

# Are you my fiduciary? Informal fiduciary litigation in Texas

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**My work as business litigator and parent collided one evening while reading “Are You My Mother?” a popular children’s book by P.D. Eastman. As the story goes, a newly-hatched baby bird earnestly asks a series of creatures—none birds—if they are his mother. Baby bird’s story ends happily, but not before asking a boat, a plane, and an ornery bulldozer if each—however impossibly—might be his mother. When mother reunites with baby bird, each recognizes the other for who she is. The pairing is both obvious and natural for both characters and the reader.**

Plaintiffs in business litigation—sometimes less earnestly—ask a similar question of defendants with whom they may share a business, or even familial relationship. The Question: Are you my fiduciary?

The informal fiduciary duty case pattern is predictable: A plaintiff asserts a breach of fiduciary duty claim in an attempt to stretch a case, and the parties’ relationship, into something greater or even unrecognizable. Because there is ordinarily a lack of any formal fiduciary relationship at law (ie. a trustee and her beneficiary, or an attorney and her client), the plaintiff seeks to create an “informal” duty. He may invent nonexistent, “informal” fiduciary duties, and allege that the defendant has taken improper advantage of a relationship of trust and confidence. Ordinarily, the parties’ relationship does not indicate the type of extraordinary, extra-contractual relationship plaintiff seeks to impose. Instead, a plaintiff seeks to unwind an unfavorable—usually timeworn—transaction.

In reviewing the relationship between the parties, in the context of an informal duty courts consider whether the party claiming to be owed a fiduciary relationship actually and justifiably placed special confidence in the other party to act in his best interest. See *Thigpen v. Locke*, 363 S.W.2d 247, 253 (Tex. 1962). This can lead to protracted discovery concerning the history of the parties and the true nature of their relationship and can result in the airing of dirty laundry in depositions or before a court. A plaintiff may hang tight to a far-fetched informal fiduciary claim in an effort to introduce conflicting facts and survive summary judgment.

Helpfully, Texas courts are reasonably equipped to tell the difference between a mother bird and a bulldozer. Texas law is fairly well-developed with regard to what is and is not an informal fiduciary relationship, and, helpfully, the determination of the existence, and breach, of a fiduciary duty is a question of law. *Meyer v. Cathey*, 167 S.W.3d 327 (Tex. 2005). Both parties should make use of case law in evaluating the viability of a breach of

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fiduciary duty claim. The following are some helpful guideposts under Texas law:

- Courts are reticent to create an informal fiduciary. Due to its extraordinary nature, while “an informal fiduciary duty may arise from a moral, social, domestic or purely personal relationship of trust and confidence; however, in order to give full force to contracts, the court does not create such a relationship lightly. *Lindley v. McKnight*, 349 S.W.3d 113, 124 (Tex. App.—Fort Worth 2011, no pet.).
- Business transactions among contracting parties are less likely to involve an informal fiduciary relationship. The fact that one businessperson trusts another and relies upon a promise to perform does not rise to a confidential relationship; every contract includes an element of confidence and trust that each party will faithfully perform his or her obligation under the contract. *Gregan v. Kelly*, 355 S.W.3d 223, 229 (Tex. App.—Houston [1st Dist.] 2011, no pet.). In a business transaction, a fiduciary or confidential relationship “must exist prior to, and apart from, the agreement made the basis of the suit.” *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 176-77 (Tex. 1997). “Contracting parties are generally not fiduciaries” and due diligence requires that each protect its own interests. *Via Net v. TIG Ins. Co.*, 211 S.W.3d 310 (Tex. 2006). Similarly, consider whether the parties are self-reliant or sophisticated.
- Titles and subjective trust are not determinative. The actualities of the relationship are what matter. See *Garcia v. Vera*, 342 S.W.3d 721, 724 (Tex. App.—El Paso 2011, no pet.). No viable informal duty claim exists for relations characterized by estrangement and distrust. See *Hoggett v. Brown*, 971 S.W.2d 472, 488-89 (Tex. App.—Houston [14th Dist.] 1997). A familial or close relationship does not by itself establish a fiduciary relationship. *Texas Bank & Trust Co. v. Moore*, 595 S.W.2d 502, 508 (Tex. 1980). Neither is the fact that the relationship has been a cordial one, of long duration, evidence of a confidential relationship. *Crim Truck & Tractor Co. v. Navistar Int’l Transp. Corp.*, 823 S.W.2d 591, 595 (Tex. 1992).
- Obligations of directors, officers, and shareholders. The Texas Supreme Court has “never recognized a formal fiduciary duty between majority and minority shareholders in a closely-held corporation.” *Ritchie v. Rupe*, 443 S.W.3d 856 (Tex. 2014).
- Be on guard for fraud by non-disclosure claims. Often, a plaintiff will allege fraud by non-disclosure, usually with regard to the terms of a transaction, on top of a fiduciary claim. Texas law is full of cases which demonstrate that the failure to disclose available contract terms is not actionable in a fraud case, see *Bradford v. Vento*, 48 S.W.3d 749 (Tex. 2001), and is clear that there is no duty to tell another contractual party the terms of a contract the party actually signs or explain the effect laws have on the contract, *Emerald Tex., Inc. v. Peel*, 920 S.W.2d 398, 402 (Tex. App.—Houston [1st Dist.] 1996, no writ). “Courts presume that parties to a contract knew and took into consideration the laws affecting matters about which they contracted unless the contrary clearly appears in the terms of the contract.” *Coldwell Banker Whiteside Associates v. Ryan Equity Partners, Ltd.*, 181 S.W.3d 879, 886 (Tex. App.—Dallas 2006, no pet.).



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