* In addition, the agreements provided that "the General Partner shall not be liable to the Partnership or any Limited Partner except for wilful [sic] malfeasance or fraud." *Id.*

The trial court, however, failed to take these provisions into account in submitting questions to the jury. Instead, at the limited partners' request, the court asked the jury to find whether the charges by the general partner to the partnerships for administrative and professional fees were "excessive." *Id.* at 340. The court of appeals concluded that "the case was submitted to the jury on the wrong theory" and that the "jury verdict favoring Plaintiffs would not have supported a judgment," because the jury's affirmative answer to the question failed to establish "willful malfeasance, fraud or even an abuse of the broad discretionary powers vested in the General Partner by the contract language." *Id.*; *see also Sterling Trust Co. v. Adderly*, 168 S.W.3d 835, 847 (Tex. 2005) (jury instruction on fiduciary duties owed by defendant was "overly broad" and "defective" because it "did not account for the[] contractual modifications" of the defendant's fiduciary duties).

18. Limited Partners

Unlike partners in a general partnership or the general partner in a limited partnership, at least two Texas courts have recognized that "a person's mere status as a limited partner is insufficient to create fiduciary duties." *Crawford v. Ancira*, No. 04-96-00078-CV, 1997 WL 214835, at *5 (Tex. App. -- San Antonio Apr. 30, 1997, no writ) (not designated for publication); *see also AON Props., Inc. v. Riveraine Corp.*, No. 14-96-00229-CV, 1999 WL 12739, at *23 (Tex. App.--Houston [14th Dist.] Jan. 14, 1999, no pet.) (not designated for publication) (limited partners do not owe fiduciary duties to other limited partners). These holdings are entirely consistent with, and faithful to, the language of the TRPA discussed above.[1]

Other courts take the contrary position. For example, in *McBeth v. Carpenter*, 565 F.3d 171 (5th Cir. 2009), the Fifth Circuit disregarded *Crawford* and *AON Properties* as unpublished opinions and concluded that Texas law imposes fiduciary duties between limited partners. *Id.* at 177-79 & n.1. Similarly, without recognizing any distinction between general partners and limited partners, the court in and *Zinda v. McCann Street, Ltd.*, 178 S.W.3d 883, 890-91 (Tex. App. -- Texarkana 2005, pet. denied), concluded each limited partner owes fiduciary duties to the other limited partners. In so holding, these cases are full of the same rhetoric and loose use of "fiduciary" concepts that the TRPA expressly rejects. *See* TEX. REV. CIV. STAT. art. 6132b-4.04 cmt. At least one commentator has criticized the holdings in *McBeth* and *Zinda*. *See* Elizabeth S. Miller, *Fiduciary Duties, Exculpation, and Indemnification in Texas Business Organizations*, at 11-12, 15-16, *in* STATE BAR OF TEX. PROF. Dev. PROGRAM, ESSENTIALS OF BUSINESS LAW COURSE (2010) (recognizing that "limited partners should not owe fiduciary duties as limited partners because they are merely passive investors" and criticizing the "questionable" conclusions and limited analysis in *McBeth* and *Zinda*, which both failed to recognize the distinction between general partnerships and limited partnerships or the distinction between general partners and limited partners).

In any event, like agreements governing general partnerships, limited partnership agreements may be drafted to eliminate or modify the duties owed by

[1] In certain instances, section 4.03 of the TRLPA makes general partnership law under the TRPA applicable to the general partner of a limited partnership. *See* TEX. REV. CIV. STAT. art. 6132a-1, § 4.03 & cmt.

limited partners. Indeed, the "primary goal" of the Texas Revised Limited Partnership Agreement ("TRLPA") is to effectuate the principle of freedom of contract by giving partners "flexibility" and "wide leeway" in drafting a limited partnership agreement that "create[s] structures and relationships tailored to their financial, control, tax and other desires" and provides protection to limited partners. *See* TEX. REV. CIV. STAT. art. 6132a-1 cmt. (describing the "Purposes" of the TRLPA and the "Role of [a Limited] Partnership Agreement"). The TRLPA is also designed to give "flexibility" to the drafters of limited partnership agreements, to "preserve a limited partner's limited liability even though the limited partner engages in a variety of activities or has the right to do so," and to allow the partnership agreement to "vary . . . the rights, powers and restrictions of a general partner" and "the liabilities of a general partner to the . . . other partners." *Id.*; *id.* § 3.03 cmt.; *id.* § 4.03 cmt.

B. Informal Fiduciary Relationships

In addition to formal fiduciary relationships, an informal relationship may give rise to a fiduciary duty or "confidential relationship" when one person trusts in and relies on another. *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 176 (Tex. 1997); *Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp.* 823 S.W.2d 591, 594 (Tex. 1992). An informal fiduciary duty arises from a moral, social, domestic, or purely personal relationship of trust and confidence. *Meyer v. Cathey*, 167 S.W.3d 327, 331 (Tex. 2005). But "not every relationship involving a high degree of trust and confidence rises to the stature of a fiduciary relationship." *Schlumberger*, 959 S.W.2d at 176-77; *Crim Truck*, 823 S.W.2d at 594.

