SURCHARGE ACTIONS: THE BAD, THE UGLY, AND THE UGLIER

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CHAPTER 18

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Education

University of Houston Law Center: J.D., 1989

University of Houston; B.B.A., 1986
Concentration--Management Informational Systems

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Admitted to Practice

State Bar of Texas, 1989
Fifth Circuit Court of Appeals, 1989
United States Federal Court, All Districts of Texas

Experience

12/1/97 to Present	**Galligan & Manning, Attorneys at Law,** Houston, Texas *Partner:* Probate litigation and mediation (will and guardianship contests, fiduciary litigation, will and trust construction suits, contest and defense of beneficiary designations, recovery of estate assets).
10/93 to 12/1/97	**Tammy C. Manning, Attorney at Law**, Houston, Texas *Owner*: Probate litigation (will and guardianship contests, fiduciary litigation, will and trust construction suits, contest and defense of beneficiary designations, recovery of estate assets), commercial and consumer litigation, insurance disputes, employment issues.
6/91 to 10/93	**Gilpin, Paxson & Bersch, L.L.P.**, Houston, Texas *Associate*: insurance defense (bad faith, coverage issues, personal injury), employment and commercial litigation.
7/89 to 6/91	**Richie & Greenberg, P.C.**, Houston, Texas *Associate*: commercial litigation (banking, construction, partnership disputes, business torts, post-judgment collection).
9/88 to 12/88	**The Honorable Alice Oliver Trevathan**, 151st District Court, Houston, Harris County, Texas *Judicial Intern*: reviewed files, recommended rulings; researched and wrote papers for presentation by Judge at CLE seminars.
6/86 to 7/89	**Hebinck & Associates**, Houston, Texas *Law Clerk*: active involvement in trials, hearings, depositions and client conferences; drafted pleadings; discovery and correspondence; organized cases in preparation for trial in federal, state and county courts; performed legal research; interfaced with clients, other attorneys and court personnel.

Articles

"Requests for Admissions, Interrogatories and Other Discovery Devices"; co-authored by Honorable Susan Soussan; presented at October 1990 and February 1991 Houston Bar Association CLE seminars.

"The Interaction of the DTPA and the Insurance Code"; co-authored by James L. Cornell; presented at 1993 and 1994 CLE seminars.

Updated “Sanctions for Discovery Abuse” by Justice William W. Kilgarlin; presented at September 1988 CLE seminar.

“Procedural Considerations in Defending and Defeating Privileges”, co-authored with Hon. Alice Oliver Parrott; presented at October 1988 CLE seminar.

Updated and condensed “Good Faith – Bad Faith Litigation” by Hon. Alice Oliver Trevathan and Terry O. Tottenham; presented at 1988-89 CLE seminars.

“Who Has Standing in Probate Court?”; co-authored with Mary Galligan; presented at 2001 Wills & Probate Institute, South Texas College of Law.

“Jury Trials in Probate Court”, co-authored with Jason A. Cox; presented at 2004 Wills & Porbate Institute, South College of Law.

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Nancy Hamren is a Director of the Firm. Her practice emphasizes all aspects of litigation, including trials and appeals, with a focus on suretyship, employment matters, and other business litigation. Nancy's surety practice includes representation of construction bond sureties, as well as sureties which issue probate, appeal, and other bonds. Nancy's employment practice includes handling employment-related litigation, including wrongful discharge, discrimination, sexual harassment, Fair Labor Standards Act issues, Family and Medical Leave Act issues, and worker's compensation related issues. As part of her practice, Nancy also provides counseling to clients on a range of employment and personnel issues and has represented clients before administrative agencies, including the United States Department of Labor, the Equal Employment Opportunity Commission, the Texas Commission on Human Rights, the Texas Workforce Commission, and the Texas Worker's Compensation Committee.

Undergraduate Education

- B.S. Police Administration/Criminal Justice, Summa Cum Laude, 1981, Eastern Kentucky University

Legal Education

- J.D., 1984, University of Houston

Legal Experience

- Associate, Lehman & Associates (1984 – 1985)
- Associate, Coats, Rose, Yale, Ryman & Lee, P.C. (1985 – 1992)
- Director, Coats, Rose, Yale, Ryman & Lee, P.C. (1992 – Present)

Professional Activities

- Member, Houston Bar Association, Construction Law, Employment Law, Litigation, and Commercial Law Sections
- Member, State Bar of Texas, Construction Law, Employment Law, Litigation, and Commercial Law Sections
- Member, Society for Human Resources Management
- Licensed in the State of Texas, United States District Court for the Southern, Eastern, Northern and Western Districts of Texas, and the United States Court of Appeals, Fifth Circuit

Publications/Presentations

- "Enforcement of Real Property Leases in Texas"; Advanced Creditors' Rights Seminar, 1990

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Education

University of Houston Law Center; Houston, Texas.
Doctor of Jurisprudence, May 2002.

