TO AFFIRMATIVELY DISCLOSE OR TO PASSIVELY DISCLOSE, THAT IS THE TEXAS TRUSTEE'S QUESTION: WHAT DUTY OF DISCLOSURE DOES A TEXAS TRUSTEE OWE TO A BENEFICIARY?

I. MISSION IMPOSSIBLE: DETERMINING THE CORRECT MEANS OF DISCLOSURE IN TEXAS

"The trustee's job, I think, does not afford him such a happy lot. In return for modest fees, he's subject to a constant squeeze. And written in the trustee's bible is the rule: 'You're always liable.' In view of [t]his how can it be, that anyone would be trustee?"[1] This statement characterizes a Texas trustee's role to a tee.[2] The difficulties that surround a Texas trustee's duties are most evident in the Texas trustee's role of disclosure to a beneficiary.[3] However, as if the trustee's role is not already difficult enough, the role's difficulty is

1. GERRY W. BEYER, TEXAS TRUST LAW CASES AND MATERIALS 165 (2007) (quoting Daniel M. Schuyler, 56 NW. U. L. REV. 177, 189 (1961)).

2. *See id*.

3. *See generally* Glenn M. Karisch, *2007 Legislative Update: Summary of Changes Affecting Probate, Guardianship and Trust Law* 8-12 (2007), *available at* www.texasprobate.com/07leg/2007update.pdf (last visited Oct. 15, 2008) (discussing the potential problems that may arise from the current state of the Texas Trust Code—namely the issue involving the trustee not having a clear definition of what the trustee's duties actually entail).

compounded by the Texas legislature's inability to establish a bright-line standard on the form of disclosure a trustee is required to give a beneficiary.[4] The law's lack of clarity in regards to trustee disclosure has left the trustee in the precarious position of not knowing when information warrants disclosure, and, therefore, potentially causing the trustee to fail to disclose pertinent information and exposing the trustee to a host of libelous predicaments.[5]

As a general matter, the crux of the trustee's duties lies in the effective administration of the trust for the benefit of the beneficiary.[6] A key component in accomplishing this duty is disclosing pertinent information to the beneficiary.[7] Therefore, in executing this pivotal duty, the trustee must have clear and detailed guidelines on what information is considered pertinent.[8] Otherwise, the trustee must make blind guesses in regards to tasks that are central to the trustee's fiduciary duties to the beneficiary (e.g., disclosure).[9]

A brief time-based trilogy will outline the evolution of the trustee's duty of disclosure in Texas. Prior to January 1, 2006, a trustee had a common law duty to disclose information to the beneficiary either if the beneficiary requested information or if material facts known to the trustee would affect the beneficiary's rights.[10] The common law duty, however, did not always provide for a clear application because "[t]here was no agreement on exactly what the common law duty [was] and how far it reache[d]."[11]

In an attempt to remedy the common law conundrum, the 2005 Texas legislature decided to codify the common law duty of disclosure by enacting Trust Code section 113.060.[12] This section provided that the trustee had a duty to keep the beneficiaries "reasonably informed" regarding the trust administration and the material facts necessary for the beneficiaries to protect their interests.[13] At the same time, the legislature also enacted Trust Code section 111.0035 which authorized the settlor to limit this duty to inform but only if the beneficiary was either: (1) under age twenty-five or (2) not eligible for current distribution or for a distribution if the trust were to terminate now.[14] Immediately, however, the codification of the duty to inform raised significant

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4. *See id*.

5. *See* Karisch *supra* note 3, at 10.

6. Huie v. DeShazo, 922 S.W.2d 920, 924 (Tex. 1996); Trostle v. Trostle, 77 S.W.3d 908, 914 (Tex. App.—Amarillo 2002, no pet.).

7. *Trostle*, 77 S.W.3d at 914.

8. *See* Karisch, *supra* note 3, at 10-11.

9. *See id.*; *see also* William D. Pargaman, *2005 Year in Review*, 69 TEX. B.J. 43, 43-45 (2006) (discussing the concerns around the current duty of disclosure to a beneficiary and stating that there needs to be some form of clarification regarding this duty of disclosure).

10. Montgomery v. Kennedy, 669 S.W.2d 309, 313 (Tex. 1984) (stating that a trustee has a "duty of full disclosure of all material facts . . . that might affect [a beneficiary's] rights").

11. Karisch, *supra* note 3, at 12.

12. *See* TEX. PROP. CODE ANN. § 113.060 (Vernon Supp. 2005).

13. *Id.*

14. *Id.* § 111.0035(b)(5)(A), (b)(5)(c).

concerns for trustees.[15] One major concern was the broad subjective language used in the statute (e.g. what does "reasonably" mean).[16] Another major concern was whether the beneficiaries needed to be told about all trustee actions, even day-to-day activities, because notice of virtually all actions may be necessary if the beneficiaries wanted to protect their interests.[17] These problems and others were triggered by the way the legislature carved section 113.060, a very short and undetailed provision, out of Uniform Trust Code section 813, which includes an extensive explanation of the duty and how it may be satisfied.[18]

In an effort to alleviate the confusion, the 2007 legislature repealed the statutory duty (Trust Code Section 113.060) and restored the common law duty.[19] The change was intended to address concerns regarding potentially overbroad judicial interpretations of the scope of the statutory duty to keep beneficiaries informed.[20] In essence, the 2007 legislature attempted to resurrect the common law duty to keep a beneficiary informed that existed prior to January, 1, 2006.[21] However, under new Trust Code section 111.0035(c), the settlor may limit the duty to keep the beneficiary informed under the following conditions: (1) the trust is revocable; (2) the beneficiary is under age twenty-five; or (3) the beneficiary is not eligible for current distributions or a distribution if the trust were to terminate now.[22]

Therefore, the Texas legislature has come full circle over the past few years with its enactment, repeal, and reenactment of the common law duty of disclosure.[23] It would seem that all the legislative revamping would eventually provide a workable solution for trustees. However, the exact opposite has happened and trustees are as confused as ever in regards to what information warrants disclosure. The law's lack of clarity has resulted in trustees being more prone to innocently breaching their fiduciary duties.