Mere subjective trust alone is "not enough to transform arms-length dealing into a fiduciary relationship," and "[t]he fact that one businessman trusts another, and relies upon his promise to perform a contract, does not rise to a confidential relationship." *Crim Truck*, 823 S.W.2d at 594-95; *see Rawhide Mesa-Partners*, 2011 WL 1744089, at *4 (plaintiff's testimony that he "trusted" the defendant-law firm was "no evidence that a confidential relationship existed between the lawyers and [plaintiff]"); *Esty v. Beal Bank, S.S.B.*, 298 S.W.3d 280, 304 (Tex. App.--Dallas 2009, no pet.) (mere fact that assignee in bankruptcy of prospective borrower's claims against lender "placed his trust and confidence in [lender] because [lender] represented that it had substantial bankruptcy experience and could meet the auction deadline" did not establish a fiduciary relationship). Furthermore, the fact that parties may be aligned does not give rise to a fiduciary duty "because all parties presumably contract for their mutual benefit." *Schlumberger*, 959 S.W.2d at 177. Indeed, a party to a contract is ordinarily "free to pursue its own interests, even if it results in a breach of that contract, without incurring tort liability." *Crim Truck*, 823 S.W.2d at 594; *see Amoco Prod. Co. v. Alexander*, 622 S.W.2d 563, 571 (Tex. 1981).

Thus, "a contractual obligation does not generally give rise to a fiduciary duty." *Nat'l Plan Adm'rs*, 235 S.W.3d at 702. For example, in *Crim Truck*, the Texas Supreme Court recognized that the breach of a "contractual duty of good faith and fair dealing gives rise only to a cause of action for breach of contract and does not give rise to an independent tort cause of action." *Crim Truck*, 823 S.W.2d at 595 n.5. Texas courts have similarly recognized that a contractual "best efforts" clause cannot turn an arms-length business transaction into a fiduciary relationship. *See Wheeler v. Sajovich*, No. 03-09-00367-CV, 2010 WL 2540689, at *9 (Tex. App.--Austin June 23, 2010, no pet.) (mem. op.) (contractual obligation to use "best efforts" did not give rise to a fiduciary duty).

In light of these principles, a fiduciary relationship is an extraordinary one and is not created lightly. *Schlumberger*, 959 S.W.2d at 177. The fact that a relationship "has been a cordial one, of long duration, [is not] evidence of a confidential relationship." *Crim Truck*, 823 S.W.2d at 595; *see Meyer*, 167 S.W.3d at 331 (refusing to impose a fiduciary duty "based on the fact that, for four years, Cathey and Meyer were friends and frequent dining partners). When a party attempts to impose a fiduciary relationship in a business transaction, "the relationship must exist *prior to, and apart from*, the agreement made the basis of the suit." *Id.* (emphasis added); *Transport Ins. Co. v. Faircloth*, 898 S.W.2d 269, 280 (Tex. 1995); *see Four Bros. Boat Works, Inc. v. Tesoro Petroleum Cos.*, 217 S.W.3d 653, 670 (Tex. App.--Houston [14th Dist.] 2006, pet. denied) (trial court properly granted summary judgment on plaintiffs' breach of fiduciary duty claim when no informal fiduciary duty existed because plaintiffs could not show any relationship with the defendant prior to entering into the agreements that were the subject matter of the litigation); *Jones*, 196 S.W.3d at 449 (trial court did not err in granting summary judgment on claim for breach of informal fiduciary duty when the evidence showed that two attorneys who entered into fee sharing agreement did not have a special relationship of trust and confidence prior to

their agreement); *Farah v. Mafrige & Kormanik*, 927 S.W.2d 663, 675-76 (Tex. App.--Houston [1st Dist.] 1996, no writ) (affirming grant of summary judgment on plaintiff's breach of fiduciary duty claim when plaintiff failed to raise a fact issue regarding the existence of a confidential duty).

Outside of the business context, a plaintiff must establish that the dealings with the alleged fiduciary continued long enough to justify the plaintiff's reliance on the fiduciary to act in the plaintiff's best interest. *Carr v. Weiss*, 984 S.W.2d 753, 765 (Tex. App.--Amarillo 1999, pet. denied). Unless the underlying facts are undisputed, whether the defendant owes an informal fiduciary duty to the plaintiff is generally a question of fact. *Lundy v. Masson*, 260 S.W.3d 482, 502 (Tex. App.--Houston [14th Dist.] 2008, pet. denied).

