STANDING, CAPACITY, AND NECESSARY PARTIES IN TRUST LITIGATION

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I. INTRODUCTION

Standing and capacity are two issues that are constantly present in trust litigation.[1] Because lawyers and courts often conflate the two, this paper seeks to clarify the confusion.[2]

A plaintiff must have standing and capacity to bring a lawsuit.[3] "A plaintiff has *standing* when it is personally aggrieved, regardless of whether it is acting with legal authority; a party has *capacity* when it has the legal authority to act, regardless of whether it has a justiciable interest in the controversy."[4] "Capacity concerns 'a party's personal right to come into

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1. *See, e.g.*, Austin Nursing Ctr., Inc. v. Lovato, 171 S.W.3d 845, 848–49 (Tex. 2005) (discussing the confusion between standing and capacity); Nootsie, Ltd. v. Williamson Cty. Appraisal Dist., 925 S.W.2d 659, 661–62 (Tex. 1996).

2. *See infra* Parts I–III.

3. *Lovato*, 171 S.W.3d at 848.

4. *Id.* at 848–49 (citing *Nootsie*, 925 S.W.2d at 661).

court,' while standing concerns 'the question of whether a party has an enforceable right or interest.'"[5]

Standing is a component of subject-matter jurisdiction.[6] "In Texas, the standing doctrine requires that there be (1) 'a real controversy between the parties,' that (2) 'will be actually determined by the judicial declaration sought.'"[7] The court in *Austin Nursing Center, Inc. v. Lovato* adds:

> In addition to standing, a plaintiff must have the capacity to pursue a claim. For example, minors and incompetents are considered to be under a legal disability and are therefore unable to sue or be sued in their individual capacities; such persons are required to appear in court through a legal guardian, a "next friend," or a guardian ad litem. Similarly, a [trust] "is not a legal entity and may not properly sue or be sued as such." Although a minor, incompetent, or [trust] may have suffered an injury and thus have a justiciable interest in the controversy, these parties lack the legal authority to sue; the law therefore grants another party the capacity to sue on their behalf. Unlike standing, however, which may be raised at any time, a challenge to a party's capacity must be raised by a verified pleading in the trial court.[8]

In short, standing is jurisdictional.[9] To have standing, (1) a party must have suffered an injury, and (2) there must exist a real controversy that can be resolved by the judicial relief sought (i.e., there must be a justiciable controversy).[10]

Because they are intertwined with capacity and standing in trust litigation, this paper will also discuss necessary parties to trust disputes, claims against third parties, and derivative claims.[11]

II. STANDING

A. Standing Introduction

Standing is a jurisdictional doctrine that "requires that there be (1) 'a real controversy between the parties,' that (2) 'will be actually determined by the judicial declaration sought.'"[12] A person has standing if he (1) has sustained, or is immediately in danger of sustaining, some direct injury as a

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5. AVCO Corp. v. Interstate Sw., Ltd., 251 S.W.3d 632, 649 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (quoting *Lovato*, 171 S.W.3d at 849).

6. M.D. Anderson Cancer Ctr. v. Novak, 52 S.W.3d 704, 711 (Tex. 2001); Bland Indep. Sch. Dist. v. Blue, 34 S.W.3d 547, 553–54 (Tex. 2000).

7. *Lovato*, 171 S.W.3d at 849 (citing *Nootsie*, 925 S.W.2d at 662).

8. *Id.* at 849 (internal citations omitted).

9. *Id.*

10. *See* Wassmer v. Hopper, 463 S.W.3d 513, 523 (Tex. App.—El Paso 2014, no pet).

11. *See infra* Part III.

12. *Lovato*, 171 S.W.3d at 849 (citing *Nootsie*, 925 S.W.2d at 662).

result of the wrongful act of which he complains; (2) has a direct relationship between the alleged injury and claim sought to be adjudicated; (3) has a personal stake in the controversy; (4) has suffered some injury in fact, either economic, recreational, environmental, or otherwise; or (5) is an appropriate party to assert the public's interest in the matter, as well as his own.[13]

Before proceeding, it is important to understand the differences between some future interests that trust beneficiaries may own.[14]

B. Future Interests

A vested remainder beneficiary must be alive and ascertained, and his or her interest must not be subject to a condition precedent, meaning that nothing must happen before the beneficiary is entitled to possession, except for the natural ending of the prior interest.[15] One type of vested remainder interest is an indefeasibly vested remainder interest.[16] This is when the vested remainder beneficiary or his or her successors will receive possession because the interest is not subject to any conditions or limitations (except for the natural ending of the prior interest—i.e., the death of the lifetime beneficiary).[17] If a trust provides for "income to A for life, remainder to B and his or her heirs," then B is an indefeasibly vested remainder beneficiary.[18]

Another type of vested remainder interest is one that is subject to open, also known as subject to partial divestment.[19] This is when the remainder interest will pass to a class which has at least one living member.[20] If a trust provides for "income to A for life, remainder to B's children and their heirs," and if B is still alive and has at least one living child, then B's living child is a vested remainder beneficiary whose interest is subject to open.[21] Because B is alive, the class (i.e., their children) is still open because they could have more children.[22]

The third type of vested remainder interest is one that is subject to total divestment (also known as subject to complete defeasance).[23] This is when a vested remainder beneficiary's interest is subject to a condition subsequent.[24] If a trust provides for "income to A for life, remainder to B

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13. *Wassmer*, 463 S.W.3d at 523 (citing Nauslar v. Coors Brewing Co., 170 S.W.3d 242, 249 (Tex. App.—Dallas 2005, no pet.).
14. *See infra* Section II.B.
15. *See, e.g.*, Roger W. Andersen, *Present and Future Interests: A Graphic Explanation*, 19 SEATTLE U. L. REV. 101, 115 (1995).
16. *Id.* at 116.
17. *Id.*
18. *See id.*
19. *Id.* at 119.
20. *See id.*
21. *See id.*
22. *See id.*
23. *See id.* at 116–17.
24. *See id.*

and his heirs, but if B predeceases A, then remainder to C and his heirs," then B is a vested remainder beneficiary subject to total divestment.[25]

A contingent remainder, also known as non-vested remainder, beneficiary is one who is unborn, who is unascertained, or whose interest is subject to a condition precedent.[26] If a trust provides for "income to A for life, remainder to B's children and their heirs," and if B is still alive but has no children, then B's unborn children are contingent remainder beneficiaries.[27]

If a trust provides for "income to A for life, remainder to B's heirs," and if B is still alive, then B's heirs are contingent remainder beneficiaries.[28] This is because heirs are not determined until death, making them "unascertained" until B's death.[29] B may have children, who will indeed be his heirs upon his death, but B is still alive, and the trust says "heirs" rather than "children."[30] Whether B actually has any children is irrelevant.[31]

If a trust provides for "income to A for life, remainder to B and his heirs if B gets married before A's death," and if A is still alive and B is still unmarried, then B is a contingent remainder beneficiary.[32] This is because his remainder interest is subject to a condition precedent—he must get married.[33]