Texas A&M University; College Station, Texas.
Bachelor of Arts, Journalism, May 1994.

Specialized Coursework, Activities and Awards

Law and Society Review
Online Editor, *Houston Journal of International Law*
Criminal Law Academic Enrichment Assistant (*tutor*)
Research Assistant in Criminal Law and Ethics
Recipient, M.D. Anderson Graduate Scholarship
Recipient, Gil Epstein Scholarship
Recipient, Tindall & Foster Writing Award

Publications

Note, "Redefining Gender: *Hernandez-Montiel v. INS*,"
24 HOU. J. INT'L L. 187 (Fall 2001).

Experience

Galligan & Manning; Houston, Texas.
February 2004 – present.
Associate Attorney. Probate, Probate litigation, and fiduciary litigation.

Hill & Conley, PC/The Conley Law Firm; Houston, Texas.
July 2002 – February 2004.
Associate Attorney. Municipal defense, construction law, and assorted issues related to emerging technologies.

Coats, Rose, Yale, Ryman & Lee; Houston, Texas.
August 2001 – May 2002.
Law Clerk. Civil litigation, including insurance defense and trademark issues.

Office of the State Attorney General; Austin, Texas.
May 2001 – August 2001.
Honors Law Clerk. Worked in civil litigation division as part of Attorney General John Cornyn's Honors Program, helping defend Texas state agencies at all points in the trial process.

Environmental Design; Houston, Texas.
April 1996 – April 1998.
Publications Director. Managed nationwide print advertising campaign, created customer and client databases, wrote articles for trade publications, handled contract and client proposal writing/editing.

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SURCHARGE ACTIONS: THE BAD, THE UGLY, AND THE UGLIER

This paper covers the basics of surety litigation and surcharge actions, focusing specifically on those litigation aspects that differ from ordinary commercial or personal litigation. For the non-probate practitioner, it may be helpful to think of surcharge actions as akin to a claim for contribution, or a cause of action where there is joint and several liability. Surcharge actions in the probate context generally seek to recompense estate beneficiaries for amounts lost due the actions of a fiduciary (often the estate representative). Although sureties are not responsible for a principal's conduct, they assume liability for the principal's actions by entering into a contractual relationship whereby the interests of an estate's beneficiaries are secured by a bond. The paper does not encompass all potential claims against a principal, instead concentrating on the surety's liability once the principal is joined.

The Authors wish to acknowledge and thank Howard Reiner ("Probate Surcharge Actions") and R. Dyann McCully ("Suing and Collecting on Corporate Surety Bonds") for the use of their papers. Mr. Reiner's sections on "Preliminary Actions and Discovery Tools for a Surcharge Action" and discussion of accounting and discovery of assets are incorporated almost verbatim.

a.

I. OVERVIEW

A. Sureties and Bonds in General.

When a court appoints a fiduciary (a guardian or dependent administrator) to manage or distribute the assets of an estate, it often requires the posting of a bond in order to protect the estate, its creditors, and potential estate beneficiaries. The bond is a method of ensuring a fiduciary – in the probate context, an administrator or guardian (and at times an executor) – faithfully performs his or her duties in accordance with the applicable laws.

Essentially, a bond is a contract: It is an agreement in which one party (the surety) obligates itself to a second party (the obligee) to answer in the case of a default by a third-party (the principal). A surety bond is an agreement providing for monetary compensation should there be a failure by the principal to perform specified acts within a stated period. (see Appendix 1for an example of a bond).

Thus, a surety is a party who promises to answer for the debt of another. *Crimmins v. Lowry*, 691 S.W.2d 582, 585 (Tex. 1985). A surety is generally bound with his principal by the same instrument executed at the same time and on the same consideration. *Insta/Com Inc. v. Aetna Casualty & Sur. Co.*, 589 S.W.2d 494, 495 (Tex. Civ. App. –Dallas 1979, no writ).