This comment will analyze the evolution and current state of the Texas trustee's duty of disclosure. More specifically, this comment will focus on how the current duty of disclosure has exposed the trustee to unjustified liability. Part II presents a hypothetical that illustrates the difficulties that a trustee faces while performing disclosure duties under the current Texas trust law.[24] Part III defines and discusses the two competing theories of the duty of disclosure,

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15. Karisch, *supra* note 3, at 11.
16. *Id.* at 11-12.
17. *Id.* at 9.
18. *Id.*
19. Act of June 16, 2007, 80th Leg., R.S. ch. 451, § 21, 2007 Tex. Gen. Laws 808 [hereinafter Act of June 16, 2006]. ("The common-law duty to keep a beneficiary informed that existed immediately before January 1, 2006, is continued in effect.").
20. Karisch, *supra* note 3, at 11.
21. Act of June 16, 2007, *supra* note 19.
22. TEX. PROP. CODE ANN. § 111.0035(c) (Vernon Supp. 2008).
23. *See* discussion *supra* notes 12-22.
24. *See* discussion *infra* Part II.

affirmative and passive.[25] Part IV discusses the general history of Texas trust law and its duty of disclosure requirement.[26] Part V specifically focuses on why Texas's duty of disclosure requirement has failed.[27] Part VI suggests solutions to remedy the current disheveled state of the duty of disclosure.[28] In summation, this comment critically discusses the confusion that currently plagues Texas's disclosure standard and suggests potential solutions to remedy the failing standard.

II. IT IS NOT EASY BEING A TRUSTEE

The following hypothetical illustrates a situation in which a trustee is subjected to unwarranted liability for failing to abide by Texas's disheveled disclosure standard.

Tony Trustee and his brother Bob Trustee were named by their father, who is now deceased, as co-executors of a will in favor of their younger sister Sarah. However, due to a business relocation, Bob moved away from Texas—where the hypothetical takes place—and delegated the management of the estate and administration of Sarah's trust to Tony. The will stated that Sarah would be a life beneficiary and that Sarah's children would eventually receive whatever remained of the corpus of the trust, which included a ranch and personal property. The will also provided some specific bequests to Sarah, mainly twenty-percent of the father's stock in Realty Company. The Realty Company's main asset was a building in downtown Houston called the Central Tower. However, the Central Tower was under a disadvantageous long-term lease that made the Realty Company's cash flow negative. Therefore, throughout the existence of the trust, Sarah complained bitterly to her brother about the unprofitable trust. However, outside the unprofitable lease situation, Sarah was satisfied with Tony's performance as her trustee because Tony never failed to dutifully comply with Sarah's requests.

In an effort to appease Sarah, Tony decided to sell a small tract of land on the ranch to generate funds into the trust. In preparation for the sale, Tony hired various surveyors to calculate the value of the land. A geologist performed one of the surveys to determine if the land contained valuable minerals. In performing the survey, the geologist searched all areas within the generally accepted industry standard depth of 200 feet below the surface of the land. After performing the survey, the geologist concluded that the land was barren of any type of valuable mineral.

After acquiring the surveys, Tony calculated a reasonable value of the land and sold it to Lou Lucky for $40,000. Following the sale, Lou, who was a former geologist, decided to perform his own evaluation on the land's bearing

25. *See* discussion *infra* Part III.
26. *See* discussion *infra* Part IV.
27. *See* discussion *infra* Part V.
28. *See* discussion *infra* Part VI.

of valuable minerals. Lou was an overly thorough geologist and searched all areas 300 feet below the surface. Lou's thoroughness paid off because Lou struck an oil pocket approximately 290 feet below the surface and the land's value skyrocketed to $1 million.

Needless to say, Sarah was infuriated when she discovered that Tony sold the oil-filled tract of land. Sarah claimed that if she had known about the sale she would have stopped it and prevented the loss of such a lucrative piece of land. Sarah further asserted that Tony's failure to inform her caused her to suffer damages equal to the amount of lost profits, or at least some combination of the amount of capital gains, the taxes paid in connection with the transaction, and the interest lost on the amount of those taxes. At a bare minimum, Sarah believed that she was entitled to a reduction or refund in the amount of the trustee's compensation. Furthermore, Sarah alleged that Tony had breached his duty of good faith by failing to inform her about the sale.

In the lawsuit Sarah will likely bring against Tony, Tony will defend the sale by arguing that he dutifully complied with the passive duty of disclosure which requires the trustee to disclose information only upon a beneficiary's request.[29] Tony will argue that, because he complied with all of Sarah's requests, he should be free of any liability.[30] In other words, Tony will claim that common law does not create an affirmative duty to provide information to a beneficiary before a beneficiary's request.

Although it may appear obvious, this situation could have been circumvented if Tony had disclosed all information that he deemed to be relevant.[31] One commentator gave this advice: "Disclose everything the trustee can think of to disclose, and disclose it to every beneficiary that can be located, regardless of remoteness."[32] Compliance with the previously mentioned advice may be sound advice for corporate trustees because they can set up their computers to generate additional trust accounting statements and disseminate other required information.[33] However, even if a corporate trustee follows this advice there would still be a chance that the trustee may let a piece of vital information slip through the cracks or forget to disseminate information to a

29. *See* C. Boone Schwartzel, *A Texas Trustee's New Duty to Inform: Beware of the Creeping Uniform Trust Code*, 12 ST. B. TEX. ANN. ADVANCED EST. PLAN. STRATEGIES COURSE CH. 5.4, at 7-9 (2006). This article discusses two of the leading Texas Supreme Court cases Huie v. DeShazo, 922 S.W.2d 920 (Tex. 1996) and Montgomery v. Kennedy, 669 S.W.2d 309 (Tex. 1984) involving trusts, and this article argues that both cases should be interpreted as complying with the passive duty of disclosure as opposed to the affirmative duty of disclosure. *Id.*; Karisch, *supra* note 3, at 2; RESTATEMENT (SECOND) OF TRUSTS § 173 cmt. c (2006) (stating that under the general common law duty of disclosure—passive duty—a trustee needs only to disclose information upon a reasonable and timely request by the beneficiary); *see also* Shannon v. Frost Nat. Bank, 553 S.W.2d 389, 993 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.) (stating that a passive duty of disclosure should be applied between a trustee and a beneficiary).

30. *See* RESTATEMENT (SECOND) OF TRUSTS § 173 cmt. c.

31. *See* Karisch, *supra* note 3, at 12.