Texas Trust Code Section 115.001 confers jurisdiction on enumerated Texas courts over all proceedings by or against a trustee and all proceedings concerning trusts.[34] Texas Trust Code Section 115.011 provides that "[a]ny *interested person* may bring [i.e., has standing to bring] an action under Section 115.001 of this Act."[35] Texas Trust Code Section 111.004(7) defines "interested person" as:

> [A] trustee, beneficiary, or any other person having an interest in or a claim against the trust or any person who is affected by the administration of the trust. Whether a person, excluding a trustee or named beneficiary, is an interested person may vary from time to time and must be determined according to the particular purposes of and matter involved in any proceeding.[36]

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25. *See id.* at 117.
26. *Id.* at 121.
27. *See id.* at 121–22.
28. *See id.*
29. *See* Evans v. Rankin, 44 S.W.2d 644, 646 (Mo. 1931).
30. *See generally* Andersen, *supra* note 15, at 105 ("Courts interpreted ['and his heirs'] not as words of purchase indicating who got the property . . . rather, courts treated the magic words as words of limitation describing the estate granted.").
31. *See id.* at 122–23.
32. *See id.* at 123.
33. *See id.*
34. TEX. PROP. CODE ANN. § 115.001 (Supp.).
35. *Id.* § 115.011 (emphasis added).
36. *Id.* § 111.004(7).

Texas Trust Code Section 111.004(2) defines "beneficiary" as "a person for whose benefit property is held in trust, *regardless of the nature of the interest.*"[37] Texas Trust Code Section 111.004(6) defines "interest" as "any interest, whether legal or equitable or both, present or future, vested or contingent, defeasible or indefeasible."[38]

Vested remainder beneficiaries of a trust should always meet this "interested person" standard.[39] Contingent remainder beneficiaries should also meet this standard.[40] Nevertheless, some courts have determined that certain remainder beneficiaries are not "interested persons" because "[w]hether a person, excluding a trustee or named beneficiary, is an interested person may vary from time to time and must be determined according to the particular purposes of and matter involved in any proceeding."[41]

C. Application to Trustee Duties

Texas Trust Code Section 117.008 codifies the fiduciary duty of impartiality as follows: "If a trust has two or more beneficiaries, the trustee shall act impartially in investing and managing the trust assets, taking into account any differing interests of the beneficiaries."[42] If the trustee breaches his or her duty of impartiality by favoring an income beneficiary (over a remainder beneficiary), then the income beneficiary will have no incentive (nor any damages) to prosecute the breach; it is consequently necessary that a remainder beneficiary have standing to prosecute the breach.[43] Texas Trust Code Section 117.008 is taken from section 183 of the Restatement (Second) of Trusts.[44] To understand this duty, one should also review Section 232 of the Restatement (Second) of Trusts, which provides that: "If a trust is created for beneficiaries in succession, the trustee is under a duty to the successive beneficiaries to act with due regard to their respective interests."[45]

Comment b to section 232, titled "Duty to each of successive beneficiaries," provides that:

> If by the terms of a trust the trustee is directed to pay the income to a beneficiary during a designated period and on the expiration of the period to pay the principal to another beneficiary, the trustee is under a duty to the former beneficiary to take care not merely to preserve the trust property but

37. *Id.* § 111.004(2) (emphasis added).
38. *Id.* § 111.004(6).
39. *See id.* § 111.004(7).
40. *See id.*
41. *Id.*
42. *Id.* § 117.008.
43. *See id.* § 111.004(7).
44. *See id.* § 117.008; RESTATEMENT (SECOND) OF TRUSTS § 183 (AM. LAW. INST. 1959).
45. RESTATEMENT (SECOND) OF TRUSTS § 232 (AM. LAW. INST. 1959).

> to make it productive so that a reasonable income will be available for him, and he is under a duty to the latter beneficiary to take care to preserve the trust property for him. Although the trustee is not under a duty to the beneficiary entitled to the income to endanger the safety of the principal in order to produce a large income, he is under a duty to him not to sacrifice income for the purpose of increasing the value of the principal. Thus, the trustee is under a duty to a life beneficiary not to purchase or retain unproductive property or property which yields income that is substantially lower than that which is normally earned by trust investments, although it is probable that the property will appreciate in value.
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> On the other hand, the trustee is under a duty to the beneficiary who is ultimately entitled to the principal not to purchase or retain property which is certain or likely to depreciate in value, although the property yields a large income, unless he makes adequate provision for amortizing the depreciation.[46]

Comment d to section 232, titled "To what duties the Section is applicable," provides that:

> The rule stated in this Section is applicable to the duty of the trustee in making or continuing investments, to the general management of the trust estate, the making of repairs and replacements, and to the allocation of receipts and expenditures to principal and income. The rule stated in this Section is applicable whether the designated period for which the income is to be paid to a beneficiary is a period of uncertain duration, such as the life of the beneficiary, or a fixed period, such as a term of years. The rule stated in this Section is applicable where there are two or more beneficiaries entitled successively to income during designated periods.[47]

Texas courts have long held that a trustee owes a fiduciary duty to the trust's remaindermen not to destroy their remainder interests except as authorized by the trust's terms.[48] A remainderman can maintain an action against a trustee for breach of the duty not to destroy remainder interests.[49]

> Defendants assert that plaintiff, who has no interest in the net income from the trust and is merely a remainderman as to the corpus, lacks sufficient interest to enable her to maintain the present suit. We do not agree. If funds which should have been applied to the preservation of the property in which

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46. *Id.* at cmt. b (internal citations omitted).

47. *Id.* at cmt. d.

48. Elliott v. Green, 05-94-01019-CV, 1995 WL 437206, at *3 (Tex. App.—Dallas July 19, 1995, no writ) (not designated for publication); Moody v. Pitts, 708 S.W.2d 930, 936 (Tex. App.—Corpus Christi 1986, no writ); Maxwell v. Harrell, 183 S.W.2d 577, 579 (Tex. App.—Austin 1944, writ ref'd w.o.m.).

49. Snyder v. Cowell, 08-01-00444-CV, 2003 WL 1849145, at *6 (Tex. App.—El Paso Apr. 10, 2003, no pet.) (mem. op.); *Elliott*, 1995 WL 437206, at *3; *Maxwell*, 183 S.W.2d at 581; *see also* Yturri v. Yturri, 504 S.W.2d 809, 812 (Tex. App.—San Antonio 1973, no writ).