Based on these principles, the court in *Garcia v. Vera*, ___ S.W.3d ___, No. 08-09-00084-CV, 2011 WL 1605973 (Tex. App.--El Paso Apr. 29, 2011, no pet. hist.), recently held that evidence from the plaintiff that (1) he trusted the defendant "without reservation" (without giving the basis for his subjective trust), (2) that the defendant was his nephew, (3) that he transferred property to the defendant when he was in poor health and afraid he would die, and (4) that he could not speak, read, or write English when the signed the documents transferring the property to his nephew was insufficient to establish the existence of a confidential relationship before the property transaction. *Id.* at *2-3. In rejecting this evidence, the court noted that uncles and nephews do not "necessarily have a confidential relationship" and that the plaintiff "submitted no evidence regarding the actualities of their relationship." *Id.* at *3.

The court further suggested types of evidence that might be relevant to establish a confidential relationship, including evidence that "the two men were close or that they spent a lot of time together, that they had engaged in prior business, property, or financial transactions together, or that [the plaintiff] had previously relied on [the defendant] for any type of advice." *Id.*; *compare Flanary v. Mills*, 150 S.W.3d 785, 794 (Tex. App.--Austin 2004, pet. denied) (evidence sufficient where parties had uncle/nephew relationship, but they were more like brothers, one party worked for the other and had always "looked up" to him, and they had previously been business partners), *and Dominguez v. Brackey Enters., Inc.*, 756 S.W.2d 788, 791 (Tex. App.--El Paso 1988, writ denied) (evidence sufficient where parties had a longstanding business and personal association and one party was accustomed to being guided by the other's advice in legal and accounting matters), *and Hamblet v. Coveney*, 714 S.W.2d 126, 129 (Tex. App.--Houston [1st Dist.] 1986, writ ref'd n.r.e.) (evidence sufficient where two parties had aunt/niece relationship, they and their families had a close relationship spanning years, and one party counseled the other for years), *with Thigpen v. Locke*, 363 S.W.2d 247, 249, 252–53 (Tex. 1963) (evidence insufficient where parties were close friends who saw each other frequently and one party personally guaranteed a loan for the others and gave them business advice), *and Trostle v. Trostle*, 77 S.W.3d 908, 914 (Tex. App.--Amarillo 2002, no pet.) (evidence insufficient where parties had stepmother-stepson relationship, but they were not particularly close).

III. CONSEQUENCES OF A FIDUCIARY RELATIONSHIP

Once a fiduciary relationship is established, a plaintiff must still prove that the defendant breached its fiduciary duty. When parties enter a fiduciary relationship, each agrees to have its conduct toward the other measured by the standard of duties imposed by courts of equity. *Vogt v. Warnock*, 107 S.W.3d 778, 782-83 (Tex. App.--El Paso 2003, pet. denied) (citing *Tex. Bank & Trust Co. v. Moore*, 595 S.W.2d 502, 508 (Tex. 1980)). All categories of fiduciaries owe general duties as well as specific duties depending on the nature of the fiduciary relationship.

Additional consequences and considerations when a party owes a fiduciary duty include: (1) possible third party and related claims; (2) the presumption of unfairness; and (3) the ability of a plaintiff to recover damages without having actually been damaged.

A. General Duties

In Texas, a fiduciary owes six general duties:

(1) a duty of loyalty and utmost good faith;
(2) a duty of candor;
(3) a duty to refrain from self-dealing;
(4) a duty to act with integrity of the strictest kind;
(5) a duty of fair, honest dealing; and
(6) a duty of full disclosure.

Welder v. Green, 985 S.W.2d 170, 175 (Tex. App.--Corpus Christi 1998, pet. denied); *Hartford Cas. Ins. Co. v. Walker County Agency*, 808 S.W.2d 681, 687-88 (Tex. App.--Corpus Christi 1991, no writ).

While some courts have distinguished among the six general duties, two principal duties exist -- the duty of loyalty and utmost good faith (incorporating the duty to refrain from self-dealing) and the duty of full disclosure (incorporating the duties of candor and fair, honest dealing). And, in reality, the duties are often blended even more than that based on the facts of many of the fiduciary duty cases.

One of the common avenues for establishing (or attempting to establish) a breach is the duty of loyalty. Loyalty to a principal may require candor to the principal or an act of full disclosure. *Trahan v. Lone Star Title Co. of El Paso*, 247 S.W.3d 269, 287 (Tex. App.--El Paso 2007, pet. denied); *Landon v. S&H Mktg. Group, Inc.*, 82 S.W.3d 666, 672 (Tex. App.--Eastland 2002, no pet.).

Any form of self-dealing or disloyalty is prohibited when a fiduciary relationship exists. For example, in *Daniel v. Falcon Interest Realty Corp.*, 190 S.W.3d 177, 185-87 (Tex. App.--Houston [1st Dist.] 2005, no pet.), the fiduciary formed a subcontractor for the express purpose of profiting from the project and contract for which he was project manager. Such acts clearly violated this duty as well as the duties of full disclosure and candor because Daniel failed to disclose this relationship. Similarly, in *ERI Consulting Engineers, Inc. v. Swinnea*, 318 S.W.3d, 867, 870 (Tex. 2010), the fiduciary's spouse formed a competing company, in which Swinnea assisted and participated. Again, such acts clearly violate the duty to refrain from self-dealing and duty of loyalty. Because Swinnea continually failed to disclose the relationship and his other business interests (and in fact fraudulently concealed them), such acts also violated his duty of full and honest disclosure. *Id.*

B. Specific Duties

In addition to the general duties that are applicable to all fiduciary relationships, there are also specific duties owed based on some of the relationships in which a fiduciary duty arises, including those for: (1) attorneys; (2) trustees; (3) agents and employees; (4) partners; and (5) officers and directors.

