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Texas Remedies in Equity for Breach of Fiduciary Duty: Disgorgement, Forfeiture, and Fracturing.

George P. Roach

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TEXAS REMEDIES IN EQUITY FOR BREACH OF FIDUCIARY DUTY: DISGORGEMENT, FORFEITURE, AND FRACTURING

GEORGE P. ROACH*

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SECTION I. INTRODUCTION

Even though there was ample precedent in equity for ordering the disgorgement of fiduciary compensation, *Burrow v. Arce*¹ introduced a modified remedy in equity as fee forfeiture, and thereby greatly raised awareness of the possibility of securing restitution of a lawyer’s agreed compensation.² This new awareness spurred a surge in fiduciary claims against lawyers as claims in the alternative in which causation is easier to establish than in actual damages for malpractice.

In the aftermath of *Burrow*, the number of fiduciary cases pleading for fee forfeiture increased, but the rate of liability for lawyer fiduciaries has fallen. Appellate courts have reacted adversely to the surge in claims against lawyer fiduciaries by improvising three new rules that minimize fee forfeiture claims at summary judgment.³ Currently, liability rates against lawyer fiduciaries are approaching a level at which such claims appear nearly futile.

If a case arose under the same facts as *Burrow* today, Texas courts are likely to grant summary judgment to the defendant based on any one of the new rules. Effectively the appellate courts are in conflict with the Texas Supreme Court’s opinion in *Burrow* and subsequent court opinions. As the conflict widens, the opinions from both “sides” fail to relate to

1. *Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999).

2. *See id.* at 243–44 (listing factors to be considered for fee forfeiture).

3. The current application of the fracturing rule evaluates whether the claim for breach of fiduciary duty sounds in legal malpractice, not whether an independent claim has been implicated. The improper benefit rule rejects claims that solely seek to forfeit fees. The third-party rule rejects claims for the forfeiture of fees paid to a lawyer in breach by a third party. Sections VIII and IX show how every one of these rules would be applied against a case similar to *Burrow*.

traditional law in equity, and they increase the confusion about the relationship of asset and fee forfeiture to monetary remedies in equity.⁴

Restitution of fiduciary compensation is not new, as Texas courts have generally followed traditional law in equity, which provides for disgorgement of a fiduciary's profit and/or compensation. Because claims against lawyers for breach of fiduciary duty have arisen largely in only the last thirty years,⁵ practically all previous claims for disgorgement were made against non-lawyer fiduciaries, including real estate brokers, business partners, and trustees.

Texas precedent on disgorgement against non-lawyer fiduciaries has been almost totally ignored in fee forfeiture opinions. As a result, most forfeiture opinions ignore the key distinction between disgorgement of a fiduciary's secret profit and forfeiture of agreed compensation. Only when this distinction is appreciated can it be understood that Texas precedent allows for the disgorgement or forfeiture of a fiduciary's compensation in addition to actual damages. Therefore, restitution of a fiduciary's compensation is not necessarily mutually exclusive with actual damages for breach of fiduciary duty or legal malpractice.⁶

The no-fracturing rule⁷ has been frequently applied by trial courts to grant summary judgment based on a claim's similarity to malpractice rather than whether an independent claim was implicated. Increasingly over the last fifteen years, trial and appellate courts cited the no-fracturing rule to hold that claims for negligence or malpractice against lawyers effectively

4. See George P. Roach, *Unjust Enrichment in Texas: Is It a Floor Wax or a Dessert Topping?*, 65 BAYLOR L. REV. 153, 244 (2013) (explaining the supreme court's opinion and how the lower appellate opinions are unclear in their distinctions between disgorgement and forfeiture of compensation).

5. See Charles W. Wolfram, *A Cautionary Tale: Fiduciary Breach as Legal Malpractice*, 34 HOFSTRA L. REV. 689, 695 (2006) (explaining that malpractice claims against lawyers have been asserted almost exclusively in the last three to four decades).

6. See *Burrow*, 997 S.W.2d at 243–44 (“The adequacy-of-other-remedies factor does not preclude forfeiture when a client can be fully compensated by damages. Even though the main purpose of the remedy is not to compensate the client, if other remedies do not afford the client full compensation for his damages, forfeiture may be considered for that purpose.”); see also *Rash v. J.V. Intermediate, Ltd.*, 498 F.3d 1201, 1213 (10th Cir. 2007) (following *Burrow*, in that forfeiture is not limited even if the client can be entirely compensated by damage payments); Deborah A. DeMott, *Causation in the Fiduciary Realm*, 91 B.U. L. REV. 851, 852 (2011) (“Additionally, a distinctive variety of dualism permeates both the substance of fiduciary liability and the available remedies. That is, a disloyal fiduciary, subject to liability for harm caused to the beneficiary, must also disgorge benefits obtained or derived from the disloyal conduct.”).

7. See *infra* Section VIII for a discussion on the no-fracturing rule.

preempt claims for breach of fiduciary duty. To survive a motion for summary judgment, the plaintiff must now substantiate an intentional breach. Even in cases in which the breach of duty claim is not preempted, the claimant must establish evidence of an improper benefit other than the lawyer's fees, even when only the fees are at issue.

A schism in the substantive law for fiduciary claims is developing between lawyer and non-lawyer fiduciaries as a result of the three new rules, despite the supreme court's explicit assertion in *Burrow* that standards for all fiduciaries should be the same.⁸ This schism in substantive law has resulted in a substantial disparity in the outcome of claims for breach of fiduciary duty between lawyer and non-lawyer fiduciaries.⁹

This article evaluates the conflict between the Texas Supreme Court and courts of appeals by examining Texas precedent relating to non-lawyer fiduciaries. Neither side of the dispute acknowledges the context of Texas law in equity into which *Burrow* was dropped. The schism in substantive law is due to the court's failure to adequately distinguish between disgorgement of a secret profit that itself breaches fiduciary duty and disgorgement of agreed compensation to remedy a separate breach of duty. The schism is also the result of the refusal of some courts to accept that a claim for restitution of fiduciary compensation by itself can constitute an independent cause of action. The article will also show that by considering the law in equity more broadly, claimants can improve their litigation by considering alternative remedies in equity, or by specifically pleading for jurisdiction in equity for fee forfeiture based on the inability to measure actual damages.

Section II compares the applicability of disgorgement and forfeiture by listing the precedents that support various combinations of relief for

8. See *Burrow*, 997 S.W.2d at 242–43 (“The rule is not dependent on the nature of the attorney-client relationship, as the court of appeals thought, but applies generally in agency relationships.”). In the opinion, the Court footnoted and quoted the appellate opinion in disapproval. See *Arce v. Burrow*, 958 S.W.2d 239, 249 (Tex. App.—Houston [14th Dist.] 1997) (“Thus, we find a distinction, for purposes of the potential amount of forfeiture, between the typical agency relationship and the attorney-client relationship.”), *aff'd in part, rev'd in part on other grounds*, 997 S.W.2d 229 (Tex. 1999). The Fifth Circuit denies the assertion that *Burrow* applies to all fiduciaries. See *Always at Mkt. Inc. v. Girardi*, 365 F. App'x 603, 605 (5th Cir. 2010).

9. A summary of existing case law for the last twenty-five years, based on 741 appellate opinions, suggests that the disparity in rates of summary judgment and liability is growing between the two groups. For the period of 2008 through 2012, lawyer fiduciaries and non-lawyer fiduciaries were granted (and affirmed) summary judgment in 62% and 32% of their respective cases, and those defendants were found liable in 8.5% and 21.1% after appeal, respectively.

breach. Section III summarizes the review of a large sample of appellate opinions, which suggests that the rate of granting summary judgment is much higher for lawyer defendants than for non-lawyers. Section IV reviews the basic principles for remedies at law and remedies in equity for breach of fiduciary duty against non-lawyers. Section V examines the principles of causation for remedies in equity—however minimal—to identify the actual causation standards. Section VI compares causation issues and suggests alternative remedies for seven groups of claims relating to non-lawyer fiduciaries to highlight the varying causation standards for various damage and benefit scenarios. Section VII analyzes *Burrow* and *ERI Consulting Engineers, Inc. v. Swinnea*,¹⁰ the Texas Supreme Court's initial opinions on fee forfeiture and asset forfeiture, highlighting the changes from Texas precedent. Some readers might find it useful to review this section out of order to gain familiarity with fee forfeiture. Section VIII traces the development of the fracturing rule and criticizes how applications of the rule contradict prior Texas law and minimize *Burrow*. Section IX addresses the improper benefit and third-party fee rules from the same perspective. Section X explains that the law in equity has long encouraged opportunistic lawyers to seek alternative remedies in equity for their clients and may offer other remedies more effective than fee forfeiture.

Sometimes it is just as important to identify related topics that are not addressed in an article. This is not an article on malpractice except that the article suggests that the Texas courts of appeals have overreacted to the surge in claims against lawyer fiduciaries. Remedies at law for breach of fiduciary duty are addressed, but mainly in comparison to remedies in equity. Finally, while the data samples were summarized, they were not analyzed or tested for statistical significance. The discussion of such statistical analysis would distract from the article's focus on substantive law. As a result, the statistical results should be considered preliminary and at best support suggestions rather than conclusions.

SECTION II. DISGORGEMENT VS. FORFEITURE AND OTHER SEMANTIC DISTINCTIONS

Much of the disparity and confusion that prevails in Texas case opinions is founded on the courts' failure to distinguish between

10. *ERI Consulting Eng'rs, Inc. v. Swinnea*, 318 S.W.3d 867 (Tex. 2010).

disgorgement of secret profit and forfeiture of agreed compensation. In *Burrow*, the supreme court failed to recognize the difference between *Kinzbach Tool Co. v. Corbett-Wallace Corp.*¹¹ and *Burrow*.¹² Similarly, Texas courts of appeals regularly misapply disgorgement standards to forfeiture cases.¹³ The distinction can best be revealed by listing the Texas precedents that support the alternative roles possible for either remedy.¹⁴ Furthermore, this analysis demonstrates that actual damages and restitution of fiduciary compensation are not necessarily mutually exclusive.

When a fiduciary breaches her fiduciary duty, the following six combinations of remedies have been supported or awarded to the principal:¹⁵

(A) Damages at law (which includes a defense or counterclaim to a claim for payment from the fiduciary¹⁶);¹⁷

11. *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 138 Tex. 565, 160 S.W.2d 509 (1942).

12. See Charles Silver, *A Critique of Burrow v. Arce*, 26 WM. & MARY ENVTL. L. & POL'Y REV. 323, 333 (2001) ("In *Burrow*, there was no allegation that the attorney-defendants received secret commissions in return for settling the plaintiffs' personal injury claims. The *Burrow* plaintiffs sought to recover fees they paid the attorney-defendants themselves. *Kinzbach Tool* had nothing to say about this fee recoupment claim. *Kinzbach Tool Company* neither sought to recover a dime that it paid Turner in fees nor was awarded a fee recovery. Consequently, *Kinzbach Tool* could not have determined the outcome in *Burrow*.").

13. See *infra* note 50 and accompanying text.

14. Note that all cases in the groups of precedents support the remedy or combination of remedies in this section; contrary appellate opinions are discussed in Sections VIII and IX. Most of the precedents listed are for non-lawyer fiduciaries because practically all of the precedents in Texas before the early 1990s relate to non-lawyer fiduciaries. As shown in Table A of Section III, claims against lawyers for malpractice or breach of fiduciary duty have largely arisen in the last twenty-five to thirty-five years. See Charles W. Wolfram, *A Cautionary Tale: Fiduciary Breach as Legal Malpractice*, 34 HOFSTRA L. REV. 689, 695 (2006) (recognizing the startling increase in legal malpractice claims).

15. For convenience, the roles of client, principal, or beneficiary are generalized as 'principal' to designate the party on whose behalf the fiduciary is acting. For the purposes of this article, fiduciaries are designated as lawyer fiduciaries only if the claim relates to claims between lawyers and their clients over legal services. Disputes between two law partners or between an associate and her firm are considered non-lawyer claims. The term 'restitution' in the law in equity does not imply compensation or a remedy intended to restore the plaintiff to her original position. The *Restatement (First) of the Law of Restitution* in 1937 was a landmark work of legal research and synthesis but its introduction of 'restitution' was singularly ill-chosen for the mistaken connotations of compensating damages. In this article, 'restitution' is employed as a generic terms for a group of remedies in equity, especially fee forfeiture or disgorgement. The term 'counter-restitution' is intended to include the right of the defendant fiduciary to attempt to reduce a monetary remedy in equity by proving that some of the revenues identified by the claimant should be apportioned (or excluded) or offset by expenditures that were reasonable and created or maintained value for the claimant or her assets.

16. See *Rash v. J.V. Intermediate, Ltd.*, 498 F.3d 1201, 1212 (10th Cir. 2007) ("In *Burrow v. Arce*,

(B) A combination of damages at law for the principal's losses plus a remedy

the Texas Supreme Court describes forfeiture as a 'defense of an agent's claim for compensation.' Forfeiture is based on the concept that '[a]n agent is entitled to no compensation for a service which constitutes a violation of his duties of obedience.'" (citations omitted); Cent. Tex. Orthopedic Prods. v. Espinoza, No. 04-09-00148-CV, 2009 Tex. App. LEXIS 9355, at *15 (Tex. App.—San Antonio Dec. 9, 2009, pet. denied) (mem. op.) (reversing summary judgment as employee's alleged breach of confidentiality could preclude compensation); Ray v. T.D., No. 03-06-00242-CV, 2008 Tex. App. LEXIS 986, at *16 (Tex. App.—Austin Feb. 7, 2008, no pet.) (mem. op.) (upholding the denial of a lawyer's fee for undisclosed conflict); Robles v. Consol. Graphics, Inc., 965 S.W.2d 552, 556–57 (Tex. App.—Houston [14th Dist.] 1997, no pet.) (affirming that undisclosed commissions from both parties made the contract illegal and unenforceable); S. Cross Indus., Inc. v. Martin, 604 S.W.2d 290, 293 (Tex. Civ. App.—San Antonio 1980, writ ref'd n.r.e.) (holding that an agent's failure to disclose key information was a breach and precluded compensation); Bute v. Stickney, 160 S.W.2d 302, 305 (Tex. Civ. App.—San Antonio 1942, writ ref'd w.o.m.) (affirming the denial of commission to conflicted agent); Bryant v. Lewis, 27 S.W.2d 604, 608 (Tex. Civ. App.—Austin 1930, writ dism'd) (affirming that unintentional conflict precludes any legal fees).

17. See Johnson v. Peckham, 132 Tex. 148, 120 S.W.2d 786, 787 (1938) (holding that a transaction between agent and principal can only be ratified after the agent makes full disclosure); Parsons v. Greenberg, No. 02-10-00131-CV, 2012 Tex. App. LEXIS 888, at *12–13 (Tex. App.—Fort Worth Feb. 2, 2012, pet. denied) (mem. op.) ("Parsons was therefore required to prove what amount he paid to Greenberg and Motsenbocker that he would not have had to pay but for Greenberg's negligence. 'Causation must be proved, and conjecture, guess, or speculation will not suffice as that proof.'" (quoting Akin, Gump, Strauss, Hauer & Feld, LLP v. Nat'l Dev. & Research Corp., 299 S.W.3d 106, 122 (Tex. 2009))); Kormanik v. Seghers, 362 S.W.3d 679, 684, 688–89 (Tex. App.—Houston [14th Dist.] 2011, pet. denied) (affirming judgment against lawyers for effectively full refund of fees paid based on the jury finding that "[t]he sum of \$130,000, if paid now in cash, would fairly and reasonably compensate Seghers for his damages, if any, that were proximately caused by Kormanik's breach of fiduciary duty"); SJW Prop. Commerce, Inc. v. Sw. Pinnacle Props., Inc., 328 S.W.3d 121, 154 (Tex. App.—Corpus Christi 2010, pet. denied) (awarding lost profits on real estate transaction); Norwood v. Norwood, No. 2-07-244-CV, 2008 Tex. App. LEXIS 8673, at *26–27 (Tex. App.—Fort Worth Nov. 13, 2008, no pet.) (mem. op.) (affirming the award of 100% of lost value as actual damages for conversion); Dunnagan v. Watson, 204 S.W.3d 30, 47 (Tex. App.—Fort Worth 2006, pet. denied) (permitting trial court's award of actual damages for self-dealing); McGrede v. Coursey, 131 S.W.3d 189, 193 (Tex. App.—San Antonio 2004, no pet.) (allowing the award of actual damages and exemplary damages for conversion); Anickwu v. Daniels, No. 03-01-00697-CV, 2002 Tex. App. LEXIS 7541, at *24–25 (Tex. App.—Austin Oct. 24, 2002, no pet.) (not designated for publication) (upholding award of expectancy damages and exemplary damages for fraud); Whiteside v. Hartung, No. 14-97-00111-CV, 1999 Tex. App. LEXIS 5584, at *12 (Tex. App.—Houston [14th Dist.] July 29, 1999, pet. denied) (not designated for publication) ("In addition, recovery of fees paid to an attorney may be appropriate when his or her negligence rendered the services of no value."); Crowder v. Meyer, No. 01-98-00105-CV, 1999 Tex. App. LEXIS 890, at *9–10 (Tex. App.—Houston [1st Dist.] Feb. 11, 1999, no pet.) (not designated for publication) (affirming actual damages for negligent breach of fiduciary duty); Wilson v. Donze, 692 S.W.2d 734, 740 (Tex. App.—Fort Worth 1985, no writ) (approving of damages against real estate broker for 100% of the resale profit or an excessive commission or resale profit received from third party); Watson v. Ltd. Partners of WCKT, 570 S.W.2d 179, 182 (Tex. Civ. App.—Austin 1978, writ ref'd n.r.e.) (confirming award of full restitution for waste and negligence as a claim for money had and received).

in equity to reverse the fiduciary's gains;¹⁸

(C) A combination of damages at law plus disgorgement or forfeiture of the fiduciary's compensation;¹⁹

18. See *Geo-Goldenrod #2 #3 & #4 Joint Venture v. Rose (In re Thuringia, LLC)*, No. 09-34555-HDH-11, 2010 Bankr. LEXIS 2820, at *6 (Bankr. N.D. Tex. Aug. 25, 2010) (creating a constructive trust for an overriding royalty interest and actual damages in a claim for conversion); *ERI Consulting Eng'rs, Inc. v. Swinnea*, 318 S.W.3d 867, 882 (Tex. 2010) (reversing the appellate court and holding that asset forfeiture can be awarded in addition to actual and exemplary damages); *Manges v. Guerra*, 673 S.W.2d 180, 181 (Tex. 1984) (upholding the award of actual and exemplary damages as well as cancelling a self-dealing lease); *Houston v. Ludwick*, No. 14-09-00600-CV, 2010 Tex. App. LEXIS 8415, at *8 (Tex. App.—Houston [14th Dist.] Oct. 21, 2010, pet. denied) (mem. op.) (awarding rescission for two properties and actual damages for two properties that the lawyer purchased for inadequate consideration and in conflict with his representation); *Murphy v. Am. Rice, Inc.*, No. 01-03-01357-CV, 2007 Tex. App. LEXIS 2031, at *34 (Tex. App.—Houston [1st Dist.] Mar. 9, 2007, no pet.) (mem. op.) (granting declarative relief and actual damages for fraud); *Robertson v. ADJ P'ship*, 204 S.W.3d 484, 494 (Tex. App.—Beaumont 2006, pet. denied) (affirming the award of actual damages and specific restitution of the overriding royalty interest); *Bright v. Addison*, 171 S.W.3d 588, 601-03 (Tex. App.—Dallas 2005, pet. denied) (allowing actual damages and a constructive trust plus exemplary damages); *Acevedo v. Stiles*, No. 04-02-00077-CV, 2003 Tex. App. LEXIS 3854, at *3 (Tex. App.—San Antonio May 7, 2003, pet. denied) (mem. op.) (opining that the awards of rescission and damages are essential to accomplish full justice against lawyers); *Leavens v. Envtl. Control Sys. Corp.*, 1998 Tex. App. LEXIS 89, at *1 (Tex. App.—Houston [1st Dist.] Jan. 8, 1998, pet. denied) (not designated for publication) (affirming the award of specific restitution and lost profits).

19. See *Rash*, 498 F.3d at 1213 (“Finally, Rash contends that forfeiture is not an available remedy since JVIC sought actual damages and was adequately compensated. *Burrow* specifically forecloses this line of reasoning. “The adequacy-of-other-remedies factor does not preclude forfeiture when a client can be fully compensated by damages.”); *Akin, Gump, Strauss, Hauer & Feld, LLP v. Nat'l Dev. & Research Corp.*, 299 S.W.3d 106, 121 (Tex. 2009) (“If an attorney has breached his or her fiduciary duty to a client, then part or all of the fees the client paid may be recovered through disgorgement and forfeiture But because attorney's fees in an underlying case may be subject to forfeiture for breach of fiduciary duty, it does not follow that fees and expenses paid to attorneys who negligently try a suit should not be recoverable as compensatory damages in a second suit for malpractice.” (citations omitted)); *Murphy-Bolanz Land & Loan Co. v. McKibben*, 236 S.W. 78, 80-82 (Tex. Comm'n App. 1922, judgm't adopted) (affirming the award of damages and disgorgement of 100% of the commission paid by a third party for making an improper investment); *W. Reserve Life Assurance Co. of Ohio v. Graben*, 233 S.W.3d 360, 368 (Tex. App.—Fort Worth 2007, no pet.) (approving award of lost profits as actual damages and disgorgement of 100% of the commissions from a third party); *Fortson v. Asaf*, No. 01-00-00542-CV, 2001 Tex. App. LEXIS 6365, at *4 (Tex. App.—Houston [1st Dist.] Aug. 31, 2001, pet. denied) (not designated for publication) (awarding actual damages, forfeiture and exemplary damages against the lawyer); see also *Tatum v. Preston Carter Co.*, 702 S.W.2d 186, 187 (Tex. 1986) (disgorging 100% of a commission from a third party from agent that usurped principal's opportunity); *Douglas v. Aztec Petrol. Corp.*, 695 S.W.2d 312, 316-17 (Tex. App.—Tyler 1985, no writ) (supporting award of actual damages, 90% exemplary damages and denial of compensation of mineral interest). But see *Always at Mkt. Inc. v. Girardi*, 365 F. App'x 603, 611-14 (5th Cir. 2010) (affirming damages for secret profits but denying forfeiture for any non-lawyer).

(D) A remedy in equity to reverse the unjust enrichment;²⁰

(E) A remedy in equity to reverse the unjust enrichment that includes disgorgement of the fiduciary's compensation;²¹ or

20. *See* *Wilz v. Flournoy*, 228 S.W.3d 674, 676–77 (Tex. 2007) (holding that the defendant failed to disprove the plaintiff's tracing analysis for 100% of the assets in the constructive trust); *Johnson v. Brewer & Pritchard, PC*, 73 S.W.3d 193, 202 (Tex. 2002) (finding that an employee's wrongful receipt of a fee or compensation from a third party without the employer's consent must all be disgorged); *Fort Worth v. Pippen*, 439 S.W.2d 660, 663–65 (Tex. 1969) (awarding disgorgement of 100% of defendants' gross benefit due to their failure to prove counter-restitution); *Schiller v. Elick*, 150 Tex. 363, 240 S.W.2d 997, 998 (1951) (creating a constructive trust for the secret profit of a mineral interest); *Haut v. Green Café Mgmt., Inc.*, 376 S.W.3d 171, 183 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (“In his fifth issue, Haut contends the equitable remedy of forfeiture of his interests in the two companies is inappropriate as a matter of law because Haut paid \$100 for his interest in Alabama Green and \$300 for his stock in GCM and because forfeiture is only applied in exceptional circumstances.”); *Allen v. Devon Energy Holdings, LLC*, 367 S.W.3d 355, 410–11 (Tex. App.—Houston [1st Dist.] 2012) (reversing the trial court and stating that disgorgement could establish actual damages), *pet. granted and judgment vacated by agr.*, 2013 Tex. LEXIS 20 (Tex. Jan. 11, 2013); *In re Estate of Preston*, 346 S.W.3d 137, 169–70 (Tex. App.—Fort Worth 2011, no pet.) (upholding the award of specific restitution for conversion); *LJ Charter, LLC v. Air Am. Jet Charter, Inc.*, No. 14-08-00534-CV, 2009 Tex. App. LEXIS 9469, at *25 (Tex. App.—Houston [14th Dist.] Dec. 15, 2009, *pet. denied*) (mem. op.) (affirming the award of 100% of future unjust enrichment for breach of fiduciary duty); *Yeckel v. Abbott*, No. 03-04-00713-CV, 2009 Tex. App. LEXIS 3881, at *20–21 (Tex. App.—Austin June 4, 2009, *pet. denied*) (mem. op.) (disgorging 100% of the excess compensation and expenses based on public policy); *Donaho v. Bennett*, No. 01-08-00492-CV, 2008 Tex. App. LEXIS 8783, at *10 (Tex. App.—Houston [1st Dist.] Nov. 20, 2008, no pet.) (mem. op.) (providing injunctive relief for breach of fiduciary duty); *Paschal v. Great W. Drilling, Ltd.*, 215 S.W.3d 437, 445 (Tex. App.—Eastland 2006, *pet. denied*) (explaining how the tracing element in constructive trust can allow a plaintiff to seek the proceeds of converted assets); *Daniel v. Falcon Interest Realty Corp.*, 190 S.W.3d 177, 182–83 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (affirming the disgorgement of 100% of the net secret profit of an employee in breach); *Devji v. Keller*, No. 03-02-00754-CV, 2003 Tex. App. LEXIS 6322, at *42 (Tex. App.—Austin July 24, 2003, *pet. denied*) (mem. op.) (affirming the trial court's award of a constructive trust and equitable lien on the defendant's shares); *Lesikar v. Rappoport*, 33 S.W.3d 282, 310 (Tex. App.—Texarkana 2000, *pet. denied*) (holding that under the remedy of constructive trust plaintiffs are entitled to proceeds of converted asset); *Grupo v. Garcia*, 1999 Tex. App. LEXIS 5845, at *30 (Tex. App.—Corpus Christi Aug. 5, 1999, *pet. denied*) (not designated for publication) (stating that the sale to a third party was so far below market value as to indicate fraud and warrant rescission from third party).

21. *See* *Crites, Inc. v. Prudential Ins. Co.*, 322 U.S. 408, 416–18 (1944) (affirming the disgorgement of 100% of the secret profits from the lawyer fiduciaries and the denial of payment for any additional compensation); *Int'l Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567, 577 (Tex. 1963) (affirming disgorgement of 100% of the directors' secret profits and the denial of any offsetting compensation); *McCord v. Nabours*, 101 Tex. 494, 109 S.W. 913, 917 (1908) (explaining that the rescission of the transaction should provide for return of the purchase price, offsetting credit for permanent improvements and, normally, disgorgement of the commission which was not proven in this case); *Armstrong v. O'Brien*, 83 Tex. 635, 19 S.W. 268, 273 (1892) (affirming the disgorgement of profit and denial of commission to agent for fraud); *McGuire v. Kelley*, 41 S.W.3d 679, 681 (Tex. App.—Texarkana 2001, no pet.) (finding against the lawyer fiduciary on breach of contract, breach of fiduciary duty, and fraud claims); *Murphy v. Canion*, 797 S.W.2d 944, 945 (Tex.

(F) A remedy in equity for the principal to obtain or recoup some or all of the contractual compensation gained by the fiduciary.²²

Therefore forfeiture of fiduciary compensation has been awarded or supported in Groups A, C, and F; disgorgement of fiduciary profit has been awarded or supported in groups D and E; and disgorgement of compensation has been awarded or supported in groups C, E and F.

App.—Houston [14th Dist.] 1990, no writ) (holding that the award for constructive trust should not provide any credit for fiduciary compensation); *Chien v. Chen*, 759 S.W.2d 484, 489 (Tex. App.—Austin 1988, no writ) (reversing summary judgment and holding that the question of fact warrants a jury trial on the fraud claim for secret profit and third-party commission); *Anderson v. Griffith*, 501 S.W.2d 695, 701 (Tex. Civ. App.—Fort Worth 1973, writ ref'd n.r.e) (stating that agent in breach must forfeit compensation and account to principal); *Burleson v. Earnest*, 153 S.W.2d 869, 873 (Tex. Civ. App.—Amarillo 1941, writ ref'd w.o.m.) (allowing rescission of a fraudulent transaction including 100% of the agent's paid fee as an interim benefit); *Stein v. Sims*, 283 S.W. 319, 322 (Tex. Civ. App.—Amarillo 1926, no writ) (affirming an order for disgorgement and citing five cases “in which it has been held that the agent not only forfeits all compensation for his services, but that his principal, upon discovery of fraud, may recover the secret profits and compensation paid to him”); *see also Hahl v. Kellogg*, 94 S.W. 389, 391 (San Antonio 1906, writ ref'd) (approving an order to disgorge commission as well as secret profit).

22. *See Burrow v. Arce*, 997 S.W.2d 229, 232–34 (Tex. 1999) (remanding summary judgment for consideration of actual damages for legal malpractice and fee forfeiture for breach of fiduciary duty); *Onyung v. Onyung*, No. 01-10-00519-CV, 2013 WL 3875548, at *19 (Tex. App.—Houston [1st Dist.] July 25, 2013, pet. denied) (mem. op.) (“Her testimony establishes that she had an attorney–client relationship with Yuen and that he failed to perform the services that he agreed to perform. She testified that she and her husband paid Yuen \$7,500 for his promised legal services and that they had previously been informed that Yuen’s fee for such services would be \$15,000. Separate and apart from the award of fraud damages, Mrs. Onyung was compensated for the attorney’s fees that she paid by way of the award of a disgorgement of Yuen’s fees. She is not entitled to recover the same element of damages twice.”); *Deutsch v. Hoover, Bax & Slovacek, LLP*, 97 S.W.3d 179, 205 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (Bristler, C.J., concurring and dissenting) (upholding arbitrator’s award of fee forfeiture—approximately 70%—to offset the law firm’s claim for unpaid fees); *Piro v. Sarofim*, 2002 Tex. App. LEXIS 2656, at *20 (Tex. App.—Houston [1st Dist.] Apr. 11, 2002, no pet.) (not designated for publication) (affirming the order to forfeit 100% of the \$3 million of fees or \$3 million of actual damages for fraudulent billing and other breaches), *vacated and appeal dismissed*, 80 S.W.3d 717 (Tex. App.—Houston [1st Dist.] Apr. 11, 2002) (not designated for publication); *Rush v. Barrios*, 56 S.W.3d 88, 93 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (agreeing with the trial court’s order to forfeit \$77,000 of the original fee of \$111,000 from a third party for breach of fiduciary duty); *Spera v. Fleming, Hovenkamp & Grayson, PC*, 25 S.W.3d 863, 873 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (reversing and remanding only with regard to the claim for fee forfeiture); *Jackson Law Office, PC v. Chappell*, 37 S.W.3d 15, 22 (Tex. App.—Tyler 2000, pet. denied) (affirming a fee forfeiture of 12.5% of the lawyers’ fees on a jury’s finding of breach of fiduciary duty); *Marist College v. Nicklin*, No. 01-94-00849-CV, 1995 Tex. App. LEXIS 871, at *5 (Tex. App.—Houston [1st Dist.] Apr. 27, 1995, writ denied) (not designated for publication) (declaring the disgorgement of 100% of the commissions paid by a third party and for the defendant to adequately account to the principal for all he received in breach of fiduciary duty).

Group A includes *Watson v. Limited Partners of WCKT*,²³ which affirmed a claim for money had and received rather than a remedy in equity.²⁴ Also note the unusual case of *Kormanik v. Seghers*,²⁵ in which the client recovered all fees paid as actual damages for breach of fiduciary duty, seemingly without expert testimony, based on the lawyer fiduciary's inability to prove the fairness of the representation agreement. There is substantial precedent in Group B for the principle that remedies at law and in equity can be combined when circumstances require such relief, even without seeking to disgorge the fiduciary's compensation.²⁶ In Group C, the principal was awarded actual damages for the breach in addition to disgorgement or forfeiture of the fiduciary's fee. In three cases, *McGuire v. Kelley*,²⁷ *Fortson v. Asaf*,²⁸ and *Douglas v. Aztec Petroleum Corp.*,²⁹ the client's lawyer achieved a "hat trick": the client was awarded actual damages, forfeiture of compensation and punitive damages.³⁰ Group D includes

23. *Watson v. Ltd. Partners of WCKT*, 570 S.W.2d 179 (Tex. Civ. App.—Austin 1978, writ ref'd n.r.e.).

24. *See id.* at 182 (awarding reimbursement based on a claim for money had and received).

25. *Kormanik v. Seghers*, 362 S.W.3d 679 (Tex. App.—Houston [14th Dist.] 2011, no pet.).

26. *See Italian Cowboy Partners, Ltd. v. Prudential Ins. Co.*, 341 S.W.3d 323, 345 (Tex. 2011) ("Rescission is an equitable remedy and, as a general rule, the measure of damage is the return of the consideration paid, together with such further special damage or expense as may have been reasonably incurred by the party wronged on account of the contract." (quoting *Smith v. Nat'l Resort Cmty., Inc.*, 585 S.W.2d 655, 660 (Tex. 1979))); *Acevedo v. Stiles*, No. 04-02-00077-CV, 2003 Tex. App. LEXIS 3854, at *3 (Tex. App.—San Antonio May 7, 2003, pet. denied) (mem. op.) ("If both rescission and damages are essential to accomplish full justice, they may both be awarded.").

27. *McGuire v. Kelley*, 41 S.W.3d 679 (Tex. App.—Texarkana 2001, no pet.).

28. *Fortson v. Asaf*, No. 01-99-00542-CV, 2001 Tex. App. LEXIS 6365 (Tex. App.—Houston [1st Dist.] Aug. 31, 2001, pet. denied) (not designated for publication).

29. *Douglas v. Aztec Petrol. Corp.*, 695 S.W.2d 312 (Tex. App.—Tyler 1985, no writ).

30. *See McGuire*, 41 S.W.3d at 681 ("The jury found in Kelley's favor on her breach of contract, breach of fiduciary duty, and fraud claims. Additionally, the jury found that McGuire received a \$47,000.00 benefit from the settlement he negotiated on Kelley's behalf, that McGuire failed to pay Kelley \$17,000.00 in settlement money, that Kelley suffered mental anguish damages of \$3,000.00, that McGuire should pay \$8,000.00 as exemplary damages, and that Kelley should be awarded attorney's fees."); *Fortson*, 2001 Tex. App. LEXIS 6365, at *4 ("The case was tried in December 1998. In the court's charge to the jury, questions were submitted only against appellant and Withem individually and only on the issues of breach of contract and breach of fiduciary duty. Appellant made no objections to the court's charge. The jury found that (1) both appellant and Withem entered into an agreement with appellees to provide legal services for which appellees would pay on a pro rata basis; (2) appellant and Withem failed to comply with the agreement; (3) appellees were damaged in the total amount of \$39,750; (4) appellant breached a fiduciary duty to appellees; (5) each appellee should be compensated \$4,500 for appellant's breach; (6) appellant acted with intent to gain an additional benefit and should be assessed \$200,000 in exemplary damages . . ."); *Douglas*, 695 S.W.2d at 315 (affirming award of actual damages, 90% exemplary damages and denial of compensation of mineral interest).

cases in which remedies in equity (other than forfeiture) are awarded to remove the profit or benefit gained by the fiduciary from her breach, including avoidance, rescission, constructive trust, and disgorgement. This group includes cases like *Kinzbach* and *Johnson v. Brewer & Pritchard, PC*³¹ that supported total disgorgement of secret profit, which was the source of liability for the breach.³² Group E is similar to Group D except that the profit or benefit gained by the fiduciary includes fee recoupment that is included in disgorgement, constructive trust, or rescission. Group F includes case opinions that support an order to forfeit or disgorge agreed fiduciary compensation because of a breach of fiduciary duty otherwise unrelated to the fees. This includes *Burrow*, which related to a claim for a fiduciary's compensation that was contracted and the receipt of which by itself did not constitute a breach of fiduciary duty.³³ It also includes

31. *Johnson v. Brewer & Pritchard, PC*, 73 S.W.3d 193 (Tex. 2002).

32. *See id.* at 200 (“In virtually all of the cases that we have found in which an agent diverted an opportunity from the principal or engaged in competition with the principal, the agent or an entity controlled by the agent profited or benefitted in some way. That was the situation in *Kinzbach Tool* We held that the agent had a fiduciary duty to disclose this arrangement in its entirety and to disgorge any compensation he received from the seller, even though the principal was willing to pay the full price desired by the seller”); *Slay v. Burnett Trust*, 143 Tex. 621, 187 S.W.2d 377, 388 (1945) (reinforcing the rules governing the conduct between the parties involved in a fiduciary relationship); *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 138 Tex. 565, 160 S.W.2d 509, 514 (1942) (“It is the law that in such instances if the fiduciary ‘takes any gift, gratuity, or benefit in violation of his duty, or acquires any interest adverse to his principal, without a full disclosure, it is a betrayal of his trust and a breach of confidence, and he must account to his principal for all he has received.’” (quoting *United States v. Carter*, 217 U.S. 286, 306 (1910))); *see also Crites, Inc. v. Prudential Ins. Co.*, 322 U.S. 408, 416–17 (1944) (finding that the lawyer fiduciary's profit must be disgorged and that the lawyer's fee, subject to the court's discretion, should be denied); *Magruder v. Drury*, 235 U.S. 106, 119–20 (1914) (“It is a well settled rule that a trustee can make no profit out of his trust. The rule in such cases springs from his duty to protect the interests of the estate, and not to permit his personal interest to in any wise conflict with his duty in that respect. The intention is to provide against any possible selfish interest exercising an influence which can interfere with the faithful discharge of the duty which is owing in a fiduciary capacity.”). *But see Friedman, Clark & Shapiro, Inc. v. Greenberg, Grant & Richards, Inc.*, No. 14-99-01218-CV, 2001 Tex. App. LEXIS 6525, at *20–24 (Tex. App.—Houston [14th Dist.] Sept. 27, 2001, pet. denied) (not designated for publication) (accepting claimant's evidence that damages could be measured as defendant's revenues of \$865,408 or claimant's lost revenue of \$950,374, even though there was no evidence or testimony in opposition to this evidence); *Hettich v. Pruitt*, No. 05-93-00951-CV, 1994 Tex. App. LEXIS 3964, at *36 (Tex. App.—Dallas Aug. 3, 1994, no writ) (not designated for publication) (finding that a fiduciary duty arose with the confidential relationship that was formed).

33. *See Burrow v. Arce*, 997 S.W.2d 229, 239–40 (Tex. 1999) (“An attorney's compensation is for loyalty as well as services, and his failure to provide either impairs his right to compensation.”); *Russell v. Truitt*, 554 S.W.2d 948, 952 (Tex. Civ. App.—Fort Worth 1977, writ ref'd n.r.e.) (“Here the plaintiffs pled as a breach of fiduciary duty the alleged secret agreement and sought recovery of the \$500.00 monthly payments made to Defendant Russell Company for acting as their agent pursuant to

Russell v. Truitt,³⁴ which is an interesting example because the opinion affirmed the fee forfeiture despite the fact that the jury found that the fiduciary gained no advantage.³⁵

Burrow mistakenly claimed *Kinzbach* as a supporting precedent for forfeiture³⁶ and especially for the new graduated measurement of the remedy.³⁷ This claim was later contradicted in *Johnson v. Brewer & Pritchard*, which confirmed that the holding in *Kinzbach* required disgorgement of any profit or compensation.³⁸

Since *Akin, Gump, Strauss, Hauer & Feld, LLP v. National Development & Research Corp.*,³⁹ the Court has acknowledged that disgorgement and forfeiture co-exist as remedies for breach of fiduciary duty.⁴⁰ Recently,

written contract.”); *Anderson v. Griffith*, 501 S.W.2d 695, 701 (Tex. Civ. App.—Fort Worth 1973, writ ref’d n.r.e.) (involving a situation where a real estate agent received compensation prior to the breach of fiduciary duty).

34. *Russell v. Truitt*, 554 S.W.2d 948 (Tex. Civ. App.—Fort Worth 1977, writ ref’d n.r.e.).

35. Note, however, that the jury also awarded exemplary damages of \$55,000, perhaps suggesting that both the trial judge and the jury were influenced by the plaintiff’s large loss. *See id.* at 954 (“However, there is no dispute that an \$8,000.00 management fee was paid to Defendant Russell Company, the agent for the joint venturers. The jury’s finding that defendants received no monetary advantage does not render the \$8,000.00 award improper here. Nor was any special issue necessary to support the award because there was no dispute as to the amount of the agency fees.”). *But see* Charles Silver, *A Critique of Burrow v. Arce*, 26 WM. & MARY ENVTL. L. & POL’Y REV. 323, 337 (2001) (“Given the significant financial loss in *Russell*, any statement regarding fee recovery in the absence of harm can only have been dictum, not holding.”).

36. *See Burrow*, 997 S.W.2d at 238 (“In the one case in which we have considered the subject, *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, this Court held that an agent was required to forfeit a secret commission received from a conflicting interest even though the principal was unharmed.”). *But see* Charles Silver, *A Critique of Burrow v. Arce*, 26 WM. & MARY ENVTL. L. & POL’Y REV. 323, 333 (2001) (emphasizing the disparities between *Kinzbach* and *Burrow*).

37. *Compare Burrow*, 997 S.W.2d at 240 (“Our holding that his entire compensation was subject to forfeiture cannot fairly be said to require automatic, complete forfeiture of all compensation for any misconduct of an agent.”), *with Kinzbach Tool Co.*, 160 S.W.2d at 514 (holding that the employer, in tendering an offer to make the installment payment, was entitled to offset from the installment payment the ratable portion of the entire bribe, i.e., if the disgorgement were graduated or digital, the full amount would not have been necessarily available for offset.). *See generally* Charles Silver, *A Critique of Burrow v. Arce*, 26 WM. & MARY ENVTL. L. & POL’Y REV. 323, 333 (2001) (explaining why *Kinzbach* was not a reliable precedent for *Burrow*).

38. *See Johnson v. Brewer & Pritchard*, PC, 73 S.W.3d 193, 200–01 (Tex. 2002) (“[In *Kinzbach*, w]e held that the agent had a fiduciary duty to disclose this arrangement in its entirety and to disgorge any compensation he received from the seller, even though the principal was willing to pay the full price” (footnote omitted)).

39. *Akin, Gump, Strauss, Hauer & Feld, LLP v. Nat’l Dev. & Research Corp.*, 299 S.W.3d 106 (Tex. 2009).

40. *See id.* at 121 (“If an attorney has breached his or her fiduciary duty to a client, then part or all of the fees the client paid may be recovered through disgorgement and forfeiture.”).

however, *Swinnea* advised that the court would apply disgorgement to fiduciary profit and forfeiture only to compensation:

Accordingly, courts may fashion equitable remedies such as profit disgorgement and fee forfeiture to remedy a breach of fiduciary duty. For instance, 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 Similarly, even if a fiduciary does not obtain a benefit from a third party by violating his duty, a fiduciary may be required to forfeit the right to compensation for the fiduciary's work.⁴¹

A brief review of some of the key cases reveals substantial confusion between disgorgement of "ill-gotten profit" and forfeiture of agreed compensation. One distinction lies in the difference between secret and agreed compensation, as secret compensation (or secret profit) will generally be disgorged, and agreed compensation can be either disgorged or forfeited as explained in the quote above from *Swinnea*. A second distinction relates to whether the fiduciary's compensation or gain itself is integral to establishing liability for disloyalty or if the compensation sought is to be forfeited because of a breach unrelated to the compensation itself. The forfeiture of fees sought in *Burrow* was based on the lawyer's undisclosed aggregate settlement practices, not the fees themselves.⁴² In *Kinzbach* and *Brewer & Pritchard*, however, the object of the disgorgement was also the source of liability.

Professor Silver's article evidences his continuing interest in the key issues of *Burrow* in which he filed an amicus brief. Highlighting the issue of fee recoupment, his article asserts that there is no Texas precedent to support the plaintiff's claim that fee forfeiture permitted an ex-client to seek recoupment of paid fees.⁴³ While he correctly proved that much of

41. *ERI Consulting Eng'rs, Inc. v. Swinnea*, 318 S.W.3d 867, 873 (Tex. 2010) (citation omitted); see also RESTATEMENT (THIRD) OF AGENCY § 8.01(d)(2) (2006) ("Forfeiture may be the only available remedy when it is difficult to prove that harm to a principal resulted from the agent's breach or when the agent realizes no profit through the breach.").

42. See *Burrow*, 997 S.W.2d at 239–40 ("An attorney's compensation is for loyalty as well as services, and his failure to provide either impairs his right to compensation."); *Russell v. Truitt*, 554 S.W.2d 948, 952 (Tex. Civ. App.—Fort Worth 1977, writ ref'd n.r.e.) (emphasizing that the thrust of the complaint was not the fee collected by the defendant but the alleged secret agreement made between the defendants and a third party); *Anderson v. Griffith*, 501 S.W.2d 695, 696–97 (Tex. Civ. App.—Fort Worth 1973, writ ref'd n.r.e.) (asserting a claim for breach of fiduciary duty due to the lack of disclosure by a real estate broker to the broker's clients).

43. See Charles Silver, *A Critique of Burrow v. Arce*, 26 WM. & MARY ENVTL. L. & POL'Y REV. 323, 325 (2001) (criticizing the reasoning of the court).