32. *Id.*

33. Schwartzel, *supra* note 29, at 10.

remote beneficiary, thus exposing the trustee to liability.[34] On the other hand, compliance by individual trustees could prove to be more challenging because "individual trustees are accustomed to accounting (if at all) only to the primary beneficiary of a trust" but normally not to a remote beneficiary.[35] Furthermore, compliance with the "disclose everything under the sun" idea would exact a great deal of time out of the individual trustee.[36] Tony will assert that an accurate reading of past precedent establishes the passive duty of disclosure, and that implementing the passive duty of disclosure would alleviate the previously mentioned practicality concerns for trustees.[37]

In contrast to Tony's argument, Sarah will argue that the court should impose an affirmative duty of disclosure upon Tony, thereby holding Tony culpable for failing to inform Sarah of the sale.[38] In short, an affirmative duty of disclosure requires the trustee to disclose information regardless of a request by the beneficiary.[39] Sarah will argue that Tony's failure to disclose the sale amounted to a breach of Tony's fiduciary duty to affirmatively disclose information regardless of a beneficiary's request.[40] Sarah will base this assertion on interpretations of the Texas common law, including precedent from *Montgomery v. Kennedy*, which has been interpreted to impose an affirmative duty of disclosure upon a trustee.[41] In *Montgomery v. Kennedy*, the Texas Supreme Court held that the defendant trustees owed the beneficiaries a fiduciary duty of full disclosure of all material facts, e.g. a lease.[42] Sarah will argue that Tony's failure to disclose the lease was fraudulent concealment and a breach of his fiduciary duties.

This situation forces Texas courts to decide whether to apply the passive (Tony) or the affirmative (Sarah) duty of disclosure.[43] Many trust experts argue that the Texas common law and its precedent impose a passive duty of disclosure on the trustee.[44] Other trust experts take the opposing view and interpret the Texas common law as imposing an affirmative duty of disclosure upon a trustee.[45] Despite the lack of clarity in the Texas common law's duty of disclosure, Texas courts have sat quietly in the background and have failed to clarify the issue.[46]

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34. *Id*.
35. *Id*.
36. *See id*. at 9-10.
37. *See id*.
38. *Compare id. with* Scwartzel, *supra* note 29, at 7-8.
39. *See* Karisch, *supra* note 3, at 8-9
40. *See id*.
41. *See id.* at 9-10.
42. Montgomery v. Kennedy, 669 S.W.2d 309, 313 (Tex. 1984).
43. *See generally* Schwartzel, *supra* note 29, at 7-9 (analyzing *Montgomery* and discussing valid arguments for imposing the affirmative and the passive duty of disclosure; however, concluding that the passive duty of disclosure is the correct reading).
44. *Id.* at 4.
45. Karisch, *supra* note 3, at 10-12.
46. *See id.* at 11.

This scenario represents the all-too-common problem that a Texas trustee encounters in performing the trustee's duty of disclosure. The problem derives from the Texas legislature's inability to clearly define what duty of disclosure is warranted and the Texas courts' failure to set a clear precedent in the common law.[47] Consequently, this uncertainty poses a severe obstacle for the trustee, forcing the trustee to guess which form of disclosure is warranted in each specific situation.[48] The failure of the legislature to establish a uniform disclosure standard will potentially cause a trustee to mismanage the duties under the trust, breach fiduciary duties, and expose the trustee to a wide array of liabilities.[49] Therefore, the legislature should resolve this situation by enacting a transparent and clear set of disclosure rules for a trustee.[50] The Texas legislature has attempted to establish a clear set of disclosure rules, but through the 2007 legislative session, the duty of disclosure between a trustee and a beneficiary remains unclear.[51]

III. THE CRITICAL DISTINCTIONS BETWEEN AN AFFIRMATIVE DUTY OF DISCLOSURE AND A PASSIVE DUTY OF DISCLOSURE

An affirmative duty of disclosure requires a trustee to provide information regardless of request, as opposed to a passive duty of disclosure which arises only upon the beneficiary's request.[52] Comparing an affirmative duty of disclosure and a passive duty of disclosure is like comparing night and day.[53] However, there is a similarity between the two contrasting theories.[54] For instance, both duties attempt to support public policy concerns involved in keeping the beneficiary reasonably informed about the trust; however, this is basically the extent of the two theories' similarity.[55]

The passive duty of disclosure, the general common law duty of disclosure, places:

> The trustee . . . under a duty to the beneficiary to give him *upon his request* at reasonable times complete and accurate information as to the nature and amount of the trust property, and to permit him or a person duly authorized by

47. *Id.*

48. *Id.* at 10-12.

49. BEYER, *supra* note 1, at 165-68 (discussing the various remedies that a beneficiary may be afforded against the trustee for mismanaging the trust, including money damages, lost value, lost profits, removal, injunction, and criminal sanctions).

50. Karisch, *supra* note 3, at 10.

51. *See id.* at 10-11.

52. *Id.* at 10.

53. *See* Scwartzel, *supra* note 29, at 10-12.

54. Karisch, *supra* note 3, at 9-10.

55. *Id.*

> him to inspect the subject matter of the trust and the accounts and vouchers and other documents relating to the trust.[56]

In other words, a "trustee is under a duty to permit an accountant to examine the trust securities, accounts, vouchers, and other documents if the beneficiary so requests."[57] Therefore, under the passive duty of disclosure, a trustee is only required to disseminate information upon a beneficiary's request.[58]

In contrast, under the affirmative duty of disclosure, a trustee is required to disclose information to a beneficiary regardless of a beneficiary's request or the beneficiary's remote location.[59] Restated, the affirmative duty of disclosure forces a trustee to proactively disclose information (not necessarily material facts) regardless of a request from the beneficiary.[60] Therefore, the critical distinction between the two theories hinges on whether the beneficiary has requested some form of disclosure (e.g. inspection, accounting, or general disclosure).[61]

Texas, through its history of legislation and court decisions, has attempted to bring clarity to the duty of disclosure between a trustee and a beneficiary. However, every attempt has been riddled with avid critics espousing multiple interpretations of the law that eventually subjected the legislation to repeal.[62]

IV. BACKGROUND HISTORY: THE ORIGINS OF THE CONFUSION

It is very apparent that the Texas legislature has overhauled Texas trust statutes lately.[63] In many respects, this overhaul has not been a beneficial change, but instead a cycle of confusing legislative mandates that have forced trustees to be mind-readers in respect to discerning the proper means of disclosure.[64] The legislature has made this most evident over the past four to five years, and this overhaul—as per the 2007 Texas legislative session—seems to be escalating.[65] However, not all the blame should be placed upon the Texas

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56. RESTATEMENT (SECOND) OF TRUSTS § 173 (2006) (emphasis added).

57. *Id*. at cmt. a.

58. *See* Corpus Christi Bank & Trust v. Roberts, 587 S.W.2d 173, 179 (Tex. App.—Corpus Christi 1979, no writ).