> plaintiff had an interest were being diverted to other purposes, the injury to her interest is clear.[50]

A trust is not a legal entity that can sue or be sued.[51] In *In re Guetersloh*, the court held that, "[t]he general rule in Texas (and elsewhere) has long been that "the term 'trust' refers not to a separate legal entity but rather to the *fiduciary relationship* governing the trustee with respect to the trust property."[52] Accordingly, suits against a trust must be brought against the trustee.[53]

D. Standing Examples

Example 1: The trust provides for income to A for life, remainder to B. If B is not living upon A's death, then remainder to C if C is then-living. It is clear that A (the income beneficiary), B (a vested remainder beneficiary), and C (a contingent remainder beneficiary) all fall within the statutory definition of "interested person."[54]

Example 2: A more difficult situation arises when trust #1, of which X is the trustee, provides for income to A for life, remainder to Y as trustee of trust #2. B is the lifetime income beneficiary of trust #2, and, upon B's death, the remainder of trust #2 is payable to C. If C is not living upon B's death, then remainder to D if D is then-living. X (the trustee of trust #1), A (the income beneficiary of trust #1), and Y (if currently serving as trustee of trust #2) clearly fall within the statutory definition of "interested persons" in trust #1. Do B, C, or D fall within this definition? In the author's opinion, B and C are clearly "interested persons" in trust #1, and so is D, but it is a closer call. D is a closer call because "[w]hether a person, excluding a trustee or named beneficiary, is an interested person may vary from time to time and must be determined according to the particular purposes of and matter involved in any proceeding."[55]

Example 3: An even more difficult situation arises when trust #1, of which A is the trustee, provides for income to A for life, remainder to Y as trustee of trust #2. B is the lifetime income beneficiary of trust #2, and, upon B's death, the remainder of trust #2 is payable to C. If C is not living upon B's death, then remainder to D if D is then-living. A (the trustee and income beneficiary of trust #1) and Y (if currently serving as trustee of trust #2) clearly fall within the statutory definition of "interested persons" in trust #1. Do B, C, or D fall within this definition? What if Y has not yet accepted the

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50. *Yturri*, 504 S.W.2d at 812.
51. *In re* Guetersloh, 326 S.W.3d 737, 739 (Tex. App.—Amarillo 2010, no pet.).
52. *Id.*
53. *Id.*
54. The following examples were created by the authors for purposes of this article.
55. TEX. PROP. CODE ANN. § 111.004(7) (Supp.).

trusteeship of trust #2 and therefore is not currently serving as trustee of trust #2? There should always be someone who can enforce the trust, especially when trust #1's beneficiary and trustee are the same person. For example, if A commits a breach of trust and Y has not yet accepted the trusteeship of trust #2, then who can hold A accountable for breach of trust? In the author's opinion, B and C are clearly "interested persons" in trust #1, and so is D, but it is a closer call for the same reasons in Example 2.

E. Aubrey *Case*

Texas Trust Code Section 115.011(d) provides that: "A beneficiary of a trust may intervene and contest the right of the plaintiff to recover in an action against the trustee as representative of the trust for a tort committed in the course of the trustee's administration or on a contract executed by the trustee."[56] In the recent Texas Court of Appeals case of *Aubrey v. United Heritage Credit Union*, the court held that a remainder beneficiary did not have standing to sue a trustee because, until the primary income beneficiary's death, the remainder beneficiary was only an "expectant heir" who has no present interest or right in the trust property.[57] Despite discussing the statutory definitions of "beneficiary," "interested person," and "various causes of action permitted by the Texas Property Code," the *Aubrey* court seemingly ignored them in rendering its decision.[58]

On its face, this is a horrible opinion that flies in the face of hundreds of years of well-established trust law.[59] There are many cases in Texas where the lifetime income beneficiary is also the trustee.[60] If the remainder beneficiaries do not have standing to sue the trustee/beneficiary, then the trustee/beneficiary could steal the entire trust estate during his or her lifetime, and no one would have standing to complain.[61] In effect, the beneficiary/trustee would have complete ownership of the trust property regardless of the trust's distribution standard.[62]

The *Aubrey* court confused the issues of standing with those of capacity.[63] What the court really meant was that the plaintiff, a remainder beneficiary, did not have capacity to sue third parties on behalf of the trustee.[64]

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56. TEX. PROP. CODE ANN. § 115.011(d) (Supp.).

57. Aubrey v. United Heritage Credit Union, 03-16-00233-CV, 2017 WL 1404728, at *1 (Tex. App.—Austin Apr. 12, 2017, no pet.) (mem. op.) (per curiam).

58. *Id.* at *4.

59. *See id.*

60. *See* AVCO Corp. v. Interstate Sw., Ltd., 251 S.W.3d 632, 649 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (quoting Austin Nursing Ctr., Inc. v. Lovato, 171 S.W.3d 845, 849 (Tex. 2005)).

61. *See Aubrey*, 2017 WL 1404728, at *1.

62. *Id.*

63. *See id.*

64. *Id.* at *3.

> We need go no further than to observe that Aubrey's cited statutory causes of action are directed to claims against or by the trustee of a trust, not the types of claims for damages that Aubrey seeks to bring against Schroeder and United Heritage, a third party purchaser of property for fair value . . . [A]ubrey has failed to affirmatively demonstrate the trial court's jurisdiction over his asserted claims against Heritage and Schroeder.[65]

The court's reasoning was still flawed.[66] The well-established rule in third-party derivative actions is that the trustee alone has the exclusive authority to prosecute third-party suits for the benefit of the beneficiaries of the trust.[67] It is only when the trustee cannot or will not sue the third party that the beneficiary may "step into the trustee's shoes."[68]

The *Aubrey* ruling implies that a remainder beneficiary may never sue a third party on behalf of the trustee.[69] This is contrary to Texas case law, the Restatement of Trusts, and virtually all trust treatises.[70] It seems that the *Aubrey* court believed that the plaintiff was a contingent, not vested, remainder beneficiary because the plaintiff's interest would not vest, if at all, until the lifetime beneficiary died.[71] That is incorrect—the plaintiff was a vested remainder beneficiary; that the plaintiff will not receive possession until the natural ending of the prior interest is not a condition precedent.[72] Further, because the lifetime beneficiary was also the trustee, the *Aubrey* opinion would mean, albeit incorrectly, that none of the remainder beneficiaries could sue the trustee for her actions.[73]

III. CAPACITY

A. Capacity Introduction

Once it is determined that a person has standing to bring a cause of action in a trust case, then it is necessary to determine the capacity in which that person brings the lawsuit.[74]

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65. *Id.* at *4.
66. *See id.*
67. *Id.* at *3.
68. *Id.*
69. *See id.*
70. *See, e.g.*, Interfirst Bank-Houston, N.A. v. Quintana Petroleum Corp., 699 S.W.2d 864, 874 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.) (stating that the beneficiary may sue a third party if trustee "cannot or will not"); *see also* Grinnell v. Munson, 137 S.W.3d 706, 714 (Tex. App.—San Antonio 2004, no pet.).
71. *See Aubrey*, 2017 WL 1404728, at *2.
72. *Id.*
73. *Id.*
74. Austin Nursing Ctr., Inc. v. Lovato, 171 S.W.3d 845, 848–49 (Tex. 2005).