Burrow was unsupported by Texas precedent, Professor Silver's assertion on the absence of precedents for recoupment overlooked the cases included in Groups C, E, and F. In addition, disgorgement has been ordered in Texas for fees paid by third parties. Both forms of recoupment are also supported by the *First and Third Restatements of Restitution*.⁴⁴

In the process of measuring disgorgement, there are two types of cases that recoup or deny compensation that are little noticed. In some cases, the court specifically itemizes previously paid compensation, generally transactional fees that must be included in the disgorgement or included as an interim benefit for rescission.⁴⁵ Secondly, in a couple of other cases, the fiduciary has pled for counter-restitution for services that were otherwise of value to the principal. Most requests were denied due to the now outdated principle that disloyal fiduciaries or agents do not warrant any compensation.⁴⁶ Generally, discussion of counter-restitution and offsetting credits in written opinions is rare either because it is regarded as a small detail, or in the case of constructive trusts, counter-restitution is generally resolved in motion practice after the trust is confirmed.⁴⁷

Some may infer from *Swinnea* that claims for a fiduciary's compensation are distinct from claims for a fiduciary's profits, and a fiduciary's compensation should not be included as profit.⁴⁸ In light of precedents that order disgorgement of compensation (Groups C and F) or that

44. See *infra* notes 284 and 285.

45. See *Hahl v. Kellogg*, 94 S.W. 389, 390–91 (San Antonio 1906, writ ref'd) (holding that fraud of fiduciary agent warrants disgorgement of agent's gross resale profit of \$7,500 without offsetting credit for agent's fee of \$1,000 or payments to assistants of \$2,000); see also *Burleson v. Earnest*, 153 S.W.2d 869, 873 (Tex. Civ. App.—Amarillo 1941, writ ref'd w.o.m.) (affirming the accounting for payments and interim benefits in the remedy of rescission to include repayment of the agent's commission).

46. See *Crites, Inc. v. Prudential Ins. Co.*, 322 U.S. 408, 418 (1944) (“The Court below allowed credit to the receivers for the \$250 fees received by Harrison and Ingalls from the court as preliminary compensation and for all out-of-pocket expenses incurred by the two attorneys on behalf of the estate. But all credits were denied for additional attorney fees paid to them.”); *Int'l Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567, 577 (Tex. 1963) (showing approval of a California holding that required disgorgement of the president and director's secret profits without offsetting credit for the value of defendant's services (citing *W. States Life Ins. Co. v. Lockwood*, 135 P. 496, 498 (Cal. 1913))); *Murphy v. Canion*, 797 S.W.2d 944, 945 (Tex. App.—Houston [14th Dist.] 1990, no writ) (holding that an award for constructive trust should not provide credit for the partner's compensation).

47. See *infra* note 128. See generally George P. Roach, *Counter-Restitution for Monetary Remedies in Equity*, 68 WASH. & LEE L. REV. 1271, 1308 (2011) (“As with the motion practice for most constructive trusts, there is no published opinion on whether Snapp's reasonable expenses, if any, were rejected out of public policy or for other reasons.”).

48. See *supra* note 41 and accompanying text.

include compensation as profit and that define profit to include compensation (Group E), there is presently little support for this interpretation.⁴⁹

Claims against non-lawyer fiduciaries are generally made for disgorgement of the fiduciary's unjust enrichment for undisclosed profits, self-dealing, and usurped opportunities (Group D). Disgorgement of the fiduciary's compensation is sometimes sought, but it is less frequently at issue for non-lawyer fiduciaries (Group E). Claims against lawyer fiduciaries are predominately seeking the lawyer's agreed compensation as a form of restitution for the fiduciary's breach unrelated to the compensation itself (Group F). Therefore, when courts require the principal to produce proof of the fiduciary's improper benefit for a plea of fee forfeiture, they are confusing profit disgorgement with fee forfeiture.⁵⁰

SECTION III. STATISTICS ON TEXAS APPELLATE OPINIONS

"Nothing in the caselaw in Texas or elsewhere suggests that opportunistically motivated litigation to forfeit an agent's fee has ever been a serious problem."⁵¹

Subject to the possible sampling bias attendant to relying on a sample of Texas appellate opinions (discussed at the end of this section), a brief summary of the tables below would suggest two observations. The last twenty-five years of litigation on breach of fiduciary duty against lawyer fiduciaries should be divided into three distinct periods. First is the ten years before *Burrow* when activity was low; second is the next five years during which *Burrow* was handed down and during which Texas courts became acclimated to *Burrow* as claims greatly surged; and third is the most recent ten years in which liability against lawyer fiduciaries has largely been minimized despite the increasing number of claims. Second, a comparison of the data, distinguished between lawyer and non-lawyer fiduciaries, suggests that the former have experienced lower rates of liability and higher rates of summary judgment at the trial level as well as moderately higher rates of affirmation for all trial court judgments and especially for summary judgments. Non-lawyer defendants have also experienced a

49. See *infra* note 132.

50. See *supra* notes 12 and 37 and accompanying text. See also Section IX *infra* on applying improper benefit suitable for secret profit to forfeiture claims.

51. See *Burrow v. Arce*, 997 S.W.2d 229, 240 (Tex. 1999) (suggesting that the lack of precedent indicates that opportunistic behavior does not need to be protected against).

favorable trend in liability over the last twenty-five years but seemingly not on the same order of magnitude as the lawyer fiduciaries.⁵²

Three different databases were accumulated. First, all Texas appellate opinions from 1988 through 2012, according to LexisNexis, in which the “core-term” included “fiduciary duty” were collected. These 1309 cases were reviewed for relevance strictly on case summary data included in the sections entitled “Subsequent History,” “Prior History,” “Procedural Posture,” “Overall Summary,” and “Outcome” as compiled by LexisNexis. After 568 cases were excluded, the database consists of 741 cases.

A second database was compiled as a result of the substantive research in Texas case opinions for the article, which accumulated 241 Texas appellate opinions on breach of fiduciary duty against lawyer fiduciaries handed down between 1988 and 2012. They were accumulated subjectively and were reviewed as full case opinions.⁵³

Based on a third series of searches, Table A shows the build-up of malpractice claims in Texas over the last thirty-five years and the increasing percentage of “legal malpractice” opinions that include “fiduciary duty.”⁵⁴ While the inclusion of “legal malpractice” in a summary of core terms does not necessarily establish a legal malpractice case, these unsophisticated searches have the advantage of being objective: comparisons of period to period data are not tainted by subjective evaluations of which case opinions sufficiently relate to legal malpractice. Whether the headcount is based on cases that used both terms as “core terms” or on cases that merely mentioned both terms in the body of the

52. For reference, it is generally acknowledged that the number of civil trials in Texas has decreased by 50% over the last twenty years. See Nathan L. Hecht, *The Vanishing Civil Jury Trial: Trends in Texas Courts and an Uncertain Future*, 47 S. TEX. L. REV. 163, 166 (2005) (noting the decline in civil jury trials); Carl Reynolds, *Texas Courts 2030—Strategic Trends & Responses*, 51 S. TEX. L. REV. 951, 975–78 (2010) (comparing and contrasting criminal and civil cases and the rate at which their prevalence increases or decreases).

53. The summary data from the two databases differ only in degree while they suggest the same overall trends and comparisons. The summary data from the two databases for cases relating to lawyer fiduciaries were compared and found to agree on every case. The data for 2007 for both databases are listed in Appendix A. The accumulation and treatment of the data from 2003-2007 is on file with the *St. Mary's Law Journal* and is available upon request.

54. Four searches were conducted on the LexisNexis database for each period to determine the number of appellate opinions (excluding the supreme court) which included (a) “legal malpractice” as a core term; (b) “legal malpractice” and “fiduciary duty” as core-terms; (c) “legal malpractice” as mentioned in the body of the opinion; and (d) “legal malpractice” and “fiduciary duty” as mentioned in the body of the opinion.

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opinion, the resulting trends are similar. The data in Table A indicates a rapid surge in legal malpractice from 1983 to 2002 and rapid growth in the percentage of legal malpractice cases that included “fiduciary duty” from 1992 to present day.

Table A: Trends in Appellate Opinions with “Legal Malpractice” and “Fiduciary Duty”

	<u>Core Terms</u>			<u>Mentioning</u>		
	Legal Malpractice	Legal Malpractice & Fiduc. Duty		Legal Malpractice	Legal Malpractice & Fiduc. Duty	
2008 to 2012	110	48	43.6%	225	108	48.0%
2003 to 2007	100	19	19.0%	223	85	38.1%
1998 to 2002	158	34	21.5%	306	120	39.2%
1993 to 1997	104	16	15.4%	204	61	29.9%
1988 to 1992	53	4	7.5%	114	20	17.5%
1983 to 1987	12	0	0.0%	26	2	7.7%
1978 to 1982	5	0	0.0%	20	2	10.0%

Table B relates to the first, larger database and suggests that claims against all fiduciaries, as indicated by the number of appellate opinions, have grown in the last twenty-five years, while claims against lawyer fiduciaries have grown faster than non-lawyers. It also shows the outcome of the cases after the appeal. It suggests that while lawyer liability spiked in the middle five-year period, liability has declined since then. The data also suggest that the number of appellate opinions in which non-lawyers are found liable for breach of fiduciary duty has been fairly steady, even though the number of opinions has been increasing.

Table B: 741 Cases by Fiduciary and Liability

Years	Lawyer		Non-Lawyer		Total Cases
	Liable	All Cases	Liable	All Cases	
2008 to 2012	4	47	28	133	180
2003 to 2007	2	29	46	128	157
1998 to 2002	9	54	32	131	185
1993 to 1997	2	25	31	98	123
1988 to 1992	4	11	32	85	96
Total	21	166	169	575	741

A comparison of Tables A and B indicates that that while the number of legal malpractice opinions temporarily increased between 1998 and 2002, the overall number of malpractice cases was fairly steady over the last twenty years. In contrast, the number of fiduciary duty opinions peaked between 1998 and 2002, but it shows signs of continuing to increase above the pre-1998 level. Equally important, there is no overt evidence to suggest that the growth in fiduciary claims against lawyers has increased the number of legal malpractice claims.

The next table lists the percentage of cases in which the lawyer or non-lawyer fiduciary was found not liable or liable after appellate review—data for remanded cases are not shown. From the first five-year period to the most recent five years, the liability rate for both groups has declined, but the liability rate for lawyer fiduciaries declined to a much lower rate of 8.5% as opposed to 22.11% for non-lawyers.

Table C: All Fiduciary Cases by Outcome After Appellate Review

	Not Liable		Liable	
	Lawyers	Non-Lawyers	Lawyers	Non-Lawyers
2008 to 2012	80.9%	63.2%	8.5%	21.1%
2003 to 2007	79.3%	50.8%	6.9%	35.9%
1998 to 2002	57.4%	54.2%	16.7%	24.4%
1993 to 1997	84.0%	39.8%	8.0%	31.6%
1988 to 1992	36.4%	38.8%	36.4%	37.6%
Total	70.5%	50.8%	12.7%	29.4%

Table D indicates that the rate at which the defendants' motions for summary judgment have been granted has increased. Lawyer defendants have enjoyed a substantially higher incidence of summary judgments than non-lawyers throughout the twenty-five years. There is no overt evidence that the increasing rate of granting motions for summary judgment was due to the advent of the motion for no-evidence summary judgment.⁵⁵

55. See David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 47 S. TEX. L. REV. 409, 483 n.543 (2006) ("On August 15, 1997, the Texas Supreme Court approved an amendment to Texas Rule of Civil Procedure 166a, which took effect on Sept. 1, 1997." (citing TEX. R. CIV. P. 166a.)); see also Lynne Liberato & Kent Rutter, *Reasons for Reversal in the Texas Courts of Appeals*, 48 HOUS. L. REV. 993, 1011 (2012) (discussing the implications of no-evidence summary judgments).

Perhaps more interesting however, is the substantial difference in the rate of affirmed summary judgments to all cases; for the latest five years, in 62% of all cases against lawyer fiduciaries, the defendant was granted summary judgment that was subsequently affirmed, compared to only 32% for non-lawyer fiduciaries.

Table D: All Fiduciary Cases by Fiduciary and Summary Judgment

	Lawyers			Non-Lawyers		
	S.J./All Cases	Aff'd S.J./S.J.	Aff'd S.J./All Cases	S.J./All Cases	Aff'd S.J./S.J.	Aff'd S.J./All Cases
2008 to 2012	70%	88%	62%	43%	74%	32%
2003 to 2007	55%	75%	41%	29%	76%	22%
1998 to 2002	57%	68%	39%	37%	65%	24%
1993 to 1997	60%	87%	52%	43%	55%	24%
1988 to 1992	46%	40%	18%	28%	54%	15%
Total	60%	77%	46%	36%	66%	24%

In the second database, the data was selected subjectively as appellate opinions that were interesting or important, or that were cited in other opinions. The first table below, Table E, lists data from the trial level, which confirms that the number of cases has been growing but the rate of liability has been falling from the highpoint of the middle five-year period.

Table E: 247 Cases Against Lawyer Fiduciaries by Outcome After Trial

	Liable		Not Liable	
	Count	Percentage	Count	Percentage
2008 to 2012	9	11.3%	71	88.8%
2003 to 2007	6	10.7%	50	89.3%
1998 to 2002	13	18.1%	59	81.9%
1993 to 1997	4	15.4%	22	84.6%
1988 to 1992	0	0.0%	7	100.0%
Total	32	13.3%	209	86.7%

Table F shows that trial court opinions on lawyer fiduciaries have enjoyed a high affirmation rate, recently close to 90%.

Table F: Lawyer Fiduciary Cases Affirmed/Reversed

	Affirmed		Reversed		Total
2008 to 2012	71	88.8%	9	11.3%	80
2003 to 2007	47	83.9%	9	16.1%	56
1998 to 2002	48	66.7%	24	33.3%	72
1993 to 1997	21	80.8%	5	19.2%	26
1988 to 1992	6	85.7%	1	14.3%	7
Total	193	80.1%	48	19.9%	241

Table G below shows that summary judgments have been increasingly affirmed for lawyer defendants.

Table G: Summary Judgments for Lawyer Fiduciaries:
Affirmed/Reversed

	S.J.'s	% of All Cases	S.J.'s Aff'd	% of S.J.'s	Aff'd As % All Cases
2008 to 2012	62	77.5%	58	93.5%	72.5%
2003 to 2007	39	69.6%	32	82.1%	57.1%
1998 to 2002	51	70.8%	32	62.7%	44.4%
1993 to 1997	18	69.2%	15	83.3%	57.7%
1988 to 1992	6	85.7%	5	83.3%	71.4%
Total	176	73.0%	142	80.7%	58.9%

When comparing Tables F and G, it appears that affirmation has been higher for summary judgment orders than regular judgments in some periods but not in others. Liberato and Rutter indicate the same pattern, i.e., that there is no necessary or consistent relationship between the two rates of affirmation.⁵⁶

56. A higher affirmation rate for summary judgment than other judgments may seem counter-intuitive, but Liberato's and Ruttner's analysis suggest that the affirmation rate between the two groups of cases has had no constant relationship in their last two observations. Lynne Liberato & Kent Rutter, *Reasons for Reversal in the Texas Courts of Appeals*, 48 HOUS. L. REV. 993, 1002 (2012).

A. *Potential Biases in Sampling*

While the data samples are fairly large and were drawn from a long time period, it is unclear at present whether the percentage statistics are reliable indicators for the total population of trial judgments or even all appellate opinions in Texas for breach of fiduciary duty. There are at least five major issues with projecting statistics based on a large sample of Texas appellate opinions. First, no two cases for breach of fiduciary duty are alike. Given the myriad case facts, the personalities of the parties, the different judges and the different lawyers, there may be insufficient uniformity to deduce the population from a sample of cases. Alternatively, not all trial or appellate opinions are equal in importance; some opinions are inevitably more influential or important than others. Second, researchers have no public database of trial opinions in Texas so that most detailed analysis is based on appellate opinions. Researchers therefore must rely on appellate opinions as secondary sources on judgments at the trial level. This bias is more likely to be a selection or interpretation bias than any substantial inaccuracy. Third, the selection of which appellate opinions are published or listed on LexisNexis is another possible source of selection bias about the representativeness of the public sample of case opinions to the entire population. Fourth, a comparison of liability rates for lawyer and non-lawyer fiduciaries needs to take into account the different nature of claims against the two types of fiduciaries.⁵⁷

The fifth issue is that claims against lawyer fiduciaries seem to include more examples of weak claims. A strictly objective measure of this factor is unlikely, so any discussion must rely on anecdotal evidence. Claims against lawyer fiduciaries include assertions that the lawyer breached her fiduciary duty by:

- (1) Failing to disclose that the law firm billed in fifteen minute intervals;⁵⁸
- (2) Failing to manage litigation on the agreed budget despite the fact that the law firm issued monthly invoices;⁵⁹
- (3) Failing to explain that the settlement amount was not net of agreed compensation for the lawyer;⁶⁰

57. See *supra* note 50 and accompanying text.

58. McGuire, Craddock, Strother & Hale, PC v. Transcon. Realty Investors, Inc., 251 S.W.3d 890, 894 (Tex. App.—Dallas 2008, pet. denied).

59. *Id.* at 894–95.

60. See Hoover v. Larkin, 196 S.W.3d 227, 229 (Tex. App.—Houston [1st Dist.] 2006, pet. denied) (alleging that the lawyer failed to explain that the terms of the settlement agreement were gross rather than net).

- (4) Agreeing to installment payments on an invoice rather than demanding payment in full of agreed fees;⁶¹
- (5) Disappointment with the outcome;⁶²
- (6) Failing to warn a client that an impending settlement could result in a large contingency fee despite the existence of a detailed retainer agreement;⁶³ and
- (7) Failing to advise the client of the lawyer's incompetence when, in hindsight, a tactical decision in litigation proves disappointing.⁶⁴

Of course, it is possible that the related appellate opinions failed to adequately report the nature of the claims against the lawyer fiduciaries, but it appears that some of these claims are somewhat weak. If so, the lower liability rate could be due in part to an inflated number of claims.

None of these potential biases are necessarily serious or fatal. Empirical research techniques include tests and adjustments that can resolve most if not all of the uncertainty. To pursue those techniques in this article would needlessly elevate the role of the statistics, and strain most lawyers' tolerance for statistics. However, until such time as the uncertainty is resolved, any inferences from the data should be limited to the level of suggestion, not conclusion.

61. See *Fulbright & Jaworski LLP v. Mariner Health Care, Inc.*, No. SA-05-CA-1127-FB, 2006 U.S. Dist. LEXIS 86229, at *50 (W.D. Tex. May 22, 2006) ("In sum, no reasonable finder of fact could conclude Fulbright failed to rebut a presumption, if any, that the Letter Agreement was unfair or invalid.").

62. See *Duerr v. Brown*, 262 S.W.3d 63, 73 (Tex. App.—Houston [14th Dist.] 2008, no pet.) ("In light of this deposition testimony, Duerr's 'conflict of interest' theory boils down to a contention that other hip replacement claimants represented by his lawyers obtained greater recoveries than they otherwise would have obtained because of Duerr's participation in the class settlement, and that his lawyers thereby obtained additional fees. But the 'crux' of Duerr's lawsuit remains his contention that he got less than the promised \$1.68 million recovery net of attorney's fees.").

63. See *Tanox v. Akin, Gump, Strauss, Hauer & Feld, LLP*, 105 S.W.3d 244, 253 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) ("Second, Tanox alleges that during the settlement discussions, the Lawyers failed to disclose to Tanox that the proposed settlement would give rise to an 'unexpected and massive claim for fees.'").

64. See *Murphy v. Mullin, Hoard & Brown, LLP*, 168 S.W.3d 288, 292 (Tex. App.—Dallas 2005, no pet.) (affirming summary judgment against claim for breach of fiduciary duty based on negligent drafting and the failure to timely disclose such negligence to the client.); *Kimleco Petrol., Inc. v. Morrison & Shelton*, 91 S.W.3d 921, 924 (Tex. App.—Fort Worth 2003, pet. denied) (rejecting a claim for breach of fiduciary duty because the crux of the claim was that the lawyer negligently "failed to timely designate a qualified expert witness and misled Appellants into believing the case was ready for trial," therefore the claim was for legal malpractice, not for breach of fiduciary duty); *Ersek v. Davis & Davis, PC*, 69 S.W.3d 268, 270, 274 (Tex. App.—Austin 2002, pet. denied) (finding DTPA claim based on law firm's alleged "misrepresentations regarding its competency" was impermissibly fractured claim for legal malpractice).

SECTION IV. REMEDIES AGAINST NON-LAWYER FIDUCIARIES

The traditional law on Texas remedies for breach of fiduciary duty is embedded in the non-lawyer cases since claims against lawyers for breach of fiduciary duty were not prevalent much before the *Burrow* opinion on fee forfeiture in 1998.⁶⁵ Yet, even as the number of claims increased, the supreme court and the appellate courts made little effort to reconcile the law on fee forfeiture with the substantive law for non-lawyer fiduciaries or other traditional law in equity. As a result, the substantive law is becoming more dissimilar and more difficult to reconcile between the two groups of defendants.

Traditionally, Texas courts have offered two explanations for the apparent severity of remedies for breach of fiduciary duty. First, the courts are concerned that many breaches go undiscovered, as they can be easy to hide since fiduciaries generally control most of the underlying documents and data needed to discover a breach of fiduciary duty.⁶⁶ Courts emphasize the need for deterrence and to minimize the temptation for fiduciaries to abuse their powerful positions of control over their clients' assets and opportunities.⁶⁷ Second, Texas courts remind fiduciaries that they entered into their positions of trust voluntarily and

65. See *supra* Table A in Section III and note 5.

66. See *United States v. Carter*, 217 U.S. 286, 305–06 (1910) (“Such an agent has the power to conceal his fraud and hide the injury done his principal. It would be a dangerous precedent to lay down as law that unless some affirmative fraud or loss can be shown, the agent may hold on to any secret benefit he may be able to make out of his agency.”); *Shannon v. Marmaduke*, 14 Tex. 217, 220 (1855) (“The rule is founded on the danger of imposition and the presumption of the existence of fraud inaccessible to the eye of the court. The policy of the rule is to shut the door against temptation, and which, in the cases in which such a relationship exists, is deemed to be of itself sufficient to create the disqualification.” (quoting 4 Kent Com., 438)).

67. See *Slay v. Burnett Trust*, 143 Tex. 621, 187 S.W.2d 377, 388 (1945) (“By this rule trustees may be liable to great losses while they can receive no profit; and the rule is made thus stringent, that trustees may not be tempted from selfish motives to embark the trust fund upon the chances of trade and speculation.” (quoting 1 JAIUS WARE PERRY, PERRY’S LAW OF TRUSTS AND TRUSTEES 714–16 Sec. 429 (7th ed.))); *Allison v. Harrison*, 137 Tex. 582, 156 S.W.2d 137, 140 (1941) (“It is pointed out that in the recent case of *Burleson v. Earnest*, that for reasons founded in public policy the law does not permit an agent to assume any relationship antagonistic to his duty to this principal, and that the underlying reason for the rule is to shut the door against temptation[.]” (quotations and citations omitted)); *Crenshaw v. Swenson*, 611 S.W.2d 886, 891 (Tex. Civ. App.—Austin 1980, writ ref’d n.r.e.) (imposing a high standard of fiduciary loyalty); *Burleson v. Earnest*, 153 S.W.2d 869, 874 (Tex. Civ. App.—Amarillo 1941, writ ref’d w.o.m.) (emphasizing that it is against public policy for a fiduciary to be against his beneficiary for any reasons); *Parks v. Schoellkopf Co.*, 230 S.W. 704, 709 (Tex. Civ. App.—Amarillo 1921, no writ) (recognizing that equity prevents a fiduciary from using his unique position to the detriment of the principal).

knowingly, and that fiduciaries accept heightened standards of loyalty in exchange for their clients' trust.⁶⁸

Remedies at law and in equity for breach of fiduciary duty have some significant similarities. Both can be plead in the alternative under Texas Rule of Civil Procedure 48⁶⁹ (subject to the 'one satisfaction rule'⁷⁰), and the claimant is free to wait to elect her remedy until after the jury has rendered its findings of fact.⁷¹ Technically, the claimant elects which theory of recovery is preferable, not which judgment.⁷² In the event that the claimant does not assert her election, the trial judge must make the election based on which alternative offers the greater recovery.⁷³

Texas is one of the few jurisdictions that offer jury trials for both remedies at law and remedies in equity.⁷⁴ The trial judge retains discretion to grant jurisdiction in equity and discretion to grant a remedy in equity,⁷⁵

68. See *Tex. Bank & Trust Co. v. Moore*, 595 S.W.2d 502, 508 (Tex. 1980) ("When persons enter into fiduciary relations each consents, as a matter of law, to have his conduct towards the other measured by the standards of the finer loyalties exacted by courts of equity. That is a sound rule and should not be whittled down by exceptions. If the existence of strained relations should be suffered to work an exception, then a designing fiduciary could easily bring about such relations to set the stage for a sharp bargain. There is no suggestion in this record that Peckham did that thing, but mischief would result more often from engrafting exceptions upon the general rule than from a strict adherence thereto." (quoting *Johnson v. Peckham*, 132 Tex. 148, 120 S.W.2d 786, 788 (1939))).

69. TEX. R. CIV. P. 48; see *Duerr v. Brown*, 262 S.W.3d 63, 71 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (examining whether a party "asserted a breach of fiduciary claim that is distinct from his legal malpractice claim"); *Deutsch v. Hoover, Bax & Slovacek, LLP*, 97 S.W.3d 179, 190–91 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (allowing the plaintiff to plead in the alternative).

70. See *LJ Charter, LLC v. Air Am. Jet Charter, Inc.*, No. 14-08-00534-CV, 2009 Tex. App. LEXIS 9469, at *19–20 (Tex. App.—Houston [14th Dist.] Dec. 15, 2009, pet. denied) (mem. op.) ("Under the One Satisfaction Rule, a plaintiff is entitled to only one recovery for any damages suffered.").

71. See *id.* at *26 (finding that the party should have elected its remedy following trial).

72. See *City of Glenn Heights v. Sheffield Dev. Co.*, 55 S.W.3d 158, 166–67 (Tex. App.—Dallas 2001, pet. denied) ("When a party tries a case on alternative theories of recovery, and the jury returns favorable findings on two or more theories, the party has a right to a judgment on the theory providing the greatest or most favorable relief." (quoting *Ponton v. Munro*, 818 S.W.2d 865, 867 (Tex. App.—Corpus Christi 1991, no writ))).

73. See *LJ Charter*, 2009 Tex. App. LEXIS 9469, at *26 ("Accordingly, because Air America did not elect its remedy, we hold that the trial court should have made the election for Air America and limited Air America's recovery to the damages awarded for its fraud claim because that awarded the greatest recovery."); *Lesikar v. Rappeport*, 33 S.W.3d 282, 304 (Tex. App.—Texarkana 2000, pet. denied) ("We therefore delete the overpayment award from the judgment and uphold the imposition of a constructive trust, with modification.").

74. See MICHAEL ARIENS, *LONE STAR LAW: A LEGAL HISTORY OF TEXAS* 24 (Tex. Tech Univ. Press 2011) (noting that the Texas Constitution created a "right to a jury trial upon demand by one of the parties" in equity).

75. See *Wagner & Brown, Ltd. v. Sheppard*, 282 S.W.3d 419, 428–29 (Tex. 2008) ("As with

but the jury renders a finding on whether the defendant has breached her fiduciary duty,⁷⁶ and on the amount of the monetary remedy in equity—constructive trust,⁷⁷ disgorgement,⁷⁸ and rescission.⁷⁹

In addition to the fiduciary, third parties are sometimes held liable for knowingly assisting or participating in the fiduciary's breach.⁸⁰ In some cases, third-party beneficiaries of a breach of fiduciary duty may be ordered to disgorge benefits even though the third parties had no

other equitable actions, a jury may have to settle disputed issues about what happened, but 'the expediency, necessity, or propriety of equitable relief is for the trial court' (footnote omitted); *State v. Tex. Pet Foods, Inc.*, 591 S.W.2d 800, 803 (Tex. 1979) (differentiating between ultimate issues of fact, which are determined by the jury, and the right to a jury trial in equity).

76. *See Meadows v. Bierschwale*, 516 S.W.2d 125, 130 (Tex. 1974) (finding fraud at the trial level).

77. *See Wilz v. Flournoy*, 228 S.W.3d 674, 676–77 (Tex. 2007) (noting that in the underlying trial, the jury found that no personal funds were used to purchase the farm, which justified the award of a constructive trust on the farm.); *Paschal v. Great W. Drilling, Ltd.*, 215 S.W.3d 437, 445 (Tex. App.—Eastland 2006, pet. denied) ("The jury found that all of the premiums on the four policies were paid with funds that Alan stole from Great Western. Accordingly, the trial court imposed a constructive trust on all of the funds remaining in existence from the life insurance proceeds.").

78. *See Int'l Bankers Life Ins. Co. v. Holloway*, 368 SW 2d 567, 571 (Tex. 1963) (basing its decision, in part, on special issues submitted to the jury on real estate profit and commissions gained by the defendants, the trial court entered judgment in favor of claimants for disgorgement and exemplary damages); *Peckham v. Johnson*, 98 S.W.2d 408, 418 (Tex. Civ. App.—Fort Worth 1936) ("If the evidence upon another trial is the same as upon the former in this respect, the amount of his damages should be determined as a matter of fact by the jury."), *aff'd*, 132 Tex. 148, 120 S.W.2d 786 (1938); *see also Houston v. Ludwick*, No. 14-09-00600-CV, 2010 Tex. App. LEXIS 8415, at *6 (Tex. App.—Houston [14th Dist.] Oct. 21, 2010, pet. denied) (mem. op.) (detailing the amount awarded to the plaintiff by the jury at the trial level); *Yeckel v. Abbott*, No. 03-04-00713-CV, 2009 Tex. App. LEXIS 3881, at *11 (Tex. App.—Austin June 4, 2009, pet. denied) (mem. op.) ("The jury made findings as to each of these years and that Yeckel's total 'excess salary' for the period was \$4,155,850."); *Friedman, Clark & Shapiro, Inc. v. Greenberg, Grant & Richards, Inc.*, No. 14-99-01218-CV, 2001 Tex. App. LEXIS 6525, at *23 (Tex. App.—Houston [14th Dist.] Sept. 27, 2001, pet. denied) (not designated for publication) ("The jury has the discretion to award damages within the range of the evidence presented at trial." (citation omitted)); *Harper v. Harper*, 8 S.W.3d 782, 784–85 (Tex. App.—Fort Worth 1999 pet. denied) (affirming the trial court's judgment of monies under an unjust enrichment claim); *Hettich v. Pruitt*, No. 05-93-00951-CV, 1994 Tex. App. LEXIS 3964, at *36 (Tex. App.—Dallas August 1, 1994, no writ) (not designated for publication) (finding that the evidence was sufficient to support disgorgement).

79. *See infra* note 129 for cases on requirement for jury findings on interim benefits to the claimant for rescission.

80. *See Hunter v. Shell Oil Co.*, 198 F.2d 485, 489 (5th Cir. 1952) (concluding that the unfaithful fiduciary was liable as well as other "willing, knowing and active" participants in the breach); *Grupo v. Garcia*, No. 13-98-247-CV, 1999 Tex. App. LEXIS 5845, at *27 (Tex. App.—Corpus Christi Aug. 5, 1999, pet. denied) (not designated for publication) (reversing the trial court and remanding the case by holding that a third-party buyer that paid \$200,000 to a fiduciary for property appraised at \$2,186,000 could be subject to rescission).

knowledge of the breach.⁸¹ Furthermore, it is common for a court in equity to order the fiduciary to disgorge payments or benefits to the principal that the fiduciary received from a third party.⁸²

The affirmative defense of ratification is applicable to both remedies at law and remedies in equity.⁸³ This defense requires a jury finding that enumerates the detailed conditions that are required to establish the defense.⁸⁴

In some cases, the measure of a remedy at law and an alternative remedy in equity may yield about the same amount. This similarity sometimes occurs because the principal's loss can be the same as the fiduciary's gain, such as in cases for secret profits or self-dealing.⁸⁵ Yet the occasional similarity in results belies the contrast in the remedial goals of the common law and law in equity, which can magnify the difference in remedies.⁸⁶ Remedies at law compensate the claimant and aim to restore the claimant to her economic position before the tort.⁸⁷ However, the

81. See *infra* Section VII, Part F.

82. See the case descriptions in notes 18 through 22, *supra*, which indicate disgorgement of payments from third parties.

83. See *Slay v. Burnett Trust*, 143 Tex. 621, 187 S.W.2d 377, 391 (1945) (affirming the ruling that legal fees charged to a third-party borrower are not subject to disgorgement because the beneficiary ratified the payments); *Allison v. Harrison*, 137 Tex. 582, 156 S.W.2d 137, 141-42 (1941) (stating that ratification must be on the basis that all material facts known to the agent that might affect the principal were fully and completely disclosed); *Harris v. Archer*, 134 S.W.3d 411, 431 (Tex. App.—Amarillo 2004, pet. denied) (rejecting the claim that the plaintiff ratified defendant's actions).

84. See *Burleson v. Earnest*, 153 S.W.2d 869, 874-75 (Tex. Civ. App.—Amarillo 1941, writ *ref'd w.o.m.*) (stating that “the burden rests upon the agent to show that his principal had full knowledge, not only of the fact that the agent was interested, but also of every material fact known to the agent which might affect the principal and that, having such knowledge, the principal freely consented to the transaction”).

85. See *Murphy v. Am. Rice, Inc.*, No. 01-03-01357-CV, 2007 Tex. App. LEXIS 2031, at *13 (Tex. App.—Houston [1st Dist.] Mar. 9, 2007, no pet.) (mem. op.) (“Murphy committed fraud, which the jury found by clear and convincing evidence, against ARI and also constructively defrauded ARI, both of which frauds resulted in the exact same categories and amounts of damages as those that the jury found for Murphy's breach of fiduciary duty.”).

86. See Deborah A. DeMott, *Causation in the Fiduciary Realm*, 91 B.U. L. REV. 851, 864 (2011) (“That is, damages that quantify harm resulting from a breach of duty cannot plausibly be characterized as restoring to the beneficiary assets misappropriated or otherwise taken by a disloyal fiduciary. Such damages compensate the beneficiary and attempt to restore the beneficiary to her position prior to the fiduciary's breach, but are not geared to recapture benefits belonging to the beneficiary that the fiduciary appropriated through disloyal conduct.”).

87. See DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES: CASES AND MATERIALS* 15 (2d ed. 1994) (“[T]he fundamental principal of damages is to restore the injured party as nearly as possible to the position he would have been in but for the wrong—is the essence of compensatory damages.”).

goal for remedies in equity is not to compensate the claimant, nor to attempt to restore the claimant to her initial position (except for rescission).⁸⁸ Disgorgement restores the defendant to her initial position, i.e., it removes any net benefit or advantage that the fiduciary in breach may have gained from the breach.⁸⁹

Finally, remedies at law and in equity are not necessarily mutually exclusive. There are at least three scenarios in which damages at law and disgorgement or forfeiture can be combined without violating the one-satisfaction rule. First, when the fiduciary breaches her duty in multiple actions and incurs profits for herself and losses for the principal, each distinct breach can be measured and remedied separately. The defendant fiduciary is not necessarily allowed to account for the group of breaches as the net of profits and losses. This “anti-netting rule” is one of long standing in and outside Texas and is intended to deter the fiduciary from gambling with the principal’s money to try to offset losses.⁹⁰ Second, Texas courts have awarded damages at law for breach of fiduciary duty plus disgorgement of the fiduciary’s compensation,⁹¹ and the disgorgement awarded in other cases included fiduciary compensation.⁹²

88. See *supra* note 15.

89. See Colleen P. Murphy, *Misclassifying Monetary Restitution*, 55 SMU L. REV. 1577, 1625 n.265 (2002) (“[R]estitution aims at the defendant’s [rightful position]. Disgorgement is the key concept. By making the defendant disgorge the benefits he cannot justly retain, the law of restitution returns the defendant to the position he should, ‘in equity and good conscience,’ have occupied.” (quoting DAVID SCHOENBROD ET AL., *REMEDIES: PUBLIC AND PRIVATE* 727 (3d ed. 2002))).

90. See *Slay v. Burnett Trust*, 143 Tex. 621, 187 S.W.2d 377, 388 (1945) (“The intention is to provide against any possible selfish interest exercising an influence which can interfere with the faithful discharge of the duty which is owing in a fiduciary capacity.” (quoting *Magruder v. Drury*, 235 U.S. 106, 119 (1914))); *Allison v. Harrison*, 137 Tex. 582, 156 S.W.2d 137, 140 (1941) (emphasizing the need for this rule “to shut the door against temptation”); *Houston v. Ludwick*, No. 14-09-00600-CV, 2010 Tex. App. LEXIS 8415, at *8 (Tex. App.—Houston [14th Dist.] Oct. 21, 2010, pet. denied) (mem. op.) (“The trial court entered judgment on the jury’s verdict, with the exception that it ordered rescission of the deeds conveying Units 202 and 802 rather than damages for those two units.”); *Crenshaw v. Swenson*, 611 S.W.2d 886, 891 (Tex. App.—Austin 1980, writ ref’d n.r.e.) (exacting a high standard for the fidelity of fiduciaries); *Parks v. Schoellkopf Co.*, 230 S.W. 704, 709 (Tex. Civ. App.—Amarillo 1921, no writ) (reiterating that the relationship between the fiduciary and the principal “require[es] the most perfect loyalty and the utmost good faith”); see also *RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT* § 51(5)(b) (2011) (“A conscious wrongdoer or a defaulting fiduciary who makes unauthorized investments of the claimant’s assets is accountable for profits and liable for losses.”).

91. See *supra* Group C in Section II.

92. See *supra* Group E in Section II.

Third, the remedy of rescission or specific restitution sometimes includes the award of additional special damages.⁹³

A. *Damages at Law*

Similar to claims for fraudulent inducement, the plaintiff's damages can be measured according to the out-of-pocket or lost profit approaches.⁹⁴ The lost profit approach is based on expectancy damages and compares (1) the actual price paid to the market value of the purchase as represented, or (2) measures the difference between actual profits and expected profits from the asset or project as represented.⁹⁵ Expectancy damages can occasionally yield dramatically greater damages than any other remedy. In *General Resources Organization v. Deadman*,⁹⁶ for example, the plaintiffs proved \$237,086.50 of cash losses, but the Fourth District affirmed expectancy damages of approximately \$31.2 million plus \$100 million in exemplary damages.⁹⁷

B. *Jurisdiction for Remedies in Equity*

A key issue in fee forfeiture claims is whether the principal is entitled to seek the remedy in equity of fee forfeiture as an alternative to a claim for

93. *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 346 (Tex. 2011).

94. For an example of a lost operating profits claim see *Dunnagan v. Watson*, 204 S.W.3d 30, 46–48 (Tex. App.—Fort Worth 2006, pet. denied). For a lost transaction profit claim, see *Nat'l Plan Adm'rs, Inc. v. Nat'l Health Ins. Co.*, 150 S.W.3d 718, 736 (Tex. App.—Austin Sept. 10, 2004) (mem. op.), *rev'd*, 235 S.W.3d 695 (Tex. 2007). Finally, for an example of lost enterprise value, see *Norwood v. Norwood*, No. 2-07-244-CV, 2008 Tex. App. LEXIS 8673, at *26–27 (Tex. App.—Fort Worth 2008, no pet.) (mem. op.).

95. *See Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 816–17 (Tex. 1997) (“Out-of-pocket damages measure the difference between the value the buyer has paid and the value of what he has received; benefit-of-the-bargain damages measure the difference between the value as represented and the value received.”).

96. *Gen. Res. Org., Inc. v. Deadman*, 907 S.W.2d 22 (Tex. App.—San Antonio 1995, writ denied).

97. *See id.* at 26 (“Glen Deadman and William Adamson invested and lost \$237,086.50 in the scheme There was evidence that the damages to GRO resulting from the breach of contract were \$24,505,000.00. The evidence was that Deadman and Adamson suffered damages in the amount of \$6,680,689.42.”). The liability for \$131 million was also held to be joint and several, including the law firm that provided “escrow” services for the deposit and represented that it had actually seen the non-existent gold. *Id.*

damages at law for legal malpractice.⁹⁸ Of the scores of appellate opinions that have considered fee forfeiture,⁹⁹ few, if any, addressed the fundamental issue of jurisdiction in equity.¹⁰⁰

In Texas, jurisdiction in equity is still distinct from jurisdiction at law.¹⁰¹ The claimant must still plead for jurisdiction in equity and prove their claim of irreparable injury.¹⁰² Jurisdiction is still subject to the discretion

98. See *Burrow v. Arce*, 997 S.W.2d 229, 240 (Tex. 1999) (concluding that a client may be allowed forfeiture of attorney fees if said attorney breached fiduciary duties to the client, regardless of whether that breach caused the client actual harm in certain instances).

99. See, e.g., *Mendenhall v. Clark*, No. 07-11-00213-CV, 2012 Tex. App. LEXIS 1213, at *5 (Tex. App.—Amarillo Feb. 16, 2012, pet. denied) (mem. op.) (“No matter how a plaintiff may try to circumvent the elements of a legal malpractice claim, if the theory of recovery against an attorney sounds in tort, Texas courts are going to treat it as a legal malpractice claim.” (citations omitted)).

100. See *State v. Logue*, 376 S.W.2d 567, 570 (Tex. 1964) (“One of the reasons that the courts of equity arose in England was the inadequacy of legal remedies. It is the adequacy of the remedy at law that marks off the limitations as well as the jurisdiction of equitable relief.”); *S. Plains Switching, Ltd. v. BNSF Ry.*, 255 S.W.3d 690, 703 (Tex. App.—Amarillo 2008, pet. denied) (“The burden of invoking the court’s equity jurisdiction is on the party seeking it and the comparative advantages of the equitable remedy must be shown to outweigh those of the legal remedy.”); *Davis v. Estridge*, 85 S.W.3d 308, 310 (Tex. App.—Tyler 2001, pet. denied) (“A district court, in contemplation of exercising its traditional equitable powers, must weigh several factors to determine whether a party’s request for equitable relief should be granted, including: probability of irreparable damage to the moving party in the absence of relief, possibility of harm to the nonmoving party if the requested relief is granted, and public interest.”); *Frost Nat’l Bank v. Burge*, 29 S.W.3d 580, 596 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (“Equity invokes the ‘court of conscience,’ and it applies only when ‘the legal remedy is not as complete as, less effective than, or less satisfactory than the equitable remedy.’” (quoting *First Heights Bank, FSB v. Gutierrez*, 852 S.W.2d 596, 605 (Tex. App.—Corpus Christi 1993, writ denied))).

101. See *Rogers v. Daniel Oil & Royalty Co.*, 130 Tex. 386, 110 S.W.2d 891, 894 (1937) (“In spite of this blended system of law and equity the distinction between them is as absolute as ever, and to entitle the plaintiff to equitable relief he must show a proper case for a court of equity to exercise its equitable jurisdiction.”); see also *Ochoa v. Am. Oil Co.*, 338 F. Supp. 914, 920 (S.D. Tex. 1972) (“Although the equity side and the law side of the federal trial courts were thus fused, we are still far from the time envisioned by Maitland ‘when lawyers will cease to inquire whether a given rule be a rule of equity or a rule of common law.’” (citation omitted)).

102. See *Grassmeyer v. Beeson*, 18 Tex. 753, 766 (1857) (“Our courts, possessing the powers of courts of chancery, may proceed to administer relief upon the principles of equity, as fully and completely as a court of chancery in England could do, without the aid of the statute. The foundation of the jurisdiction of equity is not in the statute, but in the judicial incompetency of the courts of common law, to furnish a plain, complete and adequate remedy; and in complicated cases, the statute would afford a very inadequate and incomplete remedy.”); *Camp Mystic, Inc. v. Eastland*, 399 S.W.3d 266, 273 (Tex. App.—San Antonio 2012, no pet.) (“However, a temporary injunction should only issue if the applicant establishes (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim if the injunction is not granted.” (citing *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002))); *Monroe v. Goff*, No. 11-10-00102-CV, 2012 Tex. App. LEXIS 3349, at *16 (Tex. App.—

of the judge who evaluates whether the claimant has proven whether she would suffer irreparable injury without access to remedies in equity.¹⁰³ However, the issue is raised more often in appellate opinions on injunctive relief than for monetary remedies in equity.¹⁰⁴

Since claims against fiduciaries were traditionally heard only in equity, most jurisdictions outside Texas today hold that such claims enjoy presumptive jurisdiction in equity.¹⁰⁵ Texas courts are divided: a minority of courts uphold presumptive jurisdiction.¹⁰⁶ A majority of Texas appellate courts require principals to prove irreparable injury in their

Eastland Apr. 30, 2012, no pet.) (“Generally, the proper application of an equitable theory presupposes the lack of an adequate remedy at law . . .”).

103. See *Story v. Story*, 142 Tex. 212, 176 S.W.2d 925, 927 (1944) (“The rule is generally recognized in this state that the extraordinary writ of injunction will not be granted where there is a plain and adequate remedy at law. This general rule is not rigidly enforced in this state.” (citations omitted)); *Bank of Sw. Nat’l Ass’n v. LaGasse*, 321 S.W.2d 101, 106 (Tex. Civ. App.—Houston 1959, no writ) (“In courts administering both law and equity, like ours, the rules denying injunction when there is a remedy at law should not be applied as rigidly as at common law, where the issuance of the writ in equity was to a certain extent an invasion of the jurisdiction of another tribunal.”).

104. Based on prior investigation using word searches, the author found that the terms “adequate remedy” or “irreparable injury” were found in less than five percent of the Texas cases that used “unjust enrichment” or “constructive trust” as core-terms. In contrast, the corresponding range for injunction or mandamus is from 20% to 40%. Similar searches for all U.S. state courts showed comparable distinctions between rescission and injunction or mandamus for the last 110 years. George P. Roach, *Rescission in Texas: A Suspect Remedy*, 31 REV. LITIG. 493, 538 n.185 (2012).