59. Schwartzel, *supra* note 33, at 1-4.

60. Karisch, *supra* note 3, at 9-10.

61. *See* discussion *supra* notes 56-60.

62. Kara Blanco, *The Best of Both Worlds: Incorporating Provisions of the Uniform Trust Code Into Texas Law*, 38 TEX. TECH L. REV. 1105, 1114-18 (2006) (discussing the history of various enactments by the Texas Legislature in regards to disclosure issues in a trustee beneficiary relationship and criticisms of these enactments).

63. *See* Karisch, *supra* note 3, at 10.

64. *Id*. at 9-11. In Texas, there is currently a state of confusion regarding the proper means of disclosure between a trustee and a beneficiary because of the lack of a clearly defined disclosure standard. *Id*. This confusion has the potential to cause confused trustees to mismanage the trust and expose themselves to liability. *Id.*

65. *Id.*

legislature.[66] Texas courts should also be allocated blame for their failure to remedy the confusing Texas disclosure standard by establishing clear precedent.[67] Therefore, the Texas legislature and courts, throughout the last four to five years, have implemented and interpreted a duty of disclosure statute that lacks clarity and leaves trustees susceptible to unwarranted liability.[68]

A. History of the Texas Legislature's Implementation of Trust Statutes

To understand the origin and driving impetus behind the Texas Trust Code's recent overhaul, which has caused uncertainty regarding the disclosure standard, one must first understand the Texas Trust Code's entanglement with the Uniform Trust Code (UTC).[69] Understanding the integration of the Texas Trust Code with the UTC enhances comprehension of the various issues surrounding the current state of the Texas Trust Code (e.g., the duty of disclosure).[70]

Texas was a pioneer state in codifying its trust law; other states, as well as the drafters of the UTC, have modeled their trust laws after Texas's.[71] The Texas Trust Act of 1943 substantially codified Texas trust law.[72] Another benchmark occurrence in Texas trust law came in 1984 when Texas law underwent another major change with the enactment of the Texas Trust Code, a modernization of the Texas Trust Act that is still in effect today.[73]

In contrast to Texas's deep-rooted trust law, the UTC is relatively new (2000), and only twenty states and the District of Columbia have enacted it.[74] The UTC was created by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in an attempt to bring clarity to the

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66. *Id.*

67. Blanco, *supra* note 62, at 1118-19; *see* Karisch, *supra* note 3, at 9-11. Texas courts have failed to exclusively adopt either the passive or affirmative duty of disclosure. *Id*. This is most evident in viewing the Texas Supreme Court's inability to adopt a bright-line rule in *Huie v. DeShazo*, which arguably imposes an affirmative duty of disclosure. Huie v. Deshazo, 922 S.W.2d 920, 923-25 (Tex. 1996).

68. Blanco, *supra* note 62, at 1117-19.

69. *Id*. at 1114-19 (discussing the entanglement of the UTC and Texas Trust Code).

70. Schwartzel, *supra* note 29, at 3-5. There is a great deal to fear with the entanglement of the "creeping" UTC with the Texas Trust Code. *Id*. at 3-4. This fear has been validated through watching other states struggle with implementing the UTC into their own respective trust codes. *Id*. at 4.

71. BEYER, *supra* note 1, at 7-8.

72. *See id*.

73. *See id*.

74. UTCproject.org, http://www.utcproject.org/utc/DesktopDefault.aspx (last visited Oct. 15, 2008). The following states have adopted the Uniform Trust Code: Kansas, Nebraska, Wyoming, New Mexico, Utah, Maine, Tennessee, New Hampshire, Missouri, Arkansas, Virginia, South Carolina, Oregon, North Carolina, Alabama, Florida, Ohio, Pennsylvania, North Dakota, and Arizona, as well as the District of Columbia. *Id*. Arizona enacted the Uniform Trust Code but repealed the Uniform Trust Code's enactment merely one year later in April 2004. Michelle W. Clayton, *Uniform Trust Code 2005: Legislative Process, Enactment Prospects and Healthy Debates*, E-State 1 (A.B.A. REAL PROP. PROB. & TR. L. SEC.), Dec. 2004, *available at* http://www.abanet.org/rppt/publications/estate/2004/2/UTC-clayton.pdf. In 2008, the Arizona legislature once again approved a version of the Uniform Trust Code. H.B. 2806, 48th Leg., 2nd Reg. Sess. (Ariz. 2008).

disconnected and muddled standards that comprise trust law in the states.[75] In accomplishing this formidable task, NCCUSL attempted to assemble the first comprehensive codification of trust law.[76] In compiling the UTC, NCCUSL considered the comprehensive trust statutes that existed in California, Georgia, Indiana, and Texas.[77] However, the UTC was not enacted without meeting its fair share of criticism in several states, and NCCUSL has done its best to silence critics with counterarguments and staunch support of the UTC.[78]

When the adoption of the UTC came up in Texas, the Real Estate, Probate, and Trust Law Section of the State Bar of Texas (REPTL) conducted a study of the UTC and determined that Texas should not completely replace the Texas Trust Code with the UTC.[79] REPTL believed that since the Texas Trust Code had been in existence fifteen years longer than the UTC, the Texas Trust Code would be more "familiar to Texans, [and be] superior to the UTC in many ways and should be retained."[80] However, REPTL recommended that the Texas legislature adopt certain UTC provisions that it found to be apt for integration into the Texas Trust Code.[81]

The 2003 and 2005 Texas legislatures responded by incorporating several of REPTL's suggestions into the Texas Trust Code.[82] For instance, in 2003, the Texas legislature adopted the Uniform Prudent Investor Act and the Uniform Principal and Income Act, which were both more or less "stand alone" acts that were newly enacted into the UTC.[83] Both acts smoothly transitioned into the Texas Trust Code because the acts harbored a great deal of similarities to the Texas Trust Code, unlike many of the other UTC provisions.[84] With an apparent sense of confidence from a mere two UTC enactments from the 2003 legislative session, the 2005 legislature enacted House Bill 1190, by far the largest enactment of UTC law into the Texas Trust Code.[85]

Despite the apparent compatibility of the Texas Trust Code and the UTC from the 2003 legislation, critics in Texas urge against the integration of the

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75. *See* Blanco, *supra* note 62, at 1106.

76. Robert T. Danforth, *Article Five of the UTC and the Future Creditors Rights in Trusts*, 27 CARDOZO L. REV. 2551, 2553-54 (2006).