"[A] party has *capacity* when it has the legal authority to act, regardless of whether it has a justiciable interest in the controversy."[75] Additionally, "capacity concerns 'a party's personal right to come into court' . . . "[76] If a beneficiary, in his individual capacity, sues a trustee, then any recovery is paid to the beneficiary, individually, rather than to the trust estate of the trust.[77] Likewise, if a trustee is sued in his or her individual capacity, then any recovery is paid from the trustee's individual assets, rather than from the trust estate of the trust.[78]

If a beneficiary sues in a derivative capacity on behalf of the trust/trustee, then any recovery is paid to the trust estate of the trust, rather than to the beneficiary, individually.[79] If a trustee is sued in his or her derivative (representative) capacity as trustee, then any recovery is paid from the trust estate of the trust, rather than from the trustee's individual assets.[80]

A trustee, acting in his individual capacity, may represent himself *pro se* with regard to claims asserted against him in his individual capacity.[81] However, the trustee may not represent himself *pro se* in his derivative (representative) capacity as trustee "if a non-attorney trustee appears in court on behalf of the trust, he or she necessarily represents the interests of others, which amounts to the unauthorized practice of law.[82]

B. Capacity Examples

Example 1: A trust provides that the beneficiary is to receive distributions of $1,000 per month. The trustee fails to make distributions to the beneficiary for six months. The beneficiary, in his individual capacity, sues the trustee in his derivative capacity for $6,000. The beneficiary prevails. Consequently, the trustee is required to pay the beneficiary, in her individual capacity, $6,000 from the trust estate of the trust rather than from the trustee's individual assets.

Example 2: A trustee engages in a self-dealing transaction that depletes the trust estate of the trust by $6,000. The beneficiary, acting in his derivative capacity on behalf of the trustee, sues the trustee in his individual capacity. The beneficiary prevails. Consequently, the trustee is required to reimburse the trust estate of the trust $6,000 from his individual assets rather than from the trust estate of the trust (which would not make sense).

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75. *Id.* (citing Nootsie, Ltd. v. Williamson County Appraisal Dist., 925 S.W.2d 659, 661 (Tex. 1996)).

76. AVCO Corp. v. Interstate Sw., Ltd., 251 S.W.3d 632, 649 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (quoting *Lovato*, 171 S.W.3d at 849).

77. TEX. PROP. CODE ANN. § 114.001 (Supp.).

78. *Id.*

79. *Id.*

80. *Id.*

81. *In re* Guetersloh, 326 S.W.3d 737, 740 (Tex. App.—Amarillo 2010, no pet.).

82. *Id.* at 740.

C. Types of Derivative Causes of Action

There are two types of derivative claims: (1) direct derivative causes of action"; and (2) third party derivative causes of action.[83] A direct derivative cause of action is an action whereby a beneficiary, acting on behalf of the trust/trustee, sues the trustee.[84] A third party derivative cause of action is an action whereby a beneficiary, acting on behalf of the trust/trustee, sues a third party.[85]

1. Direct Derivative Causes of Action

Texas Trust Code Section 114.001(c) provides, in part, that: "A trustee who commits a breach of trust is chargeable with any damages resulting from such breach of trust, including but not limited to: (1) any loss or depreciation in value of the trust estate as a result of the breach of trust . . . "[86] This provision codifies section 205(a) of the Restatement (Second) of Trusts.[87]

Section 114.001(c) specifically allows any beneficiary to seek derivative damages from the trust estate in any case where a trustee's breach of trust causes damage to the trust estate.[88]

The court in *In re XTO Energy Inc.* was faced with the concept of direct derivative actions.[89] The *XTO* court stated that it had found no Texas case authority allowing a trust beneficiary to sue a trustee on behalf of the trust.[90] This is probably because the Texas Trust Code specifically deals with the issue.[91] Adding to the problem, the parties in *XTO* actually stipulated that Texas law did not authorize a beneficiary, acting on behalf of the trust, to sue the trustee.[92] Had the issue been adequately briefed, the court likely would have come to a different conclusion.[93]

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83. *Compare* TEX. PROP. CODE ANN. § 114.001 (Supp.), *with* Slay v. Burnett Trust, 187 S.W.2d 377, 387 (Tex. 1945) (trustees were liable for dividing profits realized from a loan of trust funds in accordance with §114.001 because trustees may keep compensation, not profits).

84. TEX. PROP. CODE ANN. § 114.001 (Supp.).

85. *See In re* XTO Energy Inc., 471 S.W.3d 126, 131 (Tex. App.—Dallas 2015, no pet.).

86. TEX. PROP. CODE ANN. § 114.001(c) (Supp.).

87. *Id.*

88. *See id.*

89. *In re* XTO Energy Inc., 471 S.W.3d at 131.

90. *Id.*

91. *See* TEX. PROP. CODE ANN. § 114.001(c)(1) (Supp.) (trustee liable for loss or depreciation in value of the *trust estate* of the trust); *see also* RESTATEMENT (SECOND) OF TRUSTS § 205(a) (AM. LAW INST. 1959).

92. *See In re* XTO Energy Inc., 471 S.W.3d at 138.

93. *See id.*

2. Third Party Derivative Causes of Action

The Texas Trust Code does not specifically deal with third party derivative causes of action.[94] There are, however, numerous cases dealing with this issue.[95]

Generally, trustees have the exclusive authority to prosecute third-party suits in their own name and for the benefit of the beneficiaries of the trust.[96] It is only when the trustee cannot or will not enforce the cause of action that he or she has against the third party that the beneficiary is allowed to enforce it.[97] This general rule has also been addressed by treatises on trust law:

> The trustee has a title (generally legal title) to the trust property, usually has its possession and a right to continue in possession, and almost always has all the powers of management and control which are necessary to make the trust property productive and safe. Any wrongful interference with these interests of the normal trustee is therefore a wrong to the trustee and gives him a cause of action for redress or to prevent a continuance of the improper conduct. Although the beneficiary is adversely affected by such acts of a third person, no cause of action inures to him on that account. The right to sue in the ordinary case vests in the trustee as a representative.
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> If the trustee cannot or will not enforce the cause of action running to him for the benefit of the beneficiary, a practical difficulty arises which compels the courts to vary their usual rules as to parties. There is danger that the cause of action may be barred by laches or the operation of the Statute of Limitations, if the beneficiary is obliged to wait for the trustee to act, or is forced to sue the trustee to compel action, or to bring a proceeding for the removal of the trustee and the appointment of a successor. In addition the financial condition of the third party may change so that all relief will be shut off. In the emergency the court permits a suit in equity by the beneficiary to enforce the cause of action running to the trustee, in which the third party and the trustee should be made parties defendant. The beneficiary is not enforcing his own cause of action, but is acting as a temporary representative of the trust in order to effect a recovery which will go to the trustee or his successor for the benefit of the beneficiary.
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> If the trustee refuses to bring the action, after demand, or fails to act, or the trusteeship is vacant, or the trustee has been absent for many years, or the trustee has an adverse interest, or has conspired to defeat the trust, or the trustee is held to be estopped to sue the third party, the beneficiary may

94. *See* TEX. PROP. CODE ANN. ch. 114.