105. See 1 DAN B. DOBBS, *DOBBS LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION*, § 5.18(3), at 935 (2d ed. 1993) (“Because equity created the substantive rights against fiduciaries, equity has always taken jurisdiction in claims against them without regard to the adequacy test.”).

106. See *Tex. Bank & Trust Co. v. Moore*, 595 S.W.2d 502, 507 (Tex. 1980) (invalidating the transfer of two accounts from decedent to fiduciary on the grounds that gifts given to a fiduciary are presumptively unfair); *Johnson v. Peckham*, 132 Tex. 148, 120 S.W.2d 786, 787–88 (1938) (“As we understand the opinion the duty to disclose was held to rest upon a presumption which might be overcome by proper evidence. The evidence held to be sufficient to overcome the presumption and raise an issue of fact as to whether the parties were dealing at arm’s length is disclosed in that opinion.”); *Hibbs v. Hibbs*, No. 13-97-755-CV, 1998 Tex. App. LEXIS 1876, at *2 (Tex. App.—Corpus Christi Mar. 26, 1998, no pet.) (mem. op., not designated for publication) (“Where there is a reasonable likelihood that a trustee will commit a breach of trust, however, the beneficiary can sue in equity to enjoin the breach, with any threat of irreparable harm being immaterial.”); *Gatlin v. GXG, Inc.*, No. 05-93-01852-CV, 1994 Tex. App. LEXIS 4047, at *18–19 (Tex. App.—Dallas Apr. 19, 1994, no writ) (per curiam) (not designated for publication) (reviewing the reasoning applied by Texas courts in assessing the validity of claims in equity, and the standards used to weigh the efficiency and practicality of remedies in law or equity depending on the situation); *183/620 Grp. Joint Venture v. SPF Joint Venture*, 765 S.W.2d 901, 903 (Tex. App.—Austin 1989, writ dismissed w.o.j.) (“Courts of law do not enforce, because they do not recognize, fiduciary duties and equitable titles; hence, in a proceeding to enforce either, or protect the latter, it is meaningless to require the applicant to demonstrate that his remedy at law is inadequate.”).

claims against fiduciaries.¹⁰⁷ However, Texas courts do uphold most of the established exceptions to the doctrine. Jurisdiction in equity is generally granted in Texas when the plaintiff cannot measure her damages at law;¹⁰⁸ when the dispute relates to real estate or unique assets;¹⁰⁹ when the defendant is likely to be insolvent;¹¹⁰ and under other circumstances.¹¹¹

Contrary to many appellate opinions that reject pleas for fee forfeiture as mere subterfuges for clients that cannot otherwise prove their damages at law,¹¹² the client's inability to prove or measure her damages at law should actually improve the client's claim for jurisdiction in equity.¹¹³

Despite the accumulation of English or Texas case opinions over the last four hundred years that support the doctrine of irreparable injury, the need for a claimant for monetary remedies in equity to prove her right to jurisdiction in equity is not widely acknowledged in the current state of practice among Texas litigators. This contradiction between "book law" and actual practice is suggested by prior research, which shows that the doctrine is much less of a consideration for monetary remedies in equity

107. See George P. Roach, *Unjust Enrichment in Texas: Is It a Floor Wax or a Dessert Topping?* 65 BAYLOR L. REV. 153, 197–99 (2013) ("Only three appellate courts have held that claims related to trusts or fiduciaries are entitled to presumptive jurisdiction in equity.").

108. See *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002) (stating that courts may grant temporary injunction if damages cannot be measured); *Gatlin*, 1994 Tex. App. LEXIS 4047, at *17–18 ("Thus, for example, no adequate remedy at law will be found if damages are incapable of calculation or if the defendant is incapable of responding in damages." (citation omitted)); *Smith v. Smith*, No. 05-94-00037-CV, 1994 Tex. App. LEXIS 4082, at *5 (Tex. App.—Dallas Apr. 19, 1994, no writ) (not designated for publication) (discussing the test to determine whether or not irreparable injury is likely to occur, and considering the incapability of measuring the damages in monetary terms to be an important factor); *Chevron U.S.A. Inc. v. Stoker*, 666 S.W.2d 379, 382 (Tex. App.—Eastland 1984, writ dismissed w.o.j.) (refusing appellees the right to a temporal injunction in part because they failed to show that their monetary damages could not be adequately measured); *Ennis v. Interstate Distribs., Inc.*, 598 S.W.2d 903, 906–07 (Tex. Civ. App.—Dallas 1980, no writ) (granting rescission for breach of contract when damages could not be determined).

109. See *Butnaru*, 84 S.W.3d at 211 ("[A] trial court may grant equitable relief when a dispute involves real property." (citation omitted)).

110. See *Loye v. Travelhost, Inc.*, 156 S.W.3d 615, 621 (Tex. App.—Dallas 2004, no pet.) ("A plaintiff does not have an adequate remedy at law if the defendant is insolvent.").

111. See *Willis v. Donnelly*, 118 S.W.3d 10, 37–38 (Tex. App.—Houston [14th Dist.] 2003) (acknowledging the availability of an adequate remedy at law for the plaintiff, yet granting jurisdiction to ensure complete justice), *aff'd in part and rev'd in part on other grounds*, 199 S.W.3d 262 (Tex. 2006).

112. See *supra* note 99.

113. See *Ennis*, 598 S.W.2d at 906–07 (allowing equitable remedy when damages could not reasonably be assessed).

than for injunctive relief.¹¹⁴ Furthermore, in a recent informal poll of litigators experienced in fiduciary claims, about 75% of the forty-four respondents reflected the opinion that an argument for fee forfeiture based on the claimant's irreparable injury would not be taken seriously by a trial judge in Texas.¹¹⁵

C. *Non-Monetary Remedies in Equity*

Remedies in equity are unique in that they can help to prevent or reduce future damages.¹¹⁶ In Texas, non-monetary remedies in equity include declaratory relief,¹¹⁷ injunctions,¹¹⁸ equitable liens,¹¹⁹ avoidance,¹²⁰ and reformation¹²¹ which can be awarded separately or to enhance additional relief in equity.¹²²

Subject to the discretion of the trial judge, proof of liability for breach

114. *See supra* note 104.

115. Of the total group of litigators initially contacted by email, approximately 30% responded to a poll of three questions. When asked directly if a plea for jurisdiction in equity based on immeasurable damages at law would be taken seriously by the trial judge, approximately 80% answered "no." The poll questions and sampling procedures were informal such that the possibility of various biases must preclude the results being regarded as anything more than a collection of anecdotes with unknown representativeness. Further note that this collection of perceptions was limited to monetary remedies in equity as many of respondents volunteered their belief that jurisdiction in equity is relevant only to non-monetary remedies in equity such as injunction.

116. For centuries, the combination of injunctive relief and accounting in equity has been singularly successful in resolving a wide range of business disputes. *See* 1 DAN B. DOBBS, DOBBS LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION, § 4.1(2), at 562 (2d ed. 1993) ("Restitution and unjust enrichment are often the terms in which rights in intangibles are recognized or rejected."); Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 713-14 (1990) ("Injunctions are a routine remedy for misappropriation of trade secrets; infringement of patents, copyrights, or trademarks; violations of antitrust laws or covenants not to compete; interference with contract; and other kinds of unfair competition. In all these cases, damages and restitution are the usual remedies only for past violations beyond the reach of injunctions." (footnotes omitted)).

117. *Murphy v. Am. Rice, Inc.*, No. 01-03-01357-CV, 2007 Tex. App. LEXIS 2031, at *34-35 (Tex. App.—Houston [1st Dist.] Mar. 9, 2007, no pet.).

118. *In re Estate of Preston*, 346 S.W.3d 137, 171-79 (Tex. App.—Fort Worth 2011, no pet.).

119. *Devji v. Keller*, No. 03-02-00754-CV, 2003 Tex. App. LEXIS 6322, at *4-5 (Tex. App.—Austin July 24, 2003, no pet.) (mem. op.).

120. *See Acevedo v. Stiles*, No. 04-02-00077-CV, 2003 Tex. App. LEXIS 3854, at *2 (Tex. App.—San Antonio May 7, 2003, pet. denied) (mem. op.) (affirming the trial court's remedy that the warranty deed conveying the property to fraudfeasor be set aside and declared void, a quitclaim deed the victim had signed in favor of the fraudfeasor also be set aside, and title quieted in the victim).

121. *See Hoover Slovacek LLP v. Walton*, 206 S.W.3d 557, 565 (Tex. 2006) (noting that a provision in the appellant's contract is unconscionable, but refraining from ruling the entire fee agreement void).

122. *See supra* Group B in Section II.

of fiduciary duty establishes the right of the principal to avoid any transactions with the fiduciary¹²³ that were not specifically ratified by the principal and to require the fiduciary to account to the principal for any transactions in question.¹²⁴ One or both of these elemental remedies of relief are generally included in most monetary remedies in equity.

D. *Monetary Remedies in Equity*

There are at least three key considerations in monetary remedies in equity that relate to this article. First, the measure of remedies in equity is based on ex post evidence: the remedy measures actual benefits or advantages accrued by the defendant, not what would have been reasonable to expect or what results the plaintiff could have achieved.¹²⁵

Second, some form of an accounting in equity is observed in practically all monetary remedies in equity. It is traditional for courts both in and outside Texas to state that a fiduciary liable for breach of fiduciary duty “must account to his principal.”¹²⁶ Monetary remedies in equity, constructive trust, rescission, and disgorgement all rely on the principles of accounting in equity although they differ in how the accounting is rendered.¹²⁷ The accounting aspects of a constructive trust are frequently conducted in motion practice subsequent to the judgment.¹²⁸ In

123. See *supra* Section VI, Part A, on voidable contracts and transactions.

124. See *supra* notes 83 and 84 and accompanying text on ratification.

125. See *Providence Rubber Co. v. Goodyear*, 76 U.S. 788, 804 (1870) (“The rule is founded in reason and justice. It compensates one party and punishes the other. It makes the wrong-doer liable for actual, not possible, gains. The controlling consideration is that he shall not profit by his wrong.”); *Allen v. Devon Energy Holdings, LLC*, 367 S.W.3d 355, 410 (Tex. App.—Houston [1st Dist.] 2012) (“The uncertainties . . . as to how many shares Allen would have kept absent the alleged fraudulent inducement and when he would have sold those shares do not pose an obstacle to a potential disgorgement remedy because there is no dispute over what Devon paid to acquire Chief.”), *pet. granted and judgment vacated by agr.*, 2013 Tex. LEXIS 20 (Tex. Jan. 11, 2013); *Robertson v. ADJ P’ship*, 204 S.W.3d 484, 494 (Tex. App.—Beaumont 2006, *pet. denied*) (rejecting the defendant’s argument that basis for disgorgement should be what the plaintiff would have otherwise received, rather than the actual receipts of the defendants).

126. See *supra* note 31.

127. See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 51 cmt. a (2011) (“Restitution measured by the defendant’s wrongful gain is frequently called ‘disgorgement.’ Other cases refer to an ‘accounting’ or an ‘accounting for profits.’ Whether or not these terms are employed, the remedial issues in all cases of conscious wrongdoing are the same.”). A formal accounting in equity is generally rendered by a third party appointed by the court. See *Tex. Bank & Trust Co. v. Moore*, 595 S.W.2d 502, 511 (Tex. 1980) (holding that the trial court’s appointment of chancery master is within the reasonable discretion of the trial judge).

128. See *Lesikar v. Rappoport*, 104 S.W.3d 310, 312–13 (Tex. App.—Texarkana 2003, *pet. denied*) (“To collect on the Constructive Trust, Rappoport requested a turnover order. After an

rescission, both parties litigate the measure of interim benefits of each party but the plaintiff is not entitled to the remedy without securing a jury finding on the claimant's interim benefits.¹²⁹ In disgorgement, both sides enter evidence to assist the jury to render a finding on the amount of unjust enrichment, if any.¹³⁰

Third, the object of disgorgement is alternatively called the defendant's "benefit," "advantage," or "profit."¹³¹ A key issue in remedies in equity for breach of fiduciary duty is whether the accepted definition in Texas of the fiduciary's profit, benefit, or advantage includes the fiduciary's compensation. However, there is no single definition or description of exactly what can be disgorged; Texas precedent includes a wide range of definitions for "profit," most of which included fiduciary compensation.¹³²

E. *Different Remedies in Equity Can Provide the Same Relief*

Forfeiture is not the only remedy in equity that results in restitution of compensation. The same effect can result from disgorgement or

accounting and a hearing, the trial court found that Lynwood Lesikar had wrongfully withdrawn \$48,342.97 from the court's registry, and it ordered him to return those funds.").

129. *Cruz v. Andrews Restoration, Inc.*, 364 S.W.3d 817, 826 (Tex. 2012); *Powell v. Rockow*, 127 Tex. 209, 92 S.W.2d 437, 439 (1936).

130. *See City of Fort Worth v. Phippen*, 439 S.W.2d 660, 667 (Tex. 1969) ("When the City proved a breach of duty on the part of these fiduciaries and the amount of the money that went to Hall, the City made its case. The burden then fell on Phippen and Rattikin to show any benefit received by the City which should be offset against its recovery[.]" (citations omitted)).

131. *See Johnson v. Brewer & Pritchard, PC*, 73 S.W.3d 193, 200 (Tex. 2002) (explaining how courts may disgorge a profit or benefit resulting from a fiduciary's avoidance of an opportunity belonging to a principal); *see also* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 51 cmt. e (2011) ("The object of the disgorgement remedy—to eliminate the possibility of profit from conscious wrongdoing—is one of the cornerstones of the law of restitution and unjust enrichment.").

132. *See Johnson*, 73 S.W.3d at 203 ("We hold only that an associate may participate in referring a client or potential client to a lawyer or firm other than his or her employer without violating a fiduciary duty to that employer as long as the associate receives no benefit, compensation, or other gain as a result of the referral."); *Erskine v. De La Baum*, 3 Tex. 406, 414 (1848) ("Indeed, the doctrine may be more broadly stated that executors and administrators will not be permitted, under any circumstances, to derive a personal benefit from the manner in which they transact the business or manage the assets of the estate." (citation omitted)); *Doyle v. Teske*, No. 12-09-00359-CV, 2011 Tex. App. LEXIS 2360, at *20 (Tex. App.—Tyler Mar. 31, 2011, no pet.) (mem. op.) ("[Appellant] breached his fiduciary duty to [appellee] by running the business as his sole proprietorship to the exclusion of [appellee], including using funds and a credit card that [appellee] designated for their business for his personal benefit.").

constructive trust. Under some circumstances even rescission may offer a comparable result.

From an economic perspective, monetary remedies are combinations of some or all of the following fundamental remedial actions in equity: accounting in equity, specific restitution, avoidance, and occasionally some form of trust or lien.¹³³ In the event that case facts enhance the comparative advantages of specific restitution or accounting in equity, most monetary remedies in equity will have relatively comparable effects especially in comparison with damages at law.¹³⁴ Similarly, if the defendant is deeply insolvent, remedies in equity such as constructive trust or an equitable lien may offer the claimant the only hope of securing senior priority as a judgment creditor in the defendant's bankruptcy procedures.¹³⁵

Specific restitution can offer distinct advantages that overwhelm the comparison between remedies in equity and remedies at law. For example, a claimant that has been fraudulently induced to purchase an asset can reverse the transaction and regain the purchase price even after an intervening event results in reducing or eliminating the value or operating income of the asset (unless the claimant is responsible for the intervening event).¹³⁶ It should, therefore, be no surprise to find that specific restitution has been awarded frequently in Texas litigation over mineral claims, which can be subject to rapid change in value and operating performance.¹³⁷

133. Thus rescission is a combination of avoiding a contract, specific restitution, and accounting for interim benefits. A constructive trust is a combination of specific restitution, disgorgement of net benefits, and a trust on the related assets.

134. See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 55 cmt. c (2011) ("Whatever the defendant's assets, specific restitution will be more attractive than a money judgment when the property in question has special value for the claimant; when it has appreciated in value; when its value might be difficult to establish; or when recovery of a specific thing is merely less costly than proof and recovery of its value.").

135. See *infra* note 538.

136. For a dramatic example of specific restitution is a Ninth Circuit case relating to the misappropriation of an undeveloped website (www.sex.com), see *Kremen v. Cohen*, 337 F.3d 1024 (9th Cir. 2003). For further background, see *Kremen v. Cohen*, 325 F.3d 1035, 1037–39 (9th Cir. 2003). See generally KIEREN MCCARTHY, *SEX.COM: ONE DOMAIN, TWO MEN, TWELVE YEARS AND THE BRUTAL BATTLE FOR THE JEWEL IN THE INTERNET'S CROWN* (2007) (discussing the litigation over sex.com and its outcome).

137. If an undeveloped mineral interest were to be converted or misappropriated, damages at law is measured by the fair market value of that interest on the date of the tort. If that interest were subsequently developed, the consequential appreciation and income would not be included in the tort relief. See *Manges v. Guerra*, 673 S.W.2d 180, 181 (Tex. 1984) (affirming remedies that included

In Texas, rescission has become more flexible and is less restrained by traditional requirements.¹³⁸ Courts are now more likely to grant a remedy that resembles “monetary rescission” or even reimbursement. Traditionally, a claimant did not have to return the consideration initially received from the defendant if the asset was determined to be worthless.¹³⁹ For example, if a defendant fraudulently sold the claimant a sick horse, which subsequently died, the claimant would not be expected to return the corpse.¹⁴⁰ In Texas this exception has been widened to include fact patterns in which the asset could not be returned due to actions of the defendant.¹⁴¹ Claims relating to joint investments or partnerships in which the defendant committed an intentional tort or breach of fiduciary duty are therefore sometimes eligible for “monetary rescission” or specific restitution that resembles reimbursement.¹⁴²

cancelling a lease Manges executed to himself; voiding, as to the Guerras' interests, certain transactions between Manges and third parties; and awarding the Guerras \$382,608.79 in actual damages and \$500,000 in exemplary damages); *Schiller v. Elick*, 150 Tex. 363, 240 S.W.2d 997, 1001 (1951) (affirming the award of a constructive trust for the agent's secret profit in the form of a partial mineral interest.); *Robertson v. ADJ P'ship*, 204 S.W.3d 484, 494 (Tex. App.—Beaumont 2006, pet. denied) (affirming the award of a constructive trust for cash and resulting mineral interests); *Lesikar v. Rappeport*, 33 S.W.3d 282, 310 (Tex. App.—Texarkana 2000, pet. denied) (“When one's funds or other assets are used by a fiduciary to acquire property for himself, the aggrieved party may seek the property itself or its value.”).

138. See generally George P. Roach, *Rescission in Texas: A Suspect Remedy*, 31 REV. LITIG. 493, 562 (2012) (noting that Texas courts are very similar to many other jurisdictions when it comes to rescission claims in that they are more “tolerant of uncertainty as to the amount of damages than the fact any damages were incurred”).

139. See *Wintz v. Morrison*, 17 Tex. 372, 388 (1856) (“[I]t was not necessary to entitle the plaintiff to recover his damages, nor was it necessary to entitle him to a rescission of the contract that he should have offered to restore the property, it having been proved and found by the jury to be utterly worthless.”).

140. See *Navarro Publ'g Co. v. Fishburn*, 2 J.W. Posey, Texas Unreported Cases 587, 594 (Tex. Comm'n App. 1882) (St. Louis, Gilbert Book Co. 1891) (“[T]he plaintiff show[ed] . . . its inability to restore the defendant to the position in which he was at the time of making the contract.”); see also *Wintz*, 17 Tex. at 388 (reiterating that if the property or asset is rendered to be worthless, the plaintiff did not have to return the property to the defendant who fraudulently made the sale).

141. See *Nelson v. Najm*, 127 S.W.3d 170, 177 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) (“Rather, we conclude the trial court imposed an equitable remedy, making Najm whole by returning to him the consideration he paid—\$100,000. Nelson had already reacquired the property via foreclosure; thus a true rescission of the contract was not possible; nevertheless, this award was the functional equivalent of rescission because it restored Najm to his original position before entering into the contract.”).

142. See *Dall. Farm Machinery Co. v. Reaves*, 158 Tex. 1, 307 S.W.2d 233, 241 (1957) (approving the court award of the financial equivalent of specific restitution without discussion); *Duncan v. Lichtenberger*, 671 S.W.2d 948, 953 (Tex. App.—Fort Worth 1984, writ ref'd n.r.e.) (“The remedy chosen by the appellees in the present case was restoration of the monies conveyed to

The traditional position denies rescission for service agreements that have already been partially performed or in circumstances in which the defendant's position has materially changed.¹⁴³ In 2012, the Texas Supreme Court explained that unfulfilled service contracts can be rescinded for a claim of fraud if the claimant secures a jury finding on the value of the services already rendered, emphasizing the additional importance of the aggravated nature of the defendant's wrongdoing.¹⁴⁴ In the context of fiduciary fees, this approach or measure is similar to a claim at law under the out-of-pocket approach: the principal is entitled to damages for the amount of fees paid in excess of the value of the services rendered.¹⁴⁵

Depending on the case facts, the effect of rescission, avoidance, or reimbursement can be indistinguishable. In cases in which there are no interim benefits, rescission resembles avoidance or cancellation.¹⁴⁶ In rescission claims without interim benefits, the effect is the same as specific restitution and when the initial consideration from the defendant is worthless, the effect of rescission resembles reimbursement.¹⁴⁷

Duncan for their shares of stock in 'Phase III, Inc.');

Crenshaw v. Swenson, 611 S.W.2d 886, 891 (Tex. Civ. App.—Austin 1980, writ ref'd n.r.e.) (“Elizabeth Swenson has breached her fiduciary duty to the limited partners as a matter of law and that appellants are entitled to equitable restitution to the extent of their respective partnership contribution.”).

143. See *Ennis v. Interstate Distribs.*, 598 S.W.2d 903, 906 (Tex. App.—Dallas 1980, no writ) (“On the other hand, our courts have treated contracts as executory in cases where one party has performed under the contract but not to such extent as would render the remedy of rescission inequitable.” (citation omitted)); *Freyer v. Michels*, 360 S.W.2d 559, 562 (Tex. Civ. App.—Dallas 1962, writ dism'd) (denying rescission of a lease in which the claimant had occupied “the premises for two-thirds of the lease term”).

144. See *Cruz v. Andrews Restoration, Inc.*, 364 S.W.3d 817, 826 (Tex. 2012) (“Generally, rescission is an equitable remedy, and Cruz correctly asserts that fault is relevant. A defendant's wrongdoing may factor into whether he should bear an uncompensated loss in those cases in which it is impossible for a claimant to restore the defendant to the status quo ante. But it does not excuse the claimant in such cases from counter-restitution when feasible—as it would be here.” (citing RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 54 (2011))); see also *Kish v. Van Note*, 692 S.W.2d 463, 466 (Tex. 1985) (awarding damages based on implicit assumption that defendant's services had zero value to plaintiff).

145. See *Edwards v. Holleman*, 893 S.W.2d 115, 120 (Tex. App.—Houston [1st Dist.] 1995, writ denied) (noting that the fiduciary charged an unreasonable fee, thereby breaching his fiduciary duty). Note that the defendant in *Cruz* had not fully completed its services under that agreement, i.e., the holding does not necessarily apply to service contracts that have been completed. See *Cruz*, 364 S.W.3d at 821 (showing that the defendant had breached the original agreement between the parties by not completing its services and only paying a portion of the invoices).

146. See *Ennis*, 598 S.W.2d at 906–07 (granting rescission for breach of contract where damages could not be determined).

147. See *supra* notes 141 and 142.

F. *Measuring and Proving Remedies in Equity*

The principle of shifting burdens of proof in the law of equity is based on the assumption that the defendant is a fiduciary in control of the relevant documents and data.¹⁴⁸ After the claimant has satisfied its initial burden of proof by identifying the applicable revenues for disgorgement or establishing the existence of a conflicted transaction, the trial court can award all of the revenues,¹⁴⁹ or void the conflicted transaction,¹⁵⁰ unless the fiduciary produces sufficient evidence to substantiate a claim for apportionment or counter-restitution, or proves the perfect fairness of the transaction, respectively.

Remedies in equity are not intended to impose a general forfeiture; the “defendant’s liability in restitution is not the whole of the gain from a tainted transaction, but the amount of the gain that is attributable to the underlying wrong.”¹⁵¹ In Texas, once the plaintiff has shifted its burden of proof by identifying the assets or revenues related to its claim, the defendant has the right to present evidence of counter-restitution:

148. For a case in which the defendant’s burden of proof was relieved because the plaintiff had equal access to the evidence, see *Am. Honda Motor Co. v. Two Wheel Corp.*, 918 F.2d 1060, 1063–64 (2d Cir. 1990). See generally RESTATEMENT OF THE LAW (THIRD) OF AGENCY § 8.01 cmt. b (2006) (“The agent’s breach subjects the agent to liability to account to the principal. In general, an agent has the burden of explaining to the principal all transactions that the agent has undertaken on the principal’s behalf. The agent bears this burden because evidence of dealings and of assets received is more likely to be accessible by the agent than the principal.”).

149. See *C&B Sales & Serv., Inc. v. McDonald*, 177 F.3d 384, 387 (5th Cir. 1999) (illustrating how plaintiff corporation bore the burden of establishing revenues of business done by the former president in breach of his fiduciary duty by holding that a “reasonable approximation” of gain was required but not one of great specificity); *City of Fort Worth v. Pippen*, 439 S.W.2d 660, 667 (Tex. 1969) (“When the [plaintiff] proved a breach of duty on the part of these fiduciaries and the amount of the money that went to [defendant], the [plaintiff] made its case.” (citing *Kinzbach Tool Co. v. Corbett-Wallace Corp.* 138 Tex. 565, 160 S.W.2d 509, 514 (1942))); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 51(5)(d) (2011) (“A claimant who seeks disgorgement of profit has the burden of producing evidence permitting at least a reasonable approximation of the amount of the wrongful gain. Residual risk of uncertainty in calculating net profit is assigned to the defendant.”).

150. See *Tex. Bank & Trust Co. v. Moore*, 595 S.W.2d 502, 507 (Tex. 1980) (declaring that a fiduciary relationship had been established, but ruling for the fiduciary that had not rebutted the presumptive invalidity and unfairness of the transactions at issue); *Archer v. Griffith*, 390 S.W.2d 735, 739 (Tex. 1964) (“The burden of establishing its perfect fairness, adequacy, and equity, is thrown upon the attorney, upon the general rule, that he who bargains in a matter of advantage with a person, placing a confidence in him, is bound to show that a reasonable use has been made of that confidence; a rule applying equally to all persons standing in confidential relations with each other.” (quoting 1 JOSEPH STORY, EQUITY JURISPRUDENCE, § 311 (7th ed. 1857))).

151. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 51 cmt. i (2011).

adjustments that should be made to apportion the assets or revenues¹⁵² or to offset the gross amount for reasonable expenditures that benefitted the assets or directly contributed to the generation of the revenues.¹⁵³

The law in equity expects trial judges to observe the doctrine of total equity when they structure a judgment.¹⁵⁴ This means considering what is fair for both parties to avoid a judgment that produces any unjust enrichment.¹⁵⁵ Even when the defendant intended to defraud the claimant, one court required the claimant to compensate the defendant for the purchase price of the property to be returned: “A court of equity will not make Strange a present of the lots because Moroney had intended to defraud him.”¹⁵⁶ The

152. See *Wilz v. Flournoy*, 228 S.W.3d 674, 676 (Tex. 2007) (stating that once the burden of proof is met, “the entire . . . property will be treated as subject to the trust, *except in so far as the trustee may be able to distinguish and separate that which is his own*” (quoting *Eaton v. Husted*, 141 Tex. 349, 172 S.W.2d 493, 498–99 (1943))); *McCord v. Nabours*, 101 Tex. 494, 109 S.W. 913, 917 (1908) (finding that the plaintiffs could not recover the compensation retained by the defendant because they did not identify the amount as being compensation for the transaction); *Marist College v. Nicklin*, No. 01-94-00849-CV, 1995 Tex. App. LEXIS 871, at *14 (Tex. App.—Houston [1st Dist.] Apr. 27, 1995, writ denied) (not designated for publication) (holding that the disgorgement of the defendant’s commissions should not include commissions unrelated to the College’s investment). See generally George P. Roach, *Counter-Restitution for Monetary Remedies in Equity*, 68 WASH. & LEE L. REV. 1271, 1273–74 (2011) (“[T]he plaintiff’s counter-restitution, offsetting credit for revenue apportionment and the defendant’s beneficial expenses, is an essential consideration to measure the defendant’s unjust enrichment.” (footnote omitted)).

153. See *Stone v. King*, No. 13-98-022-CV, 2000 Tex. App. LEXIS 8070, at *24 (Tex. App.—Corpus Christi Nov. 30, 2000, pet. denied) (not designated for publication) (“A trustee is not entitled to reimbursement for expenses that do not confer a benefit upon the trust estate, such as those expenses related to litigation resulting from the fault of the trustee.” (citation omitted)).

154. See *Johnson v. Cherry*, 726 S.W.2d 4, 8 (Tex. 1987) (“The equitable power of the court exists to do fairness and is flexible and adaptable to particular exigencies, ‘so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other.’” (quoting *Warren v. Osborne*, 154 S.W.2d 944, 946 (Tex. Civ. App.—Texarkana 1941, writ ref’d))); *State v. Snyder*, 66 Tex. 687, 18 S.W. 106, 108 (1886) (“[W]hatever may be the nature of the relief sought by the plaintiff, the equitable rights of the defendant growing out of . . . the subject of the controversy in question will be protected; and . . . the court will, by its affirmative decree, award to the defendant whatever reliefs may be necessary in order to protect . . . those rights.” (citation omitted)).

155. See Charles E. Rounds, Jr., *Relief for IP Rights Infringement is Primarily Equitable: How American Legal Education Is Short-Changing the 21st Century Corporate Litigator*, 26 SANTA CLARA COMPUTER & HIGH TECH. L.J. 313, 349 (2010) (“Whether it is the case of the trustee of an express trust who has engaged in unauthorized self-dealing or the proprietary remedial constructive trustee of someone else’s IP rights, this equitable right of indemnity is grounded in Equity’s contribution to the law of unjust enrichment, specifically the equitable right of counter-restitution. The court in equity is loath to fashion a remedy that leaves either party unjustly enriched.”).

156. See *S. Lumber Co. v. Kirby Lumber Corp.*, 181 S.W.2d 859, 863 (Tex. Civ. App.—Beaumont 1944, writ ref’d w.o.m.) (“‘A court of equity will not make Strange a present of the lots because Moroney had intended to defraud him.’ Therefore, appellee having failed to tender

defendant is generally entitled to introduce evidence of expenditures that were reasonable and necessary to protect the assets or generate the revenues.¹⁵⁷ The fiduciary in default who purchased real property from the principal without notice is therefore entitled to reimbursement for the purchase price and possibly for improvements and taxes.¹⁵⁸

The limits to the types of expenditures eligible for offsetting credit are not fixed, except that the expenditures must be of value to the plaintiff or the asset and any infringing expenditures (such as compensation for the defendant)¹⁵⁹ are generally but not always rejected.¹⁶⁰ In fact, in claims

appellants any portion of the purchase price paid by them to John H. Kirby et al., regardless of what the other facts might have shown, it would not, as we view it, be entitled to recover the title thus acquired by appellants." (quoting *Homes Inv. Co. et al. v. Strange*, 109 Tex. 342, 195 S.W. 849, 852 (1917))).

157. See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 43, cmt h (2011) ("A nearly uniform rule, reflected in many of the preceding Illustrations, entitles the fiduciary in such cases to reimbursement of the costs of acquisition."); RESTATEMENT (SECOND) OF TRUSTS § 244 cmt. c (1959) ("To the extent to which the trustee is entitled to indemnity, he has a security interest in the trust property."); *Id.* § 245(2) ("Although an expense is not properly incurred in the administration of the trust, the trustee is entitled to indemnity out of the trust estate for such expense to the extent that he has thereby conferred a benefit upon the trust estate, unless under the circumstances it is inequitable . . .").

158. See *Stoffela v. Nugent*, 217 U.S. 499, 501 (1910) ("It is true that the defendant acted fraudulently and knew what he was about. But a man by committing a fraud does not become an outlaw and *caput lupinum*. He may have no standing to rescind his transaction, but when it is rescinded by one who has the right to do so the courts will endeavor to do substantial justice so far as is consistent with adherence to law." (citations omitted)); *Ehrlich v. United States*, 252 F.2d 772, 776 (5th Cir. 1958) ("The harm should be undone but there is no reason to reward the victim."); *Procom Energy, LLA v. Roach*, 16 S.W.3d 377, 380, 385 (Tex. App.—Tyler 2000, pet. denied) (affirming the award of \$26,000 offset for valuable improvements); *First Heights Bank, FSB v. Gutierrez*, 852 S.W.2d 596, 605 (Tex. App.—Corpus Christi 1993, writ denied) ("Equity is based upon the avoidance of irreparable injury. Moreover, it seeks to prevent unjust enrichment, and in particular, abhors that unjust enrichment which comes from a double satisfaction of an obligation. Equity seeks to do justice, to strike a balance by reviewing the entire situation. Equity acts in accordance with conscience and good faith and promotes fair dealing; it will not further an improper objective which is likely to cause a detriment to the other party." (citation omitted)).

159. See *Crites, Inc. v. Prudential Ins. Co.*, 322 U.S. 408, 418 (1944) ("[T]he fact that Simkins entered into a fee-splitting contract so patently illegal, plus the fact that he engaged in other misconduct and indiscretions incompatible with his position as an officer of the court, compel the conclusion that all fees and compensation as co-receiver should have been denied him."); *Int'l Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567, 577–78 (Tex. 1963) ("The profit which defendants sought to make for themselves through the instrumentality of the Fort Worth Corporation must be held to belong to the corporation."); *Murphy v. Canion*, 797 S.W.2d 944, 948 (Tex. App.—Houston [14th Dist.] 1990, no writ) (involving a defendant arguing that he was paid after the termination of the partnership and therefore his fiduciary breach could not have caused the plaintiff's damages); see also *Hahl v. Kellogg*, 94 S.W. 389, 390–91 (San Antonio 1906, writ *ref'd*) ("By defendant in error's cross-assignments it is contended that the court erred in not rendering judgment

for unjust enrichment against a fiduciary, it is not unusual for a court to effectively disgorge the fiduciary's compensation by rejecting the compensation as counter-restitution or as an additional benefit or advantage to be disgorged.¹⁶¹ With a few exceptions, most cases that disgorged the fiduciary's compensation or denied the fiduciary's claim for compensation did so on a total basis; few claims were apportioned.¹⁶²

G. Remedies in Equity As Windfall

Litigation in equity is no stranger to a defendant's claim that a remedy in equity would produce a windfall for the claimant. It is most closely associated with rescission, especially the specific restitution element within rescission,¹⁶³ but it has also been made against the use of ex-post data.¹⁶⁴

Section VIII and IX will show that some courts have held that by pleading for fee forfeiture of third-party fees based on breach of fiduciary

in his favor for \$7,500, for the reason that Hahl, as an agent, was guilty of such fraud . . . as to deprive him of the right to compensation for his services.”).

160. See *Siegrist v. O'Donnell*, 182 S.W.2d 403, 405 (Tex. Civ. App.—San Antonio 1944, writ ref'd) (affirming the order to disgorge the amount of the secret profit less an offset for compensation for work unrelated to the breach); *Frazier v. Havens*, 102 S.W.3d 406, 412 (Tex. App.—Houston [14th Dist.] 2003, no pet.) (demonstrating that if the trial court had carefully considered that the overpayments made by the defendants exceeded the judgment amount against them, then they could have prevailed on their counterclaim); *Landon v. S & H Mktg. Group, Inc.*, 82 S.W.3d 666, 686 (Tex. App.—Eastland 2002, no pet.) (illustrating that despite the existing liability for multiple breaches of duty, the court affirmed defendant's allowance of credit for postage and travel expenses). *But see Ginn v. Seidel (In re Allied Physicians Group, P.A.)*, No. 397-31267-BJH-11, 2004 U.S. Dist. LEXIS 25389, at *13–14 (N.D. Tex. Dec. 15, 2004) (affirming that the trustee has no greater claim to reimbursement for expenses than for payment of compensation).

161. See *supra* notes 45 and 46 and accompanying text.

162. See *supra* notes 16, 19 and 22.

163. See *Burrow v. Arce*, 997 S.W.2d 229, 244 (Tex. 1999) (“The [defendant's] argument that relief for attorney misconduct should be limited to compensating the client for any injury suffered ignores the main purpose of the remedy.”); *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 138 Tex. 565, 160 S.W.2d 509, 514 (1942) (“It is beside the point for either [defendant] to say that [plaintiff] suffered no damages because it received full value for what it has paid and agreed to pay.”); *Russell v. Truitt*, 554 S.W.2d 948, 952 (Tex. Civ. App.—Fort Worth 1977, writ ref'd n.r.e.) (involving defendants arguing that a remedy in equity would be unfair because a portion of the funds had already been paid); see also RESTATEMENT (THIRD) OF AGENCY § 8.01 cmt. d (2006) (“Forfeiture may also have a valuable deterrent effect because its availability signals agents that some adverse consequence will follow a breach of fiduciary duty.”); George P. Roach, *Rescission in Texas: A Suspect Remedy*, 31 REV. LITIG. 493, 498–507 (2012) (expressing how pleading rescission can create a windfall because it allows the plaintiff more time and opportunities).

164. See *Miga v. Jensen*, 96 S.W.3d 207, 215 (Tex. 2002) (rejecting the use of market data for any date later than the date of the tort for measuring the claimant's loss of value).

duty, the principal is attempting to gain a windfall or that the claimant is trying to opportunistically expand the statute of limitations from two to four years as a tactical windfall.¹⁶⁵ These opinions overlook similar windfalls that Texas courts have affirmed in which the plaintiff gained strategic advantage by pleading in the alternative for remedies in equity.

The law in equity would make no apologies for the fact that its remedies do not fit seamlessly into weave of the common law. Equity's primary concerns are to ensure a remedy for a claimant that can prove liability,¹⁶⁶ and to deny unjust enrichment to fiduciaries in breach.¹⁶⁷ Deterrence by itself is not necessarily a compelling justification for a remedy because any excessive remedy can deter. Equity holds that the public policy risk of a windfall is less than the risk of permitting unjust enrichment: "It is more appropriate to give the defrauded party the benefit even of windfalls than to let the fraudulent party keep them."¹⁶⁸

165. See *Beck v. Law Offices of Edwin J. (Ted) Terry, Jr.*, PC, 284 S.W.3d 416, 427 (Tex. App.—Austin 2009, no pet.) (holding that the claimant's pleading that contained both legal malpractice and breach of fiduciary duty contained only "thinly veiled" claims of the former).

166. See *Sw. Weather Research v. Duncan*, 319 S.W.2d 940, 944 (Tex. Civ. App.—El Paso 1958) ("[E]quity was created for the man who had a right without a remedy, and, as later modified, without an adequate remedy."), *aff'd*, 160 Tex. 105, 327 S.W.2d 417 (1959).

167. See *supra* note 155.

168. See *Randall v. Loftsgaarden*, 478 U.S. 647, 663–64 (1986) (acknowledging that the remedy in equity as applied in *Affiliated Ute Citizens of Utah* "clearly does more than simply make the plaintiff whole for the economic loss proximately caused by the buyer's fraud," but that such a windfall was a significant part of the securities law's deterrent purpose (quoting *Janigan v. Taylor*, 344 F.2d 781, 786 (1st Cir. 1965))); *Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co.*, 316 U.S. 203, 206–07 (1942) ("The burden is the infringer's to prove that his infringement had no cash value in sales made by him. If he does not do so, the profits made on sales of goods bearing the infringing mark properly belong to the owner of the mark. There may well be a windfall to the trade-mark owner where it is impossible to isolate the profits which are attributable to the use of the infringing mark. But to hold otherwise would give the windfall to the wrongdoer." (citation omitted)); *Lee v. Lee*, 47 S.W.3d 767, 780 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) ("Under the facts of this case, it is more appropriate for the estate to obtain the benefit of a windfall than to let appellee keep \$1.5 million in fees the jury found was unreasonable."); *Stein v. Sims*, 283 S.W. 319, 322 (Tex. Civ. App.—Amarillo 1926, no writ) ("This may operate to give to the principal the benefit of valuable services rendered by the agent, but the agent has only himself to blame for that result." (citation omitted)); see also *Farnsworth v. Feller*, 471 P.2d 792, 797 (Or. 1970) ("In any event, the fact that one who has been defrauded may also have some other reason to desire the rescission of a transaction is not a defense in a suit for rescission if all of the required elements have been established, as in this case."); *S. Lumber Co. v. Kirby Lumber Corp.*, 181 S.W.2d 859, 863 (Tex. Civ. App.—Beaumont 1944, writ ref'd w.o.m.) (requesting relief in equity).

H. *Exemplary Damages*

Exemplary damages are also available to plaintiffs for breach of fiduciary duty in addition to remedies in equity or remedies at law.¹⁶⁹ Proof of malice or actual fraud is sufficient but not necessary to establish eligibility for exemplary damages in equity. For claims of breach of fiduciary duty, the claimant only needs to prove that the fiduciary demonstrated her intent to gain an additional benefit. Proof that the fiduciary breached her duty and gained an additional benefit has also been held as sufficient proof.¹⁷⁰

Pleas for specific restitution or other forms of monetary remedies in equity require a jury finding on the value of assets that are conveyed under the remedy in equity. This finding is equated to the amount of actual damages for the purposes of justifying exemplary damages.¹⁷¹

169. See, e.g., *McGrede v. Coursey*, 131 S.W.3d 189, 193 (Tex. App.—San Antonio 2004, no pet.) (awarding \$93,405.42 each for conversion and exemplary damages for breach of fiduciary duties by the guardian of the estate); *Brosseau v. Ranzau*, 81 S.W.3d 381, 385 (Tex. App.—Beaumont 2002, pet. denied) (affirming an award for the claimant of “\$107,196.76 in actual damages and \$200,000” in punitive damages, plus attorney’s fees for diverting partnership rental income as determined by the trial court).

170. See *In re Estate of Preston*, 346 S.W.3d 137, 170–71 (Tex. App.—Fort Worth 2011, no pet.) (“An intentional breach may be found where the fiduciary intends to gain an additional benefit for himself. . . . [T]he Supreme Court [has] suggested that willful and fraudulent acts are presumed when the fiduciary . . . gains an additional benefit for himself as a result of his breach.” (citation omitted)); *Fortson v. Asaf*, No. 01-99-00542-CV, 2001 Tex. App. LEXIS 6365, at *11 (Tex. App.—Houston [1st Dist.] Aug. 31, 2001, pet. denied) (not designated for publication) (“The issue of exemplary damages for breach of fiduciary duty is not whether there is an intent to injure, but whether the party with the fiduciary duty intended to gain an additional benefit for himself.”); *Lesikar v. Rappeport*, 33 S.W.3d 282, 311 (Tex. App.—Texarkana 2000, pet. denied) (“In *Texas Bank & Trust Co. v. Moore*, 595 S.W.2d 502, 507 (Tex. 1980), the Texas Supreme Court held that exemplary damages are proper when self-dealing by a fiduciary has occurred. Where, as here, a fiduciary in fact gains a benefit by breaching her fiduciary duty, willful and fraudulent acts may be presumed.”).

171. See *Nabours v. Longview Sav. & Loan Ass’n*, 700 S.W.2d 901, 903 (Tex. 1985) (“Even in cases where actual damages are *not recoverable*, it is still necessary to allege, prove[,] and secure jury findings on the existence and amount of actual damage sufficient to support an award of punitive damage.” (citation omitted)); *RDG P’ship v. Long*, 350 S.W.3d 262, 280 (Tex. App.—San Antonio 2011, pet. denied) (pointing out actual damages must be determined in order to support punitive damages); *Martin v. Tex. Dental Plans, Inc.*, 948 S.W.2d 799, 805 (Tex. App.—San Antonio 1997, writ denied) (“In the present case, appellant obtained no finding of the value of the equitable relief sought on which an award of punitive damages could be based. While a jury issue is not necessary to the award of reinstatement, if such relief is to serve as a basis for punitive damages, an issue and finding regarding the value of the reinstatement is necessary.”); *Russell v. Truitt*, 554 S.W.2d 948, 955 (Tex. Civ. App.—Fort Worth 1977, writ ref’d n.r.e.) (“The forfeiture of the \$8,000.00 in agency fees is a form of equitable relief awarded for the breach of the equitable duties of those in a fiduciary role. Accordingly, under the rule in *International Bankers Life*, [] no actual damages are necessary to support the exemplary damage award.” (citation omitted)).

SECTION V. CAUSATION AND DAMAGES IN FACT¹⁷²

There are two causation standards for remedies in equity that are asserted out of context: (1) that causation for remedies in equity for breach of fiduciary duty need not be proven¹⁷³ and (2) that causation between the breach and the improper benefit must be adequately pled to survive summary judgment. While the causation standard for a remedy in equity in a fiduciary claim can be minimal, most monetary remedies in equity at least require adequate identification of the applicable res or revenue in dispute.¹⁷⁴ However, the most rigorous causation standard for a remedy in equity rarely resembles the normal 'but for' standard when considering a remedy at law.¹⁷⁵

The favorable causation standard is also important in explaining the advent of the modern practice of pleading fee forfeiture against lawyer fiduciaries.¹⁷⁶ A number of modern case opinions reflect the common view that the difference in proving causation between malpractice and fee forfeiture has prompted many claimants for malpractice to claim fee forfeiture for breach of fiduciary duty as a fallback position for the likely possibility that the claimant will not be able to measure actual damages or establish causation for malpractice.¹⁷⁷

172. In claims at law, the plaintiff must prove both damages in fact and damages in amount. The issue of damages in fact refers to proving in a non-speculative manner that the plaintiff incurred non-nominal damages. Once damages at law are established, the actual measure of damages is addressed as damages in amount, which is subject to an easier standard on speculativeness. *See* ERI Consulting Eng'rs, Inc. v. Swinnea, 318 S.W.3d 867, 877 (Tex. 2010) (“[U]ncertainty as to the fact of legal damages is fatal to recovery, but uncertainty as to the amount will not defeat recovery.” (quoting Sw. Battery Corp. v. Owen, 131 Tex. 423, 115 S.W.2d 1097, 1099 (1938))).