1. Attorneys

An attorney breaches his fiduciary duty by obtaining an improper benefit from the representation, which might include putting his interest first, engaging in self-dealing, failing to disclose conflicts of interest, improperly retaining client funds, or making misrepresentations to the client. *See Duerr v. Brown*, 262 S.W.3d 63, 71 (Tex. App.--Houston [14th Dist.] 2008, no pet.); *Gibson v. Ellis*, 126 S.W.3d 324, 330 (Tex. App.--Dallas 2004, no pet.). As a fiduciary, an attorney has a duty to preserve client confidences. *Goffney v. Rabson*, 56 S.W.3d 186, 193 (Tex. App.--Houston [14th Dist.] 2001, pet. denied); *Brown v. Green*, 302 S.W.3d 1, 8-9 (Tex. App.--Houston 2009, no pet.).

In addition, attorneys have:

- a duty to represent the client with undivided loyalty, *Burrow v. Arce*, 997 S.W.2d 229, 237-38 (Tex. 1999);
- a duty to act with absolute perfect candor, openness, and honesty, *Beck v. Law Offices of Edwin J. (Ted) Terry, Jr., P.C.*, 284 S.W.3d 416, 429 (Tex. App.--Austin 2009, no pet.);
- a duty to inform the client of material matters, *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 160 (Tex. 2009);
- a duty to turn over funds belonging to the client, *Avila v. Havana Painting Co.*, 761 S.W.2d 398, 399-400 (Tex. App.--Houston [14th Dist.] 1988, writ denied) (settlement funds received were not turned over);
- a duty to timely inform client of a conflict of interest, *Deutch v. Hoover, Bax & Slovacek, L.L.P.*, 97 S.W.3d 179, 190 (Tex. App.--Houston [14th Dist.] 2002, no pet.) (attorneys failed to timely disclose that firm was representing itself and client in same bankruptcy proceeding while also representing client in related suit); and
- a duty to disclose fully the terms of any proposed settlement, *General Motors Corp. v. Bloyed*, 916 S.W.2d 949, 959 (Tex. 1996).

While a non-exhaustive list, these are the specific duties the courts have held to apply in the attorney-client context, and the key to them, as with the general duties, is full disclosure, candor, and acting only in the client's interest.

Inadequate representation is generally a malpractice claim and not a breach of fiduciary duty cause of action. In *Trousdale v. Henry*, 261 S.W.3d 221, 228 (Tex. App.--Houston 2008, pet. denied), the court held that a separate breach of fiduciary duty claim existed when the attorney failed to inform his client that a case had been dismissed and failed to return the client's files in an attempt to conceal the dismissal. The court explained that the actions gave rise to a fiduciary duty claim because of the intentional and willful acts the attorney took to hide his true actions and the facts. *Id.*

2. Trustees and Executors

Trustees and executors owe the same duties as fiduciaries. *Kappus v. Kappus*, 284 S.W.3d 831 (Tex. 2009); *Human Soc'y v. Austin Nat'l Bank*, 531 S.W.2d 574, 577 (Tex. 1975). The Texas Trust Code sets forth the duties of a trustee, including:

- the duty of good faith in administering the trust according to its terms;
- the duty to refrain from lending trust funds to itself or an affiliate of the trustee (including relatives, employers or employees, partners, or other business associates);
- the duty to refrain from purchasing or selling trust property from or to itself or an affiliate; and
- the duty to account to the beneficiaries for all trust transactions

TEX. PROP. CODE §§ 113.051-.053, 113.151.

Trustees have additional duties that arise under the common law, including:

- the duty to fully disclose all material facts that might affect the beneficiaries' rights, *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996); and
- the duty to properly manage, supervise, and safeguard trust funds, *Hoenig v. Texas Commerce Bank*, 939 S.W.2d 656, 661 (Tex. App.--San Antonio 1996, no writ).

Again, even the specific duties relate back to the general fiduciary duties to refrain from self-dealing, to err on the side of full disclosure, and to never put the trustee's interest above that of the beneficiaries. Finally, exculpatory clauses can relieve trustees from liability for breach of fiduciary duty except for certain types of self-dealing, including loaning trust money to itself, buying trust property from itself, or selling trust property to itself. *Tex. Commerce Bank, N.A. v. Grizzle*, 96 S.W.3d 240, 250 (Tex. 2002).