Corporate sureties are entities that are licensed under a state's insurance laws, which, under their charter, have legal power to act as a surety for others. Suretyship companies operating in Texas are expressly subject to these licensing requirements found in the Texas Insurance Code. See *Great Am. Ins. Co.*, 908 S.W.2d at 422-23 (Tex. 1995). Because of the unique character, rights, and obligations of suretyship, and the complexities that would result by the imposition of liability under TEX. INS. CODE ANN. art. 21.21, the Texas Supreme Court concluded that the legislature intended to include suretyship in the definition of the business of insurance under Article 21.21. *Dallas Fire Ins. Co. v. Tex. Contrs. Sur. & Cas. Agency*, 2004 Tex. LEXIS 1368 (Tex. 2004). The court also noted, however, that absent a clear legislative directive, suretyship, as historically understood in the insurance and suretyship fields, does not constitute the business of insurance under Article 21.21, which leaves no room for applying Article 21.21 to parts of the surety business. See *id*.

In addition, it's not unusual to have co-sureties, that is, two or more surety companies directly participating in a significant bond. Their obligation to the owners is joint and several, but often a limit of liability for each surety is stated as between themselves.

B. Jurisdiction and Venue.

Sections 5(e) and 606(e) of the Texas Probate Code confer jurisdiction on courts exercising original probate jurisdiction to hear actions based on probate bonds.

The most common basis of surcharges are unauthorized and improper expenditures of estate assets, payment of excessive commissions, failure to invest or investments in improper investments, failure to collect estate assets or pursue claims of the estate, misuse or waste of estate assets, failure to sell assets that will diminish or deteriorate in value.

II. REQUIREMENTS FOR BONDS

The Texas Probate Code outlines the requirements for bonds for personal representatives of estates. Generally, unless a bond is not required (i.e., Decedent's will directs that no bond or security be required of the person named as executor or if the personal representative is a corporate fiduciary), the court will not order the issuance of letters testamentary or of administration until the representative or principal enters into a bond. TEX. PROB. CODE §§ 194, 195, 703

A. Setting the Bond Amount.

The Probate Code requires the judge to fix the penalty of the bond, which is to be set "in an amount deemed sufficient to protect the estate and its

creditors." TEX. PROB. CODE § 194. The Probate Code does not specify the bond amount, but instead allows the judge to set the amount after hearing evidence. TEX. PROB. CODE § 194(3); *Bandy v. First State Bank*, 835 S.W.2d 609, 614 (Tex. 1992). If the potential personal representative is also the sole beneficiary, the court will set the bond in an "amount sufficient to protect creditors only." See *id*. If there is more than one beneficiary, the court fixes the penalty of the bond in "an amount equal to the estimated value of all personal property belonging to the estate, . . . together with an additional amount to cover revenue anticipated to be derived during the succeeding twelve (12) months from interest, dividends, collectible claims, the aggregate amount of any installments or periodical payments, exclusive of income derived or to be derived from federal social security payments, and rental for use of real and personal property; provided that the penalty of the original bond shall be reduced in proportion to the amount of cash or value of securities or other assets authorized or required to be deposited or placed in safekeeping . . ." See *id*. Practically, however, the bond is often set at an amount equal to an estate's liquid assets and personal property, including one year of expected income if there is rental or royalty income, for example. If a client cannot qualify for the required bond, cash and securities can be placed in safekeeping and will not be considered in setting the bond. TEX. PROB. CODE § 194(5). However, management of assets in safekeeping can form the basis for claims against a principal and surety. *Id*. The Code sets out a sample bond at Section 196.

B. Requiring a New Bond.

A court can also require a new bond. Such new bonds may be required when 1) any of the sureties upon the bond die, move beyond the limits of the state, or become insolvent; 2) when the court is of the opinion that the bond is insufficient; 3) when the court is of the opinion that the bond is defective; 4) when the amount of the bond is found to be insufficient; 5) when the sureties, or any of them, petitions the court to be discharged from future liability upon the bond; and 6) when the bond and the record thereof have been lost or destroyed. See TEX. PROB. CODE §§ 203, 205. Courts sometime notice a bond is insufficient when the annual accounting is reviewed by the court auditor.