173. *See infra* note 178.

174. *See infra* notes 184 and 185.

175. *Compare* Deborah A. DeMott, *Causation in the Fiduciary Realm*, 91 B.U. L. REV. 851, 867–68 (2011) (“In all cases, the causal standard seems a function of the remedy sought by the beneficiary, because restitutionary remedies—including forfeiture of fees otherwise due a disloyal lawyer—escape the stringency of ‘but-for’ causation.”), *with* Edwards v. Pena, 38 S.W.3d 191, 198 (Tex. App.—Corpus Christi 2001, no pet.) (“Cause in fact and proximate cause are but specific applications of the rule that a plaintiff must produce evidence from which the [juror] may reasonably infer that the [injury suffered and the] damages sued for have resulted from the conduct of the defendant.” (citing Mar. Overseas Corp. v. Ellis, 977 S.W.2d 536, 538 (Tex. 1996))), *and* Peterson v. Dean Witter Reynolds, Inc., 805 S.W.2d 541, 543–44 (Tex. App.—Dallas 1991, no writ) (affirming the trial court’s judgment for the defendant based on the plaintiff’s failure to prove proximate cause).

176. *See* Home Loan Corp. v. Tex. Am. Title Co., 191 S.W.3d 728, 735 n.22 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) (noting that causation was not dispositive, because the plaintiff pursued actual and punitive damages).

177. *See id.* (stating that because the plaintiff’s “claim for breach of fiduciary duty sought only actual and punitive damages, and not fee forfeiture, a lack of causation is dispositive”); *see also*

There is substantial support in Texas for the assertion that remedies in equity for breach of fiduciary duty are not subject to proving causation or damages.¹⁷⁸ While this is generally true, the actual standard varies between avoidance, forfeiture, and disgorgement as different remedies in equity.

First, Texas law follows traditional law in equity in holding that once the principal establishes a breach of fiduciary duty, the principal is entitled to avoid prior transactions related to the breach.¹⁷⁹ However, a Texas defendant could reasonably claim that pleading avoidance or cancellation is an attempt to circumvent the pleading and evidentiary requirements for rescission and that the principal must at least secure a jury finding on the claimant's interim benefits or the absence of benefits to secure the award of rescission or avoidance.¹⁸⁰

Second, the opinions that eschew proof of causation generally relate to cases containing fee forfeiture issues.¹⁸¹ As a general statement, the inapplicability of a causation standard also generally applies to claims to

Hoover v. Larkin, 196 S.W.3d 227, 230 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (holding that fee forfeiture was not available due to a lack of causation); *see also* Total Clean, LLC v. Cox Smith Matthews, Inc., 330 S.W.3d 657, 667 (Tex. App.—San Antonio 2010, pet. denied) (affirming summary judgment for the defendant because the plaintiff failed to present any evidence of actual damages, but reversing summary judgment for fee forfeiture).

178. *See* Burrow v. Arce, 997 S.W.2d 229, 240 (Tex. 1999) (“The [a]ttorneys urge that a bright-line rule making actual damages a prerequisite to fee forfeiture is necessary to prevent misuse of the remedy. We disagree. Fee forfeiture for attorney misconduct is not a windfall to the client. An attorney’s compensation is for loyalty as well as services, and his failure to provide either impairs his right to compensation.”). “Generally speaking, where the claim rests on the disloyalty of the lawyer, and the remedy sought is forfeiture or disgorgement of fees already paid, rather than compensatory damages for poor service, the breach of the duty of loyalty *is* the harm, and the client is not required to prove causation or specific injury.” *Id.* at n.37 (quoting 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 1.5:108 (2d ed. Supp. 1998)); *see also* Arce v. Burrow, 958 S.W.2d 239, 248 (Tex. App.—Houston [14th Dist.] 1997) (“We interpret the holdings in these cases by the Supreme Court and the First and Second Courts of Appeals to hold that the breach of the fiduciary relationship inherently damaged the plaintiff, and thus, there was no need to prove causation or damage. Under all three cases, one who claims a breach of fiduciary relationship need only prove the existence of a breach to be entitled to fee forfeiture.” (citations omitted)), *aff’d in part, rev’d in part on other grounds*, 997 S.W.2d 229 (Tex. 1999).

179. *See infra* Section VI, Part A.

180. *See supra* note 129.

181. *See* Yaquinto v. Segerstrom (*In re* Segerstrom), 247 F.3d 218, 226 (5th Cir. 2001) (“While the Texas Supreme Court has dispensed with the need to prove an actual injury and causation when a plaintiff seeks to forfeit some portion of an attorney’s fees in connection with a breach of fiduciary duty, *see* Burrow v. Arce, 997 S.W.2d 229, 240 (Tex. 1999), injury and causation are still required when a plaintiff seeks to recover damages for a breach of fiduciary duty.”).

avoid transactions or contracts.¹⁸² When the plaintiff seeks the disgorgement or forfeiture of the fiduciary's compensation for a breach of fiduciary duty, she needs to identify the fiduciary's relevant compensation with sufficient specificity.¹⁸³ In the past, courts have rejected claims for disgorgement when the claim included compensation from unrelated activities¹⁸⁴ or to similar activities unrelated to the breach.¹⁸⁵ Causation and the measure of forfeiture are then contested between the parties in relation to the factors suggested in *Burrow*.¹⁸⁶

In relation to disgorgement of a profit or advantage, the claimant must also produce some proof, albeit subject to a distinctly less rigorous process.¹⁸⁷ The linkage between the breach and the defendant's benefits or advantages is described in a less specific manner.¹⁸⁸ Professor DeMott advises that "causation" gives way to terms like "obtains" or "derives."¹⁸⁹

182. See *Taber v. Dall. Cnty.*, 101 Tex. 241, 106 S.W. 332, 332 (1908) (emphasizing that if a fiduciary derives an unauthorized benefit to himself, the transaction is voidable at the option of the beneficiary).

183. See *Taylor v. Meirick*, 712 F.2d 1112, 1122 (7th Cir. 1983) ("If General Motors were to steal your copyright and put it in a sales brochure, you could not just put a copy of General Motors' corporate income tax return in the record and rest your case for an award of infringer's profits.').

184. See *McCord v. Nabours*, 101 Tex. 494, 109 S.W. 913, 917 (Tex. 1908) ("If the plaintiffs in the case had shown what proportion of the charge was for the sale made to Lawrence by which McCord acquired the title to the property, then we are of the opinion that he could not receive compensation for making that transaction, but there is no pleading which undertakes to specify any particular amount as being compensation for that transaction.').

185. *Marist College v. Nicklin*, No. 01-94-00849-CV, 1995 Tex. App. LEXIS 871, at *14 (Tex. App.—Houston [1st Dist.] Apr. 27, 1995, writ denied).

186. See *Burrow v. Arce*, 997 S.W.2d 229, 243 (Tex. 1999) (listing five factors to be considered in order to determine if compensation should be allowed in full, denied, or reduced); *Jackson Law Office, PC v. Chappell*, 37 S.W.3d 15, 22 (Tex. App.—Tyler 2000, pet. denied) (involving an appellant claiming that the trial court erroneously ordered a forfeiture despite "the jury's finding that the breach of fiduciary duty did not cause [appellee] any harm").

187. See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 51 (2011) (stating that a claimant seeking disgorgement of profit only has the burden of proving at least an estimate of the amount of wrongful profit); Deborah A. DeMott, *Causation in the Fiduciary Realm*, 91 B.U. L. REV. 851, 853 (2011) ("In fact, as this Article elaborates, causal concepts are germane to disgorgement. Implicit in some respects in the beneficiary's prima facie case, doctrines derived from these causal concepts connect recoverable gains to the fiduciary's wrongful conduct.').

188. See Deborah A. DeMott, *Causation in the Fiduciary Realm*, 91 B.U. L. REV. 851, 853 (2011) (discussing casual terms used to describe a fiduciary's wrongful gains).

189. See *id.* ("Each side of fiduciary liability also uses a distinctive vocabulary. Within restitution, a disloyal fiduciary 'obtains' or 'derives' benefits through wrongful conduct, terms that hint at causal connections[,] but do not explicitly articulate them." (quoting E. Allan Farnsworth, *Your Loss or My Gain?: The Dilemma of the Disgorgement Principle in Breach of Contract*, 94 YALE L.J. 1339, 1362 (1985))).

The *Restatement (Third) of Restitution and Unjust Enrichment* employs the term “attributable.”¹⁹⁰

More importantly, the goal of disgorgement is to remove the defendant’s unjust enrichment.¹⁹¹ Thus, the jury is not asked to focus on what the plaintiff could or would have done without the defendant’s actions or what else might have happened,¹⁹² because disgorgement is limited to actual results.¹⁹³

Texas law agrees with the majority view that the “but-for” standard does not generally apply to breach of fiduciary duty.¹⁹⁴ In *Slay v. Burnett Trust*,¹⁹⁵ the trustees made independent loans of money that they borrowed in turn from the trust.¹⁹⁶ The “but-for” standard would suggest that the trustees could have borrowed money from a bank to re-loan, but the Texas Supreme Court rejected the defendant’s attempt to limit their liability to a market rate of interest and required the trustees to disgorge all benefits and profits.¹⁹⁷ Again, the distinct goal of remedies in equity for breach of fiduciary duty or removing all unjust enrichment has a major impact.¹⁹⁸

While the “but-for” standard does not apply to measuring the amount

190. See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 51 cmt. f (2011) (employing the word “attributable” to describe wrongfully earned profits).

191. See *supra* notes 32, 67, 125 and 132 and accompanying text.

192. See *Providence Rubber Co. v. Goodyear*, 76 U.S. 788, 804 (1870) (“The rule is founded in reason and justice. It compensates one party and punishes the other. It makes the wrong-doer liable for actual, not possible, gains. The controlling consideration is that he shall not profit by his wrong.”).

193. See Deborah A. DeMott, *Causation in the Fiduciary Realm*, 91 B.U. L. REV. 851, 853 (2011) (“However, when the beneficiary seeks disgorgement of the fiduciary’s illicit gains, the absence of but-for causation does not necessarily exonerate the fiduciary. Put differently, but-for causation is not dispositive of restitutionary liability.”).

194. See *Luecke v. Wallace*, 951 S.W.2d 267, 274–75 (Tex. App.—Austin 1997, pet. denied) (“Luecke and Tex-Lee argue that, to establish a breach of this duty on summary judgment, Wallace would have had to establish that *she* could have made a better deal than the one-eighth royalty and the less than fifty dollar per acre bonus that Luecke received from Tex-Lee. We disagree. Wallace only needed to establish that Luecke obtained benefits for himself that he did not obtain for Wallace.”).

195. *Slay v. Burnett Trust*, 143 Tex. 621, 187 S.W.2d 377 (1945).

196. See *id.* at 393 (“[T]he profits and commissions obtained by the defendants become the property of the trust, even though the trust may not have suffered any loss.”).

197. *Id.*; see also RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 51 cmt. f (2011) (“Absence of but-for causation does not necessarily exonerate the wrongdoer, because a finding that the defendant would have realized the profit in any event does not compel the conclusion that the defendant, under the circumstances, has not been unjustly enriched.”).

198. See *supra* notes 31, 67, 124, 131, and accompanying text.

of the remedy, Texas courts have applied it in favor of plaintiffs to establish the fact that any damages were incurred.¹⁹⁹ While the “but-for” standard does not apply to measuring the amount of the remedy, Texas courts have applied it in favor of plaintiffs to establish the fact that damages existed.²⁰⁰

In effect the “but for” test can work against the claimant on issues of damages in fact. In one case, the plaintiff adequately proved that his brother killed their mother and that the murderer should not be allowed to inherit the mother’s property. However, the court denied the claim because the brother did not prove that he would have otherwise inherited their mother’s estate but for the murder.²⁰¹

Similarly, an heir sued the attorney and executor for his mother’s estate for encouraging her to waive her life estate rights in her husband’s estate in favor of the alternate devisee, a charity.²⁰² The heir established liability, but the Fourth District reversed the award of constructive trust for the bequest lost to her estate and her heirs.²⁰³ The plaintiff’s choice to not seek relief from the charity that actually received the bequest necessarily proved fatal to the plaintiff’s remedy in equity because the lawyer and executor never held or owned the assets in the bequest.²⁰⁴ Since the charity benefitted from the breach, it was the only party vulnerable to a remedy in equity (except perhaps for fee forfeiture).²⁰⁵

SECTION VI. COMPARING TEXAS REMEDIES AGAINST NON-LAWYER FIDUCIARIES

Because the choice of a remedy can be influenced by the difference in applicable causation standards, this section analyzes causation issues as distinguished by the nature of the plaintiff’s losses and/or the defendant’s

199. *See infra* notes 201 and 202.

200. *See* Pope v. Garrett, 147 Tex. 18, 211 S.W.2d 559, 562 (1948) (“But for the wrongful acts the innocent defendants would not have inherited interests in the property.”).

201. *See* Medford v. Medford, 68 S.W.3d 242, 250 (Tex. App.—Fort Worth 2002, no pet.) (“Without an accounting and without evidence addressing who might be entitled to beneficial use of Roger’s property, the trial court was unable to grant the specific relief William requested.”), *overruled on other grounds by* Mansions in the Forest, LP v. Montgomery Cnty., 365 S.W.3d 314 (Tex. 2012).

202. Baker Botts, LLP v. Cailloux, 224 S.W.3d 723, 736–37 (Tex. App.—San Antonio 2007, no pet.)

203. *Id.*

204. *Id.*

205. *Id.* at 737 (overturning the trial court’s judgment because the law firm did not hold legal title to the assets the client had disclaimed).

gains. The boundaries between the categories, however, are inexact and can overlap. The groups include those cases in which:

- (1) The principal avoids the transaction or contract upon proof of a breach;²⁰⁶
- (2) The principal is damaged but the fiduciary gains no benefit;²⁰⁷
- (3) The principal is damaged as the fiduciary gains an asset;²⁰⁸
- (4) The principal is damaged and the fiduciary benefits;²⁰⁹
- (5) The principal is damaged as the fiduciary gains an opportunity that the principal could have undertaken;²¹⁰
- (6) The principal can prove no monetary damage as the fiduciary usurps an opportunity that the principal could not have undertaken;²¹¹ and
- (7) The principal seeks damages or disgorgement related to the fiduciary's compensation.²¹²

Remedies at law apply to Groups 2 through 5 while remedies in equity apply to Group 1 and Groups 3 through 6. To establish her monetary remedy, the principal must prove damages in fact and causation for remedies at law or identify the gross amount of the fiduciary's benefit for monetary remedies in equity. Proving causation and damages in fact becomes more difficult as the typical claim goes from tangible loss in Group 2 to lost assets or lost profits in Groups 3 and 4 to opportunity cost in Group 5 and then to unjust enrichment in Group 6. Group 1 includes case opinions that uphold the principal's right to avoid the fiduciary's agreements or transactions, a remedy that is traditionally awarded without proof of damage, benefit, bad faith or negligence. It is also important to observe that when unjust enrichment is disgorged in groups 3 through 6, all of the benefit is disgorged in practically all cases and that no distinction is made for payments made by third parties.²¹³

Group 7 includes pleas for damages, disgorgement, or forfeiture related to a fiduciary's compensation. In some cases, the award of the fiduciary's compensation was also included in the remedy awarded in the other

206. *See infra* Section VI, Part A.

207. *See infra* Section VI, Part B.

208. *See infra* Section VI, Part C.

209. *See infra* Section VI, Part D.

210. *See infra* Section VI, Part E.

211. *See infra* Section VI, Part F.

212. *See infra* Section VI, Part G.

213. *See supra* the case summaries in notes 16 through 22.

groups. Prior to *Burrow*, practically all restitution of fiduciary compensation for breaches of fiduciary duty was ordered as disgorgement.

A. *Group 1: The Right to Avoid Prior Transactions or Agreements*

Proof of an underlying breach of fiduciary duty taints a transaction or contract and subsequently makes the entire deal voidable.²¹⁴ Under traditional and Texas law, the principal's right of avoidance requires no proof of the fiduciary's bad faith, losses to the principal or benefits to the fiduciary. Some opinions refer to strict liability,²¹⁵ while it is only implied in others.²¹⁶ In these cases, the principal obtains a right to avoid regardless of whether the fiduciary paid a fair price or acted in bad faith.

The traditional doctrine for constructive trusts describes the process of how the trust is formed in a manner that suggests an automatic remedy for

214. See *supra* note 16 of a summary of cases in which fee forfeiture was used as a defense to a claim from a fiduciary against the principal and all compensation was denied due to the fiduciary's breach.

215. See *Allison v. Harrison*, 137 Tex. 582, 156 S.W.2d 137, 140 (1941) ("For example, if an agent for the sale of his principal's property should buy it himself, either directly or through the instrumentality of a third person, the purchase is voidable at the option of the principal; the transaction will be set aside, even if the agent proves that the price is fair and reasonable and that there is no element of undue advantage; nothing will defeat the principal's remedy except his own confirmation after full knowledge." (quotations omitted)); *Taber v. Dall. Cnty.*, 101 Tex. 241, 106 S.W. 332, 335 (1908) ("The self-interest of the trustee rendered the transaction voidable at the election of the beneficiary."); *Gordin v. Shuler*, 704 S.W.2d 403, 410 (Tex. App.—Dallas 1985, writ ref'd n.r.e.) ("The undisclosed self-interest of the agent makes the transaction voidable at the election of the principal, 'without looking further into the matter than to ascertain that the interest existed.'" (quoting *Nabours v. McCord*, 100 Tex. 456, 100 S.W. 1152, 1154–55 (1907))); *Crenshaw v. Swenson*, 611 S.W.2d 886, 890 (Tex. Civ. App.—Austin 1980, writ ref'd n.r.e.) ("Texas cases have treated a trustee guilty of self-dealing as a wrongdoer whether he was or not and have applied strict liability in such cases as a matter of law."); *Burleson v. Earnest*, 153 S.W.2d 869, 874 (Tex. Civ. App.—Amarillo 1941, writ ref'd w.o.m.) ("The question, therefore, does not relate to the mala fides of the agent nor to whether or not a greater sum might have been procured for the property, nor even to whether or not the vendor received full value therefor.").

216. See *Fisher v. Miocene Oil & Gas Ltd.*, 335 F. App'x. 483, 487 (5th Cir. 2009) ("[S]elf-dealing transactions may be attacked by the beneficiary even though he has suffered no damages and even though the trustee has acted in good faith, a self-dealing transaction itself constitutes an injury vel non, the undoing of which is an available remedy." (citation omitted & internal quotations omitted)); *Nabours v. McCord*, 97 Tex. 526, 80 S.W. 595, 598 (1904) ("Where the trustee himself becomes a purchaser of the trust estate, the cestui que trust may, of course, come in and set aside the purchase, and have the property re-exposed to sale. And it makes no difference whether the sale was at public auction, and bona fide for a fair price, or otherwise." (citation omitted)); *Riley v. Powell*, 665 S.W.2d 578, 581 (Tex. Civ. App.—Fort Worth 1984, writ ref'd n.r.e.) ("Whenever an agent breaches his duty to his principal by becoming personally interested in an agency agreement, the contract is voidable at the election of the principal without full knowledge of all the facts surrounding the agents interest.").

breach of fiduciary duty. Our supreme court has frequently explained the remedy of a constructive trust on the basis of the theory of the springing trust—the trust springs into existence upon the commission of the breach.²¹⁷ For courts that recognize this approach, the role of the court in equity is largely to recognize the existence of the trust upon a finding of liability for breach.²¹⁸

Most of the cases cited so far in this group relate to transactions between the principal and fiduciary that were not ratified or even disclosed. The forfeiture counter-claim cases also support strict avoidance of fee agreements and other contracts based largely on undisclosed conflicts of interest.²¹⁹ Inexplicably, *Burrow* failed to extend its new principles to claims that seek to avoid a retainer agreement.²²⁰ If digital measurement is appropriate for forfeiture, why should it not be equally appropriate for voiding retainer agreements?

217. See *United States v. Carter*, 217 U.S. 286, 309 (1910) (“If an agent to sell effects a sale to himself, under the cover of the name of another person, he becomes, in respect to the property, a trustee for the principal, and, at the election of the latter, seasonably made, will be compelled to surrender it, or, if he has disposed of it to a bona fide purchaser, to account not only for its real value, but for any profit realized by him on such resale. And this will be done upon the demand of the principal, although it may not appear that the property, at the time the agent fraudulently acquired it, was worth more than he paid for it.”); *Omohundro v. Matthews*, 161 Tex. 367, 341 S.W.2d 401, 408–09 (1960) (“This trust arose . . . because under the facts, equity would raise the trust to protect the rights of the respondents, and to prevent the unjust enrichment of petitioner by his violation of his promise and duty to the respondents to take title in the name of the three of them, and for their mutual profit and advantage.”); *Pope v. Garrett*, 147 Tex. 18, 211 S.W.2d 559, 561 (1948) (“The legal title passed to the heirs of Carrie Simons when she died intestate, but equity deals with the holder of the legal title for the wrong done in preventing the execution of the will and impresses a trust on the property in favor of the one who is in good conscience entitled to it.”); *Eglin v. Schober*, 759 S.W.2d 950, 958 (Tex. App.—Beaumont 1988, writ denied) (“[T]he really important circumstance from which the law will raise a constructive trust is the breach of confidential relationship . . .”).

218. See *Smith v. Bolin*, 153 Tex. 486, 271 S.W.2d 93, 97 (1954) (“While a confidential or fiduciary relationship does not in itself give rise to a constructive trust, an abuse of confidence rendering the acquisition or retention of property by one person unconscionable against another suffices generally to ground equitable relief in the form of the declaration and enforcement of a constructive trust, and the courts are careful not to limit the rule or the scope of its application by a narrow definition of fiduciary or confidential relationships protected by it.”); *Flores v. Flores*, No. 04-10-00118-CV, 2011 Tex. App. LEXIS 6501, at *17 (Tex. App.—San Antonio Aug. 17, 2011, pet. denied) (mem. op.) (“Thus, once the trial court made a finding that [a party breached] his fiduciary duty in connection with their partnership, the court had sufficient basis to impose a constructive trust . . .”).

219. See *supra* note 16.

220. *Burrow v. Arce*, 997 S.W.2d 229, 244 (Tex. 1999).

B. *Group 2: The Principal Is Damaged but the Fiduciary Gains No Benefit*

Some claims against non-lawyer fiduciaries are founded in negligence or gross negligence; claims for breach of fiduciary duty are not based solely on the breach of the duty of loyalty.²²¹ In one case in this group, a fiduciary was found to have engaged in self-dealing, such as lending trust money to his son, but was partially absolved due to ratification. Nevertheless, the court still found the fiduciary liable for breach of fiduciary duty on the basis of gross negligence for the manner in which he pursued the transactions.²²² In other non-lawyer cases the plaintiff has elected between negligence and breach of fiduciary duty, suggesting that claims of negligence do not pre-empt fiduciary claims.²²³

Perhaps the single best example of negligence as a basis for breach of fiduciary duty is *Crowder v. Meyer*,²²⁴ in which the court affirmed actual damages against a lawyer acting as an escrow agent. Most of the funds in the escrow account were misapplied and the first district held that the jury finding could be justified on the basis of the defendant's negligence as a trustee.²²⁵

In *Graben*, the fiduciary recommended investments that were determined to be inappropriate for the client's income needs and risk profile. A claim of fraud was rejected as liability was based in negligence. Damages were measured on the lost profits approach but the court also granted disgorgement of the fiduciary's fees, which were paid by a third party.²²⁶

221. See *Ledoux v. Ledoux*, No. 09-97-024CV, 1998 Tex. App. LEXIS 5517, at *18-19 (Tex. App.—Beaumont Aug. 27, 1998, pet. denied) (not designated for publication) (awarding jury damages after a finding of fiduciary negligence in squandering of estate assets); *Watson v. Ltd. Partners of WCKT*, 570 S.W.2d 179, 182 (Tex. Civ. App.—Austin, 1978, writ ref'd n.r.e.) (affirming award of full reimbursement for waste and negligence after determining “in such [a] situation the fiduciary must account for all he has received”).

222. *Dolan v. Dolan*, No. 01-07-00694-CV, 2009 Tex. App. LEXIS 4487, at *1 (Tex. App.—Houston [1st Dist.] June 18, 2009, pet. denied) (mem. op.).

223. See *Ponton v. Munro*, 818 S.W.2d 865, 866-67 (Tex. App.—Corpus Christi 1991, no writ) (“When a party tries a case on alternative theories of recovery, and the jury returns favorable finding on two or more theories, the party has a right to a judgment on the theory providing the greatest or most favorable relief.”).

224. *Crowder v. Meyer*, No. 01-98-00105-CV, 1999 Tex. App. LEXIS 890 (Tex. App.—Houston [1st Dist.] Feb. 11, 1999, no pet.) (not designated for publication).

225. See *id.* at *10 (explaining that the jury agreed Crowder breached his fiduciary duty to Meyer in handling his funds).

226. See *W. Reserve Life Assurance Co. of Ohio v. Graben*, 233 S.W.3d 360, 375 (Tex. App.—Fort Worth 2007, no pet.) (affirming an award of lost profits as actual damages, based on profits that

Another important part of this group relates to claims for losses when the fiduciary's breaches of loyalty consist of multiple transactions that include losses and gains. For example, in *Slay* the trustees borrowed money from the trust without disclosure or ratification and lent the money for their own profit.²²⁷ Most loans were repaid at a profit but at least one loan was a total loss that the trustees charged to the trust. The trustees in breach were ordered to reimburse each loss in addition to disgorging their profits or benefits under what it is generally known as the "anti-netting doctrine."²²⁸

C. Group 3: The Principal Is Damaged as the Fiduciary Gains an Asset

This is a group of claims in which remedies in equity sometimes yield significant advantages when financial conditions markedly change between the date of the tort and the date of trial to favor the use of ex post evidence or specific restitution.²²⁹ At law, the damage is measured as a loss in value or a lost profit on the date of the tort.²³⁰ In equity, the court can award the remedy of specific restitution,²³¹ rescission,²³² constructive trust,²³³ or disgorgement²³⁴ based on asset value or profits as of the date of the trial.²³⁵

would have been gained in the absence of the defendant's negligence, and disgorgement of the commissions from a third party).

227. See *supra* note 90.

228. See *id.*

229. See *supra* notes 134, 136, and 17 on specific restitution.

230. See *SJW Prop. Commerce, Inc. v. Sw. Pinnacle Props., Inc.*, 328 S.W.3d 121, 162 (Tex. App.—Corpus Christi 2010, pet. denied) (affirming an award of lost profits on a real estate transaction); *Norwood v. Norwood*, No. 2-07-244-CV, 2008 Tex. App. LEXIS 8673, at *26–27 (Tex. App.—Fort Worth Nov. 13, 2008, no pet.) (mem. op.) (upholding the award of lost value as actual damages for conversion).

231. See *In re Estate of Preston*, 346 S.W.3d 137, 169–70 (Tex. App.—Fort Worth 2011, no pet.) (affirming the trial court's award of title to the "Sailfish house," and an injunction enjoining "any actions which would endanger the Sailfish [h]ouse in any way"); *Leavens v. Envtl. Control Sys. Corp.*, No. 01-96-00831-CV, 1998 Tex. App. LEXIS 89, *1, *6–7 (Tex. App.—Houston [1st Dist.] Jan. 8, 1998, pet. denied) (not designated for publication) (awarding a set dollar amount as restitution).

232. See *Houston v. Ludwick*, No. 14-09-00600-CV, 2010 Tex. App. LEXIS 8415, at *8 (Tex. App.—Houston [14th Dist.] Oct. 21, 2010, pet. denied) (mem. op.) ("The trial court entered judgment on the jury's verdict, with the exception that it ordered rescission of the deeds conveying Units 202 and 802 rather than damages for those two units.").

233. See *In re Estate of Wallis*, No. 12-07-00022-CV, 2010 Tex. App. LEXIS 3710, at *9 (Tex. App.—Tyler May 19, 2010) (mem. op.) ("A court of equity has jurisdiction to reach the property in the hands of a wrongdoer whenever legal title to property has been obtained through fraud, misrepresentations, concealments, or under similar circumstances that render it unconscionable for

For these claims, the combination of the admissibility of ex post data, shifting burdens of proof and some form of specific restitution can provide the claimant with a remedy in equity that is cheaper and easier to prove. The claimant's damages expert for these remedies need only identify and account for actual assets and operating gains; alternatively, the expert who substantiates actual damages must prepare and defend income projections and valuation opinions.

To remedy the misappropriation of assets, the plaintiff also may need the law in equity to trace the misappropriated property to the proceeds of its sale or the value of its use.²³⁶ Thus if an employee embezzles money and uses some or all of that money to pay life insurance premiums, the employer may be entitled to some or all of the proceeds of that policy.²³⁷ Alternatively, the claimant may be entitled to a lien on assets in the chain of tracing assets and their proceeds.²³⁸

Cases relating to restitution of real property in Texas courts maintain the courts' commitment to total equity and to protect the rights of the defendant in awarding a remedy in equity.²³⁹ The first step for courts to avoid unjust enrichment between the parties is to ensure that the remedy itself does not result in unjust enrichment by unduly denying counter-restitution.²⁴⁰ Less formally, awards of rescission, specific restitution and

the holder of legal title to retain the interest."); *see also* Geo-Goldenrod #2 #3 & #4 Joint Venture v. Rose (*In re* Thueringia, LLC), No. 09-34555-HDH-11, 2010 Bankr. LEXIS 2820, at *6 (Bankr. N.D. Tex. Aug. 25, 2010) ("[A] constructive trust is an appropriate remedy in this case."); *Compton v. Sesso*, No. 03-04-00625-CV, 2006 Tex. App. LEXIS 6322, at *12 (Tex. App.—Austin July 21, 2006) (creating a constructive trust on funds converted and assets purchased with those funds).

234. *See Allen v. Devon Energy Holdings, LLC*, 367 S.W.3d 355, 410–11 (Tex. App.—Houston [1st Dist.] 2012) (concluding that disgorgement could establish actual damages), *pet. granted and judgment vacated by agr.*, 2013 Tex. LEXIS 20 (Tex. Jan. 11, 2013).

235. *Id.*

236. *See supra* note 77.

237. *See Paschal v. Great W. Drilling, Ltd.*, 215 S.W.3d 437, 445–47 (Tex. App.—Eastland 2006, *pet. denied*) (affirming the trial court award of a constructive trust on more than one million dollars of proceeds from the life insurance policy for which decedent had used \$15,164 of stolen money to pay premiums).

238. *See Compton*, 2006 Tex. App. LEXIS 6322, at *4 ("The court placed a constructive trust on the Suburban, which was undisputedly purchased with funds from the box."); *Boyd v. Jacobs*, 25 S.W. 681, 683 (Tex. Civ. App.—San Antonio 1894) ("In the absence of a binding ratification of the investment, she has the right to hold property, or to have a personal judgment against defendant, with enforcement of lien against the property to secure its payment.").

239. *See supra* notes 154 through 156.

240. *See supra* notes 155 and 156.

constructive trusts frequently include credits to the defendant for the plaintiff's income or the use value of the restored asset.²⁴¹

While it is possible for a fiduciary, without a valid retainer agreement, to press a claim for quantum meruit, the Supreme Court's opinion in *Truly v. Austin*²⁴² in 1988 has made that option less attractive for fiduciaries. *Truly* provided that quantum meruit is a claim in equity—not a claim at law—which means that principals can now assert the “unclean hands” defense which has been effective in some cases.²⁴³

D. Group 4: The Principal Is Damaged as the Fiduciary Gains a Benefit

Group 4 is a broad group of cases in which the fiduciary gains a benefit or secret profit at the expense of the fiduciary in a business operation or asset transaction. This would include a large number of disgorgement cases in which the fiduciary gained an undisclosed secret profit from self-dealing or accepted an undisclosed payment from a third party.

The remedies awarded for this group are similar to the extent that they almost always award 100% of the bribe or secret profit as either actual damages or disgorgement.²⁴⁴ In some cases, the disgorgement of the bribe or secret profit also resulted in the disgorgement of the fiduciary's separate compensation.²⁴⁵ In other cases, the fiduciary's compensation was considered part of the principal's damages.²⁴⁶

The term “bribe” is used figuratively in this discussion as bribes are just a sub-set of undisclosed gains or benefits. The civil courts do not require

241. See *supra* note 129.

242. *Truly v. Austin*, 744 S.W.2d 934 (Tex. 1988).

243. See *id.* at 938–39 (“Recovery in quantum meruit is based on equity . . . [and] [i]t is well-settled that a party seeking an equitable remedy must do equity and come to court with clean hands.”).

244. See *infra* Group D.

245. See *infra* Groups E; see also RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 43 illus. 11 (“Moreover, Broker has no claim in restitution to the value of services rendered to Seller in committing a wrong to Seller.”); RESTATEMENT (THIRD) OF THE LAW OF AGENCY § 8.03 cmt. d (“In many cases, an agent's contravention of the rules stated in this section leads to forfeiture of commissions otherwise due the agent by the principal or principals on whose behalf the agent acted.”).

246. See *Gebhard v. Laxmi-Vishnu Enters., Inc.*, No. 04-11-00086-CV, 2012 Tex. App. LEXIS 351, at *5, 13 (Tex. App.—San Antonio Jan. 18, 2012, no pet.) (mem. op.) (affirming the award of \$139,023 for actual damages and \$69,285 for exemplary damages based on evidence that includes the agent's commission); *Hettich v. Pruitt*, No. 05-93-00951-CV, 1994 Tex. App. LEXIS 3964, at *36 (Tex. App.—Dallas Aug. 3, 1994, no writ) (not designated for publication) (discussing the factors a court will consider in evaluating damages, including a fiduciary's compensation over the relevant period of time).

proof of corrupt motive, influence or loss. As indicated previously, proof of the fiduciary's receipt of an undisclosed payment is sufficient.²⁴⁷ As a rule of thumb, a fiduciary should assume that the adequate disclosure of a payment can only be assured with formal ratification.²⁴⁸

There is one distinction between the treatment of bribes and other undisclosed payments. Bribes can be equally remedied with claims at law²⁴⁹ or in equity,²⁵⁰ while other undisclosed payments can only be fully remedied in equity. The inherent economic damage to the principal in the fiduciary's receipt of a secret payment is generally acknowledged in courts at law.²⁵¹

E. *Group 5: The Fiduciary Is Damaged as the Fiduciary Gains an Opportunity*

Group 5 cases include claims for fraud and usurped opportunities, but only those opportunities that the principal could have undertaken. The plea for lost profits or expectancy damages is available for these claims and can sometimes offer greater compensation than the disgorgement of the defendant's unjust gain as was demonstrated earlier in the discussion of *Deadman*.²⁵²

However, the greater difficulty of establishing causation for remedies at law than for remedies in equity may be pronounced for this type of case. The likelihood of the plaintiff successfully exploiting the potential of a

247. See *Crites, Inc. v. Prudential Ins. Co.*, 322 U.S. 408, 416–17 (1944) (stating that proof of profits from irregular conduct is enough to hold a fiduciary liable); *Johnson v. Brewer & Pritchard, PC*, 73 S.W.3d 193, 200–01 (Tex. 2002) (supporting the contention that “a gift, gratuity or benefit in violation” of a fiduciary duty owed is a betrayal); *Kinzbach Tool Co., Inc. v. Corbett-Wallace Corp.*, 138 Tex. 565, 160 S.W.2d 509, 514 (1942) (upholding the contention that any benefit accepted in violation of a fiduciary relationship is a betrayal); see also *Slay v. Burnett Trust*, 143 Tex. 621, 187 S.W.2d 377, 388 (1945) (stating that in cases where trustees make profits from funds entrusted to them, they “must account for every dollar” to the principal).

248. See *supra* notes 83 and 84.

249. See *Always at Market Inc. v. Girardi*, 365 F. App'x 603, 605 (5th Cir. 2010) (affirming the magistrate's finding of \$230,560 of kickbacks from vendor).

250. See *Crites, Inc. v. Prudential Ins. Co.*, 322 U.S. 408, 418 (1944) (“[T]he fact that he engaged in other misconduct and indiscretions incompatible with his position as an officer of the court, compel the conclusion that all fees and compensation as co-receiver should have been denied him.”); *Parks v. Schoellkopf Co.*, 230 S.W. 704, 709 (Tex. Civ. App.—Amarillo 1921, no writ) (“Equity will not permit him to be exposed to the temptation or brought into a situation where his own personal interests conflict with those of his principal, and with the duty he owes the latter.”).

251. See 2 DAN B. DOBBS, *DOBBS LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION*, § 10.6, at 700 (2d ed. 1993) (“So the cases allow recovery of the bribe amount from the briber either as restitution or as damages.” (citations omitted)).

252. See *supra* note 97.

project that remains on her drawing boards may not be easy to prove. The doctrine of the lost chance may apply.²⁵³ Take the simple example of the violation of non-compete clauses or employee misappropriation of confidential information. In one case, the plaintiff was unable to measure the impact of an established violation of a non-compete agreement and therefore sought rescission of the agreement,²⁵⁴ and in two cases, the principal could only prove the employees' wages during the time period of disloyal employment.²⁵⁵

When the principal pleads for disgorgement of benefits from a usurped opportunity, the law in equity does not require proof that the principal would otherwise have realized the opportunity because the goal of the disgorgement is to remove all benefits that have accrued to the fiduciary, not to assess the likelihood or measure of the principal's damages.²⁵⁶

In some cases, the principal's opportunity was usurped, and in others, the opportunity was misappropriated by actual or constructive fraud.²⁵⁷ These latter claims arise when the fiduciary and principal enter into what later proves to be an ill-advised transaction based on the fiduciary's fraudulent inducement or failure to disclose all relevant information.

If the fiduciary fails to make a significant disclosure but the fiduciary

253. *Elliott v. Methodist Hosp.*, 54 S.W.3d 789, 795 (Tex. App.—Houston [1st Dist.] 2001, pet. denied).

254. *See Ennis v. Interstate Distribs., Inc.*, 598 S.W.2d 903, 906 (Tex. Civ. App.—Dallas 1980, no writ) (holding that, despite the fact that damages could not be determined because the buyer could not reasonably measure damages, rescission for breach of contract was proper even though the service contract was partially fulfilled).

255. *See Fidelity Nat'l Title Ins. Co. v. Heart of Tex. Title Co.*, No. 03-98-00473-CV, 2000 Tex. App. LEXIS 72, at *5 (Tex. App.—Austin 2000, pet. denied) (not designated for publication) (affirming actual damages of \$6,700, an approximation of employees' compensation, in a suit against a competitor for conspiring with claimant's former employees to breach their fiduciary duty); *Russell v. Truitt*, 554 S.W.2d 948, 951 (Tex. Civ. App.—Fort Worth 1977, writ ref'd n.r.e.) (granting \$8,000 in agency fees in a case for breach of fiduciary duty).

256. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 43 illus. 12 (2011) ("On suit by Contractor, the court determines that A and B breached their duty of loyalty when they bid on the new project in competition with their employer. Contractor is entitled to restitution of \$25,000 from A and B by the rule of this section. It is not a condition of liability that, absent the disloyalty, Contractor would either have won the contract or made a profit on the job."); 2 DAN B. DOBBS, *DOBBS LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION*, § 10.4, at 667 (2d ed. 1993) ("In cases of this sort the beneficiary of the relationship does not necessarily prove that he would have refused the contract had he been given full information. He does not even prove that the contract is disadvantageous to him or that the broker's profit was made at his expense in any sense. He merely proves the disloyalty and that is enough to operate as a defense on the contract or as grounds for restitution.")

257. *Bright v. Addison*, 171 S.W.3d 588, 595–99 (Tex. App.—Dallas 2005, pet. denied).

does not benefit, the principal can still plead for damages²⁵⁸ or forfeiture of the fee.²⁵⁹ Alternatively, if the fiduciary benefits from the non-disclosure, the principal can seek disgorgement or other remedies such as a constructive trust.²⁶⁰

Under *Swinnea*, there is now a difference in remedies possible between constructive fraud and direct fraud by a fiduciary. Direct fraud is more likely to include circumstances in which the fiduciary misrepresents the actual terms of a transaction to the principal,²⁶¹ or purchases the principal's interest when the fiduciary already has a higher offer to buy from a third party.²⁶²

Asset forfeiture was affirmed in *Swinnea* to deter such aggravated fiduciary betrayal.²⁶³ The defendant sold his interest to his partner after fraudulently promising him that the defendant would not compete with his partner for a number of years.²⁶⁴ The opinion in that case affirmed asset

258. See *Bruce v. Owens*, No. 05-98-00159-CV, 2000 Tex. App. LEXIS 4294, at *5 (Tex. App.—Dallas June 28, 2000, pet. denied) (not designated for publication) (“Based on this evidence, we conclude a fact issue exists regarding the difference between the fair market value of the home and the purchase price of the sale by Bruce.”).

259. See *S. Cross Indus., Inc. v. Martin*, 604 S.W.2d 290, 293 (Tex. Civ. App.—San Antonio 1980, writ ref'd n.r.e.) (holding that the defendant's failure to disclose was a breach of fiduciary duty and precluded his recovery of any compensation).

260. See *Schiller v. Elick*, 150 Tex. 363, 240 S.W.2d 997, 1000 (1951) (affirming the award of a constructive trust for the agent's secret profit in the form of a partial mineral interest); *Fuqua v. Taylor*, 683 S.W.2d 735, 738 (Tex. App.—Dallas 1984, writ ref'd n.r.e.) (“The breach of such a fiduciary duty, which (as here) renders the acquisition or retention of property by one person against others unconscionable, supports the imposition of a constructive trust.” (citation omitted)).

261. See *Murphy-Bolanz Land & Loan Co. v. McKibben*, 236 S.W. 78, 80–82 (Tex. Comm'n App. 1922, judgm't adopted) (upholding damages and disgorgement of 100% of the commission paid by a third party); *Harris v. Archer*, 134 S.W.3d 411, 425 (Tex. App.—Amarillo 2004, pet. denied) (affirming award of constructive trust for actual and exemplary damages for fraud).

262. See *Allison v. Harrison*, 137 Tex. 582, 156 S.W.2d 137, 141–42 (1941) (stating that evidence that the fiduciary had a contemporaneous commitment to purchase part of the mineral royalty for more than the price paid to the principal was sufficient to award a constructive trust); *Peckham v. Johnson*, 98 S.W.2d 408, 418 (Tex. Civ. App.—Fort Worth 1936) (holding that the jury should measure the remedy as the claimant's interest in the property as applied to the property's profit on sale), *aff'd*, 132 Tex. 148, 120 S.W.2d 786 (1938); see also *Harris v. Archer*, 134 S.W.3d 411, 425 (Tex. App.—Amarillo 2004, pet. denied) (reducing the exemplary damages from a ratio of 400% of actual damages); *Wilson v. Donze*, 692 S.W.2d 734, 736 (Tex. App.—Fort Worth 1985, no writ) (affirming a jury verdict for \$24,900 of actual and \$35,000 of exemplary damages for breach of fiduciary duty as a tort).

263. *ERI Consulting Eng'rs, Inc. v. Swinnea*, 318 S.W.3d 867, 873 (Tex. 2010).

264. See *Swinnea v. ERI Consulting Eng'rs, Inc.*, 236 S.W.3d 825, 832 (Tex. App.—Tyler 2007) (indicating that the plaintiff bought out the defendant's interest in ERI on the condition that both parties sign a contract stipulating that the defendant was subject to a noncompete clause for six years), *aff'd in part, rev'd in part*, 318 S.W.3d 867 (Tex. 2010).

forfeiture because the court perceived that the compound tort of actual fraud and breach of fiduciary duty warranted additional deterrence.²⁶⁵

Punitive damages do seem more prevalent in cases involving fiduciary betrayal. Some have awarded punitive damages in excess of 100% of actual damages, and in at least one case, punitive damages were reduced because the jury's award was found to be excessive in relation to actual damages.²⁶⁶ Given the small sample size, no generalization seems appropriate except that it remains to be proven whether punitive damages are actually constrained in such cases. In the litigation subsequent to the supreme court remand, the plaintiff in *Swinnea* secured the exclusion of the normal limits on punitive damages by showing that the tortfeasor's actions constituted a felony under Texas Civil Practice & Remedies Code section 41.008(b).²⁶⁷

Similar to commercial betrayal is domestic betrayal, which includes a small group of cases that share the trait of prejudicial case facts relating to a better-informed husband defrauding or taking advantage of his wife.²⁶⁸ *Vickery v. Vickery*²⁶⁹ is the seminal example of domestic betrayal where the husband was a lawyer who convinced his wife to agree to a divorce to protect their community property from an expected malpractice claim.²⁷⁰ She also agreed for a mutual friend to represent them jointly and accepted the recommended split of the community property that was later shown to be grossly unfair.²⁷¹ After the divorce and property settlement were finalized, the ex-husband requested that she move out of the house

265. See *Swinnea*, 318 S.W.3d at 873 (“We hold that where willful actions constituting breach of fiduciary duty also amount to fraudulent inducement, the contractual consideration received by the fiduciary is recoverable in equity regardless of whether actual damages are proven, subject to certain limiting principles set out below.”).

266. *Harris v. Archer*, 134 S.W.3d 411, 449 (Tex. App.—Amarillo 2004, pet. denied).