3. Agents and Employees

Consistent with general fiduciary duties, an agent owes fiduciary duties to the principal to account for profits arising out of the employment or relationship; to not act as, or on account of, an adverse party without the principal's consent; to not compete with the principal on his own account or for another in matters relating to the subject matter of the agency; and to deal fairly with the principal in all transactions between them. *Johnson*, 73 S.W.3d at 200.

Similarly, escrow agents owe duties of loyalty, full disclosure, and a duty to exercise a high degree of care to conserve the escrow fund and to pay it only to those persons entitled to receive it. *Trahan v. Lone Star Title Co.*, 247 S.W.3d 269, 287 (Tex. App.--El Paso 2007, pet. denied). These duties, however, are limited to the agent's role as escrow agent. *Equisorce Realty Corp. v. Crown Life Ins. Co.*, 854 S.W.2d 691, 697 (Tex. App.--Dallas 1993, writ no writ).

Agency principles are generally applied to employees in the fiduciary duty context, and generally the same duties apply when the employee is currently employed and operating within the scope of employment. *See Johnson*, 73 S.W.3d at 200-201; *Kinzbach Tool Co.*, 160 S.W.2d at 510-11. But such duties do no prevent employees from making preparations for a future competing business, taking steps to prepare to compete, or even discuss such a venture with other employees, absent contractual obligations to refrain from such actions. *See Abetter Trucking Co. v. Arizpe*, 113 S.W.3d 503, 510 (Tex. App.--Houston [1st Dist.] 2003, no pet.)

4. Partners

Assuming that the partners at issue each other a fiduciary duty, the courts have held that the following duties apply:

- a duty of loyalty to the joint concern, *Bohatch v. Butler & Binion*, 977 S.W.2d 543, 545 (Tex. 1998);
- a duty of utmost good faith, fairness, and honesty in dealings with each other on matters in the scope of the project or enterprise, *id.*;
- a duty of full disclosure of all matters affecting the partnership or enterprise for which partnership formed, *Brosseau v. Ranzau*, 81 S.W.3d 381, 394 (Tex. App.--Beaumont 2002, pet. denied); and
- a duty to account for all partnership profits and property and refrain from self-dealing, TEX. BUS. ORGS. CODE § 152.205(1); *see also Brosseau*, 81 S.W.3d at 395.

These duties are similar to the general duties requiring loyalty and full disclosure when operating within the scope of the relationship, in this instance, the aims of the partnership.

5. Officers and Directors

Similar to the duties of agents and of partners, officers and directors of corporations also owe

specific duties that expand or mirror the general duties of a fiduciary, including:

- a duty to not usurp corporate opportunities for personal gain, *Lifshutz v. Lifshutz*, 199 S.W.3d 9, 18 (Tex. App.--San Antonio 2006, pet. denied);
- a duty of full disclosure of personal interests in the subject matter of contracts or dealings in which the officer or director participates in the negotiations, *General Dynamics v. Torres*, 915 S.W.2d 45, 49 (Tex. App.--El Paso 1995, writ denied);
- a duty of utmost good faith in relations with the corporation, *Int'l Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567, 577 (Tex. 1963); and
- a duty of loyalty, *General Dynamics*, 915 S.W.2d at 49.

In addition, officers and directors generally owe a duty of obedience, which requires that they avoid committing *ultra vires* acts. *See Campbell v. Walker*, No. 14-96-01425-CV, 2000 WL 19143, at *11 (Tex. App.--Houston [1st Dist.] Jan. 13, 2000, no pet.) (mem. op.). This duty requires that the fiduciaries be diligent and prudent in managing the corporation's affairs, but directors who are uninterested in the transaction at issue will not be liable unless the actions are *ultra vires* or fraudulent. *Id.* In *Campbell*, the court held that the actions by uninterested directors were not ultra vires because the applicable statute did not require shareholder approval of actions made in the ordinary course of business. *Id.*

C. Related/Third-Party Claims

In addition to bringing claims against a fiduciary, an aiding and abetting or knowing participation claim may also be brought against a third-party. A third party that knowingly induces a fiduciary to breach a duty or participates in the breach can be held liable as a joint tortfeasor. *Kinzbach Tool*, 160 S.W.2d at 514; *Baty v. Pro-Tech Ins. Agency*, 63 S.W.3d 841, 863 (Tex. App.--Houston [14th Dist.] 2001, pet. denied). To successfully prevail on such a claim, the plaintiff must prove the following elements of aiding or abetting through assistance or encouragement:

(1) the party owing a fiduciary duty breached that duty;
(2) the defendant (the third party) had knowledge that the primary's conduct constituted a breach;
(3) the defendant had the intent to assist the party owing the duty in committing the breach; and
(4) the defendant's assistance or encouragement was a substantial factor in causing the breach.

See Juhl v. Airington, 936 S.W.2d 640, 644 (Tex. 1996); *Crisp v. Southwest Bancshares Leasing Co.*, 685 S.W.2d 610, 613 (Tex. App.—Amarillo 1979, writ ref'd n.r.e.).