In addition, any person interested in an estate may, upon application, ask the court to set a new bond by alleging that the bond of the personal representative is insufficient or defective, or has been lost or destroyed. TEX. PROB. CODE § 204. The interested party also may ask that the personal representative be cited to appear and show cause why he should not give a new bond. See *id.* If a court requires a principal to give a new bond, the order requiring the bond suspends the representative's powers. TEX. PROB. CODE § 207. Until the representative gives a new bond and it is approved, he may not pay out any money of the estate or do any other official act, except to preserve the property of the estate. See *id.*

If the court decides to increase the existing bond amount, the new amount will only cover future losses; the past losses will have to be recovered under the prior bond amount. See *Wiseman v. Polley*, 254 S.W. 1115 (Tex. Civ. App. 1923, no writ). There is an exception for when the representative fails to recover a lost asset, or an asset converted by a third-party or the representative before the actual bonding. See *Federal Underwriters v. Sandel*, 166 S.W.2d 117 (Tex. 1942).

Conversely, a personal representative may petition the court to decrease the amount of the bond. TEX. PROB. CODE § 208.

When a new bond has been given and approved, the court will enter an order discharging the sureties upon the former bond from all liability for the future acts of the principal. TEX. PROB. CODE § 209. In some circumstances, a court will accept a rider to an already existing bond. A rider is a form changing or adding special provisions to a bond. Some probate courts refuse to allow riders and will require a wholly new bond. The principal should be sure the old bond is discharged in that situation.

The sureties upon the bond of a personal representative may at any time petition the court to require that the representative be given a new bond and that they be discharged from all liability for the future acts of the representative. TEX. PROB. CODE § 210. The court will then cite the representative to appear and give a new bond. See *id*. Premiums for bonds can be paid from the estate as an administrative expense and are generally paid annually.

III. THE EXTENT OF A CORPORATE SURETY'S LIABILITY

As noted previously, corporate sureties are entities that are licensed under a state's insurance laws, which, under their charter, have legal power to act as a surety for others. The Texas Probate Code makes no distinction between personal and corporate sureties. See TEX. PROB. CODE §§ 3, 601. Sureties are guarantors who become secondarily liable for the principal's debt or performance; they provide a monetary remedy to those who have been injured by the acts or omissions of the principal in carrying out his fiduciary duties with regard to the estate.

A. Surety Agreements.

In construing a written contract, the primary concern of the court is to ascertain the true intentions of the parties as expressed in the instrument. *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983) *Preston Ridge Fin. Servs. Corp. v. Tyler*, 796 S.W.2d 772, 775 (Tex. App. – Dallas 1990, writ denied). This cardinal

rule of construction applies to surety agreements as well. See *Balboa Ins. Co. v. K & D & Assocs.*, 589 S.W.2d 752, 756 (Tex. Civ. App. – Dallas 1979, writ ref'd n.r.e). As in other contracts, the surety agreement is interpreted to ascertain the obligations intended by the parties, gathered from the instrument as a whole. *Balboa Ins. Co.*, 589 S.W.2d at 758. Thus, because a bond is a contract between the surety and principal, in order for a third-party to affix liability to the surety, it is necessary to 'plead into the bond.' Prior to filing suit it is important to review the bond in order to see what conduct (or breaches of conduct) it covers. It is also important to review the bond before pleading an intentional tort, as these may be excluded from coverage (a breach of fiduciary cause of action is most common in these situations, because the bond is given in order to protect those benefiting from a fiduciary relationship). Pleading into a bond is akin to pleading into insurance coverage with the following important caveat: if the principal is found to have breached the terms of the bond, he or she will remain liable to the surety for that amount, in addition to the costs of defense. Courts have long recognized that a surety has an equitable right to reimbursement from the principal for amounts paid on an indemnity bond. *Associated Indem. Corp. v. CAT Contr.*, 964 S.W.2d 276, 281 (Tex., 1998).

B. No Duty of Good Faith and Fair Dealing.

In *Associated*, 964 S.W.2d 276, 281 (Tex., 1998), the principal argued that a bond surety owed a common law duty of good faith and fair dealing. The Texas Supreme Court previously examined the tripartite relationship between bond surety, principal, and obligee in *Great American Insurance Co. v. North Austin Municipal Utility District No. 1*, 908 S.W.2d 415 (Tex. 1995). The issue in *Great American* was whether a bond surety owed a common law duty of good faith to the *obligee*. The court in *Great American* noted that no such duty existed and reaffirmed that not every contractual relationship gives rise to a duty of good faith. See *Great American*, 908 S.W.2d at 418 (citing *English v. Fischer*, 660 S.W.2d 521, 522 (Tex. 1983)); see also *Crim Truck & Tractor Co. v. Navistar Int'l Transp. Co.*, 823 S.W.2d 591, 594 (Tex. 1992).