77. *Id*.

78. *Id*. at 2554-55. Numerous critics, mainly from Arizona and Colorado, have expressed adamant disapproval of the UTC by claiming that the UTC does not afford the everyday practitioner the flexibility needed to administer a trust. *Id*. at 2554-56. Additionally, another point of contention in the UTC has been its effects on eroding the common law rights of creditors. *See id*. at 2555. Despite its critics, the NCCUSL continues to support the UTC and the UTC's ultimate goal of bringing clarity to trust law. *Id*. at 2552-55.

79. Glenn M. Karisch, *2005 Legislative Update: Changes in Trust, Probate, and Guardianship Law*, *Tex. Prob.* 2, http://texasprobate.com (follow "Legislation" hyperlink; then follow "2005" hyperlink; then follow "2005 Texas Legislative Update" hyperlink) (last visited Oct. 15, 2007).

80. *Id*.

81. *Id*.

82. *Id*.

83. Blanco, *supra* note 62, at 1106-11.

84. *Id*. at 1106.

85. *Id*. at 1111.

UTC with the Texas Trust Code.[86] One critic characterized the UTC as "creeping" into Texas Trust law and stated the following concerns:

> (1) as a whole the UTC is not particularly well written; (2) the UTC attempts to address subject matter which is not essential or perhaps is best left to case law and the common law; (3) in some places the UTC goes too far in empowering courts to override settlor intentions; and (4) most importantly, the UTC contains many "reforms" of the law which may or may not constitute good public policy (and certainly deserve careful consideration and debate before they are adopted).[87]

In sum, "Texas lawyers generally have done a much better job in drafting legislation than NCCUSL because Texas lawyers generally have sought to codify, rather than reform, trust laws absent a compelling public policy reason for change."[88]

Although there were many changes in Texas trust law as per the 2005 Texas legislative session, this comment will focus on the relevant provisions regarding a trustee's duty of disclosure.

B. The Evolution of the Texas Trust Code's Duty of Disclosure Element

Prior to the 2005 enactment of section 113.0035 of the Texas Property Code, which defined the unalterable terms of Texas trust agreements, statutory trust laws were construed as default rules and were only relevant when the actual trust terms were silent.[89] Therefore, prior to 2005, a settlor could circumvent most statutory rules by including specific trust terms to override the statutory laws.[90] This caused considerable confusion amongst Texas courts and produced questionable—if not flat out wrong—verdicts.[91]

The keynote case that gave impetus to the 2005 legislation involving unalterable terms was *Texas Commerce Bank v. Grizzle*.[92] In *Grizzle*, the Texas Supreme Court afforded settlors a broad range of authority to modify default provisions in the Texas Trust Code by allowing the trustee to designate a wide range of terms that would override the statutory rules.[93] The settlor in *Grizzle*

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86. Schwartzel, *supra* note 29, at 7-10. Uniform acts can be beneficial because Texas lawyers and Texas courts will be able to gain beneficial insight into decisions on trust laws from other states. *Id*. However, "Uniform Acts are only that—'uniform'—and are not always better." *Id*. at 3. "Moreover, many of the newer Uniform Acts tend to reform, rather than simply codify, existing law." *Id*.

87. *Id.* (citations omitted).

88. *Id.*

89. *See* BEYER, *supra* note 1, at 109, 117-18, 178.

90. *See id*. at 109.

91. *See generally* Karisch, *supra* note 3, at 10-11 (discussing the Texas Supreme Court's analysis and conclusion in *Texas Commerce Bank, N.A.* v. *Grizzle*, which arguably could be interpreted to allow a trustee to exculpate herself from liability).

92. *See id*.

93. Tex. Commerce Bank, N.A. v. Grizzle, 96 S.W.3d 240, 249 (Tex. 2002).

established an exculpatory clause that overrode any statutory rule that provided the beneficiary with a remedy against the trustee for a breach of good faith.[94] While the Texas Supreme Court attempted to relegate the exculpation clause in *Grizzle* to only negligent conduct, "in some minds the opinion raised the possibility that the Court may find that willful and grossly negligent conduct could be exculpated by the settlor."[95] If so, the *Grizzle* decision would be in direct conflict and contrary to long-standing trust principles, including the Restatement of Trusts.[96] In response to this dilemma, the Texas legislature enacted section 111.0035 in 2005.[97] Section 111.0035 was drawn from the UTC and established a list of unalterable terms under a trust agreement that could not be overridden.[98] In theory, section 111.0035, through its unalterable terms, would prevent opportunistic trustees from overreaching and insulating themselves from liability.[99] Therefore, during the 2005 legislative session, Texas adopted many of the UTC's mandatory terms.[100]

One of the more contentious mandatory terms in the UTC was section 813, which described the trustee's duty of disclosure.[101] Despite the controversy surrounding section 813, the 2005 Texas legislature adopted a form of section 813 by enacting section 113.060 of the Texas Property Code.[102] Section 113.060 required trustees, whether requested or not, to affirmatively disclose material information to the beneficiary regarding the trust.[103] In drafting section 113.060, the legislature attempted to draw from section 813 of the UTC and from the Texas common law, namely *Montgomery v. Kennedy*.[104] However, integrating the Texas common law and section 813 of the UTC proved to be more difficult than anticipated by the Texas legislature.[105]

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94. *Id.* at 249-51.

95. Karisch, *supra* note 3, at 11.

96. *Id.*

97. TEX. PROP. CODE ANN. § 111.0035 (Vernon 2007); *see also* Karisch, *supra* note 3, at 9-10.

98. *See generally* David M. English, *Representing Estate and Trust Beneficiaries and Fiduciaries: The Uniform Trust Code (2000)*, AM. LAW INST.—A.B.A. CONTINUING LEGAL EDUC. COURSE OF STUDY (July 2005), *available at* SL003 ALI-ABA 1, *16 (Westlaw).

99. *See id.*

100. § 111.0035.

101. *See generally* Ashlea Ebeling, *The Great Trust Rebellion*, FORBES, Aug. 16, 2004, at 122 (discussing how the Arizona Legislature repealed the UTC by citing privacy concerns as the major impetus behind the decision); *see also* Robert L. Loftin, *The Alabama Trust Code*, 67 ALABAMA LAWYER 359, 364-65 (2006) (discussing the difficulties that Alabama faced while enacting section 813 of the UTC). However, Alabama did not adopt section 813 of the UTC as enacted by the NCCUSI but hedged off section 813's language to make it more apt for incorporation into Alabama's Trust Code. Loftin, *supra*, at 364-65.