267. See *Swinnea*, 364 S.W.3d at 424 (“*Swinnea* made false representations of past and existing material facts to ERI . . . [i] the trial court found the type of conduct referred to in [TEX. CIV. PRAC. & REM. CODE § 41.008(c)], and therefore the statutory cap on exemplary damages does not apply.”); see also TEX. CIV. PRAC. & REM. CODE ANN. § 41.008(b) (West Supp. 2013) (indicating the regular limits placed on exemplary damages awarded).

268. No case has yet been found where the victim was a husband.

269. *Vickery v. Vickery*, No. 01-94-01004-CV, 1997 Tex. App. LEXIS 6275 (Tex. App.—Houston [1st Dist.] Dec. 4, 1997, pet. denied) (not designated for publication).

270. See *id.* at *2 (“Helen claimed that Glenn, a lawyer, fraudulently tricked her into getting an uncontested divorce on the pretext that they would reunite after the threat of a potentially costly malpractice suit had passed, and that Richards breached her fiduciary duty to Helen when she represented Helen in the divorce.”).

271. *Id.*

because he planned to marry her best friend.²⁷² Case facts can indeed be stranger (and more cruel) than fiction.

Subsequently, the wife hired a different lawyer who sued the husband and the prior lawyer for fraud on the community estate and won a large judgment.²⁷³ The husband and lawyer were also subsequently suspended from the practice of law for two years.²⁷⁴ Justice Hecht's dissent in the supreme court's opinion to deny review bitterly complained that *Vickery* contradicted the court's contemporaneous opinion in *Schlueter v. Schlueter*,²⁷⁵ i.e., that Texas law does not recognize a cause of action for fraud on the community estate (except when it does!).²⁷⁶

Vickery is also an example of the occasional phenomenon in equity when the prejudicial nature of the case facts results in a change in the law or an inexplicable exception. Either because courts in equity emphasize case facts over black letter law or because equity tends to attract cases with unusual fact patterns, it is somewhat traditional for the law in equity to occasionally award a remedy that is unusually sympathetic to prejudicial case facts.²⁷⁷

F. *Group 6: The Principal Incurs No Loss but the Fiduciary Gains a Benefit*

This group of cases stresses the difference between pleading for remedies in equity and remedies at law, as the latter would fail to satisfy

272. *Id.* at *3–4.

273. *See id.* at *6 (awarding the wife \$100,000 for loss of marital property and \$350,000 for mental anguish from the conflicted lawyer, and \$6,700,000 for loss of marital property, \$1,300,000 for mental anguish, and \$1,000,000 from the ex-husband). For a less remarkable case on domestic betrayal see *Harper v. Harper*, 8 S.W.3d 782, 783 (Tex. App.—Fort Worth 1999, pet. denied).

274. *See Richards v. Comm'n for Lawyer Discipline*, 35 S.W.3d 243, 246 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (affirming the suspension of the lawyer's license to practice).

275. *Schlueter v. Schlueter*, 975 S.W.2d 584 (Tex. 1998).

276. *See Vickery v. Vickery*, 999 S.W.2d 342, 342 (Tex. 1999) (Hecht, J., dissenting) (“The lower courts in this case awarded mental anguish damages and punitive damages to one spouse for the other's fraud in the division of their marital estate, and awarded mental anguish damages against an attorney for breach of her fiduciary duty to her client. These awards are not permitted under two of this court's opinions that have issued while this petition for review has been pending.”); *see also Schlueter v. Schlueter*, 975 S.W.2d at 585 (confirming that Texas law does not recognize an independent cause of action for fraud on the community estate).

277. It is widely acknowledged that the case facts of aggravated treason in *Blake* (the defendant's treason is said to have resulted in the deaths of forty or more British intelligence agents and associates) explained the startling holding in which the House of Lords permitted disgorgement for intentional breach of a written contract. *See generally AG v. Blake*, [2001] 1 AC 268 (H.L.) (appeal taken from Eng.) (supporting the proposition that with particularly egregious and prejudicial fact patterns, courts tend grant remedies in equity outside of traditional principles).

the 'but for' standard of causation to prove loss for actual damages at law. Claims in this group are sometimes dismissed for failing to establish adequate causation. However, the priority in equity to remove temptation to breach from the fiduciary's undertaking of her duty of loyalty normally overcomes this resistance.

The group relates to breaches of fiduciary duty in which the principal could not have undertaken the fiduciary's project, but the fiduciary breached his duty by engaging in the project without obtaining the principal's approval. The principal in this situation seeks disgorgement of the benefits that the fiduciary gained from a third party as a result of the breach of loyalty.

Causation issues in these cases, even for remedies in equity, are disputed in Texas. Most pleas to disgorge the fees that a conflicted lawyer received from a second client have been denied as windfall.²⁷⁸

In comparison to the alternative remedies at law, the advantages of remedies in equity may be considered a windfall just as expectancy damages may also be regarded as windfall in *Deadman*.²⁷⁹ Generally, fee forfeiture or disgorgement is not regarded as windfall. *Burrow* explained that a disloyal fiduciary should not be compensated because loyalty is a key part of the fiduciary's work.²⁸⁰ While fee forfeiture under these circumstances may seem foreign to those accustomed to remedies at law, the principal has an absolute right to void a transaction or relationship that breaches the fiduciary's loyalty and the fiduciary has no right to retain benefits or advantages gained from actions that conflict with her fiduciary duty.²⁸¹ As indicated previously in Section IV, Part G, courts in equity

278. For discussion of the windfall defense to claims for forfeiture of third-party payments, see Section IX, Part B.

279. See *supra* note 97.

280. See *Burrow v. Arce*, 997 S.W.2d 229, 240 (Tex. 1999) (postulating that actual damages are not necessary for fee forfeiture because the compensation paid to the attorney is for loyalty in addition to services).

281. See *ERI Consulting Eng'rs, Inc. v. Swinnea*, 318 S.W.3d 867, 873 (Tex. 2010) (clarifying that where there is a breach of the duty of loyalty that is a willful and deliberate breach of contract, the fiduciary has no right to compensation, even where some service were properly performed); *Kinzbach Tool Co., Inc. v. Corbett-Wallace Corp.*, 138 Tex. 565, 160 S.W.2d 509, 514 (1942) (supporting the notion that regardless of proof of damages, a fiduciary is accountable to his principal for his ill-gotten gains resulting from a breach of fiduciary duty to his principal); *Allen v. Devon Energy Holdings, LLC*, 367 S.W.3d 355, 410 (Tex. App.—Houston [1st Dist.] 2012) (affirming that even speculative damages remain available through disgorgement where a fiduciary has usurped an opportunity of the principal and received a benefit), *pet. granted and judgment vacated by agr.*, 2013 Tex. LEXIS 20 (Tex. Jan. 11, 2013); see also RESTATEMENT (THIRD) OF THE LAW OF AGENCY § 8.02

frequently hold that the public policy consequences of a windfall to the claimant are less onerous than those of a windfall to a fiduciary that is allowed to retain gains from disloyal behavior.²⁸²

In 2011, the American Law Institute adopted the *Restatement of the Law (Third) of Restitution and Unjust Enrichment*, which included section 43 on restitution for breach of fiduciary duty.²⁸³ Illustration 2 in that section prescribes disgorging payments from a third party even when the transaction caused no loss to the principal.²⁸⁴ The previous restatement offers significant but less specific support.²⁸⁵ Other cases like *Intermarque Automotive Productions, Inc. v. Feldman*²⁸⁶ and *Slay* addressed the issue in light of section 197 of the *Restatement (First) of Restitution*.²⁸⁷ The United States Supreme Court offers further persuasive authority in two of its most prominent cases related to payments from third parties.²⁸⁸

Professor DeMott offers the illustration of a racehorse owner and a

(2006) (“An agent has a duty not to acquire a material benefit from a third party in connection with transactions conducted or other actions taken on behalf of the principal or otherwise through the agent’s use of the agent’s position.”).

282. See *supra* note 169. For further discussion of policy considerations relating to claimant gains as a result of fiduciary misconduct, see Section IV, Part G.

283. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 43 (2011).

284. See *id.* illus. 1 (“Landlord refuses to renew the lease to Retailer but grants a new lease to Employee personally. Employee’s acceptance of the lease without Retailer’s approval is a breach of his duty of loyalty under local law. By the rule of this section, Retailer may compel the assignment to it of the new lease; the result may be achieved by a decree that Employee holds the lease in constructive trust for Retailer.”); see also *Keech v. Sandford*, 25 Eng. Rep. 223, 223 (Ch. 1726) (finding that the trustee obtained the lease for himself after the landlord refused to renew his lease to the trust).

285. See RESTATEMENT (FIRST) OF RESTITUTION § 197 (1937) (“Where a fiduciary in violation of his duty to the beneficiary receives or retains a bonus or commission or other profit, he holds what he receives upon a constructive trust for the beneficiary.”).

286. *Intermarque Auto. Prods., Inc. v. Feldman*, 21 S.W.3d 544 (Tex. App.—Texarkana 2000, no pet.).

287. See *Intermarque Auto. Prods., Inc.*, 21 S.W.3d at 552 (discussing the RESTATEMENT (FIRST) OF RESTITUTION § 197 cmt. c (1937)); *Slay v. Burnett Trust*, 143 Tex. 621, 187 S.W.2d 377, 389 (1945) (indicating that a recovery for damages incurred, while not direct to the trust, is proper when it is the result of misconduct by the fiduciary).

288. See *Snepp v. United States*, 444 U.S. 507, 515–16 (1980) (affirming a constructive trust for royalties of a book, based on unauthorized disclosure of confidential information); *United States v. Carter*, 217 U.S. 286, 306 (1910) (emphasizing that receiving a benefit in violation of a duty to a principal, or adverse to a principal, is a betrayal of trust and the agent must account to the principal for all benefits received); see also RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 43 illus. 6 (2011) (affirming disgorgement of the executor’s finder’s fee paid by an insurance company for returning a famous violin stolen by the decedent).

fiduciary jockey.²⁸⁹ The owner and jockey both have economic incentives for the horse to win its race: the prize for the owner and the incentive bonus that owner will pay the jockey for winning first place. Now assume that a third party secretly offers the jockey an additional bonus for winning. DeMott concludes that the acceptance of such a second bonus would be a breach of fiduciary duty and must be disgorged to the owner.²⁹⁰ The undisclosed second bonus is not in conflict with the overall purpose of either party but it is in conflict with the owner's right to control the actions of the fiduciary-jockey.²⁹¹ Furthermore, all profits gained by the agent while executing his duties must accrue to the principal.²⁹²

In contrast to assertions in Texas appellate opinions on third-party fee cases for fee forfeiture, Texas courts do order disgorgement of professional fees paid by third parties for breach of fiduciary duty. Two Texas opinions relate to claims against disloyal real estate agents for fees that the agent received from a third party in a subsequent sale of the property in interest. *Tatum v. Preston Carter Co.*²⁹³ is the more interesting case because the defendant was found to have acted as a broker without a brokerage agreement. The defendant was found liable for disloyalty for brokering the sale of a property to the plaintiff's competitor and was ordered to disgorge his subsequent commission from a third party.²⁹⁴ In

289. See Deborah A. DeMott, *Disloyal Agents*, 58 ALA. L. REV. 1049, 1055 (2007) ("In more general terms, only the principal can assess how best to further the principal's own interests and objectives. The prospect of acquiring a side benefit may distract the agent from focusing on accomplishing the principal's objectives by biasing how the agent interprets instructions received from the principal and understands what the principal wishes to achieve."); see also RESTATEMENT (THIRD) OF THE LAW OF AGENCY § 8.01 illus. 1 (2006) (demonstrating where an agent does not perform according to his fiduciary duty to the principle and the act itself is deemed ineffective as a result).

290. See Deborah A. DeMott, *Causation in the Fiduciary Realm*, 91 B.U. L. REV. 851, 856 (2011) ("Additionally, a fiduciary must disgorge benefits obtained by using his or her position when the principal could not itself have obtained the benefits, a point most vividly established in cases subjecting the fiduciary to liability to account for bribes or other illegal payments received from third parties.").

291. See *id.* at 856–57 (supporting the notion that a conflict arises when there are improper incentives for the fiduciary, at least in part because the principal has a right to control the fiduciary).

292. See *supra* notes 31, 67, 124, 131, and accompanying text.

293. *Tatum v. Preston Carter Co.*, 702 S.W.2d 186 (Tex. 1986).

294. See *id.* at 187 (finding liability for the agent who assisted his principal's competitor to buy property sought by the principal and ordering disgorgement of the commission paid by the competitor).

Chien v. Chen,²⁹⁵ the summary judgment was reversed and remanded for further consideration of a remedy that sought the third-party's profit and subsequent commissions gained by the defendants.²⁹⁶

Two other cases related to securities brokers support disgorgement of third-party fees: one was negligent in his security transactions and recommendations for the investor,²⁹⁷ and the other failed to disclose a conflicting interest between him and the investment group that the broker recommended.²⁹⁸ The disgorged commissions were paid by the principal in neither case.

While *Daniel v. Falcon Interest Realty Corp.*²⁹⁹ is a self-dealing or secret profit case, the ruling is based on logic relevant to Group 6. A company executive who was in charge of soliciting subcontracts secretly established a shell company to bid on one of the subcontracts that he was managing.³⁰⁰ As the lowest bid, the executive's offer won the contract, which was completed satisfactorily. In the absence of the self-dealing, the employer would have had to pay more for the same contract. As the contract was not rescinded, the company benefitted from the cheap contract and also received the executive's secret profit.³⁰¹ This is another form of windfall; implicitly the law in equity would rather provide the employer with a windfall than to tolerate allowing the employee to retain a gain from possible disloyalty.

Group 6 is directly applicable to the current controversy relating to forfeiture claims against lawyer fiduciaries for legal fees paid by third parties. One variation of this claim is for the first client to seek forfeiture

295. *Chien v. Chen*, 759 S.W.2d 484 (Tex. App.—Austin 1988, no writ).

296. *See id.* at 496 (“Concerning the fraud actions alleged against Chen and Deal, we observe first that it is undisputed that they obtained the resale profit and commissions mentioned previously and that neither disclosed to Tomas that the sale to Lee was colorable only and that Chen was the actual purchaser.”).

297. *See W. Reserve Life Assurance Co. of Ohio v. Graben*, 233 S.W.3d 360, 375 (Tex. App.—Fort Worth 2007, no pet.) (affirming an award of lost profits as actual damages based on profits would have been gained in the absence of the defendant's negligence, and also affirming disgorgement of the commissions from a third party).

298. *See Marist College v. Nicklin*, No. 01-94-00849-CV, 1995 Tex. App. LEXIS 871, at *5 (Tex. App.—Houston [1st Dist.] Apr. 27, 1995, writ denied) (affirming the disgorgement of commissions paid by a third party to adequately account to the principal for all he received in breach of fiduciary duty).

299. *Daniel v. Falcon Interest Realty Corp.*, 190 S.W.3d 177 (Tex. App.—Houston [1st Dist.] 2005, no pet.).

300. *See id.* at 187 (allowing the disgorgement of the net secret profit of the employee in breach).

301. *See id.* at 186–87 (asserting that not rescinding the contract, the principal would receive the benefit of the less expensive contract, as well as the disgorgement of the profits of the agent).

of a lawyer's fees from representing a second client, whose representation is alleged to conflict with the lawyer's loyalty to the first client. While the connection between the first client and the lawyer fiduciary may seem tenuous with regard to fees paid by the second client, any compensation that the fiduciary receives in violation of fiduciary duty to the first client would appear to satisfy the low standard for causation. As reasoned in *Pope v. Garrett*,³⁰² but for the breach of duty, the lawyer fiduciary would not have gained her fees.³⁰³ To deter the temptation of a fiduciary to breach her duty and to deny unjust enrichment, the law in equity is conceptually consistent with disgorgement or forfeiture of third-party fees.³⁰⁴

G. *Group 7: Denying or Recovering Fiduciary Compensation*³⁰⁵

There are three kinds of fiduciary compensation cases: forfeiture provides the principal a possible defense or counterclaim at law to the fiduciary's claim for payment (Group A in Section II); the principal can make a claim at law for excessive billing as fraud or negligence;³⁰⁶ and the principal can make a claim in equity for fraud or breach of fiduciary duty to disgorge or forfeit fiduciary compensation that is not itself a breach of fiduciary duty.³⁰⁷

Many of the older fiduciary compensation cases related to a court's denial of the fiduciary's claim for breach of contract or quantum meruit, and were denied on the basis of a counterclaim for breach of fiduciary duty.³⁰⁸ A lawyer's overbilling of a client can be claimed at law as negligence³⁰⁹ or as an intentional tort such as a breach of fiduciary duty³¹⁰ or fraud.³¹¹

302. *Pope v. Garrett*, 147 Tex. 18, 211 S.W.2d 559 (1948).

303. *See id.* at 562 (finding that the defendants would have inherited the property interests in question but for their wrongful acts).

304. *But see* Section IX, Part B, *infra*, for a discussion of cases relating to the defense of third-party fees that has effectively shielded lawyers from such forfeiture claims. To date, the fee forfeiture claim has not been taken very seriously at the trial or appellate level.

305. For this group only, some cases relating to lawyer fiduciaries have been included.

306. *See infra* Section VIII, Part D on exceptions to fracturing rule.

307. *See supra* Groups C, E, and F in Section II.

308. *See supra* note 16.

309. *See Akin, Gump, Strauss, Hauer & Feld, LLP v. Nat'l Dev. & Research Corp.*, 299 S.W.3d 106, 123 (Tex. 2009) ("The evidence is legally sufficient to support the jury finding that Akin Gump's negligence was a cause in fact of NDR's retaining the professors and, thus, that the firm's negligence proximately caused NDR to pay the fees and expenses of the professors.').

310. *See Fortson v. Asaf*, No. 01-99-00542-CV, 2001 Tex. App. LEXIS 6365, at *10 (Tex.

Prior to *Burrow*, practically all claims in equity against a fiduciary's compensation were made as pleas for remedies in equity other than forfeiture. The few cases relating to forfeiture of fees better resemble normal claims for disgorgement in procedure than the forfeiture prescribed in *Burrow*: the defendant forfeited all compensation without consideration of any of the factors suggested in *Burrow*.³¹² As a counterclaim to a claim at law, the fiduciary's entire contract was voided or not, "chicken or feathers," based on liability for breach of loyalty.³¹³

Without acknowledging any distinction, Texas case law rarely orders the disgorgement of the defendant's salary or regular income because transactional fees are the main targets.³¹⁴ In claims against corporate officers and directors, for example, it is rare for the plaintiff to seek disgorgement or forfeiture of the defendant's regular salary or ongoing compensation. There was no mention of such a claim against the defendants in *Swinnea, Slay, Kinzbach, City of Fort Worth v. Pippen*,³¹⁵ *International Bankers Life Insurance Co. v. Holloway*,³¹⁶ or *Daniel v. Falcon Interest Realty Corp.*³¹⁷ As president of the Carl B. and Florence E. King Foundation, Yeckel was ordered to disgorge excess compensation of more than four million but the plaintiff did not seek his remaining

App.—Houston [1st Dist.] Aug. 31, 2001, pet. denied) (not designated for publication) ("We hold that appellees produced some evidence that appellant breached his fiduciary duty to appellees in the way he conducted his billing practices regarding this case.").

311. See *Sullivan v. Bickel & Brewer*, 943 S.W.2d 477, 483 (Tex. App.—Dallas 1995, writ denied) (affirming that the plaintiff properly alleged a claim for fraudulent billing practices that was separate from the legal malpractice claim, which was otherwise denied for limitations).

312. See *Russell v. Truitt*, 554 S.W.2d 948, 952 (Tex. Civ. App.—Fort Worth 1977, writ ref'd n.r.e.) ("Plaintiffs were entitled to their recovery as a matter of law if the breach of fiduciary duty was proved The breach automatically results in the forfeiture of the agent's compensation."); *Anderson v. Griffith*, 501 S.W.2d 695, 701 (Tex. Civ. App.—Fort Worth 1973, writ ref'd n.r.e.) (finding that a breach of fiduciary duty automatically forfeits all compensation and requires repayment of any improper benefit that arose from the breach).

313. See *supra* note 16.

314. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 37 cmt. e (2000) ("When a lawyer-employee of a client is discharged for misconduct, except in an extreme instance this Section does not warrant forfeiture of all earned salary and pension entitlements otherwise due.").

315. *City of Fort Worth v. Pippen*, 439 S.W.2d 660 (Tex. 1969).

316. *Int'l Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567 (Tex. 1963).

317. *Daniel v. Falcon Interest Realty Corp.*, 190 S.W.3d 177 (Tex. App.—Houston [1st Dist.] 2005, no pet.).

compensation.³¹⁸ Perhaps in that case, it was thought that Yeckel would be unable to pay even the four million so that seeking more was not worth the risk of the appearance of “piling on.”³¹⁹

SECTION VII. TEXAS FORFEITURE

In retrospect, it is ironic to recall that the legal community’s reaction to *Burrow* was largely that fee forfeiture represented a tough new remedy to plead against lawyers.³²⁰ Given the precedents for disgorgement of non-lawyer fiduciary compensation, restitution of the fiduciary’s compensation was not new. As prescribed in *Burrow*, forfeiture actually represented a substantial increase in difficulty for the plaintiff to prove her case,³²¹ as compared to disgorgement.

Prior to *Burrow*, the specific remedy of fee forfeiture was rarely sought in claims against lawyers for breach of fiduciary duty, just as claims for legal malpractice only really started to appear about thirty years ago. Of the six Texas precedents cited in *Burrow*,³²² only two relate directly to forfeiture,³²³ one to disgorgement of a secret profit,³²⁴ and three to the denial of claims at law.³²⁵

318. See *Yeckel v. Abbott*, No. 03-04-00713-CV, 2009 Tex. App. LEXIS 3881, at *12, *36–37 (Tex. App.—Austin June 4, 2009, pet. denied) (mem. op.) (affirming the award of “\$7,004,543, which included \$4,155,850 in ‘excess salary’ paid to Yeckel”).

319. According to private correspondence with one of the litigation counsel, the court’s charge to the jury did not allow the plaintiffs to seek recoupment of reasonable compensation and benefits based on the income tax code.

320. See Tom Prehoditch, *Breach-of-Fiduciary-Duty Claims Against Lawyers on the Rise*, TEX. LAW., Feb. 13, 2006, at 27 (listing the challenges attorneys face with legal malpractice suits on the rise and the new distinction made between breach of fiduciary duty claims and legal malpractice claims in *Burrow*); see also Linda Eads, *Negligence vs. Disloyalty: Limits on the Forfeiture of Attorneys’ Fees*, TEX. LAW., Jan. 12, 2004, at 1051 (“Not surprisingly, we now see a breach-of-fiduciary-duty claim in almost every case in which a client alleges lawyer misconduct, including negligence cases.”); Christopher Fuller & Robyn Bigelow, *Forfeiting Attorneys’ Fees After Arce: Consider the Consequences Before Suing Clients*, TEX. LAW., Aug. 5, 2002, at 449 (“Following *Arce*, however, an attorney who commits a clear and serious breach of fiduciary duty may forfeit all or part of his fee, regardless of whether the plaintiff was even harmed.”); Nathan Koppel, *Counsel May Lose Fees for Disloyalty: Absence of Damage to Client Won’t Bar Fee Forfeitures*, TEX. LAW., July 12, 1999, at 1 (“A unanimous court held that lawyers can now be required to forfeit some or all of their fees for breaching their fiduciary duty of loyalty to clients, even when clients aren’t damaged by the breach.”).

321. See Charles W. Wolfram, *A Cautionary Tale: Fiduciary Breach as Legal Malpractice*, 34 HOFSTRA L. REV. 689, 701 (2006) (“The Restatement of the Law Governing Lawyers, however, imposes additional requirements before the remedy of total disgorgement of a lawyer’s fee may be imposed.”).

322. *Burrow v. Arce*, 997 S.W.2d 229, 239 nn.34–35 (Tex. 1999).

323. See *Russell v. Truitt*, 554 S.W.2d 948, 952 (Tex. Civ. App.—Fort Worth 1977, writ ref’d

The key precedent for both forms of forfeiture is *Kinzbach*³²⁶ in addition to three restatements.³²⁷ The support from these precedents, however, is diminished by the fact that *Burrow* was contradicted by *Brewer & Pritchard* on how *Kinzbach* should be interpreted in relation to fee forfeiture³²⁸ and the contradiction between *Burrow* and *Swinnea* on how section 469 of the *Restatement (Second) of Agency* should be interpreted.³²⁹ The main support for the type of forfeiture prescribed in *Burrow* is found in the *Restatement (Third) of the Law Governing Lawyers*.³³⁰

Justice Green's opinion on asset forfeiture effectively recognizes a new remedy.³³¹ Although it also cites to only three Texas cases³³² and the

n.r.e.) (finding that a breach of fiduciary duty forfeits all of the breaching agent's compensation); *Anderson v. Griffith*, 501 S.W.2d 695, 702 (Tex. Civ. App.—Fort Worth 1973, writ ref'd n.r.e.) (affirming a decision to withhold a real estate broker's compensation when he breached a fiduciary duty).

324. *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 138 Tex. 565, 160 S.W.2d 509, 514 (1942).

325. See *Judwin Props., Inc. v. Griggs & Harrison, PC*, 911 S.W.2d 498, 506–07 (Tex. App.—Houston [1st Dist.] 1995, no writ) (denying the defendant's counterclaim for breach of fiduciary duty to a claim for legal fees); *Watson v. Ltd. Partners of WCKT*, 570 S.W.2d 179, 182 (Tex. Civ. App.—Austin, 1978, writ ref'd n.r.e.) (awarding reimbursement based on a claim for money had and received); *Bryant v. Lewis*, 27 S.W.2d 604, 606–08 (Tex. Civ. App.—Austin 1930, writ dism'd) (rejecting a claim for quantum meruit).

326. See *ERI Consulting Eng'rs, Inc. v. Swinnea*, 318 S.W.3d 867, 872 (Tex. 2010) (citing *Kinzbach* in an explanation of why a fiduciary must return benefits in a violation of his duties regardless of whether the plaintiff suffered damages); *Burrow*, 997 S.W.2d at 240 (noting that *Kinzbach* does not require an automatic forfeiture of all commissions when an agent breaches a fiduciary duty).

327. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49 cmt. d (2000) (“[A] lawyer who violates fiduciary duties to a client is subject to liability even if the violation or the resulting harm was not intended.”); RESTATEMENT (SECOND) OF TRUSTS § 243 (1959) (“If the trustee commits a breach of trust, the court may in its discretion deny him all compensation or allow him a reduced compensation or allow him full compensation.”); RESTATEMENT (SECOND) OF AGENCY § 469 (1958) (stating that an agent is not entitled to compensation for services that breached the agent's duty of loyalty, and if the conduct is a willful breach, then an agent is not entitled to receive compensation even for services that were performed properly).

328. See *supra* notes 12 and 32.

329. Compare *Burrow*, 997 S.W.2d at 243 (interpreting *Restatement (Second) of Agency* section 469 to compel forfeiture of any compensation which was not earned from a properly performed service when the agent deliberately breaches a fiduciary duty), with *Swinnea*, 318 S.W.3d at 873 (interpreting section 469 of the *Restatement (Second) of Agency*, which constitutes willful breach of a duty disqualifying the agent from receiving compensation even for services properly performed under the contract).

330. See Charles Silver, *A Critique of Burrow v. Arce*, 26 WM. & MARY ENVTL. L. & POL'Y REV. 323, 325 (2001) (“The only authority that supported the justices was the Restatement (Third) of the Law Governing Lawyers. Apparently, they found it too frail a reed to support their decision. This was a sensible conclusion. The authority supporting the Restatement (Third) was weak, none of it was Texas law, and the Restatement (Third) provided no analytical defense for the rule it endorsed.”).

331. See *Swinnea*, 318 S.W.3d at 870 (reversing the appellate court and holding that asset forfeiture can be awarded in addition to actual and exemplary damages).

three same restatements as *Burrow*, none of these cites address asset forfeiture. Asset forfeiture as specific restitution without any counter-restitution for the defendant is new because it contradicts Texas and traditional law on total equity and counter-restitution.³³³

The court's heavy reliance on the *Restatement (Third) of the Law Governing Lawyers* is a wobbly foundation, at best, for the changes introduced by *Burrow* and *Swinnea*.³³⁴ Owing to the fact that the State of Texas has never offered separate courts in equity and that Texas is one of the few jurisdictions to offer jury trials for claims in equity, our brand of equity is markedly different from most other jurisdictions. For example, Texas courts now recognize claims for quantum meruit as claims in equity as opposed to most jurisdictions that treat such claims as claims at law³³⁵ and Texas courts presently have great difficulty in determining whether unjust enrichment is a claim in equity, a remedy in equity, or both.³³⁶

Technically, *Burrow* does not provide much precedential authority on fee forfeiture because its specific holdings relate to expert opinions and damages in fact.³³⁷ *Burrow* held that the defendant failed to substantiate its motion for summary judgment, ordering the plaintiffs' claims for legal malpractice and breach of fiduciary duty to be remanded.³³⁸ The court held that the defendant's expert opinion was conclusory and therefore failed to refute damages in fact for malpractice and that damages in fact were not required to substantiate a claim for fee forfeiture.³³⁹ Given the narrowness of the issues, Justice Hecht chose to expand the opinion to briefly discuss the court's new position on fee forfeiture in general, which has been largely supported in all subsequent court opinions.

In contrast, the holding in *Swinnea* directly addressed the issue of asset

332. *Johnson v. Brewer & Pritchard, PC*, 73 S.W.3d 193, 199 (Tex. 2002); *Burrow*, 997 S.W.2d at 234; *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 138 Tex. 565, 160 S.W.2d 509, 514 (1942).

333. *See supra* notes 153 through 159.

334. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (2000). First, the restatement is an authority on the law relating to lawyers not on remedies in equity. Second, all restatements are statements of traditional or national law.

335. *See supra* note 243.

336. *See* George P. Roach, *Unjust Enrichment in Texas: Is It a Floor Wax or a Dessert Topping?*, 65 BAYLOR L. REV. 153, 184 (2013) (noting the confusion among courts on whether unjust enrichment is a claim at law or in equity).

337. *See Burrow*, 997 S.W.2d at 245–46 (discussing procedural issues).

338. *See id.* (remanding the case, which was previously resolved by summary judgment, to sort out the factual issues required for claims of breach of fiduciary duty and legal malpractice).

339. *See id.* at 235–36 (finding the expert opinion affidavits to be too conclusory to support a summary judgment ruling).

forfeiture: it held that asset forfeiture can be awarded as an additional tranche of damages (in addition to an award of actual plus exemplary damages) in aggravated cases of actual fraud committed against the principal.³⁴⁰

A. *Case Facts*

The underlying litigation in *Burrow* related to a tragic industrial accident at a chemical plant in 1989 when twenty-three workers were killed and hundreds were injured. The case was settled before trial for a total of \$190 million less \$60 million of contingency fees. The subsequent suit against the attorneys for malpractice and breach of fiduciary duty was filed by forty-nine plaintiffs and was dismissed on summary judgment.³⁴¹ The key issues in *Burrow* related to whether a plea of fee forfeiture for breach of fiduciary duty: (1) requires proof of damages in fact; (2) requires an award of all fiduciary fees or just some portion thereof; and (3) requires a finding of fact from the jury about the amount of fees to be forfeited.

The allegations as to what actions specifically implicated a breach of fiduciary duty differ between the opinions of the fourteenth district³⁴² and the supreme court.³⁴³ However, the trial court ruled that the plaintiffs had established a question of fact as to whether the defendant lawyers engaged in an aggregate settlement (without prior disclosure).³⁴⁴ Furthermore, the fourteenth district holding is specifically tied to the allegation of aggregate settlement practices.³⁴⁵

Snodgrass and Swinnea were equal partners in an environmental consulting business, ERI Consulting Engineers, Inc. ("ERI"), and in a holding company for the headquarters property, Malmeba Company, Ltd.

340. *ERI Consulting Eng'rs, Inc. v. Swinnea*, 318 S.W.3d 867, 870 (Tex. 2010).

341. *Burrow*, 997 S.W.2d at 232. The original suit included 126 plaintiffs represented by five attorneys.

342. *See Arce v. Burrow*, 958 S.W.2d 239, 245 (Tex. App.—Houston [14th Dist.] 1997) ("Considering the points appellants have raised and the responses to them, the main issue we must determine is whether an attorney's fees can be forfeited when the attorney has breached a fiduciary duty owed the client by entering into an aggregate settlement."), *aff'd in part, rev'd in part on other grounds*, 997 S.W.2d 229 (Tex. 1999).

343. *Burrow*, 997 S.W.2d at 232–33.

344. *See Arce*, 958 S.W.2d at 244 ("On January 11, 1995, the trial court held a hearing on the original and first supplemental motion for summary judgment. The court denied the motions and sent a letter to the parties explaining its ruling. The letter first stated that a fact issue existed 'on whether there was an aggregate settlement of the plaintiffs' claims against Phillips' and second, that the defendants had not addressed the plaintiffs' claims for damages on the aggregate settlement.'").

345. *Id.* at 245.

(“Malemba”). In 2001, Swinnea sold his interest in ERI to Snodgrass and agreed not to compete with ERI for six years in exchange for \$497,500 and Snodgrass’s interest in Malmbeba. Evidence was presented at the bench trial that showed that Swinnea prepared to compete with ERI even before the sales agreement was executed and even though Swinnea continued to work full time for ERI. It was shown that Swinnea expected to be able to buy ERI later for a depressed price after competition from his new company had “run [ERI] into the ground.”³⁴⁶

The trial court awarded ERI and Snodgrass lost profits of \$300,000; asset forfeitures of \$437,500 (a portion of the \$497,500 paid to acquire Swinnea’s interest in ERI); \$150,000 (“the value of Snodgrass’s one-half interest in Malmbeba transferred to Swinnea”); \$133,200 (“the sum of the lease payments from ERI to Malmbeba after the buyout”); and \$1 million in exemplary damages.³⁴⁷ The twelfth district reversed the trial court, holding that Snodgrass take nothing as the lost profits were not sufficiently proven and the precedents for fee forfeiture do not justify the authority to forfeit assets.³⁴⁸

It is interesting to speculate whether the Court would have endorsed asset forfeiture if the twelfth district’s opinion had not rejected all remedies for a case with such aggravated facts. If so, asset forfeiture may be, and hopefully will be what Justice Roberts famously referred to as “a restricted railroad ticket, good for this day and train only.”³⁴⁹

B. *Deterrence*

While both forfeiture opinions endorsed deterrence as the primary goal, they greatly differ on the degree of forfeiture that is reasonably required.

346. *ERI Consulting Eng’rs, Inc. v. Swinnea*, 318 S.W.3d 867, 871 (Tex. 2010).

347. *Id.* at 871–72.

348. *Compare Swinnea v. ERI Consulting Eng’rs, Inc.*, 236 S.W.3d 825, 841 (Tex. App.—Tyler 2007) (“However, to the extent Appellees assert that the trial court’s awards are valid based on the equitable remedy of fee forfeiture, we disagree. Here, there is no such fee involved and therefore that line of cases is inapposite.” (citations omitted)), *rev’d*, 318 S.W.3d 867 (Tex. 2010), *with Swinnea v. ERI Consulting Eng’rs, Inc.*, 364 S.W.3d 421, 424–25 (Tex. App.—Tyler 2012, pet. denied) (reducing lost profits from \$300,000 to \$178,601.05, affirming the punitives of \$1,000,000, and remanding the asset forfeiture to the trial court for consideration of the factors enumerated in the Supreme Court opinion).

349. *Smith v. Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting). *But see Haut v. Green Café Mgmt., Inc.*, 376 S.W.3d 171, 183 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (“In his fifth issue, Haut contends the equitable remedy of forfeiture of his interests in the two companies is inappropriate as a matter of law because Haut paid \$100 for his interest in Alabama Green and \$300 for his stock in GCM and because forfeiture is only applied in exceptional circumstances.”).

Burrow cautioned that excessive remedies may impair deterrence³⁵⁰ while *Swinnea* advocated the possible need to forfeit all fiduciary fee compensation, possibly even for properly performed services, based on a forceful interpretation of section 469 of the *Restatement (Second) of The Law of Agency*.³⁵¹ *Swinnea* further endorsed stacking the remedy of asset forfeiture on top of substantial actual and exemplary damages, perhaps assuming that “too much forfeiture is never enough.” Under *Swinnea* it is not impossible that the plaintiff could be awarded a teetering stack of actual damages plus fee forfeiture plus exemplary damages plus asset forfeiture.

C. Judge or Jury

The question of whether a claimant for fee forfeiture needs to prove damages in fact warrants a simple negative response in light of ample and longstanding precedents from Texas courts and outside authorities.³⁵² Similarly, both opinions hold that the decision to award forfeiture must be left to the discretion of the trial judge,³⁵³ which is based on the equally

350. See *Burrow v. Arce*, 997 S.W.2d 229, 241 (Tex. 1999) (“Nor is automatic and complete forfeiture necessary for the remedy to serve its purpose. On the contrary, to require an agent to forfeit all compensation for every breach of fiduciary duty, or even every serious breach, would deprive the remedy of its equitable nature and would disserve its purpose of protecting relationships of trust.”).

351. Compare *Burrow*, 997 S.W.2d at 243 (“But we do not read section 469 to mandate automatic forfeiture or preclude consideration of factors other than an agent’s willfulness any more than comments to section 49 do.”), with *Swinnea*, 318 S.W.3d at 873 (“We repeated that ‘the central purpose of the remedy is to protect relationships of trust from an agent’s disloyalty or other misconduct.’ That policy applies equally to the relationship of trust at issue here and the duties *Swinnea* owed to ERI and Snodgrass. We cited section 469 of the Restatement (Second) of Agency, which states that if ‘conduct [that is a breach of his duty of loyalty] constitutes a wilful and deliberate breach of his contract of service, he is not entitled to compensation even for properly performed services for which no compensation is apportioned.’” (quoting *Burrow*, 997 S.W.2d at 237, 240 (Tex. 1999))).

352. See *Home Loan Corp. v. Tex. Am. Title Co.*, 191 S.W.3d 728, 735 n.22 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) (“Because Home Loan’s claim for breach of fiduciary duty sought only actual and punitive damages, and not fee forfeiture, a lack of causation is dispositive.”); *Hoover v. Larkin*, 196 S.W.3d 227, 233 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (ruling that the lack of evidence proving causation can defeat a claim for fee forfeiture); *Edwards v. Pena*, 38 S.W.3d 191, 198–99 (Tex. App.—Corpus Christi 2001, no pet.) (analyzing first the evidence supporting whether there was a breach of fiduciary duty and secondly, if there is no evidence, then whether it may be determined from the record if the opposing party has established its counterclaim as a matter of law).

353. *Burrow*, 997 S.W.2d at 245.

uncontroverted position that all remedies in equity are awarded at the discretion of the judge.³⁵⁴

Even though there is a strong tradition in Texas for the jury to provide input in measuring a monetary remedy in equity,³⁵⁵ *Burrow* states that the relevant factors for determining the appropriate amount of forfeiture are too complicated or require sophisticated legal considerations beyond the experience of most jurors.³⁵⁶ Doubtlessly, the jury instructions would be complicated but it seems inconsistent to exclude jury participation from some remedies in equity but not others, especially when a jury finding on liability will still be required.

Furthermore, the two factors in question, adequate remedy and the public interest remain largely unmentioned in forfeiture opinions since *Burrow*.³⁵⁷ *Burrow* also forgets that the claimant to forfeiture is required to obtain a finding of fact from the jury on the value of the relief in equity to substitute as actual damages for the purposes of awarding punitive damages.³⁵⁸

D. *Burdens of Proof*

Because the fiduciary is traditionally more sophisticated and has better access than the principal to the key evidence, the law in equity shifts the burden of proof to the defendant once the claimant has identified a reasonable approximation of the applicable assets or revenues.³⁵⁹ Ordinarily, the fiduciary has substantial incentive to undertake her burden to produce relevant information to support her claim for counter-restitution. In a proceeding for disgorgement, the defendant would have to carry that burden because the fees are readily identified in most cases and therefore are subject to disgorgement by default.³⁶⁰

354. See *supra* note 75.

355. See *supra* notes 77, 78, and 79.

356. *Burrow*, 997 S.W.2d at 245.

357. Out of the 100 Texas case opinions that mention the term “fee forfeiture” in the LexisNexis database, only thirty even mention the terms “public interest” or “public policy.”

358. See *supra* note 171.

359. See *City of Fort Worth v. Pippen*, 439 S.W.2d 660, 667 (Tex. 1969) (affirming the award of disgorgement of 100% of defendants’ gross benefit due to their failure to prove counter-restitution).

360. See *supra* notes 34, 35, and 130.

As presently described and especially as subsequently applied in the lower courts, the process of measuring the applicable forfeiture does not observe this tradition.³⁶¹ *Burrow* fails to acknowledge the tradition or justify its reversal.

E. *Forfeiture Is Now Digital*

Burrow advocated a new digital or graduated approach to awarding forfeiture: the order to forfeit should not be tied to “chicken or feathers,” but could be any amount in between the two extremes.³⁶² The court justified the new approach with quotes from the three restatements.³⁶³ No attempt was made to reconcile this analysis with the body of case law to the opposite, including numerous supreme court holdings, that ordered total disgorgement or forfeiture.³⁶⁴ Furthermore, *Burrow* failed to recognize the distinction between disgorging all of the fiduciary’s profit and forfeiting some or all of the fiduciary’s compensation as a result of a separate breach.

Section II has already shown that *Kinzbach* offers no support for the digital measurement of forfeiture prescribed in *Burrow*.³⁶⁵ *Burrow*’s comparison of disgorgement to forfeiture also missed the point that disgorging all of a bribe or secret profit has more compelling public policy considerations than forfeiting all of a fiduciary’s compensation when the compensation is the not the source of the breach.

In other areas of remedies in equity, the “all or none” approach³⁶⁶ has been losing favor in the second half of the twentieth century.³⁶⁷ In

361. See RESTATEMENT OF THE LAW, THIRD, AGENCY § 8.01 cmt. b (2006) (“The agent’s breach subjects the agent to liability to account to the principal. In general, an agent has the burden of explaining to the principal all transactions that the agent has undertaken on the principal’s behalf. The agent bears this burden because evidence of dealings and of assets received is more likely to be accessible by the agent than the principal.”).

362. See *Burrow v. Arce*, 997 S.W.2d 229, 243 (Tex. 1999) (holding that the trial judge has discretion in determining whether the trustee shall receive full compensation or whether the compensation should be reduced or denied).

363. *Id.* at 237.

364. See *supra* notes 21, 22, and 32.

365. See *supra* notes 12 and 57 and accompanying text.

366. See *Woods v. City Nat’l Bank & Trust Co.*, 312 U.S. 262, 268–69 (1940) (explaining that a conflict of interest can seldom be measured with any degree of certainty); *United States v. Carter*, 217 U.S. 286, 317 (1910) (concluding that the defendant must account for all gains, profits or gratuities received).

367. Compare *I.G. Petrol., LLC v. Fenasci (In re W. Delta Oil Co.)* 432 F.3d 347, 354–55 (5th Cir. 2005) (stating that a court may deny compensation to an attorney who holds an adverse interest),

federal intellectual property claims, when a court is expected to award the defendant's revenues because the defendant failed to produce evidence of counter-restitution, the court found an excuse in about 40% of the cases to make a digital award somewhere in between the two extremes.³⁶⁸

Swinnea offers no direct discussion of whether or not asset forfeiture is to be measured in a digital manner. However, it seems conclusive that a digital approach is implied as the trial court's award of asset forfeiture was remanded for that court's failure to explain the award in light of the factors established to guide such an award.³⁶⁹ Yet to be determined is whether the digital approach will be applied to other remedies in equity. At a minimum, Justice Hecht should have indicated whether forfeiture as a counterclaim to a fiduciary's claim at law must be measured digitally.

F. *Factors to Be Balanced*

If the fiduciary's compensation is to be reviewed for forfeiture on a digital basis, the process prescribed includes the use of various factors suggested by the *Restatement of Trusts*³⁷⁰ or the *Law Governing Lawyers*.³⁷¹ Some of these factors contradict prior case law.

Two of the six Texas cases cited in *Burrow* repeat the following quote that reflects the strict liability approach of the avoidance cases discussed in Group 1 in Section VI, which contradicts the balancing of mitigating factors:

with Woods, 312 U.S. at 268–69 (arguing that only strict adherence can keep a fiduciary's standard of conduct at a higher level than the crowd).

368. See George P. Roach, *A Default Rule of Omnipotence: Implied Jurisdiction and Exaggerated Remedies in Equity for Federal Agencies*, 12 FORDHAM J. CORP. & FIN. L. 1, 61 (2007) (discussing the court's ability to estimate defendant's benefit).

369. *ERI Consulting Eng'rs, Inc. v. Swinnea*, 318 S.W.3d 867, 875 (Tex. 2010).

370. See *Burrow v. Arce*, 997 S.W.2d 229, 243 (Tex. 1999) ("In the exercise of the court's discretion the following factors are considered: (1) whether the trustee acted in good faith or not; (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 part of the trust property; (4) whether or not the breach of trust occasioned any loss and whether if there has been a loss it has been made good by the trustee; (5) whether the trustee's services were of value to the trust." (quoting RESTATEMENT (SECOND) OF TRUSTS § 243 cmt. c (1959))).

371. See *id.* ("Section 49 sets out considerations similar to those for trustees in applying the remedy of fee forfeiture to attorneys. As we have already noted, they are: 'the gravity and timing of the violation, its willfulness, its effect on the value of the lawyer's work for the client, any other threatened or actual harm to the client, and the adequacy of other remedies.' These factors are to be considered in determining whether a violation is clear and serious, whether forfeiture of any fee should be required, and if so, what amount. The list is not exclusive." (quotation & footnote omitted)).