C. Liability up to Face Amount of Bond.

In general, when an obligee's actual damages exceed the penal amount of a bond, a surety's liability is limited to the penal sum of the bond. *New Amsterdam Cas. Co.v. Bettes*, 407 S.W.2d 307, 314-15 (Tex. Civ. App. – Dallas 1966, writ ref'd n.r.e.); see also *Great Am. Ins. Co. v. North Austin Mun. Util. Dist. No. 1*, 908 S.W.2d 415, 426 (Tex. 1995).

IV. INVESTIGATION OF POTENTIAL CLAIMS AGAINST REPRESENTATIVE[1]

Before actually filing a surcharge petition, the person with standing should use the available resources to collect information (evidence) regarding the existence or dissipation of estate assets and any breaches of fiduciary duties. Several useful tools are a Temporary Restraining Order, a Temporary Injunction, a Removal Motion, or a Show Cause Motion. Each of these tools can be used to obtain facts about the case in a more cost effective manner without prosecuting a formal lawsuit. Mainly, you would pursue one of these avenues to obtain compliance with statutory duties and/or seek immediate court intervention to stop the wrongdoing of a personal representative.

A. Show Cause Motions.

There exist at least 40 separate sections in the Texas Probate Code that authorize a Probate Court to issue show-cause orders. The show-cause motion is used to obtain an accounting by the personal representative, or to compel the personal representative to turnover estate assets, files, and records.

1. Turnover Estate Files

All records and documents concerning the estate or its assets are the personal property of the estate and only the current personal representative has a right to their possession and not the removed representative. *Guajardo v. Chavana*, 762 S.W.2d 683 (Tex.App.—San Antonio, 1988, writ denied, appeal after remand); and *In re Estate of Chavana*, 993 S.W.2d 311 (Tex.App.- San Antonio 1999, no writ); §§ 232 and 771 of the Texas Probate Code.

2. Accounting.

Sections 400, 403, and 744 of the Texas Probate Code permit any interested person or the Probate Court, *sua sponte*, to cause a personal representative to be cited to appear for his/her failure to present a proper accounting. *Williamson v. Bowman*, 98 S.W.2d 449 (Tex.Civ.App. - Texarkana, 1936, error refused). Although the monetary penalty for failing to file an annual account is minimal, the probate code sections do empower the Probate Court to remove the personal representative. *Legler v. Legler*, 189 S.W.2d 505 (Tex.Civ.App.-Austin 1945, ref 'd w.m.); and *In re Higganbotham's Estate*, 192 S.W.2d 285 (Tex.Civ.App.-Beaumont 1946, no writ).

The Probate Court's authority to show cause for a final account in a decedent's estate or guardianship is essentially similar to the show cause procedures for an annual account. Sections 222 and 761 give the Probate

[1] Reiner, Surcharge Actions, Attorneys in Tax and Probate (May 6, 2003).

Court the authority to remove a personal representative for failing to file final accountings. Sections 414 and 758 of the Texas Probate Code authorize the Probate Court to assess a penalty of ten-percent per month or 120 percent per year against the representative for his/her failure to timely deliver the estate's assets after the approval of the final accounting.

A surety is not liable for these monetary penalties under its bond as prescribed by Sections 414 and 758. The 120 percent interest penalty can only be assessed against the representative individually, which can become a very desirable remedy where the personal representative is solvent. See *Bevill v. Young*, 167 S.W.2d 573 (Tex. Civ. App.- Dallas 1943, error refused w.m.) (where the court held that a clear case of contumacy (resistence) must be made out before such onerous damages would be assessed); *Bilek v. Tupa*, 549 S.W.2d 217 (Tex. Civ. App.- Corpus Christi 1977 ref. n.r.e.).