95. *See In re* XTO Energy Inc., 471 S.W.3d at 138; Slay v. Burnett Trust, 187 S.W.2d 377, 383 (Tex. 1945); Interfirst Bank-Houston, N.A. v. Quintana Petroleum Corp., 699 S.W.2d 864, 874 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

96. *Slay*, 187 S.W.2d at 383.

97. *Interfirst Bank-Houston*, 699 S.W.2d at 874.

> bring the action against the third person. The necessities of the case entitle the beneficiary to proceed directly.[98]

This rule was also addressed by section 282 of the Restatement (Second) of Trusts, which provides that:

> (1) Where the trustee could maintain an action at law or suit in equity or other proceeding against a third person if the trustee held the trust property free of trust, the beneficiary cannot maintain an action at law against the third person, except as stated in Subsections (2) and (3). (2) If the trustee improperly refuses or neglects to bring an action against the third person, the beneficiary can maintain a suit in equity against the trustee and the third person. (3) If the trustee cannot be subjected to the jurisdiction of the court or if there is no trustee, the beneficiary can maintain a suit in equity against the third person, if such suit is necessary to protect the interest of the beneficiary.[99]

The court in *In re XTO Energy Inc.* also dealt with third party derivative causes of action.[100] The court held that a beneficiary cannot sue a third party on behalf of a trust "unless the beneficiary pleads and proves that the trustee's refusal to pursue litigation constitutes fraud, misconduct, or a clear abuse of discretion."[101] The court also stated that it "found no Texas cases addressing the right of a beneficiary to enforce a cause of action against a third party that the trustee considered and concluded was not in the best interests of the trust to pursue."[102]

There is another subset of third party derivative causes of action that may be considered "double-derivative" causes of action.[103] These are best explained by an example.[104] Imagine that a trust owns an interest in a limited partnership; the trustee, in his representative capacity, is therefore a limited partner because trusts are not legal entities.[105] A third party steals funds from the limited partnership, but the general partner of the limited partnership refuses to sue that third party.[106] Under Texas law, a limited partner may step into the general partner's shoes to sue that third party.[107] A limited partner may also sue the general partner for allowing the theft (or maybe the general

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98. GEORGE GLEASON BOGERT ET AL., THE LAW OF TRUSTS & TRUSTEES § 869 (2018), Westlaw (database updated June 2018).

99. RESTATEMENT (SECOND) OF TRUSTS § 282 (AM. LAW. INST. 1959).

100. *In re* XTO Energy Inc., 471 S.W.3d 126, 137 (Tex. App.—Dallas 2015, no pet.).

101. *Id.* at 132.

102. *Id.* at 131.

103. *See* Sneed v. Webre, 465 S.W.3d 169, 189 (Tex. 2015).

104. *See* TEX. BUS. ORGS. CODE ANN. §§ 152.801, 153.152, 153.401 (Supp.).

105. *See* Ray Malooly Trust v. Juhl, 186 S.W.3d 568, 570 (Tex. 2006) (per curiam).

106. The following examples were created by the authors for purposes of this article.

107. TEX. BUS. ORGS. CODE ANN. §§ 153.401, 101.452, 101.463, 101.1115 (Supp.) (for LLCs).

partner was the thief).[108] But assume that the trustee—being a limited partner—also refuses to pursue those derivative claims. Consequently, the trust's beneficiary steps into the trustee's shoes to act as a limited partner, and then steps into the general partner's shoes, to act on behalf of the limited partnership, and sues the wrongdoing third party.[109]

This example has many possible variants: the general partner could be the wrongdoer; the trustee could also be the general partner; the wrongdoing third party could be the trustee (or a business owned by the trustee); and so on. And this double-derivative scenario is not limited to business entities—the beneficiary could be a beneficiary of a residual trust in a will and sue a third party that damaged the estate, which, consequently, damaged the residual estate; in that situation, the beneficiary would step into the shoes of the trustee of the residual trust, to act on behalf of the residual trust, and then step into the shoes of the executor to act on behalf of the estate and sue the wrongdoing third party.[110]

Courts should permit these double-derivative causes of action if the circumstances meet the applicable requirements set forth in the Texas Business Organizations Code, the Texas Trust Code, the Texas Estates Code, and Texas case law on a beneficiary's ability to sue third parties.[111]

IV. NECESSARY PARTIES

A. Necessary Parties Introduction

A "necessary party" to a suit is "one who is so vitally interested in the subject-matter of the litigation that a valid decree cannot be rendered without his presence as a party."[112] Texas Trust Code Section 115.001 sets forth the general jurisdictional provisions governing which courts have jurisdiction to hear cases "by or against a trustee and all proceedings concerning trusts."[113] Texas Trust Code Section 115.011 is the statute that codifies who are necessary parties to actions brought under Texas Trust Code Section 115.001.[114]

It is important to note that there is a distinction between an "interested person" and a "necessary party."[115] Texas Trust Code Section 115.011(a) provides that "*any interested person may bring an action* under Section

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108. *See* TEX. BUS. ORGS. CODE ANN. §§ 152.801, 153.152 (Supp.).

109. *See* TEX. BUS. ORGS. CODE ANN. §§ 152.801, 153.152,153.401 (Supp.).

110. *Id.*

111. *See* TEX. BUS. ORGS. CODE ANN. § 1.001 (Supp.); TEX. EST. CODE ANN. § 21.001 (Supp.); TEX. PROP. CODE ANN. § 114.001 (Supp.).

112. Commonwealth Bank & Tr. Co. v. Heid Bros., 52 S.W.2d 74, 75 (Tex. Comm'n App. 1932, judgm't adopted).

113. TEX. PROP. CODE ANN. § 115.001 (Supp.).

114. *Id.*

115. *See id.* § 115.011(a)–(b).

115.001 of this Act."[116] As set forth above, Texas Trust Code Section 111.004(7) defines "interested person" as:

> [A] trustee, beneficiary, or any other person having an interest in or a claim against the trust or any person who is affected by the administration of the trust. Whether a person, excluding a trustee or named beneficiary, is an interested person may vary from time to time and must be determined according to the particular purposes of and matter involved in any proceeding.[117]

In other words, to be a plaintiff in trust litigation, one only has to be an "interested person" in the trust (as opposed to the narrower necessary-party standard in Section 115.011(b)).[118] Texas Trust Code Section 115.011(b) identifies who are necessary parties:

> Contingent beneficiaries designated as a class are not necessary parties to an action under Section 115.001. The only necessary parties to such an action are:
> (1) a beneficiary of the trust on whose act or obligation the action is predicated;
> (2) a beneficiary of the trust designated by name, other than a beneficiary whose interest has been distributed, extinguished, terminated, or paid;
> (3) a person who is actually receiving distributions from the trust estate at the time the action is filed; and
> (4) the trustee, if a trustee is serving at the time the action is filed.[119]

In other words, the foregoing persons—who are necessary parties—must be named as defendants, even if no relief is sought from them in trust litigation.[120]

Texas Trust Code Section 115.011(c) provides that: "The attorney general shall be given notice of any proceeding involving a charitable trust as provided by Chapter 123 of this code."[121] Texas Property Code Section 123.001(3) defines "proceeding involving a charitable trust" as:

> [a] suit or other judicial proceeding the object of which is to:
> (A) terminate a charitable trust or distribute its assets to other than charitable donees;
> (B) depart from the objects of the charitable trust stated in the instrument creating the trust, including a proceeding in which the doctrine of cy-pres is involved;

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116. *Id.* § 115.011(a) (emphasis added).
117. *Id.* § 111.004(7).
118. *See id.* § 115.011(b).
119. TEX. PROP. CODE ANN. § 115.011(b) (Supp.).
120. *See id.*
121. TEX. PROP. CODE ANN. § 115.011(c) (Supp.).