The question, therefore, does not relate to the mala fides of the agent nor to whether or not a greater sum might have been procured for the property, nor even to whether or not the vendor received full value therefor. The self-interest of the agent is considered a vice which renders the transaction voidable at the election of the principal without looking into the matter further than to ascertain that the interest of the agent exists.³⁷²

Burrow highlights the public policy factor, i.e., that the amount of forfeiture should reflect the relevant public policy considerations in that case.³⁷³ This factor is redundant with the law in equity's mandate to act as a court of conscience. So far, the public policy factor has been mentioned rarely and with seeming minor impact.³⁷⁴

The *Restatement of the Law Governing Lawyers* suggests that the factors to consider should include "adequate remedy."³⁷⁵ Little explanation is offered.³⁷⁶ In general, "adequate remedy" in the law in equity relates to the doctrine of irreparable injury, which controls the gatekeeper issue of jurisdiction in equity, not how remedies in equity are measured. Unfortunately, some courts are interpreting the provision to mean that forfeiture is not to be stacked on actual damages as an alternative to actual damages³⁷⁷ despite language to the contrary in *Burrow*.³⁷⁸

One of the few comparative disadvantages for the defendant of fee forfeiture is that the supreme court has been silent on the issue of counter-restitution. Given the facts in *Burrow*, for example, there are at least two viable claims for apportionment and one for offsetting expenses. The

372. *Anderson v. Griffith*, 501 S.W.2d 695, 701 (Tex. Civ. App.—Fort Worth 1973, writ ref'd n.r.e) (quoting *Burleson v. Earnest*, 153 S.W.2d 869, 874 (Tex. Civ. App.—Amarillo 1941, writ ref'd, w.o.m.)).

373. See *Burrow*, 997 S.W.2d at 244 ("To the factors listed in section 49 we add another that must be given great weight in applying the remedy of fee forfeiture: the public interest in maintaining the integrity of attorney-client relationships The Attorneys' argument that relief for attorney misconduct should be limited to compensating the client for any injury suffered ignores the main purpose of the remedy.").

374. See *Jackson Law Office, PC v. Chappell*, 37 S.W.3d 15, 22 (Tex. App.—Tyler 2000, pet. denied) (recognizing that the attorney-client relationship requires proof of the attorney's perfect fairness).

375. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 37 (2000).

376. *Burrow*, 997 S.W.2d at 244.

377. See *Alavi v. MCI WorldCom Network Servs.*, No. 09-05-364-CV, 2007 Tex. App. LEXIS 743, at *9 (Tex. App.—Beaumont Feb. 1, 2007, pet. denied) ("A party must plead forfeiture to be entitled to that equitable remedy.").

378. See *Rash v. J.V. Intermediate, Ltd.*, 498 F.3d 1201, 1213 (10th Cir. 2007) ("Finally, Rash contends that forfeiture is not an available remedy since JVIC sought actual damages and was adequately compensated. *Burrow* specifically forecloses this line of reasoning.").

opinion states that the plaintiffs sought all of the lawyers' fees.³⁷⁹ Normally it would seem reasonable for the fiduciary to seek apportionment in equity for the fact that the claim against the lawyers was only being made by 49 out of the original 126 clients.³⁸⁰ Payments to a sub-contractor-lawyer would also seem to be a reasonable from of apportionment or offset. Such sophisticated litigation would incur substantial out of pocket expenses for experts, court fees and document processing. Are these reasonable expenditures eligible for consideration as offsets? The *Restatement (Third) of the Law Governing Lawyers* briefly states that counter-restitution should be permitted for expenditures that benefit the claimant.³⁸¹

Asset forfeiture does not allow for counter-restitution. Indeed the most striking aspect of *Swinnea* is the absence of any counter-restitution.³⁸² The trial court ordered Swinnea to return the purchase price for his interest but it did not order Snodgrass to return Swinnea's partnership interest. The equitable remedy resembles specific restitution without the chance for counter-restitution. If the lost profits remedy fully compensated Snodgrass, the effect of asset forfeiture is to restore Snodgrass to a position better than he held before the transaction.

G. Punitive Remedies

Overall, fee forfeiture is less onerous for a defendant fiduciary than traditional disgorgement, which is generally not regarded as punitive.³⁸³ Therefore it seems reasonable to conclude that fee forfeiture is unlikely to be found punitive.

Asset forfeiture, however, flouts most of the safeguards that prevent remedies in equity from exacting punitive measures. Asset forfeiture rejects counter-restitution, and therefore the remedy can easily exceed the defendant's gain.³⁸⁴ The fiduciary that makes a substantial cash outlay to

379. *Burrow*, 997 S.W.2d at 234.

380. *Id.* at 232.

381. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 37 cmt. e (2000) ("Forfeiture does not extend to a disbursement made by the lawyer to the extent it has conferred a benefit on the client.").

382. For the essential nature of the defendant's right to seek counter-restitution see *supra* notes 154 through 158.

383. See *In re Estate of Corriea*, 719 A.2d 1234, 1241 (D.C. Cir. 1998) (explaining that forfeiture is not punitive).

384. See *Snepp v. United States*, 444 U.S. 507, 515–16 (1980) (per curiam) (explaining that constructive trust remedies "[conform] relief to the dimensions of the wrong . . . since the remedy

purchase or improve an asset that is subsequently forfeited is penalized in an amount that can be greater than any profit or benefit. Lastly, there has been no evidence that existing remedies against aggravated breach of fiduciary duty have been inadequate to deter such betrayal in general or that current limits on exemplary damages excessively constrain judgments.

Swinnea was a bench trial, thus no jury instructions were necessary. It seems likely that substantial motion practice and appeals will be required on appropriate instructions for asset forfeiture. Should the jury be advised of the possibility that the judge might add asset forfeiture to the actual and exemplary damages determined by the jury? Would such an instruction encourage or discourage the jury's inclination to award exemplary damages?

As described in Section IV, the value of the monetary remedy in equity as determined by the jury is accepted as the amount of actual damages for the purposes of determining exemplary damages. Prior to *Burrow, Russell* extended that doctrine to fee forfeiture.³⁸⁵ In *Swinnea*, however, the opinion implies that the value of asset forfeiture should not be included as actual damages for the purposes of exemplary damages, but no relevant direct holding has been discovered.³⁸⁶

The constitutional law ramifications, if any, are well beyond the scope of this Article. However, asset forfeiture would seem to risk a challenge on the basis that such a remedy departs too far from the norms of remedies in equity and constitutes a remedy at law, requiring a jury trial. In prior cases, the U.S. Supreme Court has ignored the form of remedies and held that the substance of similar remedies better resembled a remedy at law that would require a jury finding.³⁸⁷

As an alternative to actual damages for malpractice or a fiduciary claim, fee forfeiture is no more punitive than disgorgement, which allows for counter-restitution and is based on a jury finding.³⁸⁸ As a remedy to be

reaches only funds attributable to the breach, it cannot saddle the [fiduciary] with exemplary damages out of all proportion to [the] gain").

385. See *Russell v. Truitt*, 554 S.W.2d 948, 955 (Tex. Civ. App.—Fort Worth 1977, writ ref'd n.r.e.) ("The forfeiture of the \$8,000.00 in agency fees is a form of equitable relief awarded for the breach of the equitable duties of those in a fiduciary role. Accordingly, under the rule in *International Bankers Life*, supra, no actual damages are necessary to support the exemplary damage award." (citation omitted)).

386. *ERI Consulting Eng'rs, Inc. v. Swinnea*, 318 S.W.3d 880, 867 (Tex. 2010).

387. See *Tull v. United States*, 481 U.S. 412, 422 (1987) ("Remedies intended to punish culpable individuals . . . were issued by courts of law, not courts of equity.").

388. See supra note 383.

awarded in addition to actual damages, fee forfeiture would greatly resemble punitive damages as the resulting combination would place the plaintiff in a better position than either the plaintiff started from or the defendant achieved. From the perspective of fee forfeiture as punitive damages, the changes introduced by *Burrow* make a great deal more sense. The traditional resistance of equity to exemplary damages would justify providing the trial judge with greater discretion on the amount of the forfeiture and even changing the burden of proof.

SECTION VIII. FRACTURING RULE: *BURROW* UNDER ATTACK

“[G]ive a dog a bad name and hang him.”³⁸⁹

In the fifteen years since *Burrow* was handed down, three new rules have emerged that have combined to minimize *Burrow* and further confuse the general field of remedies in equity for breach of fiduciary duty.

First is the rule against fracturing (the fracturing rule) that is frequently interpreted to hold that legal malpractice claims cannot be split into additional or alternative claims such as breach of contract or breach of fiduciary duty that would circumvent malpractice standards for limitations, causation and damages.³⁹⁰ Second, the plaintiff is now required to prove that the lawyer fiduciary gained an improper benefit as a result of the breach.³⁹¹ While “improper benefit” has yet to be fully defined, many courts hold that it does not include fees paid by the plaintiff.³⁹² The third

389. *SEC v. MacDonald*, 699 F.2d 47, 54 (1st Cir. 1983).

390. *See, e.g., Isaacs v. Schleier*, 356 S.W.3d 548, 556 (Tex. App.—Texarkana 2011, pet. denied) (“Texas law, however, does not permit a plaintiff to divide or fracture her legal malpractice claims into additional causes of action.”); *Kemp v. Jensen*, 329 S.W.3d 866, 872 (Tex. App.—Eastland 2010, pet. denied) (“Professional negligence claims cannot be converted into fraud, breach of contract, breach of fiduciary duty, or violations of the DTPA.”); *Beck v. Law Offices of Edwin J. (Ted) Terry, Jr., PC*, 284 S.W.3d 416, 426–27 (Tex. App.—Austin 2009, no pet.) (discussing the rule against “fracturing” professional negligence claims); *Kimleco Petrol., Inc. v. Morrison & Shelton*, 91 S.W.3d 921, 924 (Tex. App.—Fort Worth 2002, pet. denied) (“Regardless of the theory a plaintiff pleads, as long as the crux of the complaint is that the plaintiff’s attorney did not provide adequate legal representation, the claim is one for legal malpractice.”); *Haas v. George*, 71 S.W.3d 904, 910 (Tex. App.—Texarkana 2002, no pet.) (finding Haas’s claim for breach of fiduciary duty and breach of contract are encompassed in the legal malpractice claim); *Cuyler v. Minns*, 60 S.W.3d 209, 216 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (“Cuyler’s claims for breach of contract and breach of fiduciary duty represent an impermissible fracturing of her claim for legal malpractice.”).

391. *See Kimleco Petrol., Inc.*, 91 S.W.3d at 923 (“The focus of breach of fiduciary duty is whether an attorney obtained an improper benefit from representing a client, while the focus of a legal malpractice claim is whether an attorney adequately represented a client.”).

392. *See infra* note 458 for cases that have rejected fees as improper benefits.

rule rejects forfeiture claims for fees paid directly to the lawyer by a third party, although this rule has not yet been widely applied.

In effect, the remedy of fee forfeiture against lawyer fiduciaries has been marginalized in two ways. First, most appellate opinions on fracturing determine whether the claimant has fractured a malpractice claim by determining whether the claim for breach sounds in legal malpractice, not whether an independent claim for breach has been implicated.³⁹³ Some courts openly assert that not all legitimate claims for breach of fiduciary duty should be allowed as alternative claims to legal malpractice.³⁹⁴ This practice filters out most cases that fail to substantiate that the lawyer fiduciary acted intentionally.³⁹⁵ Second, while some courts do examine a breach as an independent claim, they reject those claims that fail to substantiate an improper benefit other than legal fees that resulted from the breach, and therefore effectively reject pleas for fee forfeiture against lawyer fiduciaries.

If a case with the same facts as *Burrow* were heard today, most courts of appeals would affirm summary judgment for the defendant. They are likely to reject the claim for breach of fiduciary duty as fracturing a claim for legal malpractice. Some appellate districts would also affirm summary judgment against the claim because the *Burrow* claimants could only have offered proof of the contingency fees, which fails the new standard for improper benefits or because the lawyers' fees were paid by a third party, not directly by the clients.

A. *Statistics Warn of Scylla and Charybdis*

The principal that contemplates claiming a breach of fiduciary duty against a lawyer fiduciary might pause to reflect on Odysseus's mythical dilemma of plotting a course between Scylla and Charybdis on his return voyage home to Ithaca. The "quasi-goddess" Circe informed him that his path home was blocked by the confluence of two obstacles: Charybdis, a whirlpool that would capsize his ship and drown all hands, and Scylla, a six-headed monster that would seize and kill at least six members of his crew. There was no middle course or third option. He had to face the certainty that, at best, he would lose six members of his crew. Of course, this analogy is overstated, as there is no published record of a lawyer or

393. See *infra* notes 426, 455, 456, 457, and 461.

394. See *infra* notes 455, 456, and 461.

395. See *infra* notes 456 and 457.

paralegal being seized by a six-headed monster. However, when confronted by the fracturing and improper benefit rules, no cases have succeeded in establishing liability for breach of fiduciary duty after appeal, and only about 10% succeeded in achieving a remand for a second attempt.³⁹⁶

Of the fifty-two case opinions that ruled on fracturing, fifty granted summary judgment to the defendant.³⁹⁷ Five of those cases were reversed and remanded. In two cases, the trial court found the defendant lawyer liable for breach of fiduciary duty, but both were later reversed on appeal without remand.³⁹⁸ Therefore, out of fifty-two cases, no defendants were found liable and five cases were remanded to the trial court.³⁹⁹ Charybdis got the other forty-seven cases.

While the results were tabulated strictly on the basis of the claim for breach of fiduciary duty, it is important to understand that summary judgment on breach of fiduciary duty frequently determined the viability of the plaintiff's entire case, as summary judgment was generally granted for the malpractice claim also.⁴⁰⁰

396. This group includes only cases in which the claim for breach of fiduciary duty was rejected on the basis of the three rules. There were other cases in which the fracturing rule was raised but the case was resolved for other reasons.

397. According to Table D in Section III, *supra*, trial courts granted summary judgment motions for 70% of the claims made against lawyer fiduciaries in the last five years.

398. *See Goffney v. Rabson*, 56 S.W.3d 186, 188 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (reversing and rendering judgment that Rabson take nothing on her claims); *McDermott v. Nelsen*, No. 01-98-01323-CV, 2001 Tex. App. LEXIS 2740, at *13 (Tex. App.—Houston [1st Dist.] Apr. 26, 2001, no pet.) (not designated for publication) (“We reverse and render judgment that Nelsen take nothing.”).

399. *See Riverwalk CY Hotel Partners Ltd. v. Akin, Gump, Strauss, Hauer & Feld, LLP*, 391 S.W.3d 229, 232 (Tex. App.—San Antonio 2012, no pet.) (holding that the trial court erred in granting summary judgment as to the breach of fiduciary duty); *Trousdale v. Henry*, 261 S.W.3d 221, 229 (Tex. App.—Houston [14th Dist.] 2008, pet. denied) (concluding that the trial court erred in viewing the breach of fiduciary duty claims as nothing more than claims for legal malpractice); *Archer v. Med. Protective Co.*, 197 S.W.3d 422, 428 (Tex. App.—Amarillo 2006, pet. denied) (reversing the trial court's order that Archer take nothing upon her claim for breach of fiduciary duty); *Deutsch v. Hoover, Bax & Slovacek, LLP*, 97 S.W.3d 179, 189–90 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (sustaining the issues pertaining to the claim for fee forfeiture based on breaches of fiduciary duty); *Holder v. Garner, Lovell, & Stein, PC*, No. 07-98-0175-CV, 1999 Tex. App. LEXIS 6298, at *21 (Tex. App.—Amarillo Aug. 24, 1999, pet. denied) (not designated for publication) (rejecting argument for summary judgment based on negligence claim).

400. For rulings on fee forfeiture that effectively determined the outcome of the entire case, see *Beck v. Law Offices of Edwin J. (Ted) Terry, Jr., PC*, 284 S.W.3d 416, 428 (Tex. App.—Austin 2009, no pet.); *Longoria v. Whitehurst*, No. 12-03-00298-CV, 2005 Tex. App. LEXIS 1572, at *8–9 (Tex. App.—Tyler Feb. 28, 2005, pet. denied) (mem. op.); *Bell v. Phillips*, No. 14-00-01189-CV, 2002 Tex. App. LEXIS 2734, at *22–23 (Tex. App.—Houston [14th Dist.] Apr. 18, 2002, no pet.) (not

B. *Fracturing Rule Proves Too Little or Too Much*

On its face, the narrow interpretation of the rule against fracturing is sensible and straightforward, but it is unnecessary in relation to existing doctrine on summary judgment. If the rule means that summary judgment should be granted against unsubstantiated claims or claims that *sound only in negligence*, then it redundantly states too little.⁴⁰¹

Alternatively, many opinions assert that the defendant is entitled to summary judgment even against claims in the alternative that would otherwise stand on their own merits: “Even if a complaint implicates a lawyer’s fiduciary duties, it does not necessarily follow that such a complaint is actionable apart from a negligence claim.”⁴⁰² In such cases, the rule is interpreted to state, too much to hold, that claims for legal malpractice preempt claims for breach of fiduciary duty that sound in negligence.

C. *Development of the Rule*

The fracturing rule has origins in medical malpractice litigation and the contours controversy. Based on state statute (originally the Medical Liability and Insurance Improvement Act, or Article 4590i of the Texas Revised Civil Statutes, which was re-codified under section 74.351 of the Texas Civil Practices and Remedies Code as the Texas Medical Liability Act), the courts have held that claims for medical malpractice cannot be recast as other claims to circumvent statutory restrictions.⁴⁰³

designated for publication); *Goffney*, 56 S.W.3d at 192; *Sullivan v. Bickel & Brewer*, 943 S.W.2d 477, 483 (Tex. App.—Dallas 1995, writ denied); *Sledge v. Alsup*, 759 S.W.2d 1, 2 (Tex. App.—El Paso 1988, no writ).

401. See *Deutsch*, 97 S.W.3d at 189 (“The rule against dividing or fracturing a negligence claim prevents legal malpractice plaintiffs from opportunistically transforming a claim that *sounds only in negligence* into other claims. This analysis is analogous to determining whether claims are contract or DTPA claims or whether they sound in contract or tort.” (citation omitted) (emphasis added)).

402. *Won Pak v. Harris*, 313 S.W.3d 454, 458 (Tex. App.—Dallas 2010, pet. denied); see also *Goffney*, 56 S.W.3d at 190 (“*Goffney* contends Rabson’s breach of contract, breach of fiduciary duty, and DTPA claims are essentially legal malpractice claims.”); *Kahlig v. Boyd*, 980 S.W.2d 685, 689 (Tex. App.—San Antonio 1998, pet. denied) (disagreeing that the jury was entitled to make the inference of intent).

403. See *Hart v. Wright*, 16 S.W.3d 872, 877 (Tex. App.—Fort Worth 2000, pet. denied) (“Texas courts have repeatedly held that a plaintiff cannot recast a health care liability claim in the language of another cause of action to circumvent the statute’s purpose. In determining whether a plaintiff has attempted to do so, we review the underlying nature of the cause of action. If, as here, the cause of action is based on the physician’s breach of the accepted standard of medical care, the

With the surge in claims against lawyers and the newly “discovered” alternative of pleading fee forfeiture outlined in *Burrow*, the issue of recast pleadings evolved into the dispute between malpractice and breach of fiduciary duty and became known as the no-fracturing rule or the rule against fracturing. The principal rationale outlined in *Sledge v. Alsup*⁴⁰⁴ was to avoid duplicative claims that might confuse the jury.⁴⁰⁵ Contradicting this rationale is the fact that the fracturing rule is applied whether or not the plaintiff literally pleads a claim for malpractice⁴⁰⁶ and even when the plaintiff drops the malpractice claim before trial.⁴⁰⁷

It should be acknowledged that the fracturing rule is occasionally applied for non-lawyer defendants: architects,⁴⁰⁸ engineers,⁴⁰⁹ and other professionals. In addition, the fracturing rule has been applied to reject other causes of action such as breach of contract,⁴¹⁰ fraud,⁴¹¹ and DTPA violations.⁴¹²

cause of action is nothing more than a health care liability claim, no matter how a plaintiff labels it.” (citations omitted)).

404. *Sledge v. Alsup*, 759 S.W.2d 1 (Tex. App.—El Paso 1988, no writ).

405. *See Isaacs v. Schleier*, 356 S.W.3d 548, 556 (Tex. App.—Texarkana 2011, pet. denied) (“Texas law, however, does not permit a plaintiff to divide or fracture her legal malpractice claims into additional causes of actions.”); *Kemp v. Jensen*, 329 S.W.3d 866, 872 (Tex. App.—Eastland 2010, pet. denied) (“Professional negligence claims cannot be converted into fraud, breach of contract, breach of fiduciary duty, or violations of the DTPA.”); *Beck*, 284 S.W.3d at 426–27 (discussing the rule against fracturing professional negligence claims).

406. *See Murphy v. Gruber*, 241 S.W.3d 689, 692 (Tex. App.—Dallas 2007, pet. denied) (“Whether allegations against a lawyer, labeled as breach of fiduciary duty, fraud, or some other cause of action, are actually claims for professional negligence or something else is a question of law to be determined by the court.”); *In re Estate of Degley v. Vega*, 797 S.W.2d 299, 302 (Tex. App.—Corpus Christi 1990, no writ) (“The pleadings asserted claims for fraud, overreaching, and breach of fiduciary duty. For limitations purposes, we treat these claims as one for legal malpractice and other forms of personal injury.”).

407. *See infra* note 428.

408. *See Parker Cnty. Veterinary Clinic v. GSBS Batenhorst, Inc.*, No. 02-08-380-CV, 2009 Tex. App. LEXIS 8986, at *20 (Tex. App.—Fort Worth Nov. 19, 2009, no pet.) (mem. op.) (“Because Appellants brought a breach of contract action, and because section 150.002 only applies to negligence actions, we hold that Appellants were not required to file a certificate of merit in this case.”).

409. *See Ashkar Eng’g Corp. v. Gulf Chem. & Metallurgical Corp.*, No. 01-09-00855-CV, 2010 Tex. App. LEXIS 769, at *11 (Tex. App.—Houston [1st Dist.] Feb. 4, 2010) (mem. op.) (“GCMC contends that, at most, only its negligence claim is subject to dismissal based on [s]ection 150.002. Ashkar responds that [GCMC’s] breach of contract and breach of warranty claims constitute improper re-characterizations of its negligence claim to avoid the statute.”), *withdrawn*, 403 S.W.3d 451 (Tex. App.—Houston [1st Dist.] 2013, pet. filed).

410. *Isaacs*, 356 S.W.3d at 557.

The unspoken rationale is the presumption that claims for legal malpractice preempt other claims such as breach of fiduciary duty or breach of contract. Professor Wolfram, the Reporter for the *Restatement (Third) of the Law Governing Lawyers*, acknowledges that case opinions in Missouri, Illinois, and New York make similar presumptions, but without any specific justification.⁴¹³ With the exception of the effect of its holding in *Burrow*, the Texas Supreme Court has not addressed the fracturing rule.⁴¹⁴

The fracturing rule evolved partly in response to the issue that alternative claims for breach of fiduciary duty were weak or insubstantial. It seems that some claimants tried to wrap fee forfeiture pleas around strained allegations of conflicts or failures to disclose.⁴¹⁵ Applying the no-fracturing rule, these claims were disposed of as spurious causes of action for breach of fiduciary duty used to gain tactical advantages, rather than plead legitimate claims.⁴¹⁶

In early cases, plaintiffs' counsel also occasionally strained the credibility of pleading in the alternative by cutting and pasting the fact recitations for legal malpractice claims into additional claims for breach of fiduciary duty.⁴¹⁷ Some claims for breach were added after the defendant filed a motion for summary judgment against the legal malpractice claim.⁴¹⁸

Courts overreacted to this practice by dubiously concluding that claims for malpractice and breach of fiduciary duty could not be supported by the same facts. The underlying logic supporting this conclusion is not compelling, as the similarity of supporting facts is not determinative and

411. See *Sullivan v. Bickel & Brewer*, 943 S.W.2d 477, 483 (Tex. App.—Dallas 1995, writ denied) (recognizing the distinction between an action for negligent legal malpractice and one for fraud relating to fees for legal services).

412. See *Cuyler v. Minns*, 60 S.W.3d 209, 217 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (rejecting an argument that the plaintiff did not qualify as a consumer under the DTPA).

413. See Charles W. Wolfram, *A Cautionary Tale: Fiduciary Breach as Legal Malpractice*, 34 HOFSTRA L. REV. 689, 724 (2006) ("Finally, a similar movement is afoot in New York, although, as in Illinois, the decisions are perfunctory, providing no supporting reasoning.").

414. See *Burrow v. Arce*, 997 S.W.2d 229, 245 (Tex. 1999) (avoiding the consideration of fracturing issues, the court held that jury should decide fact issues regarding both breach of fiduciary duty and malpractice).

415. See *supra* notes 58 through 64 on weak claims for fee forfeiture.

416. See *id.*

417. See *Deutsch v. Hoover, Bax & Slovacek, LLP*, 97 S.W.3d 179, 180 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (holding that the claimant did not provide sufficient facts of "probative value").

418. See *infra* note 424.

the opinions fail to address the central issue of whether the case facts pled adequately implicated a claim for breach of fiduciary duty.⁴¹⁹

Aside from these initial issues, courts have applied the fracturing rule in response to three different scenarios. One of the earliest applications related to the issue of the appropriate limitations period for a particular claim. The advantage of a four-year limitations period for breach of fiduciary claims (compared to only two years for malpractice) has allegedly persuaded malpractice claimants to plead breach of fiduciary duty in the alternative to save some claims.⁴²⁰

Initially, the fracturing rule was applied to justify holding that the two-year limitations period for legal malpractice applied to all similar claims.⁴²¹ While it remains commonplace for a trial judge to rule that the plaintiff's claim is actually a claim for malpractice, warranting a limitations period of only two years,⁴²² many courts now concede that independent claims for

419. See *Finger v. Ray*, 326 S.W.3d 285, 296 (Tex. App.—Houston [1st Dist.] 2010, no pet.) (reiterating that claims for malpractice “may not be fractured into separate non-negligence claims”); *Duerr v. Brown*, 262 S.W.3d 63, 71 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (indicating that the core issue in fracturing is determining whether the malpractice is a separate and distinct claim from the other causes of action and not merely relabeling); see also *Murphy v. Gruber*, 241 S.W.3d 689, 697 (Tex. App.—Dallas 2007, pet. denied) (“[C]haracterizing conduct as a ‘misrepresentation’ or ‘conflict of interest’ does not alone transform what is really a professional negligence claim into either a fraud or a breach-of-fiduciary-duty claim.”); cf. *Deutsch*, 97 S.W.3d at 190 (allowing a party to allege the same facts under legal malpractice and under breach of fiduciary duty, as Texas Rule of Civil Procedure 48 allows a party to plead in the alternative); *Beck v. Law Offices of Edwin J. (Ted) Terry, Jr., PC*, 284 S.W.3d 416, 427 (Tex. App.—Austin 2009, no pet.) (“[C]laimant must do more than ‘merely reassert the same claim for legal malpractice under an alternative label.’” (citation omitted)).

420. See *Beck*, 284 S.W.3d at 427 (“The rule also serves to ‘prevent legal-malpractice plaintiffs from opportunistically transforming a claim that sounds only in negligence into other claims’ to avail themselves of longer limitations periods . . .” (citation omitted)).

421. See *Longoria v. Whitehurst*, No. 12-03-00298-CV, 2005 Tex. App. LEXIS 1572, at *8–9 (Tex. App.—Tyler Feb. 28, 2005, pet. denied) (mem. op.) (“Further, Texas courts have consistently held that separating a claim for legal malpractice into claims for negligence, breach of contract, fraud, or other named causes of action does not change the underlying fact that the claims are based on professional negligence and are governed by the two-year limitations statute.”); *Willis v. Maverick*, 723 S.W.2d 259, 261 (Tex. App.—San Antonio 1986) (“Whatever label is placed on it, a suit for legal malpractice is in the nature of a tort action and thus the two[-]year statute of limitations governs.”), *aff’d on other grounds*, 760 S.W.2d 642 (Tex. 1988).

422. See *Beck*, 284 S.W.3d at 427 (holding that the claimant’s pleading asserting both legal malpractice and breach of fiduciary duty contained only “thinly veiled” claims of the former); *Beck v. Looper, Reed & McGraw, PC*, No. 05-05-00724-CV, 2006 Tex. App. LEXIS 4568, at *7 (Tex. App.—Dallas May 26, 2006, no pet.) (mem. op.) (“Here, Beck’s assertions sound only in negligence. Beck does not claim that Looper Reed obtained improper benefit from its actions and omissions. Instead, his complaint is that Looper Reed did not provide adequate legal representation. Because Beck presented only claims for legal malpractice, the applicable statute of limitations is two years, as Looper Reed asserts.”).

fraud or breach of fiduciary duty related to legal malpractice are entitled to limitations periods of four years.⁴²³

The second issue was raised at the appellate level and relates to appeals by claimants that a summary judgment motion underlying the judgment did not specifically include the fiduciary duty claim, or that subsequent to filing the motion, the claimant amended her petition and added a claim for breach. The appellate courts have held that because the claim for breach of fiduciary duty should be considered the same as the claim for legal malpractice, the summary judgment order should include the claim for breach.⁴²⁴ Alternatively, it was held that since the defendant refuted one element of a claim for legal malpractice, the summary judgment order applied to all fractured claims.⁴²⁵ Third, in two cases, courts of appeals

423. See *Sullivan v. Bickel & Brewer*, 943 S.W.2d 477, 482 (Tex. App.—Dallas 1995, writ denied) (“Two other appellate courts have addressed the issue before us. Both courts concluded there is a distinction between an action for negligent legal practice, that is, representation, and one for fraud allegedly committed by an attorney relating to establishing and charging fees for legal services.” (citing *Jampole v. Matthews*, 857 S.W.2d 57, 62 (Tex. App.—Houston [1st Dist.] 1993, writ denied); *Estate of Degley v. Vega*, 797 S.W.2d 299, 303 (Tex. App.—Corpus Christi 1990, no writ))). “In *Jampole*, the appellants alleged that because of the appellees’ fraud, they were entitled to damages for paying a fee higher than that called for in the fee agreement. In *Vega*, the administratrix alleged that the appellee failed to completely inform her and affirmatively misled her about the legal effect of the fee agreement. In both cases, the appellate court found that the appellant had stated a cause of action for fraud which is subject to the four-year statute of limitations.” *Id.*; see also *McGuire v. Kelley*, 41 S.W.3d 679, 681–82 (Tex. App.—Texarkana 2001, no pet.) (noting that appellate courts apply four-year statute of limitations in cases where breach of fiduciary duty claims are coupled with fraud claims).

424. See *Haas v. George*, 71 S.W.3d 904, 910 (Tex. App.—Texarkana 2002, no pet.) (“Haas is correct. George did not move for summary judgment explicitly on her claims for breach of fiduciary duty and breach of contract. Rather, George moved for summary judgment on the ‘claims of legal malpractice.’ However, we find Haas’[s] claims for breach of fiduciary duty and breach of contract are encompassed in the legal malpractice claim.”); *Cuyler v. Minns*, 60 S.W.3d 209, 216 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (“We find that all these claims arise from the same set of facts and circumstances as the alleged malpractice; since summary judgment on that alleged malpractice was proper, summary judgment on these claims was proper.” (citation omitted)).

425. See *Bell v. Phillips*, No. 14-00-01189-CV, 2002 Tex. App. LEXIS 2734, at *22–23 (Tex. App.—Houston [14th Dist.] Apr. 18, 2002, no pet.) (not designated for publication) (“Because Phillips disproved the causation and damages elements of Wanda’s legal malpractice claim, and the same facts and circumstances form the basis for Wanda’s breach-of-fiduciary-duty and the DTPA claims, summary judgment was also proper on those claims.”); *Griggs v. Wood*, No. 14-00-00226-CV, 2001 Tex. App. LEXIS 5968, at *13 (Tex. App.—Houston [14th Dist.] Aug. 30, 2001, no pet.) (not designated for publication) (“[S]ummary judgment may be granted on causes of action pled after the filing of a motion for summary judgment if the grounds asserted in the motion also establish that the plaintiff could not recover from the defendant on the later pled causes of action.”); *McDermott v. Nelsen*, No. 01-98-01323-CV, 2001 Tex. App. LEXIS 2740, at *12 (Tex. App.—Houston [1st Dist.] Apr. 26, 2001, no pet.) (not designated for publication) (“When the additional causes of action

reversed a jury award for breach of fiduciary duty because the plaintiff dropped its legal malpractice claim before the trial, holding that withdrawal of the malpractice claim effectively withdrew the fiduciary claim as well.⁴²⁶ Given that judgments were reached at trial, it seems reasonable to infer that the case facts implicated the fiduciary claims, and the fracturing rule was applied in the belief that additional claims, however well-substantiated, cannot be pled in the alternative to legal malpractice as a matter of law.

The fracturing rule is applied at the trial level by granting the defendant's motion for summary judgment on the basis that all claims arising from a lawyer's negligent actions must be plead as legal malpractice. The holding in *Sledge* is generally recognized as the foundational case for the fracturing rule:

If a lawyer's error or mistake is actionable, it should give rise to a cause of action for legal malpractice with one set of issues which inquire if the conduct or omission occurred, if that conduct or omission was malpractice and if so, subsequent issues on causation and damages. Nothing is to be gained in fracturing that cause of action into three or four different claims and sets of special issues. That is not in accordance with the recent trend in this state to simplify issues which are presented to a jury.⁴²⁷

The presumed justifications of simplification and judicial economy seem less compelling than the plaintiff's right to a jury trial or the right to plead in the alternative. Furthermore, if simplification requires the plaintiff to file only one claim, the plaintiff should still be able to choose which claim to pursue. However, a long list of appellate opinions have quoted or cited this statement, in which the primary focus was not whether the principal had substantiated its fiduciary claim, but whether the case implicated a

all arise from the same set of facts and circumstances as the alleged legal malpractice and when a defendant negates an element of the legal malpractice claim, summary judgment for the defendant is proper on the additional causes of action, as well." (citation omitted)).

426. See *Goffney v. Rabson*, 56 S.W.3d 186, 188 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) ("Because we find Rabson's breach of contract, DTPA, and breach of fiduciary duty claims are in the nature of a tort action for legal malpractice, which was abandoned prior to trial, we reverse the judgment of the trial court and render judgment that Rabson take nothing on her claims against Goffney."); *Kahlig v. Boyd*, 980 S.W.2d 685, 688 (Tex. App.—San Antonio 1998, pet. denied) (reversing the jury award for fraud and DTPA violations, the court held that when the claimant abandoned the legal malpractice claim, he also abandoned the other "disguised malpractice claims"); see also *Cooper v. Harris*, 329 S.W.3d 898, 905 (Tex. App.—Houston [14th Dist.] 2010, pet. denied) (reversing jury verdict for breach of contract based on fracturing rule).

427. *Sledge v. Alsup*, 759 S.W.2d 1, 2 (Tex. App.—El Paso 1988, no writ).

claim for malpractice.⁴²⁸ There are also other opinions that express this same argument in different words.⁴²⁹

Texas courts have adopted several rules of thumb to assist in applying the fracturing rule. Summary judgment is awarded if:

The same facts are recited to support claims for malpractice and breach of fiduciary duty;⁴³⁰

The gist or crux of the case relates to malpractice;⁴³¹ or

428. See, e.g., *Isaacs v. Schleier*, 356 S.W.3d 548, 556 (Tex. App.—Texarkana 2011, pet. denied) (expressing the determination of fracturing in a case); *Kemp v. Jensen*, 329 S.W.3d 866, 872 (Tex. App.—Eastland 2010, pet. denied) (discussing the “bad faith” of breach of fiduciary duty); *Beck v. Law Offices of Edwin J. (Ted) Terry, Jr., PC*, 284 S.W.3d 416, 427 (Tex. App.—Austin 2009, no pet.) (holding that a plaintiff may not assert multiple negligence claims independently because of the fracturing rule); *Kimleco Petrol., Inc. v. Morrison & Shelton*, 91 S.W.3d 921, 924 (Tex. App.—Fort Worth 2002, pet. denied) (emphasizing the need for a separate set of facts when attempting to support separate claims of legal malpractice and breach of fiduciary duty); *Cuyler*, 60 S.W.3d at 216 (“[W]e find that Cuyler’s claims for breach of contract and breach of fiduciary duty represent an impermissible fracturing of her claim for legal malpractice.”).

429. See *Brescia v. Slack & Davis, LLP*, No. 03-08-00042-CV, 2010 Tex. App. LEXIS 9204, at *23–24 (Tex. App.—Austin Nov. 19, 2010, pet. denied) (mem. op.) (“The rule against fracturing a professional-negligence claim holds that a case arising out of an attorney’s alleged bad advice or improper representation may not be split into separate claims for negligence, breach of contract, or fraud (or any other non-negligence theory), because the real issue remains whether the attorney exercised that degree of care, skill, and diligence that attorneys of ordinary skill and knowledge commonly possess and exercise.”); *Gallagher v. Wilson*, No. 2-09-376-CV, 2010 Tex. App. LEXIS 7027, at *17 (Tex. App.—Fort Worth Aug. 26, 2010, no pet.) (mem. op.) (“Regardless of the theory a plaintiff pleads, as long as the crux of the complaint is that the plaintiff’s attorney did not provide adequate legal representation, the claim is one for legal malpractice.”); *Murphy v. Gruber*, 241 S.W.3d 689, 693 (Tex. App.—Dallas 2007, pet. denied) (“Texas courts do not allow plaintiffs to convert what are really negligence claims into claims for fraud, breach of contract, breach of fiduciary duty, or violation of the DTPA.”); *Mecom v. Vinson & Elkins*, No. 01-98-00Z00-CV, 2001 Tex. App. LEXIS 3088, at *31–32 (Tex. App.—Houston [1st Dist.] May 10, 2001, pet. dismissed) (mem. op., not designated for publication) (“We further conclude the trial court properly characterized all of Lannie’s claims as legal malpractice because, regardless of how she described them, her complaints are focused on [V&E’s] actions or inactions in their representation of a client, the attorney-client relationship, and the duties owed to a client by attorneys.”).

430. See *Parsons v. Greenberg*, No. Z-10-131-CV, 2012 Tex. App. LEXIS 3172, at *3 (Tex. App.—Fort Worth Apr. 19, 2012, pet. denied) (mem. op.) (indicating that in this case, summary judgment was appropriate as the required evidence was lacking regarding the plaintiff’s breach of fiduciary duty claim); *Smith v. Aldridge*, No. 14-11-00673-CV, 2012 Tex. App. LEXIS 2499, at *15–16 (Tex. App.—Houston [14th Dist.] Mar. 29, 2012, pet. denied) (upholding summary judgment as there was no separate evidence apart from the malpractice claim to support a breach of fiduciary duty claim); *McDermott*, 2001 Tex. App. LEXIS 2740, at *12 (“Courts also invoke the non-fracturing rule in the context of deciding whether summary judgment motions address all of an opposing party’s causes of action.”).

431. See *Walker v. Morgan*, No. 09-08-00362-CV, 2009 Tex. App. LEXIS 8653, at *9–10 (Tex. App.—Beaumont Nov. 12, 2009, no pet.) (mem. op.) (“If the gist of a client’s complaint is that the

The case resembles malpractice more, or better, than a claim for breach of fiduciary duty.⁴³²

Although generally true, these arguments are not conclusive, and they assume that the two claims are mutually exclusive.⁴³³ Generally, identical facts in a carefully drafted complaint may not justify both malpractice and breach of fiduciary duty, but such a generalization is not conclusive.⁴³⁴ Logically, if the foundation of the case sounds in negligence, nothing precludes the possibility that there are sufficient facts to substantiate a claim for breach of fiduciary duty. More importantly, opinions based on these rules grant summary judgment without assessing whether the plaintiff substantiated the breach. If the pleadings and evidence did not implicate a claim for breach of fiduciary duty, why did these opinions fail to make that simple conclusion, rather than argue for the applicability of indirect rules of thumb?

The implicit issue that a claim for malpractice somehow preempts a claim for breach of fiduciary duty is difficult to dispute until it is brought out of hiding and explained. However, courts have rejected the issue of preemption in cases involving overlap between patent and breach of confidence claims.⁴³⁵ Courts have found remedies otherwise available for a patent claim to be inadequate.⁴³⁶

attorney did not exercise that degree of care, skill, or diligence as attorneys of ordinary skill and knowledge commonly possess, then that complaint should be pursued as a negligence claim, rather than some other claim.” (citing *Deutsch v. Hoover, Bax & Slovacek, LLP*, 97 S.W.3d 179, 189 (Tex. App.—Houston [14th Dist.] 2002, no pet.)); *Kimleco Petrol, Inc.*, 91 S.W.3d at 924 (explaining that the criteria for legal malpractice does not lend itself directly to a claim of breach of fiduciary duty).

432. *See Murphy*, 241 S.W.3d at 696 (“In summary, some Texas courts have recognized that breach-of-fiduciary-duty claims alleging the lawyer obtained an improper benefit from his representation or improperly failed to disclose his own conflict of interest are not professional negligence claims. But other courts have held the claim is a professional negligence claim if the claim is really that the lawyer’s conflict of interest prevented him from adequately representing the client.”).

433. For cases that permit independent causes of action to be supported by the same case facts see *Beck*, 284 S.W.3d at 427; *Murphy*, 241 S.W.3d at 693; *Finger v. Ray*, 326 S.W.3d 285, 296 (Tex. App.—Houston [1st Dist.] 2010, no pet.).

434. *See infra* notes 448–450.

435. *See Hyde Corp. v. Huffines*, 158 Tex. 566, 314 S.W.2d 763, 773 (1958) (“We agree with the holding of the Court of Civil Appeals that this is not a ‘patent case’, although ‘patent questions’ may be involved herein. The gravamen of the present suit is breach of confidence. Trade secrets as distinguished from patents are subject to protection under the equitable jurisdiction of the state courts.”).

436. *See id.* (“An award of damages for patent infringement might well prove inadequate to fully protect the one whose confidence had been violated.”).

D. *Exceptions to the Fracturing Rule*

Texas appellate courts concede the possibility that a claimant can substantiate a legitimate claim of breach of fiduciary duty in addition to legal malpractice exceptions to the rule.⁴³⁷ The first group of exceptions includes cases in which the lawyer-fiduciary effectively deceived or fraudulently induced the client. This category arose in response to *Latham v. Castillo*,⁴³⁸ where the Texas Supreme Court held that the client's case involved a DTPA claim as well as legal malpractice because the lawyer engaged in deceptive conduct.⁴³⁹ Evidence of affirmative or intentional fraud is specially excepted as a non-negligent type of claim.⁴⁴⁰ Constructive or negligent misrepresentation, however, may not be included in this group of exceptions.⁴⁴¹

Credible allegations of excessive or deceptive billing practices have been

437. See *Parker Cnty. Veterinary Clinic Inc. v. GSBS Batenhorst, Inc.*, No. 2-08-380-CV, 2009 Tex. App. LEXIS 8986, at *1 (Tex. App.—Fort Worth Nov. 19, 2009, no pet.) (mem. op.) (noticing a judicial trend allowing breach of contract claims in conjunction with breach of fiduciary duty claims); see also *Beck*, 284 S.W.3d at 427 (“[W]hen cases say that clients cannot divide or fracture their negligence claims against their attorneys into other claims, this does not mean that clients can sue their attorneys only for negligence.” (quoting *Deutsch v. Hoover, Bax & Slovacek, LLP*, 97 S.W.3d 179, 189 (Tex. App.—Houston [14th Dist.] 2002, no pet.)); *Murphy*, 241 S.W.3d at 696–97 (recognizing that “claims regarding the quality of the lawyer’s representation of the client are professional negligence claims, but that not all claims by clients against lawyers are professional negligence claims”).

438. *Latham v. Castillo*, 972 S.W.2d 66 (Tex. 1998).

439. See *id.* at 69 (“If the Castillos had only alleged that Latham negligently failed to timely file their claim, their claim would properly be one for legal malpractice. However, the Castillos alleged and presented some evidence that Latham affirmatively misrepresented to them that he had filed and was actively prosecuting their claim. It is the difference between negligent conduct and deceptive conduct. To recast this claim as one for legal malpractice is to ignore this distinction.”).

440. See *Riverwalk CY Hotel Partners, Ltd. v. Akin, Gump, Strauss, Hauer & Feld, LLP*, 391 S.W.3d 229, 237 (Tex. App.—San Antonio 2012, no pet.) (discussing how the claimant doubles his burden of proof when making both claims); *Trousdale v. Henry*, 261 S.W.3d 221, 231 (Tex. App.—Houston [14th Dist.] 2008, pet. denied) (expressing that these claims were determined separately by the court for validity); *Archer v. Med. Protective Co.*, 197 S.W.3d 422, 427–28 (Tex. App.—Amarillo 2006, pet. denied) (holding that the claimant was not fracturing her claims by asserting both causes of action in her case); *McGuire v. Kelley*, 41 S.W.3d 679, 684 (Tex. App.—Texarkana 2001, no pet.) (expressing the possibility that, when fraud is present, it can give rise to a separate claim without fracturing).

441. See *Finger v. Ray*, 326 S.W.3d 285, 299 (Tex. App.—Houston [1st Dist.] 2010, no pet.) (Jennings, J., dissenting) (“Finger’s complaint is not ultimately about the quality of representation that she received, but that Ray’s misrepresentations induced her to unnecessarily hire an attorney, which she would not have done had Ray not made the misrepresentations. Accordingly, I would hold that Finger has sufficiently alleged a claim for breach of fiduciary duty independent from a claim of legal malpractice.”).

acknowledged as sufficient to support a claim for breach of contract⁴⁴² or fraud.⁴⁴³ Such evidence can also implicate breach of fiduciary duty, as the excess fees would qualify as actual damages or unjust enrichment and would likely satisfy the requirement for proof of the fiduciary's improper benefit.⁴⁴⁴ This is also one of the few scenarios in which the fees sought are the source of the liability for breach.