3. Other Grounds.

Motions for show cause can also be used to obtain compliance by the personal representative where he/she fails to:

1. Give a bond or, where the bond is insufficient. See §§ 194, 204, 205, 210, 214, 703, 712, 713, 718, and 722 Texas Probate Code; *Estate of Navar v. Fitzgerald*, 14 S.W.3d 378 (Tex. App.- El Paso, 2000, no writ);
2. Correct or file a new inventory, appraisement, and list of claims. See §§ 257, 258, 735, and 736 Texas Probate Code, *National Surety Corporation v. Ladd*, 115 S.W.2d 601 (Tex.1938) In *Wells v. Ward*, 207 S.W.2d 698, (Tex. Civ. App.- Texarkana 1948, ref. n.r.e.) the movant had the burden to establish that an asset omitted from the inventory was owned by the Decedent; and in *Pemberton v. Leatherwood*, 218 S.W.2d 500 (Tex. Civ. App.-Eastland 1949, ref. n.r.e.) the guardian was compelled to amend an erroneous inventory to include omitted property;
3. Pay or timely pay claims. See §§ 326, 328 and 809 Texas Probate Code; *Bailey v. Cherokee County Appraisal Dist.*, 862 S.W.2d 581 (Tex., 1993); *Ertel v. O'Brien*, 852 S.W.2d 17 (Tex. App.-Waco, 1993, writ denied), on subsequent appeal; *Citizens Bank & Trust Company of Baytown v. Ertel*, 2001 WL 26141. In *Fillion v. Osborne*, 585 S.W.2d 842 (Tex. Civ. App.-Houston [1st Dist.] 1979, no writ) the court found no liability against the administrator and surety for non-payment of approved claim since probate court did not enter an order requiring payment of the creditor;
3. Sell property to pay the debts of the estate. See §§ 347 and 826 Texas Probate Code;
4. Deliver property on demand after ordered to do so by the Probate Court. See § 384 Texas Probate Code. In *Bilek v. Tupa*, 549 S.W.2d 217 (Tex. Civ. App.-Corpus Christi 1977, ref. n.r.e.) the appellate court discussed the penalty that was available for failure to deliver estate assets;
5. Rent estate property. See §§362, 366, 842, and 846 Texas Probate Code; *Bevill*, supra;
6. Lease minerals. See §§371 and 851 Texas Probate Code;
7. Invest surplus funds of the guardianship estate. See § 864 Texas Probate Code. This provision also imputes 10% interest on the uninvested principal. The imputed interest is simple and not compounded annually.

4. Procedures.

The motion for show cause, in addition to the request for relief and the prayer, must include a request that it be personally served upon the personal representative. Personal service is mandatory in order to comply with the constitutional due process requirements. In *Wetsel v. Estate of Perry*, 842 S.W.2d 374 (Tex. App. – Waco 1992, no writ) the appellate court held that the lower court's removal of the personal representative for mismanagement violated the representative's constitutional due process rights where there was no personal citation upon the personal representative. Note: The motion for show cause must also be a sworn pleading.

The order to show cause must require the personal representative to appear at a specific date, time, and location. Any ambiguity in this respect will cause the order to fail on constitutional due process grounds because of vagueness or want of specificity.

You should also pay attention to the available Probate Code sections that you are using as the basis for your action and seek reimbursement of your attorney's fees in the show cause proceeding where permitted by statute.

At the show cause hearing, giving the Respondent a copy of the signed order complies with the necessary constitutional due process requirements should a contempt proceeding be necessary. When preparing a show cause order, be very specific about what the court orders the personal representative to do, to avoid constitutional due process violations for vagueness.

B. Temporary Restraining Order – Temporary Injunction.

Injunctive remedies are often effective tools when filing a removal and/or surcharge action. While you are involved in discovering the facts of the case, you may want to seek injunctive relief to protect and safeguard the estate assets, including documents and records of the estate, from further destruction or spoilation. You may also seek a Temporary Restraining Order or Temporary Injunction against third parties in possession of estate assets. This may prove especially important where the representative's bond is insufficient or the personal representative is not solvent. Often you will find that the personal representative is attempting to use the estate assets to live and provide the financial support needed to cover his/her litigation expenses.

Additionally, a temporary injunction hearing gives you a free bite at the discovery apple. Evidence and testimony obtained at the injunction hearing can be used later in the surcharge action. Rule 681 et. seq. of the Texas Rules of Civil Procedure sets out the procedures used in obtaining equitable remedies. Since the focus of this Article is not on injunctive remedies, you will need to make your own review of these rules and case law. It is important to recognize that unsuccessful attempts at obtaining injunctive remedies can be costly to the overall result that you may obtain.