In some contexts, such as the attorney-client relationship, the courts have refused to recognize aiding and abetting the breach of fiduciary duty as a cause of action. *Span Enters. v. Wood*, 274 S.W.3d 854, 858-59 (Tex. App.--Houston [1st Dist.] 2008, no pet.) (citing *Alpert v. Crain, Caton & James, P.C.*, 178 S.W.3d 398, 407 (Tex. App.--Houston [1st Dist.] 2005, pet. denied)).

D. Presumption of Unfairness

When parties to a fiduciary relationship enter into a transaction among themselves, there is an equitable presumption that the transaction was unfair to the party who did not profit or benefit from the transaction. *Stephens County Museum, Inc. v. Swenson*, 517 S.W.2d 257, 260 (Tex. 1974). The presumption places the burden of proving the transaction's fairness on the fiduciary. *Lee v. Hasson*, 286 S.W.3d 1, 21 (Tex. App.--Houston [14th Dist.] 2007, pet. denied).

Unlike most presumptions, the presumption of unfairness shifts both the burden of producing evidence and the burden of persuasion to the defendant. *Keck, Mahin, & Cate v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 20 S.W.3d 692, 699 (Tex. 2000); *Sorrell v. Elsey*, 748 S.W.2d 584, 585 (Tex. App.--San Antonio 1988, writ denied); COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES - BUSINESS, CONSUMER, AND EMPLOYMENT PJC 104.2 (2010) (noting that burden is on fiduciary when the fiduciary has profited or benefited from a transaction with the beneficiary).

In deciding whether the transaction between the parties was fair, the following factors may be considered: (1) whether there was full disclosure; (2) whether the consideration was adequate; (3) whether the beneficiary had the benefit of independent advice; (4) whether the fiduciary significantly benefitted from the transaction given the circumstances at the time of the transaction; and (5) whether the fiduciary acted in good faith. *Lee*, 286

S.W.3d at 21; *Stephens County Museum*, 517 S.W.2d at 261. In *Stephens County Museum*, the presumption applied (and was rebutted) in a case in which a brother handled his sisters' finances and was the trustee of a trust to which the sisters donated property. In contrast, the presumption was not rebutted in *Keck, Mahin* when a law firm entered into a release of liability with a client. *Keck, Mahin, & Cate*, 20 S.W.3d at 699.

E. Plaintiff's Injury or Defendant's Benefit

A plaintiff need not necessarily establish that it was injured to prevail on a breach of fiduciary duty claim. Instead, the plaintiff must establish either that the defendant's breach resulted in an injury to the plaintiff or a benefit to the defendant. *Priddy v. Rawson*, 282 S.W.3d 588, 599 (Tex. App.--Houston [14th Dist.] 2009, pet. denied); *Burrow*, 997 S.W.2d at 238.

While examined in more detail below in Part IV, Texas courts have long followed the Texas Supreme Court's statement in *Kinzbach Tool*:

> A fiduciary cannot say to the one to whom he bears such a relationship: You have sustained no loss by my misconduct in receiving a commission from a party opposite to you, and therefore you have no remedy. It would be dangerous precedent for us to say that unless some affirmative loss can be shown, the person who has violated his fiduciary relationship with another may hold on to any secret gain or benefit he may have thereby acquired.

Kinzbach Tool, 160 S.W.2d at 514.

As a result, a plaintiff may be entitled to a remedy if it can show a resulting injury to itself or a resulting benefit to the defendant that breached its fiduciary duty.

IV. REMEDIES

If successful in establishing the existence of a fiduciary relationship, a breach of that relationship, and the injury or improper benefit resulting from that breach (when necessary), various remedies are available to a plaintiff depending on the circumstances.

A. Actual Damages

First and most generally, a plaintiff may recover its actual damages that result from the breach of fiduciary duty. *ERI Consulting Eng'rs Inc. v. Swinnea*, 318 S.W.3d 867, 877 (Tex. 2010); *Kahn v. Seely*, 980 S.W.2d 794, 799 (Tex. App.—San Antonio 1998, pet. denied).

These damages include out-of-pocket losses or lost profits. The test for lost profits is well-established under Texas law and is no different in the fiduciary duty context than in any other. Although recovery for lost profits does not require that the loss be susceptible to exact calculations, "the injured party must do more than show that they suffered some lost profits." *Holt Ahterton Indus., Inc. v. Heine*, 835 S.W.2d 80, 84 (Tex. 1992). Anticipated profits that are largely speculative or dependent on changing market conditions or risky business opportunities are not recoverable. *Texas Instruments, Inc. v. Teletron Energy Mgmt., Inc.* (877 S.W.2d 276, 279 (Tex. 1994); *see also Carr v. Weiss*, 984 S.W.2d 753, 769-70 (Tex. App.--Amarillo 1999, pet. denied). The amount of lost profits resulting from a fiduciary duty breach, therefore, must be shown by "competent evidence with reasonable certainty." *ERI Consulting Engineers, Inc.*, 318 S.W.3d at 877-78; *Holt Atherton*, 835 S.W.2d at 84.