> (C) construe, nullify, or impair the provisions of a testamentary or other instrument creating or affecting a charitable trust;
> (D) contest or set aside the probate of an alleged will under which money, property, or another thing of value is given for charitable purposes;
> (E) allow a charitable trust to contest or set aside the probate of an alleged will;
> (F) determine matters relating to the probate and administration of an estate involving a charitable trust; or
> (G) obtain a declaratory judgment involving a charitable trust.[122]

Texas Property Code Section 123.002 provides:

> For and on behalf of the interest of the general public of this state in charitable trusts, the attorney general is a proper party and may intervene in a proceeding involving a charitable trust. The attorney general may join and enter into a compromise, settlement agreement, contract, or judgment relating to a proceeding involving a charitable trust.[123]

Who has standing to commence a proceeding involving a charitable trust?[124] Generally, "[p]ersons having no special interest different from that of the general public have no standing to institute or maintain a suit to enforce a public charitable trust."[125] It is the author's experience that the attorney general's office is extremely reluctant to actually intervene in litigation involving charitable trusts.[126]

Texas Trust Code Section 115.011(d) provides that: "A beneficiary [i.e., regardless of whether the beneficiary is a "necessary party"] of a trust may intervene and contest the right of the plaintiff to recover in an action against the trustee as representative of the trust for a tort committed in the course of the trustee's administration or on a contract executed by the trustee."[127]

Can a person who is not a "necessary party" be a plaintiff in a trust lawsuit?[128] The answer is clearly "yes" because an interested person—which is defined more broadly than "necessary party"—can bring a trust lawsuit according to Section 115.011(a).[129] Remember, an "interested person" includes "a beneficiary" of any type.[130] But, Texas Trust Code Section 111.004(7) provides, in part, that: "Whether a person, excluding a trustee or *named beneficiary*, is an interested person may vary from time to time and

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122. *Id.* § 123.001(3).
123. *Id.* § 123.002.
124. *See* Gray v. Saint Matthews Cathedral Endowment Fund, Inc., 544 S.W.2d 488, 490 (Tex. App.—Texarkana 1976, writ ref'd n.r.e.).
125. *Id.*
126. *See* TEX. PROP. CODE ANN. § 123.002 (Supp.).
127. TEX. PROP. CODE ANN. § 115.011(d) (Supp.).
128. *Id.* § 155.011(a).
129. *Id.*
130. *Id.*

must be determined according to the particular purposes of and matter involved in any proceeding."[131] The Texas Trust Code defines the term "beneficiary" as "a person for whose benefit property is held in trust, regardless of the nature of the interest."[132] As explained above, "interest" is defined broadly.[133]

Texas Trust Code Section 113.151(a) provides that "*any beneficiary of the trust* may file suit to compel the trustee to deliver [an accounting] to all beneficiaries of the trust."[134] The definition of "beneficiary" contained in Texas Trust Code Section 111.004(2) set forth above is much broader than the definition of "necessary party" in Texas Trust Code Section 115.011.[135] Even a non-beneficiary "interested person may file suit to compel the trustee to account," but the court may determine whether "the nature of the interest . . . is sufficient to require an accounting by the trustee."[136]

Texas Trust Code Section 115.011(d) provides that: "*A beneficiary of a trust* may intervene and contest the right of the plaintiff to recover in an action against the trustee as representative of the trust for a tort committed in the course of the trustee's administration or on a contract executed by the trustee."[137] This language should apply to any beneficiary, including contingent and class beneficiaries.[138] It would also seem that where the vested remainder beneficiaries of a trust have a conflict, are under a disability, or perhaps refuse to bring an action, a contingent beneficiary should have standing to bring a trust lawsuit.[139] Recall that the statute does not state that contingent beneficiaries are not "interested persons"; it only states that contingent beneficiaries designated as a class are not "necessary parties" to an action under Texas Trust Code Section 115.001.[140] Arguably, contingent remainder beneficiaries could always file suit, but this is especially so if the vested remainder beneficiaries fail to file suit.[141]

Can a person who is not a "necessary party" be a defendant in a trust lawsuit?[142] The answer is clearly yes.[143] For example, a trustee may bring a lawsuit on behalf of the trust against non-beneficiary third parties for damage to the trust estate of the trust.[144] But, in many (or perhaps all) scenarios, the

131. TEX. PROP. CODE ANN. § 111.004(7) (Supp.) (emphasis added).
132. *Id.* § 111.004(2).
133. *Id.* § 111.004(6).
134. *Id.* § 113.151(a) (emphasis added).
135. *Id.*
136. *Id.* § 113.151(b).
137. *Id.* § 115.011(d) (emphasis added).
138. *Id.*
139. *Id.*
140. *Id.* § 115.001.
141. *Id.*
142. *Id.* § 115.011.
143. *Id.*; *see also* Hedley Feedlot, Inc. v. Weatherly Tr., 855 S.W.2d 826, 832–33 (Tex. App.—Amarillo 1993, writ denied).
144. *Hedley Feedlot, Inc.*, 855 S.W.2d at 832–33.

trustee must give notice to the beneficiaries before suing a third party.[145] Texas Trust Code Section 113.028 provides that:

> (a) A trustee may not prosecute or assert a claim for damages in a cause of action against a party who is not a beneficiary of the trust if each beneficiary of the trust provides written notice to the trustee of the beneficiary's opposition to the trustee's prosecuting or asserting the claim in the cause of action.
> (b) This section does not apply to a cause of action that is prosecuted by a trustee in the trustee's individual capacity.
> (c) The trustee is not liable for failing to prosecute or assert a claim in a cause of action if prohibited by the beneficiaries under Subsection (a).[146]

Texas Trust Code Section 115.011(b)(1) provides that: "a beneficiary of the trust on whose act or obligation the action is predicated" is a necessary party to an action under Section 115.001.[147] This language was taken from former Subdivision C of Section 24 of the Texas Trust Act, which provided, in part, that:

> Actions hereunder may be brought by a trustee, beneficiary, or any person affected by or having an active interest in the administration of the trust estate. If the action is predicated upon any act or obligation of any beneficiary, such beneficiary shall be a necessary party to the proceedings.[148]

One court addressed this language:

> [W]e think that the provisions of Article 7425b referred to by the Bank, that is, Subdivision C of Section 24 and Subdivisions A and B of Section 19, were not applicable to the proceeding determined by the order of July 14th. For these provisions of Sections 19 and 24 apply to and regulate suits and actions and the proceeding determined by the order of July 14th was not a suit or action. We are satisfied now that it was only the presentation of a claim to a court deemed to be administering the Trust, and we think that Subdivisions A and B of Section 19 and Subdivision C of Section 24 were [not] intended to apply to a proceeding of that kind. The only parties essential to that proceeding were before the court-if only the consent and authority of the trial court to the payment of the claim was desired.[149]

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145. TEX. PROP. CODE ANN. § 113.028 (Supp.).
146. *Id.*
147. *Id.* § 115.011(b)(1).
148. Act of Apr. 15, 1943, 48th Leg., R.S., ch. 148, §§ 1–47, sec. 2, 1943 Tex. Gen. Laws 232, 234 (repealed 1983); Am. Nat'l Bank of Beaumont v. Biggs, 274 S.W.2d 209, 226 (Tex. App.—Beaumont 1954, writ ref'd n.r.e.).
149. *Biggs*, 274 S.W.2d at 226.

It is difficult to imagine many situations in which an action is predicated by an act or obligation of a beneficiary.[150] Some examples that come to mind are: (1) when a beneficiary demands a trust accounting, the trustee supplies a purported accounting, the beneficiary objects to the accounting, and the trustee goes to court to obtain approval of the accounting; or (2) when a beneficiary's consent is required for a trustee to make a certain decision, and the trustee goes to court to seek approval of the decision.[151]

Texas Trust Code Section 115.011(b)(2) provides that "a beneficiary of the trust designated by name, other than a beneficiary whose interest has been distributed, extinguished, terminated, or paid" is a necessary party to an action under Section 115.001.[152]

If a trust provides that income be paid to "my wife, Jane Doe," then Jane Doe is a beneficiary designated by name. But what if the trust provides that income be paid to "my wife," and a later provision identifies Jane Doe as the settlor's wife? It is the author's opinion that, again, Jane Doe is a beneficiary designated by name. What if the trust provides that income be paid to "my lineal descendants, per stirpes," and a later provision in the trust identifies the settlor's children and grandchildren by name? It is the author's opinion that the settlor's named children and grandchildren are beneficiaries designated by name. If the trust simply provides that income be paid to "my wife" or "my children" without further identification, then those are not beneficiaries designated by name.[153]

Texas Trust Code Section 115.011(b)(3) provides that "a person who is actually receiving distributions from the trust estate at the time the action is filed" is a necessary party to an action under Section 115.001.[154] What if a beneficiary is entitled to discretionary distributions from the trust and has been receiving them, but the trustee stops making the distributions? Can the trustee eliminate the beneficiary's "necessary party" status by not making distributions? What if a beneficiary is entitled to permissible discretionary distributions, but they are not being made? These questions are left unanswered, but logic would dictate that a beneficiary who is currently entitled to receive permissible or mandatory distributions would be a necessary party to a lawsuit involving the trust.

Texas Trust Code Section 115.011(b)(4) provides that "the trustee, if a trustee is serving at the time the action is filed" is a necessary party to an action under Section 115.001.[155] Texas Trust Code Section 111.004(18) defines "trustee" as "the person holding the property in trust, including an

150. *See id.*; TEX. PROP. CODE ANN. § 115.011(b)(1) (Supp.).
151. *See* TEX. PROP. CODE ANN. § 115.011(b)(1) (Supp.).
152. *Id.* § 115.011(b)(2).
153. This hypothetical was created by the author for the purposes of this article.
154. TEX. PROP. CODE ANN. § 115.011(b)(3) (Supp.).
155. *Id.* § 115.011(b)(4).

original, additional, or successor trustee, whether or not the person is appointed or confirmed by a court."[156]

Texas Trust Code Section 111.004(10) defines "person" in several ways, and it includes, among others, individuals, business entities, and "two or more persons having a joint or common interest, including an individual or a corporation acting as a personal representative or in any other fiduciary capacity."[157] If there are multiple co-trustees serving, all would be necessary parties to a lawsuit involving the trust.[158]

B. Necessary Parties Examples

Example 1: The trust provides that beneficiary A (a named beneficiary) is to receive distributions of $1,000 per month for his lifetime. The trust terminates upon A's death, and the remainder is payable to B (a named, vested remainder beneficiary). If B is not living upon A's death, then remainder to C if C is then-living (a named, contingent remainder beneficiary). A, B, and C would all be necessary parties to a lawsuit involving this trust because they are all beneficiaries designated by name.[159]

Example 2: The trust provides that beneficiary A (a named beneficiary) is to receive distributions of $1,000 per month for his lifetime. The trust terminates upon A's death, and the remainder is payable to A's children in equal shares only if they survive A (unnamed, contingent remainder beneficiaries designated by class). If any of A's children do not survive A, then such deceased child's share is payable to B (a named, contingent remainder beneficiary). Because "[c]ontingent beneficiaries designated as a class are not necessary parties" (Tex. Trust Code Section 115.011(b)), only B, despite having a more-remote interest, would be a necessary party.

Example 3: The trust provides that beneficiary A (a named beneficiary) is to receive distributions of $1,000 per month for his lifetime. The trust terminates upon A's death, and the remainder is payable to A's children in equal shares (unnamed, vested remainder beneficiaries designated by class). If any of A's children are not living upon A's death, then such deceased child's share is payable to B (a named, contingent remainder beneficiary). A and B would be necessary parties because they are designated by name. A's children, however, would not be necessary parties. This is a strange scenario because A's children are vested remainder beneficiaries, whereas B is merely a contingent remainder beneficiary; despite having this more remote interest, B is nevertheless a necessary party. Note that Section 115.011 does not mention vested remainder beneficiaries designated by class—it only states

156. *Id.* § 111.004(18).

157. *Id.* § 111.004(10).

158. *See generally id.* § 115.001(b)(4) (following the logic that if "a trustee" is a necessary party, then co-trustees are also necessary parties).

159. The following examples were created by the authors for the purpose of this article.

that contingent beneficiaries designated by class are not necessary parties (Texas Trust Code Section 115.011(b)); however, because A's children do not fall under any of the prongs of Section 115.011, they are likewise not necessary parties.