C. Objections to and Restatements of Accountings.

In a surcharge case, the most important pleading may very well be the final accounting. In fact, early case law provided that a personal representative could not be surcharged until the representative restated the final accounting and the administration was closed, unless he/she was removed, died, or was discharged. See *Westchester Fire Insurance Co. v. Nuckols*, 666 S.W.2d 372 (Tex. App.-Eastland, 1984, writ ref'd n.r.e.) where the court erroneously granted judgment against an administratrix including interest and attorney's fees based merely on a show cause pleading. Also see *Diaz v. Chinn*, 150 S.W.2d 411 (Tex. Civ. App.- San Antonio, 1941, no writ); *Helge v. American Central Life Ins. Co.*, 124 S.W.2d 191 (Tex. Civ. App.-Austin, 1939, writ denied); *Wiren v. Nesbitt*, 85 Tex. 286, 20 S.W. 128 (Tex., 1892).

The simple rationale for a final accounting is that without a complete reconciliation of all receipts and disbursements, a tracing and disclosure of all estate assets, and the Court's reconciliation of the estate's accounts, you will not be able to fully establish the loss to the estate. It is possible to establish certain losses to an estate by means other than through a final accounting but with limited accuracy.

1. Auditor Assistance.

Where the accounting is complex and detailed, the Probate Court could invoke the provisions of Rule 172 of the Texas Rules of Civil Procedure and appoint an auditor to help in determining the correctness of an accounting or performing its accounting functions, under § 408(a) of the Texas Probate Code. See *Ray v. Fowler*, 144 S.W.2d 665 (Tex. Civ. App.- El Paso 1940, writ dism'd jdgmnt cor.); *Dwyer v. Kiltayer*, 5 S.W. 75, 68 Tex. 554 (1887) *Herbert v. Herbert*, 59 S.W. 594 (Tex. Civ. App.-1900, no writ).

2. Duty to Account.

The personal representative has the statutory duty to maintain the estate's books, records, and accounts, and has the burden of proof at any hearing on an annual or final accounting. See *Farley v. Cook*, 402 S.W.2d 779 (Tex. Civ. App.-Texarkana, 1966, no writ). In *Gulf Ins. Co. v. Blair*, 589 S.W.2d 786 (Tex. Civ. App.-Dallas, 1979, ref. n.r.e.) the court found that the surety was liable for a principal's acts, even after the principal's term of office as temporary administrator had expired. Also see *Cartledge v. Billalba*, 154 S.W.2d 219 (Tex. Civ. App.-El Paso 1941, error refused); *Garcia v Garcia*, 878 S.W.2d 678 (Tex. App.-Corpus Christi, 1994, no writ; and *Scott v. Taylor*, 294 S.W. 227 (Tex. Civ. App.-Amarillo, 1927, no writ). A personal representative is responsible and liable for all of the estate assets that come into his/her possession during an administration or guardianship. Thus, an interested party can cause the court to re-examine any previously approved transactions by the representative upon the filing of a final account. See *DeGaugh v. Jamison*, 419 S.W.2d 389 (Tex. Civ. App.-Houston 1967, ref. n.r.e.); *di Portanova v. Hutchison*, 766 S.W.2d 856 (Tex. App.-Houston [1st Dist.] 1989, no wit); In *Thomas v. Hawpe*, 80 S.W. 129 (Tex. Civ. App.- 1904, writ ref'd) the court allowed the heirs in 1902 to have reviewed transactions in an annual accounting filed in 1877. Also see *In re Higganbotham's Estate*, 192 S.W.2d 285 (Tex. Civ. App.-Beaumont 1946, no writ).

3. Death of a Representative.

When a personal representative dies, it is the personal representative of the deceased representative's estate that has the responsibility of filing that representative's final account. See §§ 220 and 759 Texas Probate Code. Of course, the deceased personal representative's estate will be liable for acts of malfeasance and nonfeasance by the representative. See *American Bonding Co. v. Logan*, 132 S.W. 894 (Tex. Civ. App. 1910, no writ).

4. Bill of Review.

If the Probate Court has already approved the final account, it will be necessary to file a bill of review

within the statutory time in order to overturn the Court's order. See §§ 31 and 657 Texas Probate Code. In *Mills v. Baird*, 147 S.W.2d 312 (Tex. Civ. App.-Austin, 1941, error refused) the Court set aside a final account when the Movant showed that the court's approval was based upon the fraudulent representations of the personal representative.

Upon the approval of the bill of review you will then be in position to file your objection to the accounting.