Mental anguish damages are also recoverable in some cases if the damages are a foreseeable result of the breach of fiduciary duty. *Douglas v. Delp*, 987 S.W.2d 879, 884 (Tex. 1999); *Perez v. Kirk & Carrigan*, 822 S.W.2d 261, 266-67 (Tex. App.--Corpus Christi 1991, writ denied) (permitting mental anguish damages in case where attorney's breach resulted in public embarrassment for former client).

B. Disgorgement and Fee Forfeiture

One of the most commonly sought remedies for breach of fiduciary duty is disgorgement of profits and/or fee forfeiture. The Texas Supreme Court has repeatedly upheld these equitable remedies for breach of fiduciary duty. In a recent decision, the Court stated that "courts may fashion equitable remedies such as profit disgorgement and fee forfeiture to remedy a breach of fiduciary duty." *See ERI Consulting Eng'rs*, 318 S.W.3d at 841.

Based on a number of factors developed by the courts, the court may award plaintiff any profits or fees the fiduciary made out of the breach of its fiduciary duties.[2] *Id*. The failure to produce lost

[2] While the court will ultimately determine the appropriateness and amount of award, if any, a jury may be asked the amount of profits or amount of fees. *See, e.g.*, TEX. PJC - BUSINESS, CONSUMER, AND EMPLOYMENT PJC, 115.16, 115.17 (2010).

profits evidence (or evidence of actual damages) does not preclude a cause of action based on breach of fiduciary duty. *See, e.g. Total Clean, LLC v. Cox Smith Matthews, Inc.*, 330 S.W.3d 657 (Tex. App.—San Antonio 2010, pet. denied).

1. Attorneys and Clients

In the attorney-client context, a former client can obtain forfeiture of an attorney's legal fees in addition to damages if it establishes the attorneys breached their fiduciary duties. *Swank v. Cunningham*, 258 S.W.3d 647, 667 (Tex. App.--Eastland 2008, pet. denied). The former client must prove causation to recover for actual damages, but it need not prove actual damages to establish a right to fee forfeiture. *Id.*; *Burrow v. Arce*, 997 S.W.2d 229, 240 (Tex. 1999).

The courts have justified this rule in several ways. First, the client did not receive the benefit for which it bargained. *Burrow*, 997 S.W.2d at 237-38. Second, fee forfeiture deters the attorney from breaching his fiduciary duties and removes any incentive for an attorney to stray from his duty of loyalty based on the possibility that his client will not be harmed. *Id.* at 238. Finally, the *Burrow* court reasoned that fee forfeiture is not a windfall to the client because compensation to an attorney is for loyalty as well as for services. *Id.* at 240.

In some cases, however, the courts have held that requiring a forfeiture of all fees would be an excessive sanction because it would result in a windfall for the former client. *Id.* at 241-42. For example, *Swank*, the Eastland Court of Appeals held that awarding a fee forfeiture to the plaintiffs would have been a windfall because all of the legal fees at issue were paid by a co-defendant, not the plaintiffs. *Swank*, 258 S.W.3d at 673. The Court provided several factors for consideration when fashioning a particular equitable forfeiture remedy in the context of attorney-client relationships (which has since been used in several additional contexts): "The gravity and timing of the violation, its willfulness, its effect on the value of the lawyer's work for the client, and any other threatened or actual harm to the client, and adequacy of other remedies." *Burrow*, at 243-44 (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49 (Proposed Final Draft No. 1, 1996)).

2. Trusts and Trustees

The Texas Trust Code also recognizes the principal of disgorgement, providing:

> A trustee who commits a breach of trust is chargeable with any damages resulting from such breach of trust, including but not limited to:
>
> (1) any loss of depreciation in value of the trust estate as a result of the breach of trust;
> (2) *any profit made by the trustee through the breach of trust*; or
> (3) any profit that would have accrued to the trust estate if there had been no breach.

TEX. PROP. CODE § 114.001(c) (emphasis added).

The *Burrow* Court also restated several factors from the Restatement (Second) of Trusts to take into consideration in determining whether all or part of a trustee's fees (or profits) should be forfeited: (1) whether the trustee acted in good faith; (2) whether the breach of trust was intentional or negligent or without fault; (3) whether the breach of trust related to the management of the whole trust or related only to a party of the trust property; (4) whether the breach of trust occasioned any loss and if so, whether the trustee had made good on such loss; and (5) whether the trustee's services were of value to the trust. *Burrow*, 997 S.W.2d at 243 (citing RESTATEMENT (SECOND) OF TRUSTS § 243, cmt. c).

3. Principals and Agents (and Employers and Employees)

Courts may disgorge all ill-gotten profits from a fiduciary when a fiduciary agent usurps an opportunity properly belonging to a principal, or competes with a principal. *ERI Consulting Eng'rs*, 318 S.W.3d at 873; *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 200 (Tex. 2002).