There is a small group of cases that relates to litigation over the fiduciary's refusal to transfer the principal's assets from the fiduciary's control.⁴⁴⁵ The issue does not arise often, but when liability is proven, a

442. See *Goffney v. Rabson*, 56 S.W.3d 186, 191 n.4 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (“The First Court of Appeals has indicated that breach of contract actions against attorneys are limited to claims for excessive fees for legal services rendered.”); see also *Jampole v. Matthews*, 857 S.W.2d 57, 62 (Tex. App.—Houston [1st Dist.] 1993, writ denied) (distinguishing a cause of action for legal malpractice from cause of action for breach of contract relating to excessive legal fees); *Greathouse v. McConnell*, 982 S.W.2d 165, 172 n.2 (Tex. App.—Houston [1st Dist.] 1998, pet. denied) (recognizing limited distinction between breach of contract claim for excessive legal fees and claim for legal malpractice); *Klein v. Reynolds, Cunningham, Petertson & Cordell*, 923 S.W.2d 45, 49 (Tex. App.—Houston [1st Dist.] 1995, no writ) (recognizing that a contract claim may exist independently of a malpractice claim); *Judwin Props., Inc. v. Griggs & Harrison*, 911 S.W.2d 498, 506 (Tex. App.—Houston [1st Dist.] 1995, no writ) (explaining that, due to the breach of contract elements and lack of legal malpractice facts to support the case, the two year statute of limitations applied). *But see Cooper v. Harris*, 329 S.W.3d 898, 905 (Tex. App.—Houston [14th Dist.] 2010, pet. denied) (reversing a jury verdict for breach of contract based on fracturing rule).

443. See *Spera v. Fleming, Hovenkamp & Grayson, PC*, 25 S.W.3d 863, 872–73 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (discussing fraudulent misrepresentation); *Sullivan v. Bickel & Brewer*, 943 S.W.2d 477, 482–83 (Tex. App.—Dallas 1995, writ denied) (“[W]e see a distinction between an action for negligent legal practice and one for fraud relating to fees for legal services. We conclude that appellant stated a cause of action for fraudulent billing practices to which the four-year statute of limitations applies.”); *Jampole*, 857 S.W.2d at 61–63 (finding that the lawyer's billing practices constituted malpractice); *Estate of Degley v. Vega*, 797 S.W.2d 299, 303–04 (Tex. App.—Corpus Christi 1990, no writ) (holding that the billing practices did not constitute fraud).

444. See *Riverwalk CY Hotel Partners, Ltd.*, 391 S.W.3d at 239 (holding that the client was entitled to file a separate breach of duty claim for unfair billing practices); *Fortson v. Asaf*, No. 01-99-00542-CV, 2001 Tex. App. LEXIS 6365, at *10–11 (Tex. App.—Houston [1st Dist.] Aug. 31, 2001, pet. denied) (not designated for publication) (addressing billing practices as a claim under breach of fiduciary duty); *Jackson Law Office, PC v. Chappell*, 37 S.W.3d 15, 22–23 (Tex. App.—Tyler 2000, pet. denied) (involving a lawyer's failure to maintain billing records, to record services rendered, to provide billing statements to the client, and charging the client for defending themselves against a grievance in her name).

445. See *Burnett v. Sharp*, 328 S.W. 3d 594, 601 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (“A breach of fiduciary duty occurs when a lawyer benefits improperly from his representation of the client by, among other things, a failure to deliver funds belonging to the client.”); *Taylor v. Ogg*, No. 01-02-00557-CV, 2004 Tex. App. LEXIS 1135, at *19 (Tex. App.—Houston [1st Dist.] Feb. 5, 2004, no pet.) (mem. op.) (affirming an award of actual damages and exemplary damages of 100% due to bankruptcy trustee's refusal to make scheduled payments); *Stone v. King*, No. 13-98-022-CV, 2000 Tex. App. LEXIS 8070, at *24 (Tex. App.—Corpus Christi Nov. 30, 2000, pet. denied)

defendant is frequently subjected to substantial awards for exemplary damages.⁴⁴⁶ Even though there are not many cases, the group is frequently mentioned as an exception to the fracturing rule.⁴⁴⁷

E. *Rejecting Claims That Sound Only in Negligence*

Some case opinions agree that a claim for breach of fiduciary duty against a lawyer should be reviewed independently from the malpractice claim, i.e., that a malpractice claim should not raise or lower the standards for pleading an additional claim for breach of fiduciary duty.

This stand-alone perspective is revealed in two ways. First, the fracturing rule is limited to the case that “sounds only in negligence.”⁴⁴⁸

(not designated for publication) (concluding that Stone breached a fiduciary duty when he failed to “distribute trust funds after being directed to do so”).

446. See *Goffney*, 56 S.W.3d at 193 (illustrating a case in which the defendant was not subject to substantial awards); *McGuire v. Kelley*, 41 S.W.3d 679, 682–83 (Tex. App.—Texarkana 2001, no pet.) (finding for Kelley after determining that a breach of fiduciary duty had occurred); *Avila v. Havana Painting Co.*, 761 S.W.2d 398, 399–400 (Tex. App.—Houston [14th Dist.] 1988, writ denied) (awarding of actual damages after finding a breach of fiduciary duties).

447. See *Goffney*, 56 S.W.3d at 193 (defining some of the criteria for determining breach of fiduciary duty); *Kastner v. Martin & Drought, Inc.*, 2009 Tex. App. LEXIS 701, at *15 (Tex. App.—San Antonio Feb. 4, 2009) (mem. op.) (“The focus of a breach of fiduciary duty claim against an attorney is whether the attorney obtained an improper benefit from representing the client, such as ‘failure to deliver funds belonging to the client, improper use of client confidences, or engaging in self-dealing.’” (citing *Aiken v. Hancock*, 115 S.W.3d 26, 28 (Tex. App.—San Antonio 2003, pet. denied))); *McGuire*, 41 S.W.3d at 682–83 (“Additionally, the jury found that McGuire received a \$47,000.00 benefit from the settlement he negotiated on Kelley’s behalf, that McGuire failed to pay Kelley \$17,000.00 in settlement money, that Kelley suffered mental anguish damages of \$3,000.00, that McGuire should pay \$8,000.00 as exemplary damages, and that Kelley should be awarded attorney’s fees.”); *Avila*, 761 S.W.2d at 399–400 (awarding actual damages of \$3939.75 and exemplary damages of \$3600).

448. *Deutsch v. Hoover, Bax & Slovacek, LLP*, 97 S.W.3d 179, 189–90 (Tex. App.—Houston [14th Dist.] 2002, no pet.); see also *Riverwalk CY Hotel Partners Ltd.*, 391 S.W.3d at 236 (“The rule against dividing or fracturing a negligence claim prevents legal-malpractice plaintiffs from opportunistically transforming a claim that sounds only in negligence into other claims.” (citation omitted)); *Dornak v. Carlson Law Firm*, No. 04-10-00592-CV, 2011 Tex. App. LEXIS 4758, at *9 (Tex. App.—San Antonio June 22, 2011, no pet.) (mem. op.) (“If it can be said that Dornak added a new cause of action by alleging breach of fiduciary duty, then that allegation was subsumed within Carlson’s argument that, to the extent this was a negligence case, Dornak could produce no evidence of any negligence.”); *Edwards v. Dunlop-Gates*, 344 S.W.3d 424, 427 (Tex. App.—El Paso 2011, pet. denied) (“The rule serves to prevent legal-malpractice plaintiffs from transforming a claim that sounds only in negligence into other claims to avail themselves of longer limitations periods, less onerous proof requirements, or other tactical advantages.” (citation omitted)); *Beck v. Law Offices of Edwin J. (Ted) Terry, Jr., PC*, 284 S.W.3d 416, 427 (Tex. App.—Austin 2009, no pet.) (“The rule serves to prevent legal-malpractice plaintiffs from transforming a claim that sounds only in

On the basis of this definition, if the plaintiff's claims sound in both negligence and breach of fiduciary duty, a claim for breach of fiduciary duty does not fracture the claim for malpractice. *Deutsch v. Hoover, Bax & Slovacek, LLP*⁴⁴⁹ defended this interpretation with Texas Rule of Civil Procedure 48 and *Burrow*.⁴⁵⁰ The stand-alone approach is also evident when a court evaluates the plaintiff's claim for breach of fiduciary duty for sufficient evidence to substantiate the claim.⁴⁵¹

While the concepts that support a claim for breach of fiduciary duty as independent of a simultaneous claim for legal malpractice are widely used, they are often mixed in with statements to the contrary or statements that are less exacting.⁴⁵² The majority of cases reject the plaintiff's claim for

negligence into other claims to avail themselves of longer limitations periods, less onerous proof requirements, or other tactical advantages.”)

449. *Deutsch v. Hoover, Bax & Slovacek, LLP*, 97 S.W.3d 179 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

450. *See id.* at 190–91 (“The procedural rules allow a claimant to plead in the alternative.” (citing TEX. R. CIV. P. 48; *Field v. AIM Mgmt. Group, Inc.*, 845 S.W.2d 469, 472 (Tex. App.—Houston [14th Dist.] 1993, no writ))). “When, as in this case, the evidence raises a genuine issue of material fact regarding alleged wrongful conduct that sounds in negligence as well as alleged wrongful conduct that sounds in breach of fiduciary duty, the trial court should charge the jury on both claims, regardless of any alternative pleading.” *Id.* at 190 (citing *Burrow v. Arce*, 997 S.W.2d 229, 232–33, 237–46 (Tex. 1999)).

451. *See Smith v. Aldridge*, No. 14-11-00673-CV, 2012 Tex. App. LEXIS 2499, at *16 (Tex. App.—Houston [14th Dist.] Mar. 29, 2012, pet. denied) (mem. op.) (holding that even if the plaintiff's pleadings established an independent cause of action for breach of a fiduciary duty, Smith would have had to prove a “suit within a suit”); *McInnis v. Mallia*, No. 14-09-00931-CV, 2011 Tex. App. LEXIS 1634, at *13–14 (Tex. App.—Houston [14th Dist.] Mar. 8, 2011, pet. denied) (mem. op.) (emphasizing that the plaintiff must provide sufficient evidence to avoid the no fracturing rule); *Finger v. Ray*, 326 S.W.3d 285, 297 (Tex. App.—Houston [1st Dist.] 2010, no pet.) (“Courts are to focus on whether ‘the facts that are the basis for an asserted cause of action implicate only the lawyer’s duty of care or independently actionable fiduciary, statutory, contractual, or other tort duties.’” (citation omitted)); *Stromberger v. Law Offices of Windle Turley*, 2005 Tex. App. LEXIS 2321, at *14 (Tex. App.—Dallas Mar. 28, 2005) (mem. op.) (“As discussed with regard to impermissible fracturing of a legal malpractice claim, we conclude the facts underlying these tort claims would only support a claim for legal malpractice.”); *Goffney v. O’Quinn*, No. 01-02-00192-CV, 2004 Tex. App. LEXIS 9593, at *29 (Tex. App.—Houston [1st Dist.] Oct. 28, 2004, no pet.) (mem. op.); *Tolpo v. DeCordova*, 146 S.W.3d 678, 684 (Tex. App.—Beaumont 2004, no pet.) (concluding that the “pleadings do not state a cause of action independent of a cause of action for negligence”); *Aiken v. Hancock*, 115 S.W.3d 26, 29 (Tex. App.—San Antonio 2003, pet. denied) (“Moreover, these allegations do not amount to self-dealing, deception, or express misrepresentations in Ferguson’s legal representation, and do not support a separate cause of action for breach of fiduciary duty.”); *Kimleco Petrol., Inc. v. Morrison & Shelton*, 91 S.W.3d 921, 924 (Tex. App.—Fort Worth 2003, pet. denied) (“Appellants do not allege any conduct that could constitute breach of contract or fiduciary duty. In fact, the alleged professional failures of Appellee can only be characterized as legal malpractice.”).

452. *See Finger*, 326 S.W.3d at 296–97 (“Regardless of the pleaded theory, if the crux of the

fee forfeiture, but they list multiple reasons for granting summary judgment, which may include plaintiffs not supporting an independent claim for breach of fiduciary duty, as well as the view that the gist or crux of the plaintiff's case relates to malpractice or that the plaintiff's case better supports a claim for malpractice than breach of fiduciary duty. When conflicting approaches both support the same conclusion, neither is determinative. However, there are at least four opinions that have reversed holdings for summary judgment, solely on the grounds that the claim for breach of fiduciary duty cannot be dismissed merely because the plaintiff also pled for legal malpractice.⁴⁵³

Most appellate opinions examine the independence or integrity of the principal's claim for breach of fiduciary duty, however, by demanding proof that the lawyer gained an improper benefit from the breach. Traditional disorgement cases like *Kinzbach* or *Brewer & Pritchard* would satisfy this condition, as proof of the secret profit or benefit is integral to proving liability.⁴⁵⁴ Cases that seek forfeiture of agreed compensation from a lawyer fiduciary for a breach unrelated to the fees, such as *Burrow*, would consistently fail this test. The improper benefit rule will be discussed further in Section IX.

complaint is that a plaintiff's attorney did not provide adequate legal representation, the claim is one for legal malpractice."). For case opinions that argue both for and against a stand-alone analysis see *Brescia v. Slack & Davis, LLP*, No. 03-08-00042-CV, 2010 Tex. App. LEXIS 9204, at *24, 35-36 (Tex. App.—Austin Nov. 19, 2010, pet. denied) (mem. op.); *Trousdale v. Henry*, 261 S.W.3d 221, 229, 232 (Tex. App.—Houston [14th Dist.] 2008, pet. denied); *Kimleco Petrol, Inc.*, 91 S.W.3d at 924.

453. See *Trousdale*, 261 S.W.3d at 229, 232 ((holding that the plaintiff's allegations of breach of fiduciary duty "go beyond the mere negligence allegation in a legal malpractice action" because they alleged deception and misrepresentation committed while the lawyers represented and owed duties to the plaintiff); *Deutsch v. Hoover, Bax & Slovacek, LLP*, 97 S.W.3d 179, 190-91 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (finding that the trial court erred by granting a directed verdict for Deutsch's allegations of conflicts of interest "on the basis that these allegations impermissibly fractured Deutsch's negligence claim" because the complaints were "appropriately classified as a breach-of-fiduciary-duty claim, independent of Deutsch's negligence claim"); *Francisco v. Foret*, No. 05-01-00783-CV, 2002 Tex. App. LEXIS .2610, at *11 (Tex. App.—Dallas Apr. 11, 2002, pet. denied) (not designated for publication) (finding that the plaintiffs produced more than a scintilla of evidence of a breach of fiduciary duty along with their malpractice claim).

454. See *Johnson v. Brewer & Pritchard, PC*, 73 S.W.3d 193, 200-01 (Tex. 2002) (reciting that when a fiduciary accepts "any gift, gratuity, or benefit in violation of his duty, or acquires any interest adverse to his principal, without a full disclosure," it constitutes a breach of confidence for which he must "account to his principal for all he has received" (citation omitted)); *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 138 Tex. 565, 160 S.W.2d 509, 514 (1942) (reciting that a third party who "knowingly participates in the breach of duty of a fiduciary," is liable as a "joint tortfeasor with the fiduciary").

F. *Rejecting Claims That Sound in Negligence*

The second generation of fracturing opinions is more sophisticated than *Sledge*. This group of cases holds that substantiating a claim for breach of fiduciary duty is not enough to satisfy the fracturing rule. Recent fracturing opinions state that a breach of fiduciary duty may be implicated, but that the fiduciary's negligent breaches or failures to act should be considered only legal malpractice.⁴⁵⁵ They reject claims that fail to establish that the breach was not negligent,⁴⁵⁶ or that fail to substantiate that the breach was intentional.⁴⁵⁷

455. See *Riverwalk CY Hotel Partners Ltd. v. Akin, Gump, Strauss, Hauer & Feld, LLP*, 391 S.W.3d 229, 236 (Tex. App.—San Antonio 2012, no pet.) (“Unlike conflicts of interest between jointly represented clients, the types of conflicts of interest which could give rise to a breach of fiduciary duty are those in which the lawyer has a direct pecuniary interest in the litigation that is adverse to the client, and the attorney pursues his own interest to the client’s detriment.”); *Won Pak v. Harris*, 313 S.W.3d 454, 456–58 (Tex. App.—Dallas 2010, pet. denied) (“In reaching this conclusion we necessarily reject appellants’ position that their conflict of interest allegations give rise to a breach of fiduciary duty claim. Even if a complaint implicates a lawyer’s fiduciary duties, it does not necessarily follow that such a complaint is actionable apart from a negligence claim.”); *Kemp v. Jensen*, 329 S.W.3d 866, 872 (Tex. App.—Eastland 2010, pet. denied) (“Texas courts have consistently held that the failure to disclose significant information about a client’s case is professional negligence and not a breach of fiduciary duty.”).

456. See *McMahan v. Greenwood*, 108 S.W.3d 467, 495 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (“Attorneys may be liable for a breach of fiduciary duty, but such a claim requires allegations of self-dealing, deception, or misrepresentations that go beyond the mere negligence allegations in a malpractice action.”); see also *Poledore v. Fraley*, No. 01-09-000658-CV, 2010 Tex. App. LEXIS 8184, at *12 (Tex. App.—Houston [1st Dist.] Oct. 7, 2010, pet. denied) (mem. op.) (holding that attorneys are also liable for breaching their fiduciary duties to a client, but only if the plaintiff alleges “self-dealing, deception, or misrepresentations that go beyond the mere negligence allegations in a malpractice action”); *Watkins v. Plummer*, No. 14-08-01040-CV, 2010 Tex. App. LEXIS 4183, at *18 (Tex. App.—Houston [14th Dist.] June 3, 2010, no pet.) (mem. op.) (reciting that the allegations must exceed the “mere negligence allegations” implicit in malpractice actions); *Trousdale*, 261 S.W.3d at 228 (holding that the allegations must exceed the “mere negligence allegations” implicit in malpractice actions); *Duerr v. Brown*, 262 S.W.3d 63, 70, 74 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (“The plaintiff must present a claim that goes beyond what traditionally has been characterized as legal malpractice.”).

457. See *Riverwalk CY Hotel Partners Ltd.*, 391 S.W.3d at 237 (“If Riverwalk had only alleged that Akin Gump negligently failed to recognize that insurance coverage existed and therefore negligently failed to tender the defense of the Auburn lawsuit to the insurance carrier, Riverwalk’s claim would have been simply a claim for legal malpractice. However, Riverwalk alleged that Akin Gump knew about the insurance coverage and intentionally failed to tender the defense.”); *Isaacs v. Schleier*, 356 S.W.3d 548, 559–60 (Tex. App.—Texarkana 2011, pet. denied) (“These claims do not, ‘without more, allege the type of dishonesty or intentional deception that will support a breach-of-fiduciary-duty claim,’ or demonstrate the element culpability required to meet the elements of fraud.” (quoting *Murphy v. Gruber*, 241 S.W.3d 689, 699 (Tex. App.—Dallas 2007, pet. denied))); *Won Pak*, 313 S.W.3d at 458 (“To the extent that appellants argue Harris favored his own pecuniary interest in obtaining his legal fee over appellants’ interests, we conclude that this interest, without more, is

The requirement for the plaintiff to establish the lawyer fiduciary's intent is explained in two ways: (1) intent refutes mere negligence and (2) intent establishes the linkage necessary to prove causation between the alleged breach and the resulting improper benefit.⁴⁵⁸

Sections V and VI demonstrate that such a linkage requirement is not supported by causation standards for remedies in equity.⁴⁵⁹ The plaintiff can satisfy the causation standard by identifying the relevant fees to shift their burden of proof under disgorgement.⁴⁶⁰ The defendant is free to dispute the amount of the fees or claim counter-restitution but the resolution of that dispute should be resolved in light of the evidence introduced at trial.

A few of the more recent cases have rationalized redefining the traditional boundaries between negligence and breach of fiduciary duty based on the gratuitous premise that the practice of law is somehow "more fiduciary" than other types of fiduciary professions. This rationale advocates different standards of loyalty between lawyers and non-lawyers based on the unique nature of practicing law:

insufficient to allege the type of dishonesty or intentional deception necessary to convert a negligence claim into one for breach of a fiduciary duty."); *Murphy v. Gruber*, 241 S.W.3d 689, 699 (Tex. App.—Dallas 2007, pet. denied) (concluding that the plaintiff's allegations asserted professional negligence claims because the essence was that "the [l]awyers' representation fell below the quality required under the law").

458. *See Riverwalk CY Hotel Partners Ltd.*, 391 S.W.3d at 238–39 ("The Austin court disagreed that the mere fact that the attorneys 'might have had an expectation of fees from continuing to represent [the clients] — a factor present in virtually every attorney-client relationship — [could] convert [the clients'] negligence claim into [a] breach-of-fiduciary-duty claim.' First, the court reasoned that the expectation of fees from continuing the representation, without more, does not support an inference that the attorneys' failure to disclose the condition was motivated by an intent to obtain those fees." (internal citation omitted)); *Beck v. Law Offices of Edwin J. (Ted) Terry, Jr.*, PC, 284 S.W.3d 416, 433 (Tex. App.—Austin 2009, no pet.) ("First, an expectation of fees from continuing the representation, without more, would not support the inference that the Terry Defendants' failure to disclose Terry's 'alcohol and substance abuse addictions' was motivated by an intent to obtain those fees. The non-disclosure is equally consistent with a more general aversion to revealing these sorts of discomfoting private facts to others." (citing *Kahlig*, 980 S.W.2d at 689–90)); *Gibson v. Ellis*, 126 S.W.3d 324, 331 (Tex. App.—Dallas 2004, no pet.) ("Again, even assuming Gibson's legal assertions are true, the evidence did not conclusively establish the omissions were made for the purposes of achieving an improper benefit from Ellis's representation of Gibson."); *see also Duerr v. Brown*, 262 S.W.3d 63, 73–74 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (affirming the trial court's summary judgment because the crux of complaint was that the client did not receive the desired settlement amount due to the mishandling of claim, despite allegations that firm received an improper benefit from persuading client to settle in the form of additional fees).

459. *See supra* note 450.

460. *See supra* note 130.

In non-lawyer cases in which there is a fiduciary relationship, many of the claims against the fiduciary are labeled breach-of-fiduciary-duty claims. However, the standard of care in negligence claims is often defined by the characteristics of that inherent fiduciary relationship. As a result, courts refer to the fiduciary relationship that the lawyer has to the client and use fiduciary standards to define the standard of care required of lawyers. And courts have most often applied those standards to conclude that the claims are really negligence, not breach-of-fiduciary-duty claims.⁴⁶¹

This claim not only contradicts *Burrow*⁴⁶² but it seems questionable—especially in comparison with fiduciary standards for trustees.⁴⁶³ The great danger in this point of view is the implication that satisfying a professional’s legal malpractice duties should automatically satisfy her fiduciary duties.

The foundation for a policy of excluding claims for negligent breaches of duty or requiring intentional breaches under the fracturing rule is flawed from the start. There are examples of claims against non-lawyer fiduciaries for breach of fiduciary duty based on negligence,⁴⁶⁴ and *Burrow* and *Swinnea* specifically refuse to exclude acts of negligence from liability for fee forfeiture: “For example, the ‘willfulness’ factor requires consideration of the attorney’s culpability generally; it does not simply limit forfeiture to situations in which the attorney’s breach of duty was intentional.”⁴⁶⁵ The need to prove the fiduciary’s intent to breach her fiduciary duty has never been an element of a prima facie case for breach of fiduciary duty.⁴⁶⁶

461. *Murphy*, 241 S.W.3d at 696–97; see also *Smith v. Aldridge*, No. 14-11-00673-CV, 2012 Tex. App. LEXIS 2499, at *13–14 (Tex. App.—Houston [14th Dist.] March 29, 2012, no pet.) (mem. op.) (“In negligence cases against attorneys, the standard of care is often defined by the characteristics of that inherent fiduciary relationship.”); *Won Pak*, 313 S.W.3d at 458 (“[T]he standard of care in attorney negligence cases often refers to and is defined by the characteristics inherent in the fiduciary duty between the lawyer and the client.”).

462. For the rejection of different standards between lawyer and non-lawyer fiduciaries, see *Burrow v. Arce*, 997 S.W.2d 229, 243 (Tex. 1999).

463. *But see* Charles M. Silver, *A Critique of Burrow v. Arce*, 26 WM. & MARY ENVTL. L. & POLY REV. 323, 339–40 (2001) (“Third, and more fundamentally, the suggestion the same rule should apply to all fiduciaries ignores crucial differences between trustees and litigating attorneys. An attorney with multiple clients may not subordinate the interests of one client to those of another. An attorney may act only in ways that are expected to make all clients better off. By contrast, a trustee may prefer one beneficiary to another, and many trustees make inter-beneficiary tradeoffs routinely. A trustee need only act impartially.” (citations omitted)).

464. See *supra* Group 2 at Section VI, Part B.

465. *ERI Consulting Eng’rs, Inc. v. Swinnea*, 318 S.W.3d 867, 874 (Tex. 2010) (quoting *Burrow v. Arce*, 997 S.W.2d 229, 243–44 (Tex. 1999)).

466. See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 43 cmt. a

In Texas, proof of intentional acts is sufficient but not necessary proof to establish exemplary damages.⁴⁶⁷ No fracturing case opinion has explained why fee forfeiture claims are held to the standards for exemplary damages for breach of fiduciary duty. The fracturing rule effectively conflates breach and breach with implied malice, holding lawyer fiduciaries to the higher standard of implied malice.

G. *Whittling Fiduciary Standards*

A trustee's conduct is "measured by the standards of the finer loyalties exacted by courts of equity. This is a sound rule and should not be whittled down by exceptions."⁴⁶⁸

Not only are breaches of fiduciary duty against lawyers being excluded by claims of negligence, but the standards for determining a breach of loyalty are diminishing. In the process of writing opinions to affirm summary judgment for the lawyer defendant, Texas courts of appeals are generating an inventory of statements about breaches of loyalty that whittle fiduciary duties as the courts shift the boundary between disloyalty and negligence.⁴⁶⁹

(2011) ("If restitution takes the form of a liability to disgorge profits, a disloyal fiduciary—without regard to notice or fault—is treated as a conscious wrongdoer (§ 51(3)); though a defendant who obtains a benefit in consequence of another's breach of fiduciary duty, within the rule of § 43(c), might be treated for restitution purposes as an innocent recipient (§ 50)."); see also Charles W. Wolfram, *A Cautionary Tale: Fiduciary Breach as Legal Malpractice*, 34 HOFSTRA L. REV. 689, 700 (2006) ("While disgorgement often involves conscious wrongdoing, use of this remedy even when the fiduciary's wrongdoing was non-deliberate might support the interest of deterring breaches of fiduciary duty. For such reasons, the RESTATEMENT OF THE LAW GOVERNING LAWYERS as well as the Restatement of Restitution both approve of the use of the disgorgement remedy for unintentional breach of fiduciary duty." (citations omitted)).

467. See *supra* note 170.

468. See *Tex. Bank & Trust Co. v. Moore*, 595 S.W.2d 502, 508 (Tex. 1980) ("When persons enter into fiduciary relations each consents, as a matter of law, to have his conduct towards the other measured by the standards of the finer loyalties exacted by courts of equity. That is a sound rule and should not be whittled down by exceptions. If the existence of strained relations should be suffered to work an exception, then a designing fiduciary could easily bring about such relations to set the stage for a sharp bargain. There is no suggestion in this record that Peckham did that thing, but mischief would result more often from engrafting exceptions upon the general rule than from a strict adherence thereto." (quoting *Johnson v. Peckham*, 132 Tex. 148, 120 S.W.2d 786, 788 (1939))).

469. Compare *Riverwalk CY Hotel Partners Ltd. v. Akin, Gump, Strauss, Hauer & Feld, LLP*, 391 S.W.3d 229, 236 (Tex. App.—San Antonio 2012, no pet.) ("Unlike conflicts of interest between jointly represented clients, the types of conflicts of interest which could give rise to a breach of fiduciary duty are those in which the lawyer has a direct pecuniary interest in the litigation that is adverse to the client, and the attorney pursues his own interest to the client's detriment." (citation omitted)), *with* *Bryant v. Lewis*, 27 S.W.2d 604, 608 (Tex. Civ. App.—Austin 1930, writ dismissed) ("We

Fracturing opinions are changing the boundaries between negligence and disloyalty in a categorical manner and on a case-by-case basis.⁴⁷⁰ For example, to constitute a claim for breach of fiduciary duty, a breach of confidentiality must now include evidence that the lawyer fiduciary sought financial gain.⁴⁷¹ The duty to avoid conflicting interests is deemed to require dishonesty, intentional deception, or misrepresentation.⁴⁷² These specific examples and others that exclude negligent breaches will have the effect of changing fiduciary duties from duties to affirmatively act to duties not to make a negligent error. Thus we find a case like *Isaacs v. Schleier*,⁴⁷³ in which the lawyer told his client that he was not conflicted in the representation only for the client to hear the lawyer later admit to the

think that Lewis was not guilty of any intentional wrongdoing or lack of good faith in accepting said employment from Mrs. Blackwell. But, because of the nature of said representation and the irreconcilable conflict of their interests in the same subject-matter, we conclude that he was not entitled to recover anything for his services to appellant.”). See generally Linda Eads, *Negligence vs. Disloyalty: Limits on the Forfeiture of Attorneys’ Fees*, TEX. LAW., Jan. 12, 2004, at 26 (reviewing the remedy of fee forfeiture in the wake of *Burrow*).

470. See *Murphy v. Mullin, Hoard & Brown, LLP*, 168 S.W.3d 288, 290 (Tex. App.—Dallas 2005, no pet.) (holding that the failure to timely inform clients of defects in documents was a claim for professional negligence and not breach of fiduciary duty, because there was no claim that attorneys received an improper benefit from the representation); *Beck v. Law Offices of Edwin J. (Ted) Terry, Jr., PC*, 284 S.W.3d 416, 438–39 (Tex. App.—Austin 2009, no pet.) (affirming that the plaintiff’s complaint sounds only in negligence even though it alleges that the interests of the lawyer and law firm diverged from those of the client).

471. See *Judwin Props., Inc. v. Griggs & Harrison*, 911 S.W.2d 498, 507 (Tex. App.—Houston [1st Dist.] 1995, no writ) (“However, Judwin does not allege or even suggest that Griggs has stolen its interests. Nor do the alleged acts indicate any unfairness or deception in Griggs’ use of the information. Judwin’s claim is essentially for improper disclosure of confidential information; therefore it is couched entirely in legal malpractice.” (citation omitted)); see also *Beck*, 284 S.W.3d at 438–39 (“This is not a case like *Deusch* or *Floyd* where the focus of the client’s complaint is that a lawyer or firm pursued its own pecuniary interests at the client’s expense. Instead, the focus of appellants’ ‘conflict-of-interest’ complaint is simply that the Terry Defendants failed to advise Beck, the corporations’ sole shareholder, that the interests of these entities diverged from his own personal interests and that he should obtain separate counsel for the entities.”). But see RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 43 illus. 2 (2011) (presenting the issue of an attorney using confidential information about a mother’s estate in breach of his fiduciary duty to the daughter).

472. See *Riverwalk CY Hotel Partners Ltd.*, 391 S.W.3d at 236 (“Unlike conflicts of interest between jointly represented clients, the types of conflicts of interest which could give rise to a breach of fiduciary duty are those in which the lawyer has a direct pecuniary interest in the litigation that is adverse to the client, and the attorney pursues his own interest to the client’s detriment.” (citation omitted)); *McMahan v. Greenwood*, 108 S.W.3d 467, 495 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (“Attorneys may be liable for a breach of fiduciary duty, but such a claim requires allegations of self-dealing, deception, or misrepresentations that go beyond the mere negligence allegations in a malpractice action.”).

473. *Isaacs v. Schleier*, 356 S.W.3d 548 (Tex. App.—Texarkana 2011, pet. denied).

conflict on the stand under cross-examination from the opposing party and former client.⁴⁷⁴ The Sixth District affirmed the trial court in holding that the lawyer forgot about the conflict and the omission constituted negligence not breach of fiduciary duty.⁴⁷⁵

It must be acknowledged that there are few black or white cases, and latitude must be allowed for individual judgment. On the other hand, there are three countervailing issues that would seem to urge greater restraint in redefining breaches of loyalty as negligence, especially at summary judgment. First, the law of fiduciary duty is one of the few areas of the law that resembles the rules in horseshoes or hand grenades: near misses tend to count; almost committing a breach can be considered a breach.⁴⁷⁶ In the area of conflict of interests, courts speak of actual conflicts similarly as fact patterns in which there may or might be a conflict.⁴⁷⁷ Discussion of fiduciary duty is concerned with deterring even

474. *See id.* at 552 (“Throughout the litigation, Schleier denied any attorney–client relationship with Bishop—until he testified on the stand in 2005. As a result of this admission on the stand, the Isaacses instituted this suit against Schleier and the firm in Gregg County on September 26, 2005.”).

475. *See id.* at 559–60 (“These claims do not, ‘without more, allege the type of dishonesty or intentional deception that will support a breach-of-fiduciary-duty claim,’ or demonstrate the element culpability required to meet the elements of fraud. There is no allegation or evidence presented that Schleier was anything other than mistaken in his belief that he was only representing the Isaacses in the transaction.”).

476. *See Woods v. City Nat’l Bank & Trust Co.*, 312 U.S. 262, 268 (1941) (“The principle enunciated by Chief Justice Taft in a case involving a contract to split fees in violation of the bankruptcy rules, is apposite here: ‘What is struck at in the refusal to enforce contracts of this kind is not only actual evil results but their tendency to evil in other cases.’” (citation omitted)); *Slay v. Burnett Trust*, 143 Tex. 621, 187 S.W.2d 377, 387–88 (1945) (“The rule is general in its use and is fundamental. It is for the benefit of the cestui que trust and undertakes to enforce the duty of loyalty on the part of the trustee by prohibiting him from using the advantage of his position to gain any benefit for himself at the expense of his cestui que trust and from placing himself in any position where his self interest will or may conflict with his obligations as trustee.” (citations omitted)); *Crenshaw v. Swenson*, 611 S.W.2d 886, 890 (Tex. Civ. App.—Austin 1980, writ ref’d n.r.e.) (“Not only is it his duty to administer the partnership affairs solely for the benefit of the partnership, he is not permitted to place himself in a position where it would be for his own benefit to violate this duty.”); *see also* RESTATEMENT (THIRD) OF THE LAW OF RESTITUTION AND UNJUST ENRICHMENT § 43 cmt. b (2011) (“The basic determination that opens the way to restitution within the rule of this section is always the same: that there has been trust and confidence justifiably reposed on one side, and an advantage improperly gained on the other, either in violation of fiduciary duty or in circumstances posing so great a risk of violation that violation is presumed as a matter of law. Any such advantage must be given up to the beneficiary.”).

477. *See Slay*, 187 S.W.2d at 387–88 (“It is a well-settled rule that a trustee can make no profit out of his trust. The rule in such cases springs from his duty to protect the interests of the estate, and not to permit his personal interest to in any wise conflict with his duty in that respect. The intention is to provide against any possible selfish interest exercising an influence which can interfere with the faithful discharge of the duty which is owing in a fiduciary capacity.” (citation & quotations

the temptation to breach duty,⁴⁷⁸ that the appearance of breach must be avoided. Second, these wider ‘margins’ provided for in fiduciary law should be honored, if not widened, in decisions for summary judgment.⁴⁷⁹ The reasoning in the *Isaacs* opinion, with its sharp distinctions and low tolerance for uncertainty about the principal’s case, might be the right balance for legal malpractice at trial but it does not seem compatible with the law in equity at the summary judgment stage.⁴⁸⁰ Third, even if the trial judge denies the defendant’s motion for summary judgment, the trial judge retains her discretion to grant or deny the remedy in equity as part of the judgment.

SECTION IX. IMPROPER BENEFIT AND THIRD-PARTY FEES

“Similarly, even if a fiduciary does not obtain a benefit from a third party by violating his duty, a fiduciary may be required to forfeit the right to compensation for the fiduciary’s work.”⁴⁸¹

It is commonplace to find “benefit” discussed in case opinions and treatises on disgorgement and remedies in equity but “improper benefit” has only arisen recently in Texas. In fact, the first use of improper benefit in a Texas fiduciary case was in an opinion, which held that improper benefit has the same meaning as ‘additional benefit’ and either term would suffice as proof for establishing exemplary damages.⁴⁸²

omitted)); *Dunnagan v. Watson*, 204 S.W.3d 30, 46 (Tex. App.—Fort Worth 2006, pet. denied) (“The trial court instructed the jury that the fiduciary duty of an officer or director includes the duty to exercise care in the management of corporate affairs and that in determining compliance with the fiduciary duties, the jury could consider whether . . . the officer or director placed himself in a position where his self-interest might conflict with his obligations as a fiduciary.”); *Interfirst Bank Dall., N.A. v. Risser*, 739 S.W.2d 882, 899 (Tex. App.—Texarkana 1987, no writ) (“The duty of fidelity required of a trustee forbids the trustee from placing itself in a situation where there is or could be a conflict between its self-interest and its duty to the beneficiaries.”).

478. See *supra* notes 67 and 68.

479. See *Querner v. Rindfuss*, 966 S.W.2d 661, 670 (Tex. App.—San Antonio 1988, writ denied) (“Texas law holds that a summary judgment is a harsh remedy requiring strict construction. Under our applicable standard of review, we are required to take as true all evidence favoring the non-movant and indulge every reasonable inference in his favor.” (citations & emphasis omitted)).

480. See *Isaacs*, 356 S.W.3d at 563 (“[T]he malpractice must be committed in the prosecution or defense of the claim which results in litigation.”).

481. *ERI Consulting Eng’rs, Inc. v. Swinnea*, 318 S.W.3d 867, 873 (Tex. 2010).

482. See *Edwards v. Holleman*, 893 S.W.2d 115, 120 (Tex. App.—Houston [1st Dist.] 1995, writ denied) (“Edwards argues that the trial court should have phrased question eight to ask about an *improper* benefit rather than an *additional* benefit. The issue concerning exemplary damages for breach of fiduciary duty is not whether there is an intent to injure, but rather whether the one with a

Normally “benefit” is synonymous with “advantage” or “profit” to describe the object of disgorgement. In cases in which the claimant seeks the fiduciary’s benefit or profit such as for secret profit claims, it would be normal to expect evidence of the benefit as an element in the claim.⁴⁸³ *Brewer & Pritchard* observes that most claimants for usurpation need to prove a benefit or profit, but the case does not hold that proving a benefit is a necessary condition for disgorgement let alone for fee forfeiture or restitution of agreed compensation.⁴⁸⁴ In both *Brewer & Pritchard* and *Kinzbach*, establishing the profit or benefit was necessary to prove liability for breach and neither case sought restitution of agreed fees.

The imposition of a requirement to prove an improper benefit fundamentally misunderstands the supreme court’s rationale for fee forfeiture. *Burrow* clearly stated that the principal was damaged by the breach of fiduciary duty, regardless of the proof of financial loss.⁴⁸⁵ *Burrow* did not state or imply that proof of the fiduciary’s benefit should be substituted for the requirement for proof of damages in cases for remedies at law. Until *Burrow*, Texas law held that a fiduciary should be denied all compensation for a breach of fiduciary duty without proof of damages or benefits.⁴⁸⁶ *Burrow* modified that traditional principle such that not all of the fiduciary’s compensation is necessarily forfeited, and it limited fee forfeiture to only clear and serious violations of fiduciary duty.⁴⁸⁷

fiduciary duty intended to gain an *additional* benefit for himself.” (citing *Kirby v. Cruce*, 688 S.W.2d 161, 167 (Tex. App.—Dallas 1985, writ ref’d n.r.e.)).

483. See *Johnson v. Brewer & Pritchard, PC*, 73 S.W.3d 193, 200–01 (Tex. 2002) (“A fiduciary cannot say to the one to whom he bears such relationship: You have sustained no loss by my misconduct in receiving a commission from a party opposite to you, and therefore you are without remedy.”); *Slay v. Burnett Trust*, 143 Tex. 621, 187 S.W.2d 377, 388 (1945) (concerning self-interest of a fiduciary conflicting with his obligations to a trustee); *Kinzbach Tool Co., Inc. v. Corbett-Wallace Corp.*, 138 Tex. 565, 160 S.W.2d 509, 514 (1942) (“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.”).

484. See *supra* note 131.

485. See *supra* note 178.

486. See *supra* notes 16, 19, 21, 22, 312, and 329.

487. See *Sealed Party v. Sealed Party*, No. Civ.A. H–04–2229, 2006 U.S. Dist. LEXIS 28392, at *80–81 (S.D. Tex. Apr. 28, 2006) (“On balance, the Court cannot conclude that any component of the Attorney’s violation of his fiduciary duty of continued confidentiality was both clear and serious. Some of the disclosures constitute a clear but not serious violations of fiduciary duty, and some amounted to serious but not clear violations. In the exercise of the Court’s broad discretion, the Court concludes that the public interest in maintaining the integrity of attorney-client relationships is served by the conclusions herein that the Attorney breached a fiduciary duty to the Client, but not ordering a forfeiture.” (citing *Burrow v. Arce*, 997 S.W.2d 229, 243 (Tex. 1999))); see also *Frazin v. Haynes & Boone, LLP* (*In re Frazin*), No. 02-32351-bjh-13, 2008 Bankr. LEXIS 2373, at *227 (Bankr.

Claims for fee forfeiture do not seek restitution of the benefit or profit; claims such as *Burrow* seek only the fees, so proof of a benefit other than fees is irrelevant. As described in Sections V and VI, there is substantial precedent in Texas law relating to non-lawyer fiduciaries for the holding that some remedies in equity such as avoidance, rescission, or constructive trust require minimal or no proof of advantage, benefit or profit.⁴⁸⁸ *Swinnea* specifically states that no damages or benefits need to be proven to warrant fee forfeiture.⁴⁸⁹

With a few exceptions, most opinions relating to non-lawyer fiduciary claims list the required element as “benefit,” not “improper benefit.”⁴⁹⁰ Furthermore, there is Texas precedent for the order to disgorge just fiduciary compensation, without any other advantage or profit against non-lawyers and lawyers.⁴⁹¹

In the ten years since the improper benefit test was introduced, it has increased in difficulty with new enhancements. Some courts now require a causation linkage between the breach alleged and the improper benefit despite the fact that causation standards are minimal.⁴⁹² In these more

N. D. Tex. Sept. 23, 2008) (negating a clear and serious claim because the breach of fiduciary duty occurred at the end of the representation).

488. See *supra* Section VI, Part A (addressing the principal’s right to avoid).

489. See *ERI Consulting Eng’rs, Inc. v. Swinnea*, 318 S.W.3d 867, 873 (Tex. 2010) (stating that a showing of a benefit is not required for fee forfeiture).

490. See *Acad. of Skills & Knowledge, Inc. v. Charter Schools, USA, Inc.*, 260 S.W.3d 529, 540 (Tex. App.—Tyler 2008, pet. denied) (“The elements of a breach of fiduciary duty cause of action are (1) a fiduciary relationship must exist between the plaintiff and the defendant, (2) the defendant must have breached its fiduciary duty to the plaintiff, and (3) the defendant’s breach must result in injury to the plaintiff or benefit to the defendant.”); see also *Johnson v. Brewer & Pritchard, PC*, 73 S.W.3d 193, 200–01 (Tex. 2002) (discussing element of improper benefit); *Linder v. Citizens State Bank of Malakoff*, 528 S.W.2d 90, 94 (Tex. Civ. App.—Tyler 1975, writ ref’d n.r.e.) (setting forth all elements except improper benefit).

491. See *Onyung v. Onyung*, No. 01-10-00519-CV, 2013 WL 396183, at *19 (Tex. App.—Houston [1st Dist.] July 25, 2013, pet. denied) (mem. op.) (“Separate and apart from the award of fraud damages, Mrs. Onyung was compensated for the attorney’s fees that she paid by way of the award of a disgorgement of Yuen’s fees. She is not entitled to recover the same element of damages twice.”); *Piro v. Sarofim*, No. 01-00-00398-CV, 2002 Tex. App. LEXIS 2656, at *18 (Tex. App.—Houston [1st Dist.] April 11, 2002, no pet.) (not designated for publication) (“When forfeiture of an attorney’s fee is claimed, a trial court must determine from the parties whether factual disputes exist that must be decided by a jury before the court can determine whether a clear and serious violation of duty has occurred, whether forfeiture is appropriate, and if so, whether all or only part of the attorney’s fee should be forfeited.”); *Deutsch v. Hoover, Bax & Slovacek, LLP*, 97 S.W.3d 179, 202–03 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (listing factors used in determining forfeiture of fees not including a showing of benefit).

492. See *supra* note 458.

recent cases, to avoid summary judgment, the claimant must now plead and evidence an improper benefit that has resulted from the breach. In *Beck v. Law Offices of Edwin J. (Ted) Terry, Jr.*,⁴⁹³ the court acknowledged that the deceased lawyer may have breached his fiduciary duty by failing to disclose his alcoholism and that the deceased lawyer received fees from the case; however, the court applied the fracturing rule because the plaintiff did not plead or provide evidence that the fees necessarily resulted from his conflict or his failure to disclose the conflict, stating that the lawyer's failure to disclose his alcoholism could have been due to his aversion to disclose unpleasant personal information.⁴⁹⁴ While the issues of whether a practicing alcoholic has a conflict with his client or a duty to disclose his disease may seem ethically questionable and impracticable,⁴⁹⁵ this causation standard or linkage has been adopted in other cases also.⁴⁹⁶

Agreed fees are increasingly rejected as sufficient evidence of an improper benefit. First, the linkage requirement is applied to require proof of causation between the breach of loyalty and the fiduciary's receipt of the fees. Presumably, if your lawyer unintentionally neglects to disclose that opposing counsel in your litigation happens to be his married daughter or fiancée, the client must still show that the lawyer intended to hide the conflict solely to gain the fees. The lawyer might thereby provide an adequate defense against breach of fiduciary duty by testifying that his non-disclosure was prompted by his fear of trouble with the Texas Bar, not his desire to gain fees.