V. MISCELLANEOUS MATTERS

Texas Trust Code Section 115.012 provides that: "Except as otherwise provided, all actions instituted under this subtitle are governed by the Texas Rules of Civil Procedure and the other statutes and rules that are applicable to civil actions generally."[160]

Texas Trust Code Section 115.013 deals with virtual representation in trust litigation.[161] Subsection (b) provides that: "An affected interest shall be described in pleadings that give reasonable information to an owner by name or class, by reference to the instrument creating the interest, or in other appropriate matter."[162] Subsection (c) provides that:

> [A] person is bound by an order binding another in the following cases:
> (1) an order binding the sole holder or all coholders of a power of revocation or a presently exercisable general power of appointment, including one in the form of a power of amendment, binds other persons to the extent their interests, as objects, takers in default, or otherwise are subject to the power;
> (2) to the extent there is no conflict of interest between them or among persons represented:
> (A) an order binding a guardian of the estate or a guardian ad litem binds the ward; and
> (B) an order binding a trustee binds beneficiaries of the trust in proceedings to review the acts or accounts of a prior fiduciary and in proceedings involving creditors or other third parties;
> (3) if there is no conflict of interest and no guardian of the estate or guardian ad litem has been appointed, a parent may represent his minor child as guardian ad litem or as next friend; and
> (4) an unborn or unascertained person who is not otherwise represented is bound by an order to the extent his interest is adequately represented by another party having a substantially identical interest in the proceeding.[163]

According to the commentary to Johanson's Annotated Texas Estates Code, under Texas Trust Code Section 115.013 the virtual representation doctrine cannot be invoked if the beneficiary is designated by name in the trust or is actually receiving distributions from the trust at the time the action

160. TEX. PROP. CODE ANN. § 115.012 (Supp.).
161. *Id.* § 115.013.
162. *Id.* § 115.013(b).
163. *Id.* § 115.013(c)(1)–(4).

is filed; this is because such a beneficiary would be a necessary party under Section 115.011.[164]

Texas Trust Code Section 115.014 deals with the appointment of guardians *ad litem* and attorneys *ad litem* in trust litigation.[165] This section provides:

> (a) At any point in a proceeding a court may appoint a guardian ad litem to represent the interest of a minor, and incapacitated, unborn, or unascertained person, or person whose identity or address is unknown, if the court determines that representation of the interest otherwise would be inadequate. If there is not a conflict of interests, a guardian ad litem may be appointed to represent several persons or interests.
> (b) At any point in a proceeding a court may appoint an attorney ad litem to represent any interest that the court considers necessary, including an attorney ad litem to defend an action under Section 114.083 for a beneficiary of the trust who is a minor or who has been adjudged incompetent.
> (c) A guardian ad litem may consider general benefit accruing to the living members of a person's family.
> (d) A guardian ad litem is entitled to reasonable compensation for services in the amount set by the court to be taxed as costs in the proceeding.
> (e) An attorney ad litem is entitled to reasonable compensation for services in the amount set by the court in the manner provided by Section 114.064.[166]

Texas Trust Code Section 115.015 provides that:

> [A] court may not render judgment in favor of a plaintiff in an action on a contract executed by the trustee or in an action against the trustee as representative of the trust for a tort committed in the course of the trustee's administration unless the plaintiff proves that before the 31st day after the date the action began or within any other period fixed by the court that is more than 30 days before the date of judgment, the plaintiff gave notice of the existence and nature of the action to: (1) each beneficiary known to the trustee who then had a present or contingent interest; or (2) in an action on a contract involving a charitable trust, the attorney general and any corporation that is a beneficiary or agency in the performance of the trust.[167]

Texas Trust Code Section 115.013(d) provides that "[n]otice under Section 115.015 shall be given either to a person who will be bound by the judgment or to one who can bind that person under [Section 115.013], and

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164. STANLEY M. JOHANSON, *Texas Estates Code Annotated*, in JOHANSON'S TEXAS ESTATES CODE ANNOTATED § 115.013, commentary (2018 ed.).

165. TEX. PROP. CODE ANN. § 115.014 (Supp.).

166. *Id.* § 115.014(a)–(e).

167. *Id.* § 115.015(a)(1)–(2).

notice may be given to both."[168] Further, notice "may be given to unborn or unascertained persons who are not represented under Subdivision (1) or (2) of Subsection (c) [of Section 115.013] by giving notice to all known persons whose interests in the proceedings are substantially identical to those of the unborn or unascertained persons."[169] One court addressed this situation:

> [W]e consider appellant's contention that the lower court erroneously rendered judgment without proof that the beneficiaries had received statutory notice. The law requires a plaintiff to provide beneficiaries with written notice of such an action against the trustee. The reason is obvious. Beneficiaries ought to be assured that their interests will be protected, that a potential conflict of interest will not threaten the adequacy of their interests' representation. Although the statute on its face allows rendition of judgment so long as the notice was given more than 30 days earlier, the supreme court has observed that "[t]here are undoubtedly many instances in which a notice that is sent after verdict would not be sufficient to protect a beneficiary's interest in a trust." For example, post-verdict appointment of a guardian ad litem for minor beneficiaries has been held insufficient where the beneficiaries could show both conflicts of interests and inadequate representation. In our case the beneficiaries had actual representation by their own trial counsel who participated fully in the litigation. It would take a great deal of creativity to come up with an explanation for ordering a retrial here.[170]

In *Rachal v. Reitz*, the Texas Supreme Court held that, pursuant to an arbitration provision in a trust that the beneficiaries never signed, beneficiaries can be forced to pursue their claims in arbitration.[171] *Rachal* was a case of first impression in Texas, and it appears that the Texas Supreme Court either ignored, was unaware of, or was not persuaded by Section 111.0035(b)(5) of the Texas Trust Code, which provides that the terms of a trust may not limit "the power of a court, in the interest of justice, to take action or exercise jurisdiction, including the power to: . . . (C) exercise jurisdiction under Section 115.001."[172] When the trial court in *Rachal* denied the defendant's motion to compel arbitration, it was exercising that power.[173] Nevertheless, the Texas Supreme Court deprived the trial court of that power without mentioning Section 111.0035(b)(5).[174]

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168. *Id.* § 115.013(d).

169. *Id*.

170. Nacol v. McNutt, 797 S.W.2d 153, 154 (Tex. App.—Houston [14th Dist.] 1990, writ denied) (internal citations omitted).

171. Rachal v. Reitz, 403 S.W.3d 840, 850–51 (Tex. 2013).

172. *See id.*; TEX. PROP. CODE ANN. § 111.0035 (Supp.).

173. *See Rachal*, 403 S.W.3d at 850–51.

174. *See id.*

In *In re Guetersloh*, the court held that: "if a non-attorney trustee appears in court on behalf of the trust, he or she necessarily represents the interests of others, which amounts to the unauthorized practice of law."[175]

VI. CONCLUSION

Like all things legal, these are not all hard-and-fast rules. Every fact pattern, case, and judge is different. Because much of the law in this area is unsettled, those differences affect the outcome of each case. After all, lawsuits are won and lost in the grey areas.

175. *In re* Guetersloh, 326 S.W.3d 737, 740 (Tex. App.—Amarillo 2010, no pet.).