# QUI BONO?

Breach of fiduciary is a civil claim where a defendant has no right to remain silent but, to the contrary, a fiduciary has a duty to speak. At the same time, the same facts create cause for public prosecution under the Texas Penal Code. Texas has several criminal statutes that define when fiduciary actions become criminal acts and Texas law treats the misapplication of assets held in a fiduciary capacity much more serious than a generic theft.

Under Texas Penal Code § 32.45(a)(1), the term “fiduciary” is described as:

(A) a trustee, guardian, administrator, executor, conservator, and receiver;

(B) an attorney in fact or agent appointed under a durable power of attorney as provided by Subtitle P, Title 2, Estates Code;

(C) any other person acting in a fiduciary capacity, but not a commercial bailee unless the commercial bailee is a party in a motor fuel sales agreement with a distributor or supplier, as those terms are defined by Section 162.001, Tax Code; and

(D) an officer, manager, employee, or agent carrying on fiduciary functions on behalf of a fiduciary.

What specific claims, subtracted from what ancillary cause(s), or ancillary sub-causes, will this separate lawsuit be composed of? What new and unique facts will distinguish the amputated portion from what is left behind? What claims and personas will be left behind? Will severance help clarify the issues and aid the Court in resolving the existing controversy?

## The Parties

The Brunsting trusts were drafted by the law firm of Albert Vacek Jr. which later became Vacek & Freed P.L.L.C. (the -403 case). The federal breach of fiduciary action (the “-402 case”) was filed against the Co-trustee Defendants by trust beneficiary Candace Curtis under diversity jurisdiction on February 27, 2012. Defendant Co-Trustees appeared represented by Vacek & Freed staff attorney Bernard Lilse Mathews III, State Bar # 13187450, who used a Green and Mathews firm name in effort to conceal his conflicts of interest. [2[[1]](#footnote-1)]

and, fail to provide any specificity upon which one claim could be distinguished from any other claim single nexus of operative facts upon which any claims would rely. The federal breach of fiduciary action (the “-402 case”) was filed against the Co-trustee Defendants by trust beneficiary Candace Curtis under diversity jurisdiction on February 27, 2012

## Standing and the Division of claims

The first items at issue are standing and division of claims. Carl filed tort claims in the probate court in two separate persona, Carl individually and Carl as “independent executor”. When Carl resigned the office of “independent executor” he simultaneously substituted his wife Drina as his attorney in fact. However, Carl’s individual claims have never been bifurcated from the independent executor’s claims and this substitution raises another obvious issue. If Carl resigned due to want of capacity how and when did Drina become Carl’s attorney in fact?

To help distinguish the various plaintiffs, personas, and their respective claims, one has added sub cause divisions to the -401 case beginning with Carl individually (-401.1) and Carl the independent executor (-401.2).

# The Notion of Severing

Plaintiff Carl Brunsting and the Defendant Co-Trustees (the fiduciaries), are seeking to sever their respective claims against each other and create a separate lawsuit.

The fiduciaries want to separate from:

1. The preliminary federal injunction restraining the co-trustee defendants from “wasting” the trust assets.
   1. The co-trustee defendants refuse to perform the injunctions affirmative command to deposit income into an appropriate account for the beneficiary to avoid excess taxes while, at the same time, using its prohibitions against wasting the assets as an excuse for not performing a court ordered distribution to beneficiary Carole Brunsting, within the allotted time frame.

The fiduciaries want to separate from:

1. Breach of fiduciary claims Candace filed against the Defendant Co-Trustees
2. Carl’s individual claims against the Defendant Co-Trustees and Carole
3. The Independent Executor’s claims against the Defendant Co-Trustees and Carole
4. Trust beneficiary Carole’s claims against Carl, the former Independent Executor
5. The Defendant Co-Trustee/beneficiaries counter claims against beneficiary Candace
6. The Defendant Co-Trustee/beneficiaries counter claims against beneficiary Carl
7. A trust is a relationship and for a trust relationship to exist the separation of legal and equitable title must be maintained, Texas Property Code § 112.034. When legal and equitable titles are held by the same person merger occurs, the trust collapses because no trust relationship exists and the assets are held by the beneficiary in the beneficiary’s individual capacity where they are not protected.

2015-05-27 HC Dist Ct 164 65561098 Defendants Motion for Traditional and No-Evidence Summary Judgment

2016-01-25 Case 412249-401 Plaintiff Curtis Motion for Partial Summary Judgment PBT-2016-26242.pdf

1. Emergency motion for removal of lis pendens filed with Affidavit of Amy Brunsting [↑](#footnote-ref-1)