The rejection of fees as an improper benefit directly contradicts the Supreme Court's schema in *Burrow* and *Swinnea* to provide fee forfeiture in cases in which fiduciary compensation is unrelated to establishing liability for breach. In *Burrow*, the violation of restrictions on aggregate settlement practices was unrelated to the amount of the contingency fees in that case.

493. *Beck v. Law Offices of Edwin J. (Ted) Terry, Jr., PC*, 284 S.W.3d 416 (Tex. App.—Austin 2009, no pet.).

494. *See id.* at 431–33 (“First, an expectation of fees from continuing the representation, without more, would not support the inference that the Terry Defendants’ failure to disclose Terry’s ‘alcohol and substance abuse addictions’ was motivated by an intent to obtain those fees. The non-disclosure is equally consistent with a more general aversion to revealing these sorts of discomfoting private facts to others.”).

495. Under the disease concept of alcoholism, the alcoholic is often the last to ‘know’ that she is an alcoholic.

496. *See supra* note 458.

Linking *Burrow* and *Swinnea* mistakenly conflates disgorgement cases like *Kinzbach* and *Brewer & Pritchard* with fee forfeiture cases like *Burrow*.⁴⁹⁷

The rejection of fees is impossible to reconcile with forfeiture precedents including *Truitt*, and *Burrow* as well the non-lawyer cases discussed in Sections II.⁴⁹⁸ It limits claims for fee forfeiture to disgorgement cases like *Kinzbach* or *Pippin*, in which a profit or benefit separate from compensation can be proven. Some appellate courts reject fees on the basis of the following circular reasoning: fees are no proof of an improper benefit because most lawyers are paid fees and therefore the improper benefit test would not restrict any claimants.⁴⁹⁹ This presumes the legitimacy of the requirement for an improper benefit even though the provenance or the rationale for the improper benefit rule remains to be identified. Furthermore, it is impossible to reconcile with *Burrow*⁵⁰⁰ or *Swinnea*.⁵⁰¹

Finally, the improper benefit rule is contradicted by the avoidance and strict liability opinions. If the fiduciary breaches her loyalty and brings an action for breach of contract or quantum meruit, most courts order the avoidance of contract and reject the claims without any proof of improper

497. See Charles Silver, *A Critique of Burrow v. Arce*, 26 WM. & MARY ENVTL. L. & POLY REV. 323, 333 (2001) (juxtaposing *Kinzbach* with *Brewer*).

498. See *supra* notes 18, 20, 21, and 36.

499. See *Reneker v. Offill*, No. 3:08-CV-1394-D, 2009 U.S. Dist. LEXIS 24567, at *31–32 (N.D. Tex. Mar. 26, 2009) (“Essentially, Reneker contends that Godwin Pappas improperly benefited from its attorney-client relationship with the AmeriFirst Clients because it was paid for its erroneous legal advice. If such an allegation were sufficient, however, it would effectively transform every malpractice claim arising from a paid attorney-client relationship into a breach of fiduciary duty claim. A client could almost always allege that he paid his lawyer for providing legal advice that turned out to be erroneous. Consequently, the mere receipt of professional fees in exchange for services that fall below the degree of care, skill, or diligence that attorneys of ordinary skill and knowledge commonly possess cannot, without more, be an ‘improper benefit’ that transforms an attorney negligence claim into one for breach of fiduciary duty.”); *Watkins v. Plummer*, No. 14-08-01040-CV, 2010 Tex. App. LEXIS 4183, at *20 (Tex. App.—Houston [14th Dist.] June 3, 2010, no pet.) (mem. op.) (“Third, the only ‘benefits’ Watkins alleges Plummer sought were the possible receipt of a contingency fee and having Watkins ‘take the blame for the discovery disputes.’”); *Trousdale v. Henry*, 261 S.W.3d 221, 227 (Tex. App.—Houston [14th Dist.] 2008, pet. denied) (“Appellees assert that Trousdale’s claims amount to nothing more than a recast legal malpractice claim, as they merely consist of allegations that appellees failed to keep Trousdale adequately informed while she continued to pay them for their legal services. Appellees argue that this is not the law in Texas, and contend that if such allegations are construed as claims for breach of fiduciary duty, then any alleged malpractice could be turned into a breach of fiduciary duty simply by paying one’s bills.”).

500. See *supra* note 450.

501. See *supra* Section V.

benefit.⁵⁰² Many cases state that the avoidance is justified without proof of the fiduciary's bad faith or evidence that the transaction was at variance from the market price. In such circumstances, it would be almost impossible to prove an improper benefit.⁵⁰³

A. *Third-Party Fees*

The discussion on Group 6 in Section VI, Part F, clearly applies to third-party payments. It provides substantial traditional support as well as four Texas precedents relating to non-lawyer fiduciaries. By itself, the discussion may not suffice as a 'slam-dunk' refutation of the third-party rule but it raises enough serious authority that our courts ought to take the issue more seriously than is otherwise reflected in the current appellate opinions.

Despite the small number of cases involved, there are four types of cases in which the courts have rejected a claim for the forfeiture of third-party payments. The first is one in which a lawyer represents the client but the fees were paid by a separate party, generally a co-plaintiff.⁵⁰⁴ At least one court has held that the lawyer represented the client but that the absence of direct payment precluded forfeiture.⁵⁰⁵

502. See *supra* note 15 and Section VI, Part A.

503. See, e.g., *Gordin v. Shuler*, 704 S.W.2d 403, 410 (Tex. App.—Dallas 1985, writ ref'd n.r.e.) (“The undisclosed self-interest of the agent makes the transaction voidable at the election of the principal, ‘without looking further into the matter than to ascertain that the interest existed.’ *Nabours v. McCord*, 100 Tex. 456, 100 S.W. 1152, 1154–55 (1907).”); *Crenshaw v. Swenson*, 611 S.W.2d 886, 890 (Tex. Civ. App.—Austin 1980, writ ref'd n.r.e.) (“A trustee shall not buy or sell, directly or indirectly, any property belonging to the trust estate, from or to itself. Self-dealing transactions may be attacked by the beneficiary even though he has suffered no damages and even though the trustee has acted in good faith.” (citation omitted)). This problem was addressed in *Nabours v. McCord*, quoting Judge Wheeler: “[A trustee] cannot be both buyer and seller at the same time, or connect his own interest in his dealings as an agent or trustee for another. It is incompatible with the fiduciary relation.” *Nabours v. McCord*, 97 Tex. 526, 80 S.W. 595, 598 (1904) (quoting *Shannon v. Marmaduke*, 14 Tex. 217 (1855)); see also *Watson v. Ltd. Partners of WCKT*, 570 S.W.2d 179, 182 (Tex. Civ. App.—Austin 1978, writ ref'd n.r.e.) (“The court held that the plaintiffs were ‘entitled to their recovery as a matter of law’ upon proof of the breach of fiduciary duty, and it was not necessary to decide whether the breach was a proximate cause because ‘[t]he breach automatically results in the forfeiture of the agent’s compensation.’” (quoting *Russell v. Truitt*, 554 S.W.2d 948, 952 (Tex. Civ. App.—Fort Worth 1977, writ ref'd n.r.e.))). For more examples, see *supra* Section VI, Part A.

504. See *Swank v. Cunningham*, 258 S.W.3d 647, 673 (Tex. App.—Eastland 2008, pet. denied) (holding that parties were not entitled to fees paid to the law firm by third parties, even in related matters).

505. See *Bellows v. San Miguel*, No. 14-0000-00071-CV, 2002 Tex. App. LEXIS 3164, at *45 (Tex. App.—Houston [14th Dist.] May 2, 2002, pet. denied) (not designated for publication) (“Although we have determined the evidence is sufficient to establish an attorney–client relationship

The second relates to the situation in which the client has a claim against a sub-contractor lawyer who has signed a fee-sharing agreement with the principal lawyer. In the absence of a retainer agreement between the principal and the sub-contractor, forfeiture is rejected.⁵⁰⁶ The third group arises when the client retains a lawyer on contingency and the lawyer is paid directly by the defendant as agreed in the settlement.⁵⁰⁷ The fourth group is the simplest case in which a lawyer has been retained but conducts a separate representation that is in conflict with the principal client.⁵⁰⁸

Explanation of the third-party payment rule in appellate opinions is brief. The more recent opinions justify their holdings on earlier opinions, without much distinction between the type of third-party payment or the nature of the disloyalty in each case.⁵⁰⁹ The main argument against

between Bellows and San Miguel, there is no contract, written or otherwise, establishing an agreement that San Miguel would pay Bellows any fees. Akins agreed to pay Bellows a referral fee equal to one-third of the fees he received under his written contract with San Miguel.”).

506. *See* Bailey v. Gallagher, 348 S.W.3d 322, 326 (Tex. App.—Dallas 2011, pet. denied) (“There is no evidence in the record of any contingent fee agreement between appellants and Gallagher. Thus, there is no contingent fee contract to void. Instead, appellants’ complaint is actually rooted in the contingent fee agreement between Azar and Loncar and Gallagher: that agreement allowed Gallagher to recover—through Azar and Loncar—one half of the fees initially paid by appellants.”).

507. *Swank*, 258 S.W.3d at 673–74. The issue was not raised in the Supreme Court opinion but similar case facts were present in *Burrow*, although the issue of third-party fees was not raised in the litigation. *See infra* note 525.

508. *See* Liberty Mut. Ins. Co. v. Gardere & Wynne, LLP, 82 F. App’x 116, 121 (5th Cir. 2003) (using fee forfeiture to discourage disloyalty); Gregory v. Porter & Hedges, LLP, 398 S.W.3d 881, 885 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) (“[F]ee forfeiture is a deterrent in that it removes the incentive for an attorney to take personal advantage of her position of trust in every situation, whether the client is injured or not.”); Elizondo v. Krist, 338 S.W.3d 17, 25 (Tex. App.—Houston [14th Dist.] 2010, pet. granted) (“It is undisputed that the Elizondos paid no fees to the Lawyers and so the Lawyers have no fees from them to disgorge. Instead, the Elizondos argue, the Lawyers should be required to disgorge fees they were paid by BP, a third party.”).

509. *See, e.g., Gregory*, 398 S.W.3d at 885–86 (“This court has specifically held that plaintiffs seeking forfeiture of attorneys’ fees are not entitled to recover fees paid by a third party. As this court noted in *Elizondo*, ‘a requirement that a lawyer who represents conflicting interests must disgorge all pay’ does not necessarily lead to the conclusion that one client may be awarded the fees paid by the other client. Rather, ‘the attorney must disgorge to each client the fees that each client paid to the lawyer.’” (citing *Elizondo v. Krist*, 338 S.W.3d 17, 24 (Tex. App.—Houston [14th Dist.] 2010, pet. granted)); *see also Liberty Mut. Ins.*, 82 F. App’x at 121 (holding that forfeiture of another client’s fees paid to attorneys, even in related matters, is an improper extension of *Burrow v. Arce*); *Swank*, 258 S.W.3d at 673–74 (concluding that allowing appellants, who did not pay any legal fees to the appellee lawyers, to recover fees paid to the lawyers by another party would result in an improper “windfall” result, which equity does not support). “Further, as our supreme court has instructed, fee forfeiture is only available for ‘clear and serious’ violations of a lawyer’s fiduciary duty, and even then,

forfeiture is that it would represent a windfall to the client.⁵¹⁰ Inexplicably, at the foundation of the windfall argument lies *Tener v. Bracewell*,⁵¹¹ which related to a breach of contract claim between law partners.⁵¹² As a claim for a remedy at law, *Tener* is not an appropriate precedent, as windfall is more common in equity.⁵¹³ Also anomalous was the Fifth Circuit opinion in *Liberty Mutual Insurance Co. v. Gardere & Wynne*,⁵¹⁴ which acknowledged the principle of deterrence but seemed to question whether the principle equally applied to both lawyer fiduciaries and non-lawyer fiduciaries.⁵¹⁵ Furthermore, *Liberty* mistakes the factors listed in *Burrow* for measuring how much, if any, of the fees should be forfeited with the gatekeeper issue of whether the principal should be allowed to make the claim or lose in summary judgment.⁵¹⁶

When asked to distinguish between disgorging the third-party payment in *Kinzbach* from the third-party payment in *Gregory v. Porter & Hedges, LLP*,⁵¹⁷ the fourteenth district unconvincingly argued that the fiduciary duty of the employee in *Kinzbach* differed from the lawyer's fiduciary duty in *Gregory*.⁵¹⁸ In what way can an employee's duty of loyalty exceed that of a lawyer?

Precedent abounds for disgorgement of compensation or profit paid to the fiduciary by a third party. Other than cases like *Falcon* in which the fiduciary's identity was disguised from the principal,⁵¹⁹ it is difficult to

total fee forfeiture is not always appropriate." *Gregory*, 398 S.W.3d at 886.

510. See *Swank*, 258 S.W.3d at 673–74 (“Because Swank and McCoy did not pay any legal fees to the appellee lawyers, allowing Swank and McCoy to recover them as a fee forfeiture would result in a windfall to them. Equity does not support such a ‘windfall’ result; therefore, fee forfeiture is not an appropriate remedy in this cause.”).

511. *Tener v. Bracewell*, No. 14-00-00442-CV, 2002 Tex. App. LEXIS 68 (Tex. App.—Houston [14th Dist.] June 3, 2002, no pet.) (mem. op., not designated for publication).

512. See *id.* at *7 (“Further, even if we were to assume Tener paid the premiums, then that would be her only damage. Allowing her (rather than the insurer) to recover attorney’s fees from *Bracewell* would not be compensation but a windfall.”).

513. See *supra* Section IV, Part G.

514. *Liberty Mut. Ins. Co. v. Gardere & Wynne, LLP*, 82 F. App’x 116 (5th Cir. 2003).

515. See *id.* at 121 (“In emphasizing the deterrent argument, *Liberty* mostly cites non-attorney cases for the proposition that a fiduciary must account for all gains obtained in violation of fiduciary duties, even when those gains come from third parties. *Liberty* argues, citing *Burrow*, that there is no reason to exempt attorneys from this general rule of Texas law.”).

516. *Id.*

517. *Gregory v. Porter & Hedges, LLP*, 398 S.W.3d 881 (Tex. App.—Houston [14th Dist.] 2013, no pet.).

518. See *id.* at 885 (“But *Kinzbach*, which involved a general fiduciary duty in an employee–employer relationship, does not control this case.”).

519. See *Daniel v. Falcon Interest Realty Corp.*, 190 S.W.3d 177, 182–83 (Tex. App.—Houston

imagine many secret profit or usurpation claims that do not include disgorgement of payments from third parties.

In *Kinzbach*, the defendant was paid in part (and was to be paid) by a third party for self-dealing;⁵²⁰ in *Brewer & Pritchard*, the employees were held potentially liable to forfeit fees to their employer that they received from a third party for usurpation of an opportunity,⁵²¹ and in *Burrow*, the Court held that the lawyers could be held liable to forfeit fees that they received directly from the defendant for general breaches of fiduciary duty.⁵²² Does the third-party rule aim to reverse all three? If not, what is the rationale for distinguishing applicable or inapplicable third-party payments?

Section VI, Part F, did not address two precedents that directly contradict the third-party rule. First is the persuasive authority of *The Restatement (Third) of Restitution and Unjust Enrichment* section 43, which offers an illustration directly on point: a lawyer uses confidential information that she gained from Client A to gain representation with Client B after his representation of Client A terminated normally. Her representation of Client B was successful and generated fees of \$50,000. Assuming under local law that the lawyer's use of confidential information was a breach of loyalty, the Restatement would hold that Client A is entitled to recover the fees.⁵²³

There is also a Texas precedent for forfeiture of legal fees from a third party. In *Rush v. Barrios*,⁵²⁴ three law firms represented a client and together earned a contingency fee of \$666,666,67.⁵²⁵ In a subsequent declaratory action among the client's lawyers, the jury awarded one sixth to Rush, the initial lawyer.⁵²⁶ The trial judge entered judgment non obstante veredicto (JNOV) that reduced Rush's fee by 70% pursuant to a plea by

[1st Dist.] 2005, no pet.) (affirming the disgorgement of the net secret profit of employee in breach).

520. *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 138 Tex. 565, 160 S.W.2d 509, 514 (1942).

521. *Johnson v. Brewer & Pritchard, PC*, 73 S.W.3d 193, 197 (Tex. 2002).

522. *Burrow v. Arce*, 997 S.W.3d 229, 244–45 (Tex. 1999). In private correspondence with William Skepnak, counsel for the plaintiffs in *Burrow*, the defendant in the underlying industrial accident case, Phillips Petroleum, deposited the settlement amount in an escrow account administered by Phillips' lawyers. The individual plaintiffs and their attorneys in the underlying case received payment from that escrow account. The clients did not receive the gross amount and remitted their lawyers' share back to them.

523. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 43 illus. 2 (2011).

524. *Rush v. Barrios*, 56 S.W.3d 88 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).

525. *Id.* at 92–93.

526. *Id.* at 95.

the other lawyers for fee forfeiture on the basis that Rush had been excused from the case largely due to a conflict, and the court of appeals affirmed the decision of the trial court.⁵²⁷

The most important argument against the third-party rule is that enforcement would compel a court in equity to tolerate unjust enrichment and sanction safe harbors for breach of fiduciary duty. To continue the third-party payment rule would effectively establish two safe harbors for fiduciaries in breach to avoid accountability. In general, to avoid liability for fee forfeiture in a transaction or contingency lawsuit, all the lawyer fiduciary has to do is arrange to be paid directly by the other party in the transaction or litigation. The client's only recourse would be for actual damages for legal malpractice.

The second safe harbor relates to conflicts of interest against lawyers in subsequent representations that breach loyalty to the first client. Assuming the conflict, the lawyer fiduciary has a second duty to disclose the conflict. If the conflict is disclosed and the first client does not ratify the second representation, she can seek to disqualify the lawyer or otherwise cancel the representation. But if the lawyer fails to disclose the conflict and completes the conflicted transaction or representation before the first client learns of the conflict, what remedy is available to the first client under the third-party rule? It seems unlikely that the conflicting representation could be cancelled or rescinded. Thus, not only does the third-party rule fail to deter breaches of fiduciary duty, but it actually introduces significant incentives for the lawyer to conceal such conflicts. Furthermore, what remedy would be available for the secondary breach of failing to disclose the conflict?

Seemingly, third-party payments will continue to be resolved on the issue of windfall. However, none of the third-party cases to date have noted that courts in equity frequently find the social cost of potential windfall to be less than the social cost of the tolerating unjust enrichment or failing to deter breaches of loyalty.⁵²⁸ When the balance also includes the real risks of effectively creating safe harbors, the balance should be even less in doubt.

527. *See id.* at 94 (affirming the trial court's order to forfeit \$77,000 of the original fee of \$111,000 from the third party for breach of fiduciary duty).

528. *See Burrow v. Arce*, 997 S.W.2d 229, 240 (Tex. 1999) ("Fee forfeiture for attorney misconduct is not a windfall to the client. An attorney's compensation is for loyalty as well as services, and his failure to provide either impairs his right to compensation.").

SECTION X. OPPORTUNISM AND ALTERNATIVE REMEDIES IN EQUITY

“I’m shocked, shocked to find that gambling is going on in here!”⁵²⁹

It is unethical and dishonest for a lawyer to knowingly plead a claim that cannot be adequately substantiated. However, if the claim can be substantiated, the tactic of pleading in the alternative merely to gain tactical advantage seems merely zealous and does not necessarily warrant condemnation as excessively opportunistic or as founded in bad faith.⁵³⁰ In a state in which the rules of civil procedure specifically permit pleading in the alternative,⁵³¹ and the doctrine of irreparable injury is still the basis for jurisdiction in equity,⁵³² these condemnations seem as gratuitous as Captain Renault’s “shock” that gambling was going on in Rick’s nightclub in *Casablanca*.⁵³³

One especially blatant form of such opportunistic pleading is to seek jurisdiction in equity.⁵³⁴ The doctrine of irreparable injury has been actively applied in American and British courts for at least 400 years.⁵³⁵ If the plaintiff’s claim at law cannot be reasonably measured, Texas courts hold that the plaintiff should be granted jurisdiction in equity:⁵³⁶ “[T]he

529. Captain Louis Renault in the movie *Casablanca*. *CASABLANCA* (WARNER BROS. 1942), available at http://www.youtube.com/watch?v=SjbPi00k_ME.

530. See *Williams v. Khalaf*, 802 S.W.2d 651, 658 (Tex. 1990) (explaining that until 1979, fraud was held to be an action on debt and subject to a limitations period of two years; however, when the plaintiff sought rescission of contract due to fraud, a four year statute of limitations applied).

531. See *supra* note 450.

532. See *supra* notes 100–104.

533. *CASABLANCA* (WARNER BROS. 1942).

534. See Douglas Laycock, *The Scope and Significance of Restitution*, 67 TEX. L. REV. 1277, 1284 (1989) (“The restitutionary claim matters in three sets of cases: (1) when unjust enrichment is the only source of liability; (2) when plaintiff prefers to measure recovery by defendant’s gain, either because it exceeds plaintiff’s loss or because it is easier to measure; and (3) when plaintiff prefers specific restitution, either because defendant is insolvent, because the thing plaintiff lost has changed in value, or because plaintiff values the thing he lost for nonmarket reasons.”).

535. See *Kuechler v. Wright*, 40 Tex. 600, 682 (1874) (explaining the court would not issue a writ of mandamus where no injury had been proven); C.C. Langdell, *A Brief Survey of Equity Jurisdiction*, 1 HARV. L. REV. 111, 116 (1887) (describing the evolution of courts of equity and development of their jurisdiction).

536. See *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 210 (Tex. 2002) (relying on principles of equity to afford relief to the plaintiff); *Gatlin v. GXG, Inc.*, No. 05–93–01852–CV, 1994 Tex. App. LEXIS 4047, at *17–18 (Tex. App.—Dallas Apr. 19, 1994, no writ) (per curiam) (not designated for publication) (explaining that where a legal remedy is inadequate, courts may also award equitable relief); *Smith v. Smith*, No. 05–94–00037, 1994 Tex. App. LEXIS 4082, at *5–6 (Tex. App.—Dallas Apr. 19, 1994, no writ) (not designated for publication) (discussing requirements for equitable relief, including irreparable injury and lack of adequate legal remedy).

inadequac[ies] of the remedy at law [are] both the foundation of, and conversely a limitation on equity jurisdiction.”⁵³⁷ Similarly, if the defendant has filed for bankruptcy protection and a remedy at law would not be expected to grant the plaintiff sufficient priority in bankruptcy to secure adequate compensation, most courts (including those in Texas) hold that the plaintiff should be entitled to jurisdiction in equity to seek a remedy in equity that would trump bankruptcy law and improve the priority of the plaintiff's claim against the assets of the defendant's bankruptcy estate.⁵³⁸

Therefore, a plaintiff justifies jurisdiction in equity with the assertion that she cannot measure her damages for malpractice and that forfeiture may be her only recourse. It is interesting to speculate on the difficulty that a trial judge would experience in trying to justify an opinion that grants summary judgment for the plaintiff's failure to establish damages in fact for malpractice, yet deny the plaintiff's claim for jurisdiction in equity because she will not be irreparably damaged.⁵³⁹

537. *Burford v. Sun Oil Co.*, 186 S.W.2d 306, 314 (Tex. Civ. App.—Austin 1944, writ *ref'd w.o.m.*); *see also* *Lamar Tex. Ltd. P'ship v. City of Port Isabel*, CIV.A. No. B-08-115, 2010 U.S. Dist. LEXIS 8881, at *23 (S.D. Tex. Feb. 3, 2010) (citing *Cardinal Health Staffing Network* to expand equity jurisdiction); *Cardinal Health Staffing Network, Inc. v. Bowen*, 106 S.W.3d 230, 235 (Tex. App.—Houston [1st Dist.] 2003, no *pet.*) (advocating to broaden equity jurisdiction); *Sw. Weather Research v. Duncan*, 319 S.W.2d 940, 944 (Tex. Civ. App.—El Paso 1958) (“[E]quity was created for the man who had a right without a remedy, and, as later modified, without an adequate remedy.”), *aff'd*, 160 Tex. 105, 327 S.W.2d 417 (1959). *But see* *State v. Morales*, 869 S.W.2d 941, 943 (Tex. 1994) (“Equity jurisdiction is limited.”).

538. *See* 1 DAN B. DOBBS, *DOBBS LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION* § 5.18(3), at 936 (2d ed. 1993) (“The legal remedy is clearly not adequate compared to the equitable remedy whenever the trust or lien would give the plaintiff a priority, or when the trust would give the plaintiff a return of specific unique property not reachable at law, but in such cases there is a question whether the more effective equitable remedy appropriately protects the interests of third-party creditors.”); *see also* *Butnaru*, 84 S.W.3d at 204 (discussing the court's ability to provide equitable remedies, such as injunctive relief, where legal remedies are inadequate or unavailable); *Gatlin*, 1994 Tex. App. LEXIS 4047, at *7 (“[A]n applicant for temporary injunctive relief need not show the inadequacy of its remedy at law in a case where the usages of equity require the granting of injunctive relief despite the existence of such a remedy.”); *Smith*, 1994 Tex. App. LEXIS 4082, at *4 (“To be entitled to a temporary injunction, a party must plead and prove a probable right to relief on the merits and that probable irreparable injury will result during the pendency of the case if no injunction is granted.”).

539. *See* 1 DAN B. DOBBS, *DOBBS LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION* § 5.18(3), at 935 (2d ed. 1993) (“Because equity created the substantive rights against fiduciaries, equity has always taken jurisdiction in claims against them without regard to the adequacy test. Thus if the plaintiff seeks a constructive trust against a fiduciary who converts goods, that claim will not be denied merely because the plaintiff might have done just as well by claiming in *assumpsit*.”).

A. *Alternatives in Equity to Fee Forfeiture*

Compared to disgorgement, the plea for fee forfeiture offers only disadvantages to the plaintiff.⁵⁴⁰ To prove fee forfeiture, the plaintiff cannot shift the burden of proof to the defendant and must navigate *Burrow's* list of vague factors for digital measurement that is unlikely to produce total disgorgement. As a result, it is surprising that some clients have not pled for disgorgement, constructive trust, or even rescission instead of fee forfeiture.⁵⁴¹

The common components and similarities of monetary remedies in equity may provide an interesting opportunity under the right circumstances for the principal to avoid the existing controversies and risks of pleading fee forfeiture.⁵⁴² While the trial judge may confuse disgorgement with forfeiture, there is substantial precedent for disgorgement of fiduciary compensation as listed in Groups C, E, and F in Section II.

For the client who suffered a breach of duty from her lawyer and gained no benefits from the litigation,⁵⁴³ a plea of rescission might be advantageous. The cases listed in Group 1 in Section VI provide strong precedents for the principal's right to avoid transactions and contracts with fiduciaries. Such a plea would only require proof of the breach and an expert opinion of the value of the services that the breaching lawyer rendered.⁵⁴⁴ There are a number of broad and sweeping quotes from the supreme court about constructive trusts in Texas.⁵⁴⁵ A plea for

540. See Charles W. Wolfram, *A Cautionary Tale: Fiduciary Breach as Legal Malpractice*, 34 HOFSTRA L. REV. 689, 700–01 (2006) (delineating advantages and disadvantages of equitable remedies for fiduciary breach).

541. It has been suggested that remedies in equity in general are sometimes disfavored because some malpractice insurance policies do not cover claims for remedies in equity. While this issue has been adjudicated in other jurisdictions for claims other than malpractice or breach of fiduciary duty, no Texas opinion has been found on this issue. Furthermore, the low rates of liability found in claims for both legal malpractice and breach of fiduciary duty might suggest that that argument is a distinction without a difference.

542. See *supra* Section IV, Part E.

543. However, rescission is not well suited for plaintiffs that secured any compensation from the fiduciary's actions as the value of that relief would need to be offset against the fiduciary's fees. See *Cruz v. Andrews Restoration, Inc.*, 364 S.W.3d 817, 826 (Tex. 2012) (explaining that rescission is an equitable remedy and its applicability is restricted to situations in which counter-restitution by the plaintiff would restore the defendant to the status quo). Also, it is unclear whether rescission would be held to apply to a service contract that had been fully performed.

544. *Id.*

545. See *Burrow v. Arce*, 997 S.W.2d 229, 241 (Tex. 1999) (“Constructive trusts, being remedial in character, have the very broad function of redressing wrong or unjust enrichment in keeping with

constructive trust for a claim of breach of fiduciary duty would provide the same result as forfeiture or disgorgement, as well protect the claimant's priority to the money subject to recovery.

While unjust enrichment as an independent cause of action is still a somewhat controversial claim, it warrants all of the remedies in equity discussed in this subsection.⁵⁴⁶ A plea for disgorgement based on unjust enrichment relating to a fiduciary claim does run the risk that some supercilious trial judge might hold that the plea for disgorgement is merely an opportunistic ploy to circumvent fee forfeiture which has already itself been recognized as an opportunistic ploy to circumvent the causation and damage standards of legal malpractice.

CONCLUSIONS

"[A] major departure from the long tradition of a court in equity practice should not be lightly implied."⁵⁴⁷

While the authority of a court in equity to order fee or asset forfeiture is not in doubt, both remedies are extraneous, as they only add confusion to the law of remedies in equity in Texas. Fee forfeiture is a less attractive alternative to disgorgement that is unlikely to result in full restitution of fiduciary compensation. Asset forfeiture is a new remedy that seems unnecessary even for the select few cases for which it is intended. As a punitive remedy, it is an alternative example of what Justice Cornyn explained as judicial authority that should not be exercised.⁵⁴⁸

The law for remedies in equity in Texas relating to breach of fiduciary duty is now a contradictory jumble because our supreme court's view of fee forfeiture is in conflict with that of the appellate courts, as well as the supreme court's own prior opinions on disgorgement and other remedies in equity. Compounding the jumble is the fact that neither the supreme court nor the appellate courts have seriously attempted to reconcile their perception of fee forfeiture with precedent on claims against non-lawyer

basic principles of equity and justice Moreover, there is no unyielding formula to which a court of equity is bound in decreeing a constructive trust, since the equity of the transaction will shape the measure of relief granted.").

546. See George P. Roach, *Unjust Enrichment in Texas: Is It a Floor Wax or a Desert Topping?*, 65 BAYLOR L. REV. 153, 210–26 (2013) ("In addition to opinions about the other three causes of action described in the immediately preceding sub-sections, the Texas Supreme Court has acknowledged or held that unjust enrichment is a cause of action under Texas law in ten modern cases.").

547. *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 392 (2006).

548. *State v. Morales*, 869 S.W.2d 941, 943 (Tex. 1994).

fiduciaries. In the absence of reconciliation between the senior courts and reconciliation with non-lawyer precedent, it seems likely that the temporary schism that has emerged in the results of claims between lawyer and non-lawyer fiduciaries will develop into a double standard in which some fiduciaries are effectively held to a lesser standard of loyalty than others.

The fracturing rule confounds Texas law on fee forfeiture in two ways. First, it confuses the forfeiture of agreed compensation in *Burrow* with disgorgement of secret profits for breach of fiduciary duty found in *Kinzbach*. The fracturing rule thus mistakenly argues that fee forfeiture and actual damages are mutually exclusive, ignoring the fact that a fiduciary's compensation can be recouped in addition to actual damages. Second, the fracturing rule inexplicably infers some unidentified basis for holding that a claim for actual damages in a malpractice claim pre-empts or precludes an alternative plea for fee forfeiture. This inference has no supporting precedents in claims against non-lawyer fiduciaries and should be rejected, especially when a claimant pleads for jurisdiction in equity based on irreparable injury.

The requirement under the fracturing rule for a principal to prove an intentional breach or to substantiate an improper benefit effectively raises the pleading requirements to implicate a breach with implied malice, which traditionally warrants exemplary damages. This higher level of substantiation cannot be reconciled with the fact that claims against non-lawyer fiduciaries only require proof of a "benefit."⁵⁴⁹

Of particular concern is that Texas courts are granting and affirming summary judgment for the lawyer defendants at a high rate without directly considering whether a claim for breach of fiduciary duty has been implicated. Summary judgment should not be granted on indirect logic or generalities. Granting summary judgment to the defendant for the claimant's failure to prove an improper benefit beyond legal fees directly contradicts *Burrow* and must be reversed if fee forfeiture is to retain any effect.

Even if the disparities in substantive law and in the rate of liability between lawyer and non-lawyer fiduciaries were resolved, the changes

549. See *Punts v. Wilson*, 137 S.W.3d 889, 891 (Tex. App.—Texarkana 2004, no pet.) (“Generally, for a party to establish a claim for breach of a fiduciary duty, there must exist a fiduciary relationship between the plaintiff and defendant, the defendant must have breached its fiduciary duty to the plaintiff, and the defendant’s breach must result in injury to the plaintiff, or benefit to the defendant.”).

parachuted into the Texas courts by *Burrow* and *Swinnea* still represent unresolved contradictions to the principles underlying other remedies in equity as a group. Are all remedies in equity now to be measured digitally? Will the traditional burden-shifting process be replaced for all remedies in equity?

The contradictions and uncertainties introduced by forfeiture in equity and the unsupported rules that have arisen in reaction to forfeiture seems more likely to spur two secondary trends relating to other remedies in equity. Defendants to other causes of action will seek to convince Texas courts to adopt the changes introduced in fee forfeiture to other remedies. The court never explained, for example, why only fee forfeiture should be measured digitally. Second, claimants against lawyer fiduciaries for breach have little to lose by trying to plead for alternative remedies in equity to avoid the disadvantages of fee forfeiture and the grim prospects for otherwise surviving a motion for summary judgment.

The court's failure to reconcile its opinions on forfeiture risks not only that a non-lawyer fiduciary will try to apply the changes in *Burrow* to his defense, but also that defendants to claims for misappropriation of trade secrets, trespass to minerals, or fraudulent inducement will also try to apply *Burrow* to their defenses. The remedy of forfeiture is only a small part of remedies in equity, and changes in the measure of forfeiture should not be necessarily extended beyond that remedy without an explanation of how remedies in equity relate to each other and to forfeiture.

DATA APPENDIX⁵⁵⁰

To improve the reader's ability to understand the process in which the data in Section III was generated, this appendix will offer further explanation and some examples. However, the research was never intended to be definitive, but rather approximate, because of the inevitable subjective factors and limited time available to fully analyze the relevant cases. The goal of the research is to initiate interest in the issue, not to provide firm conclusions.

550. It is strongly urged that the reader review Section III, Part A, "Potential Biases in Sampling," for a discussion of the more obvious problems in applying the statistics in Section III to justify any general conclusions that might be inferred. The author does not contend that the research justifies any conclusions, but rather it suggests some initial impressions or hypotheses for further research.

Table A in Section III was generated from two simple word searches. Within the time period of January 1, 1988 through December 31, 2012, two searches were made. First, all cases were gathered in which the “core-terms” according to LexisNexis included “fiduciary duty” and “legal malpractice.” Alternatively, cases were accumulated in which the entire opinion included both terms. The data can be verified by repeating the process on LexisNexis for oneself.

Tables B through D were generated from a search of all cases over the same twenty-five year period in which the “core-terms” included “fiduciary duty.”⁵⁵¹ Initially that search generated 1309 cases. These cases were then reviewed on a summary basis: the LexisNexis summaries of the cases (“Prior History,” “Procedural Posture,” “Overall Summary,” and “Outcome”) were reviewed, but not the body of the case opinion. The Shepard’s signal was also considered. As a result, 568 cases were excluded as not applicable to the issue of restitution of fiduciary compensation or other benefits accrued by the fiduciary.

Of the remaining 741 cases, each case was further classified for the following characteristics without further review into the body of the opinion.

The case was classified as relating to a dispute between a lawyer and her client; it was either considered an attorney case (A in the data table below) or a business or non-attorney case (B). Disputes between lawyers or against one’s lawyer for non-legal services, such as escrow, were classified as non-attorney cases.

The case was then classified on whether the defendant fiduciary was found liable (L) or not liable (NL) at the trial level solely on the issue of breach of fiduciary duty.

If the defendant was found not liable, the third classification noted if the defendant was granted a favorable summary judgment (SJ).

All of the cases were generated from a database of appellate opinions. Therefore, the appellate court’s review of the judgment on the fiduciary duty claim was classified as either affirming (Aff) or reversing the trial court judgment (Rev).

551. An alternative analysis was made with the premise of accumulating cases on the basis that the case opinion included “fiduciary duty” anywhere in the text for a couple of years in the twenty-five year period. This provided a larger number of total cases and a larger number of relevant cases, but the increase in total cases had a lower rate of applicability. On the basis of this sample, it was initially determined that the overall results would not vary in overall outcome, i.e., the additional cases did not contradict the suggestions in general inferred from the baseline data.

Finally, some reversals remanded the case to the trial court and others rendered a verdict. The fifth data column in the table therefore noted whether the appellate opinion found the defendant liable for breach of fiduciary duty (L), not liable (NL), or if the liability on appeal was indeterminate due to the uncertainty of remand (TBD).

Tables E through G were based on all case opinions relating to lawyer fiduciaries that were accumulated in the research. This group of 247 cases is believed to represent more than half of all of all lawyer fiduciary cases, but the exact share is unknown because it has been determined that not all lawyer fiduciary cases are included in this database. Furthermore, the sample of 247 cases cannot be represented as having been selected on a random or representative basis.

This group was classified for the same characteristics as the prior database, except that the entire case opinion was reviewed. While the classification attempted to make a literal review of liability, sometimes the fiduciary claim was relatively minor and not fully discussed in the appellate opinion. Some cases in this group were excluded as not applicable and others were included and assessed on the implied data. For the 160 cases that were included in both databases, the summary data for each group of 160 cases yielded the same total results.

The table below lists the cases for both databases for the year 2007:

Attorney Fiduciaries & Non-Attorney Fiduciaries

Alavi v. MCI WorldCom Network Servs., No. 09-05-364-CV, 2007 Tex. App. LEXIS 743 (Tex. App.—Beaumont Feb. 1, 2007, pet. denied) (mem. op.).	B	NL		Aff	NL
Anglo-Dutch Petrol. Int'l v. Smith, 243 S.W.3d 776 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).	B	L		Aff	L
Baker Botts, LLP v. Cailloux, 224 S.W.3d 723 (Tex. App.—San Antonio 2007, no pet.).	A	L		Rev	NL
Bradford Partners II, LP v. Fahning, 231 S.W.3d 513 (Tex. App.—Dallas 2007, no pet.).	B	NL	SJ	Aff	NL
Chafin v. Montgomery, No. 2-06-340-CV, 2007 Tex. App. LEXIS 3827 (Tex. App.—Fort Worth May 17, 2007, no pet.) (mem. op.).	B	NL	SJ	Rev	TBD

Chi. Title Ins. Co. v. Home Loan Corp., No. 14-04-01059-CV, 2007 Tex. App. LEXIS 6207 (Tex. App.—Houston [14th Dist.] Aug. 7, 2007). ⁵⁵²	B	L		Rev	NL
Conte v. Ditta, 287 S.W.3d 28, 2007 Tex. App. LEXIS 7354 (Tex. App.—Houston [1st Dist.] 2007) (mem.op.), <i>rev'd</i> , Ditta v. Conte, 298 S.W.3d 187 (Tex. 2009).	B	L		Aff	L
Cox v. S. Garrett, LLC, 245 S.W.3d 574 (Tex. App.—Houston [1st Dist.] 2007, no pet.).	B	NL		Aff	NL
Equitable Recovery, LP v. Heath Ins. Brokers of Tex., LP, 235 S.W.3d 376 (Tex. App.—Dallas 2007, pet. denied).	B	NL	SJ	Rev	TBD
Estate of Whitsett v. Junell, 218 S.W.3d 765 (Tex. App.—Houston [1st Dist.] 2007, no pet.).	A	NL	SJ	Rev	TBD
Latifi v. Wafayee, No. 2-05-378-CV, 2007 Tex. App. LEXIS 2258 (Tex. App.—Fort Worth Mar. 22, 2007, no pet.) (mem. op.).	B	NL		Aff	NL
Lee v. Hasson, 286 S.W.3d 1 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).	B	NL		Rev	TBD
Lesikar v. Moon, 237 S.W.3d 361 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).	B	L		Aff	L
Moon v. Lesikar, 230 S.W.3d 800 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).	B	NL	SJ	Aff	NL
Murphy v. Am. Rice, Inc., No. 01-03-01357-CV, 2007 Tex. App. LEXIS 2031 (Tex. App.—Houston [1st Dist.] Mar. 9, 2007, no pet.) (mem. op.).	B	L		Aff	L
Murphy v. Gruber, 241 S.W.3d 689 (Tex. App.—Dallas 2007, pet. denied).	A	NL	SJ	Aff	NL

552. This opinion was subsequently withdrawn and substituted by *Chicago Title Insurance Co. v. Home Loan Corp.*, 2007 Tex. App. LEXIS 6207 (Tex. App.—Houston [14th Dist.] Aug. 7, 2007, no pet.) (mem. op.), which upheld the trial court's award of actual damages for breach of fiduciary duty.

Parenti v. Moberg, No. 04-06-00497-CV, 2007 Tex. App. LEXIS 4210, (Tex. App.—San Antonio May 30, 2007, pet. denied) (mem. op.).	A	L		Aff	L
Phillips v. Estate of Poulin, No. 03-05-00099-CV, 2007 Tex. App. LEXIS 8163 (Tex. App.—Austin Oct. 12, 2007, no pet.) (mem. op.).	B	L		Aff	L
Quality Hardwoods, Inc. v. Midwest Hardwood Corp., No. 02-05-00311-CV, 2007 Tex. App. LEXIS 5113 (Tex. App.—Fort Worth June 28, 2007, no pet.) (mem. op.).	B	L		Aff	L
Rodriguez v. Rodriguez, No. 04-07-00252-CV, 2007 Tex. App. LEXIS 8802 (Tex. App.—San Antonio Nov. 7, 2007, pet. denied) (mem. op.).	B	L		Aff	L
Stewart v. Johnson, No. 07-05-0272-CV, 2007 Tex. App. LEXIS 3513 (Tex. App.—Amarillo May 8, 2007, pet. denied) (mem. op.).	A	NL	SJ	Aff	NL
W. Reserve Life Assurance Co. of Ohio v. Graben, 233 S.W.3d 360 (Tex. App.—Fort Worth 2007, no pet.).	B	L		Aff	L
<u>Attorney Fiduciaries Only</u>					
Baker Botts, LLP v. Cailloux, 224 S.W.3d 723 (Tex. App.—San Antonio 2007, no pet.).	A	L		Rev	NL
Capital City Church of Christ v. Novak, No. 03-04-00750-CV, 2007 Tex. App. LEXIS 4148, (Tex. App.—Austin May 23, 2007, no pet.) (mem. op.).	A	NL	SJ	Aff	NL
Estate of Whitsett v. Junell, 218 S.W.3d 765 (Tex. App.—Houston [1st Dist.] 2007, no pet.).	A	NL	SJ	Rev	TBD
Haden v. Sacks, 222 S.W.3d 580, 2007 Tex. App. LEXIS 1758 (Tex. App.—Houston [1st Dist.] 2007), <i>rev'd</i> , Sacks v. Haden, 263 S.W.3d 919 (Tex. 2008).	A	NL	SJ	Aff	NL
Kastner v. Jenkins & Gilchrist, PC, 231 S.W.3d 571 (Tex. App.—Dallas 2007, no pet.).	A	NL	SJ	Aff	NL
Kothmann v. Cook, No. 07-05-0335-CV, 2007 Tex. App. LEXIS 2778 (Tex. App.—Amarillo Apr. 11, 2007, no pet.) (mem. op.).	A	NL	SJ	Aff	NL

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Lively v. Henderson, No. 14-05-01229-CV, 2007 Tex. App. LEXIS 8951 (Tex. App.—Houston [14th Dist.] Nov. 13, 2007, pet. denied) (mem. op.).		
A	NL	SJ
Aff	NL	
Murphy v. Gruber, 241 S.W.3d 689 (Tex. App.—Dallas 2007, pet. denied).		
A	NL	SJ
Aff	NL	
O'Donnell v. Smith, 234 S.W.3d 135 (Tex. App.—San Antonio 2007), <i>aff'd</i> , 288 S.W.3d 417 (Tex. 2009).		
A	NL	SJ
Aff	NL	
Pain Care Ctr., Inc. v. O'Connor & Hannan, LLP, No. 14-06-00166-CV, 2007 Tex. App. LEXIS 7685 (Tex. App.—Houston [14th Dist.] Sept. 25, 2007, no pet.) (mem. op.).		
A	NL	SJ
Aff	NL	
Parenti v. Moberg, No. 04-06-00497-CV, 2007 Tex. App. LEXIS 4210, (Tex. App.—San Antonio May 30, 2007, pet. denied) (mem. op.).		
A	L	
Aff	L	
Stewart v. Johnson, No. 07-05-0272-CV, 2007 Tex. App. LEXIS 3513 (Tex. App.—Amarillo May 8, 2007, pet. denied) (mem. op.).		
A	NL	SJ
Aff	NL	
Stromberger v. Law Offices of Windle Turley, PC, No. 05-06-00841-CV, 2007 Tex. App. LEXIS 8196 (Tex. App.—Dallas 2007, no pet.) (mem. op.).		
A	NL	SJ
Aff	NL	