102. *See* TEX. PROP. CODE ANN. § 113.060; *see also* Blanco, *supra* note 67, at 1118.

103. § 113.060.

104. *See* Karisch, *supra* note 3, at 11 (discussing how the Texas Supreme Court decision arguably imposes an affirmative duty of disclosure); *see also* Blanco, *supra* note 67, at 1118.

105. *See* Karisch, *supra* note 3, at 11.

V. UNIFORM TRUST CODE + TEXAS COMMON LAW = DISCLOSURE CONFUSION

From here, this comment will discuss section 813 of the UTC and the Texas common law in their own respective lights. This will illuminate the differences between the two conflicting pieces of law and demonstrate how these differences correlated into the repeal of the 2007 legislation (§ 113.060) that attempted to infuse these two pieces of law to remedy the disclosure confusion.

A. Uniform Trust Code § 813

The most discussed issue in drafting the UTC was the applicability and extent to which a settlor could waive the mandatory disclosure provision under section 813.[106] Under this contentious provision, a trustee may waive most notice requirements; however, the trustee's strict obligation to affirmatively disclose information to a qualified beneficiary is not waivable.[107] UTC section 103(13) defines a qualified beneficiary as:

> [A] beneficiary who, on the date the beneficiary's qualification is determined:
>
> (A) is a distributee or permissible distributee of trust income or principal;
>
> (B) would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in

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106. Loftin, *supra* note 101, at 364; *see* UNIF. TRUST CODE § 813 (2005). Section 813 of the UTC provides the following:

> (a) A trustee shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests. Unless unreasonable under the circumstances, a trustee shall promptly respond to a beneficiary's request for information related to the administration of the trust.
>
> (b) A trustee:
>
> (1) upon request of a beneficiary, shall promptly furnish to the beneficiary a copy of the trust instrument;
>
> (2) . . . shall notify the qualified beneficiaries of the acceptance and of the trustee's name, address, and telephone number;
>
> (3) . . . shall notify the qualified beneficiaries of the trust's existence, of the identity of the settlor or settlors, of the right to request a copy of the trust instrument, and of the right to a trustee's report; and
>
> (4) . . . shall notify the qualified beneficiaries in advance of any change in the method or rate of the trustee's compensation.
>
> (c) A trustee shall send to . . . qualified or nonqualified beneficiaries who request it, at least annually and at the termination of the trust, a report of the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation [detailed list of other items that must be provided refer to section 813] . . .
>
> (d) A beneficiary may waive the right to a trustee's report or other information otherwise required to be furnished under this section . . . [and] may withdraw a waiver previously given. *Id.*

107. Loftin, *supra* note 101, at 365.

> subparagraph (A) terminated on that date without causing the trust to terminate; or
>
> (C) would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.[108]

A trustee is under an affirmative duty to proactively seek out qualified beneficiaries and disclose pertinent information to them.[109] This affirmative duty of disclosure under section 813 must be adhered to even if the trustee had no previous obligation to respond to the beneficiary in the first place.[110] This also holds true even if the state's common law imposes no affirmative duty of disclosure.[111] If a trustee fails to affirmatively disclose information to a qualified beneficiary under section 813, a host of penalties may be inflicted upon the trustee.[112]

Subsection (a) of section 813 requires a trustee to keep a qualified beneficiary reasonably informed of information that will enable the trustee to protect her interests.[113] Furthermore, this prevents opportunistic trustees from acting in bad faith (e.g., self dealing) behind the qualified beneficiary's back.[114]

In sum, UTC section 813 went against common law precedent and required trustees to affirmatively disclose information.[115] However, section 813 made this relatively manageable for trustees because the UTC confined the group of beneficiaries that warranted affirmative disclosure to a manageable group (qualified beneficiaries).[116] Therefore, the UTC eased the transition of the contentious disclosure requirement by imposing a manageable group of beneficiaries upon the trustee, which pacified critics of the formidable disclosure standard.[117]

B. The Texas Common Law Duty of Disclosure

The Texas common law duty of disclosure is similar to section 813 of the UTC in one very salient respect: both are highly contentious pieces of law.[118] Over the past twenty years in Texas, academia and various courts have held

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108. UNIF. TRUST CODE § 103(13) (2005).
109. *Id.*
110. *Id.*
111. *Id.; see also* UNIF. TRUST CODE § 105.
112. *See* Schwartzel, *supra* note 29, at 7-9.
113. UNIF. TRUST CODE § 813 cmt. a.
114. *Id.*
115. *See* discussion Part III.
116. Karisch, *supra* note 3, at 9-10. This article, in part, analyzed section 813 of the UTC and how the section failed to integrate into the Texas Trust Code. *Id*. Part of the reason section 813 of the UTC failed was because the Texas Trust Code did not employ the same terminology (e.g., qualified beneficiary) as the UTC. *Id.* at 10.
117. *See* UNIF. TRUST CODE § 813.
118. *See* discussion *supra* note 29.

heated scholarly debates on what exactly the Texas common law duty of disclosure represents.[119]

Proponents of imposing an affirmative duty of disclosure contend that Texas Supreme Court cases *Montgomery v. Kennedy* and *Huie v. DeShazo* both suggest that the Texas common law requires the affirmative duty of disclosure.[120] However, unlike the UTC, Texas does not employ any limiting language (e.g. qualified beneficiary) in its code; therefore, trustees would be faced with the formidable task of disclosing information to every beneficiary, regardless of remoteness.[121] Conversely, proponents of a passive duty of disclosure contend that *Montgomery v. Kennedy* and *Huie v. DeShazo* both suggest that the Texas common law requires the passive duty of disclosure, whereby a trustee's affirmative duty of disclosure only arises upon a request from a beneficiary.[122] This contention is bolstered by not only the widely held view under section 173 of the Restatement (Second) of Trusts,[123] but also by the San Antonio Court of Appeals in its *Shannon v. Frost National Bank* decision.[124] In this decision, the court implied there was not a duty to disclose by stating that:

> [I]t is well settled that a trustee owes a duty to give to the beneficiary upon request complete and accurate information as to the administration of the trust. Here, there was no specific request for information by plaintiff concerning the nature of the investment of the trust funds made by Bank.[125]

Proponents of the passive duty assert that *Shannon* clearly indicates a trustee is under no duty to disclose information to the beneficiary unless a request is made.[126]

Therefore, the following two incongruous factors between section 813 and Texas common law played a key role in repealing the 2007 disclosure legislation: unlike the UTC, Texas failed to categorize its beneficiaries based on their interest, and, unlike the Texas version, the UTC attempts to state what type of disclosure meets its standard.[127] Subsequent to the repeal, prominent trust officers and attorneys began to think of ways to amend the legislation.[128]

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119. *Compare* Montgomery v. Kennedy, 669 S.W.2d 309 (Tex. 1984) (imposing an affirmative duty of disclosure upon a trustee) *with* Schwartzel, *supra* note 29 (arguing that the Texas common law only imposes a passive duty of disclosure upon a trustee).