In *ERI Consulting Engineers*, the Court recently considered whether the forfeiture of contractual consideration received in a buyout agreement was proper when Swinnea sold his half-interest in a company, ERI agreed to employ Swinnea for six years, and Swinnea agreed not to compete with ERI. *ERI Consulting Engineers*, 318 S.W.3d at 871-72. In that case, the trial court ordered the forfeiture of a significant amount of the contractual consideration paid to Swinnea as part of the buyout. *Id.* at 873. The Texas Supreme Court, reasoning that the situation was closely aligned to *Burrow* in many respects, held that Swinnea owed fiduciary duties to ERI and that his

actions in fraudulently inducing the buyout agreement were willful breaches of his fiduciary duty.

Therefore, the Court held that, subject to the limitations and factors set forth in *Burrow*, the contractual consideration received by Swinnea was recoverable in equity regardless of whether or not actual damages were proven. *Id.* at 874-75.

The *ERI* decision extends and expands the history of forfeiture and disgorgement remedies in the commercial context and goes beyond concrete examples of benefits received as a result of the fiduciary duty breach. Such holdings began with cases like *D. Sullivan & Co. v. Ramsey*, 155 S.W. 580, 582, 587 (Tex. Civ. App.--San Antonio 1913, no writ), in which the principals sued the agents for breach of fiduciary duty with regard to a real estate transaction, and the court of appeals held that the value of the property should be determined at the time of trial, allowing for the disgorgement of all profits realized by the agents. The Texas Supreme Court followed suit in the well-known and often-cited *Kinzbach Tool* case, where the agent for the seller arranged for the sale and received a undisclosed commission from the buyer. *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 138 Tex. 565, 160 S.W.2d 509, 511 (1949).

Similarly, the Houston Court of Appeals has held that disgorgement of profits is the appropriate remedy in a case where the project manager breached his fiduciary duty even when all parties were satisfied with the other's performance on a construction project. *Daniel v. Falcon Interest Corp.*, 190 S.W.3d 177, 186-87 (Tex. App.--Houston [1st Dist.] 2005, no pet.). Because Daniel had breached his fiduciary duty by hiring a subcontractor in which he owned an interest and profited from the arrangement, the court held that the trial court did not err when ordering Daniel to account for and return any profits he made on the transaction. *Id.* The trial court did not, however, disgorge the profits of any other owner of the subcontractor that was at issue, again evidencing the balancing necessary when determining which profits to disgorge or fees to forfeit.

C. Constructive Trust

A court may also create a constructive trust as a remedy for a breach of fiduciary duty. Like disgorgement, a constructive trust is another available equitable remedy to prevent unjust enrichment as a result of a fiduciary's breach. *Wilz v. Flournoy*, 228 S.W.3d 674, 677 (Tex. 2007); *Omohundro v. Matthews*, 341, S.W.2d 401, 404-05 (Tex. 1960); *see also* TEX. PROP. CODE § 114.008(a). Generally, the plaintiff has the initial burden to trace improperly obtained funds to the property sought to be recovered, and if successful, the court can then place a constructive trust on any part of the property the defendant cannot prove is its own. *Wilz*, 228 S.W.3d at 676.

D. Rescission

A court may also grant rescission of a contract if that contract is the result of a breach of fiduciary duty. *Acevedo v. Stiles*, No. 04-02-00077-CV, 2003 WL 21010604, at *2 (Tex. App.--San Antonio May 7, 2003, pet. denied) (mem. op.) (rescission properly awarded to elderly stroke victim who transferred her home to her lawyer's wife in exchange for healthcare services she did not receive); *Arce v. Burrow*, 958 S.W.2d 239, 246 n.8 (Tex. App.--Houston [14th Dist.] 1997), *rev'd on other grounds*, 997 S.W.2d 229 (Tex. 1999).

E. Accounting

In addition to the remedies discussed above, a court may also order the fiduciary to make an accounting. Under section 113.151 of the Texas Property Code, the beneficiary may file suit to compel a trustee to deliver an accounting. TEX. PROP. CODE § 113.151.

F. Exemplary Damages

Finally, in a proper case, a plaintiff may recover exemplary damages in addition to actual damages and equitable relief. *Manges v. Guerra*, 673 S.W.2d 180, 184 (Tex. 1984); *see also Cantu v. Butron*, 921 S.W.2d 344, 351-53 (Tex. App.--Corpus Christi 1996, writ denied). When the breach is intentional or when, as the *Manges* Court found, the conduct represents a willful and unconscionable disregard for the interests of the party owed the duty, exemplary damages are appropriate as long as actual damages have been sustained. *Manges*, 673 S.W.2d at 184; *Brosseau v. Ranzau*, 81 S.W.3d 381, 391 (Tex. App.--Beaumont 2002, pet. denied) (listing factors for determination of exemplary damages).

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