120. *See* Karisch, *supra* note 3.

121. *Id.*

122. Schwartzel, *supra* note 33.

123. RESTATEMENT (SECOND) OF TRUSTS § 173 cmt. c (2006).

124. Shannon v. Frost Nat'l Bank, 533 S.W.2d 389, 393 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.) (stating indirectly that courts should apply a passive duty of disclosure between a trustee and a beneficiary).

125. *Id.* at 393 (citations omitted).

126. *Id.* at 11.

127. *See id.* at 11-12.

128. *See id.* at 10-12.

But history repeated itself, and, due to contrasting views, no remedial measure could be established.[129] However, one clear consensus could be agreed upon: everyone believed that Texas was better off before the 2007 disclosure legislation.[130] Consequently, Texas's disclosure standard reverted back to common law, which failed to espouse a clear standard, thereby presenting a grave problem to trustees.[131]

Despite the controversy and confusion that currently surrounds the disclosure standard, Texas expects trustees to abide by a standard that the courts and legislature have refused to determine.[132] If the trustee fails to abide by the nonexistent standard, the trustee is not reprimanded with a warning but could face liability.[133]

VI. THE REMEDY: REQUIEM FOR THE DISCLOSURE CONFUSION

In formulating a remedy to clarify the confusing disclosure standard in Texas, there are many concerns to consider.[134] One of the main concerns is to find a happy medium between upholding policy considerations regarding beneficiaries rights to information and not inundating the trustee with overbearing disclosure duties.[135] Some states have opted not to establish a middle ground between policy considerations and feasibility for the trustee and have chosen one extreme or the other.[136] For example, the Ohio Trust Code primarily focuses upon promoting policy considerations concerning beneficiaries' rights to information, with little regard for the strain on the trustee.[137] In support of Ohio's decision, the UTC's drafting committee stated that "[w]hen in doubt, the UTC favors disclosure to beneficiaries as the being [sic] better policy."[138] In theory this is a very commendable policy consideration; however, the flaw in this method is that it forces the trustee to endure an excessive strain when completing the trustee's responsibilities.[139] The strain on the trustee results from having to report to every beneficiary,

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129. *Id*. at 12; *see* RESTATEMENT (SECOND) OF TRUSTS § 173 (2006).

130. Karisch, *supra* note 3, at 12.

131. *Id*.

132. *See id.*

133. *See* Schwartzel, *supra* note 29, at 7-9.

134. *See generally* Michael A. Ogline, *Notice Provisions of the Ohio Uniform Trust Code*, 15 OHIO PROB. L.J. 119 (2005) (discussing important policy issues of keeping beneficiaries reasonably informed regarding their trusts).

135. *Id*. at 120-124 (discussing how trustee's disclosure requirements can exact a great deal of time and finances out of the trustee).

136. *See id.*

137. *See id*. (discussing Ohio's expansion of information and beneficiaries that warrant affirmative disclosure, which was a substantial departure from prior Ohio trust law that afforded the trustee discretion).

138. Edward English, *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 67 MO. L. REV. 143, 199-200 n.2 (2002).

139. *See generally* Loftin, *supra* note 106, at 364-65 (discussing states that have eased the strain on trustee disclosure standards by limiting the class of beneficiaries who may request information).

regardless of remoteness, which is both costly and time consuming.[140] On the other hand, some states have primarily focused on easing the disclosure responsibilities on trustees by significantly limiting the beneficiary's rights to information.[141] This solution mitigates the trustee's disclosure responsibilities to a manageable level; however, this also tramples policy considerations concerning a beneficiary's right to information.[142]

Therefore, if neither extreme alone provides a workable solution, the best choice would be trying to find a happy medium that attempts to satisfy both extremes.[143] In attempting to balance these two extremes, compromises must be made by both the trustee and the beneficiary.[144]

The first resolution to this problem is to define what type of information warrants disclosure between the trustee and the beneficiary.[145] This would provide clearer lines for trustees to follow as they perform their duties, which would prevent the trustees from having to take blind guesses at what information warrants disclosure.[146] Furthermore, a bright-line rule would prevent trustees from incurring unwarranted liability for failing to abide by a nonexistent standard of what information requires disclosure.[147] In addition, this would provide beneficiaries with an understanding of what information is affirmatively owed to them, which would enable the beneficiaries to gauge situations in which they must make a request.[148] This would allow beneficiaries to see the areas where a trustee does not have to affirmatively disclose and to compensate by making requests for information.[149] Therefore, clearly defining what information warrants disclosure would preclude trustees from suffering through unwarranted liability, while at the same time enabling the beneficiary to deal on fairer terms.[150]

The second solution, which would require a compromise by both the trustee and the beneficiary, is to narrow the group of beneficiaries entitled to affirmative disclosure.[151] However, this is easier said than done. Unlike the UTC, the Texas Trust Code does not currently classify beneficiaries based on their interest.[152] Under current Texas law, every beneficiary, regardless of

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140. *Id*.

141. Frances H. Foster, *Privacy and the Elusive Quest for Uniformity in the Law of Trusts*, 38 ARIZ. ST. L.J. 713, 755-57 (2006).

142. *See id*.

143. *See id*. at 757-59 (discussing competing concerns that beneficiaries and trustees both espouse in regards to defining the proper means of disclosure).

144. *Id*.

145. *See generally* Karisch, *supra* note 3, at 11-12 (discussing the 2007 legislature's approach to defining a workable disclosure standard, which included defining what information requires disclosure).

146. *See id*.

147. *See id*.

148. *See id*.

149. *See* English, *supra* note 138, at 108.

150. *Id*.

151. *See* Loftin, *supra* note 101, at 364-65.

152. Karisch, *supra* note 3, at 10.

remoteness, is potentially entitled to affirmative disclosure.[153] This forces the trustee to endure overwhelming disclosure responsibilities.[154] However, if the Texas legislature narrowed the group of beneficiaries entitled to affirmative disclosure, the trustee's disclosure responsibilities would become more manageable.[155] Ideally, the classified beneficiary group would consist of beneficiaries who maintained a significant interest in the trust but would exclude beneficiaries who maintained merely a minor interest.[156] The UTC has accomplished this classification by employing the term qualified beneficiary, which represents beneficiaries who maintain a significant interest in the trust.[157]

Other states have corrected disclosure issues similar to Texas's predicament by either employing the UTC's terminology or hedging off the UTC's language to establish narrower terms.[158] For instance, Alabama narrowed the entitled beneficiary class by changing the language in section 813 of the UTC in regards to the term qualified beneficiaries to "current permissible distributees of income or principal of the trust," thus limiting the class of those beneficiaries entitled to affirmative disclosure.[159] Alabama's limiting language mitigates the disclosure constraints on a trustee while promoting policy concerns regarding informing significant beneficiaries about their trust.[160] Both the UTC and Alabama's narrowing terms provide clearer lines for trustees and beneficiaries. Use of such limiting language would eliminate a great deal of the confusion that currently plagues Texas's disclosure standard.[161]

Although the Texas legislature has failed to enact a clear and easy-to-follow disclosure standard, legislative efforts should not cease. If anything, the legislature should go back to the drawing board in an attempt to deliver the trustee from the current state of confusion. In drafting a clear disclosure standard, the legislature must learn from its past mistakes and correct them. For instance, one of the main problems with section 113.060 was that it was overly broad, which left it susceptible to multiple and conflicting interpretations.[162] This point is best demonstrated by section 113.060's assertion that a trustee must keep the beneficiary reasonably informed.[163] The obvious next question is "what does reasonably informed mean?" The legislature never answered the question. By failing to define and qualify the term reasonably informed, the legislature left the statute susceptible to repeal and, even worse, the trustee

153. *Id.*

154. *See id.* (discussing the difficulties that face a trustee in disclosing information).

155. *See* Loftin, *supra* note 101, at 365 (discussing Alabama's success with using a limiting language in their disclosure statute).

156. *Id.*

157. UNIF. TRUST CODE § 813(a) (2005). By employing a narrowing term—qualified beneficiary—the trustee is relieved of performing overwhelming disclosure responsibilities. Loftin, *supra* note 106, at 364.

158. Loftin, *supra* note 101, at 364.

159. *Id.* at 365.

160. *See id.* (listing the positive effects that the limiting language had on the Alabama Trust Code).

161. *See* discussion *supra* note 10.

162. Karisch, *supra* note 3, at 10.

163. TEX. PROP. CODE ANN. § 113.060 (Vernon 2007).

susceptible to unwarranted liability.[164] To correct this problem, the legislature should attempt to define and qualify the term reasonably informed. This will mitigate the broad interpretations which subjected the statute to repeal. In defining reasonably informed, the legislature will establish a clear benchmark a trustee must satisfy for the beneficiary to protect the beneficiary's interests. Additionally, this will help eliminate Texas trustees from experiencing the unwarranted liability they are subjected to under the current disclosure laws.

The Texas legislature could clarify the duty of disclosure by passing a statute that defines both the proper form of disclosure warranted from a trustee and the group of beneficiaries entitled to affirmative disclosure.[165] By establishing clear standards, the legislature will liberate the trustee from the cloud of unjustified liability that looms over the trustee.[166] Additionally, the beneficiaries would be relieved from constantly wondering whether they need to request information.[167] Establishing a definitive disclosure standard would eradicate the confusion of both the trustee and the beneficiary.[168]

A. Navigating the Aftermath

A trustee must be particularly careful in establishing and executing duties to the beneficiary. An innocent slip (e.g. failure to disclose) could potentially result in a breach of the trustee's duties. A prudent trustee would implement a device that limits liability to the beneficiary.

One device a trustee could employ to limit the trustee's liability is having the settlor amend the trust.[169] Under Texas law, a settlor may add an exculpatory provision in the trust that will relieve the trustee of some duties, liabilities, or restrictions imposed by Texas trust law upon a trustee.[170] The trustee must act in strict accordance with the settlor's provision unless the provision clearly contradicts the terms of the trust, or if the settlor's provision creates a serious breach of a fiduciary duty that the trustee owes to the beneficiary.[171] The Texas legislature has shown no tolerance for overreaching exculpatory clauses and has quickly pronounced legislative mandates in response to courts that condoned them.[172] Therefore, an overreaching exculpatory clause is not a matter the legislature takes lightly, and a settlor should keep this in the forefront of the settlor's mind while drafting the provision.

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164. *See* Karisch, *supra* note 3, at 10.
165. *See* discussion *supra* note 10.
166. *See* discussion *supra* note 10.
167. *See* discussion *supra* note 10.
168. *See* discussion *supra* note 10.
169. *See* TEX. PROP. CODE ANN. § 114.003 (Vernon 2007 & Supp. 2008).
170. *Id.*; Jewett v. Capital Nat'l Bank of Austin, 618 S.W.2d 109, 111-13 (Tex. Civ. App.—Waco 1981, writ ref'd n.r.e.).
171. § 114.003(b).
172. *See supra* text accompanying notes 91-96.

Another safety device a prudent trustee would employ is a liability waiver signed by the beneficiary.[173] A beneficiary with full legal capacity acting under full information may absolve a trustee of any liability, responsibility, restriction, or duty to the beneficiary, including liability for past violations.[174] The waiver "must be in writing and delivered to the trustee."[175] The beneficiary's consent to an act of the trustee that violates the duty of loyalty precludes the beneficiary from holding the trustee liable for the act, so long as the beneficiary knew of all the material facts that the trustee knew.[176] Additionally, a trustee may resign to provide more protection from liability. This may seem extreme, but if the reward of holding a trustee position (e.g. a modest fee) is outweighed by the potential liability, then resigning would seem to be the best choice.

Without a doubt, navigating the "murky waters" of Texas's unsettled trust law is an obstacle. Failing to navigate the waters properly could result in a breach of the trustee's fiduciary duties. However, the navigation will become more manageable if the trustee has information about the potential liability traps and is prudent in using the liability offsetting devices (e.g., settlor amendment, waiver, resigning, et cetera).

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173. *See* § 114.005(a)-(b).

174. § 114.005(a).

175. § 114.005(b).

176. *See generally* Slay v. Burnett Trust, 143 Tex. 621, 187 S.W.2d 377 (1945) (discussing the duty of good faith as applied to waiving rights).