5. Objections to Accounting.

Any objections to a prior approved annual accounting can be considered at the time of the hearing on a final accounting and are not barred by any statute of limitations; *Oldman v. Brooks*, 25 S.W. 648 (Tex. Civ. App.-1894, no writ); *Tharp v. Blackwell*, 570 S.W.2d 154 (Tex. Civ. App. - Texarkana, 1978, no writ); and *Walling v. Hubbard*, 389 S.W.2d 581 (Tex. Civ. App.-1965, dismissed n.r.e.). Any accounting activity may be impeached on grounds of mistake, accident, or fraud. See *American Indemnity Co. v. First Nat. Bank in Cameron*, 94 S.W.2d 1258 (Tex. Civ. App. - Austin, 1936, no writ). Approval of an annual accounting does not have the same conclusive force as a final judgment. *Anderson v. Armstrong*, 120 S.W.2d 444 (Tex. 1938). Any objection that you file should request that the court not approve disputed, unverified, or unauthorized disbursements, or unauthorized disposition of estate assets, and should require that an annual or final accounting be restated to reflect the proper assets on hand in the estate. See *Cobb v. Speers*, 49 S.W. 666 (Tex. Civ. App. 1899, no writ). Objections to an accounting should seek to have the court deny approval of any unauthorized disbursements and/or unauthorized expenditures from the estate. See *McShan v. Lewis*, 76 S.W. 616 (Tex. Civ. App. 1903, no writ); and *James v. Craighead*, 69 S.W. 241 (Tex. Civ. App. 1902, no writ). Objections to the accounting should also request that the representative return any assets in their restated amounts to the estate's accounts and/or deliver the assets to the interested person entitled to possession of such assets. It is the court's approval of the restated accounting ordering the representative to replace assets which establishes the liability of the personal representative. This liability permits you to make demand for repayment upon the representative and the surety under the bond.

The general objections that you may make to the final account include the following:

i. Claims were improperly allowed, paid or claims were invalid.
ii. The final account is unsupported by proper vouchers.
iii. The final account fails to show proper authority for the sale of assets.
iv. The final account fails to list all of the estate's assets.
v. The final account fails to list all income and/or disbursements of the estate.
vi. The final account fails to show the propriety of payments made by and to the representative.

Unless you include objections to the final accounting in your petition for surcharge, you will be unable to seek findings for any breach of fiduciary duty, or individual and/or representative liability on the personal representative, and/or damages, attorney's fees and costs, and liability against the surety on the surety bond. See *Cunningham v. Parkdale Bank*, 660 S.W.2d 810 (Tex., 1983); and *Tharp*, supra.

6. Surety Role at Hearing on Final Accounting.

Where the Probate Court enters a deficiency judgment binding on the surety against its principal, the Court must afford the surety notice and the right to participate at the hearing. A surety will not be considered a necessary party where it is given notice of the hearing and refuses to make an appearance. The surety is not considered to be a necessary party at a hearing on a final accounting. However, the surety would be an interested party and entitled to participate in an accounting hearing to dispute its accuracy, and to assert its defenses, even if the prior personal representative waives his/her defenses. See *In re Rasco*, 552 S.W.2d 557 (Tex. Civ. App.- Dallas, 1977, no writ) where the court erroneously prohibited the surety from participating in a hearing on the final account of its principal. Also see *Satterfield v. Burke*, 514 S.W.2d 138 (Tex. Civ.A pp.-San Antonio) modified 525 S.W.2d 950 (Tex., 1975); and *Files v. Buie*, 112 S.W.2d 714 (Tex. 1938). It is considered reversible error to deny a surety the right to appear at a final accounting hearing.

D. Discovery of Assets and Claims.

You should incorporate within your pleadings those discovery methods that provide the best potential for recovering any loss to the estate. Where a personal representative is also a beneficiary or heir of the estate, any judgment in the surcharge action can be offset against his/her distribution of the remaining estate assets.

1. Joinder.

It is important to learn the propriety of joining additional parties, under other theories of liability, such as any third-party breaches of fiduciary duty. See *Kinzbach Tool Co. v. Corbett-Wallace Corporation*, 160 S.W.2d 509 (Tex. 1942), where the court found that a third party who knowingly participated in a fiduciary's breach of duty became a joint tortfeasor

with the fiduciary. You should also determine whether there exist any third-parties who have estate assets wrongfully in their possession that can be recovered. Any recoverable assets are not lost if they were obtained under liability theories and the statute of limitations will not bar such recoveries. Several examples of recoveries from third parties would be (i) uncollected rental income not barred by limitations; (ii) unauthorized loans to third-parties not barred by limitations; and (iii) unpaid promissory note payments where the estate has a retained or perfected a security interest.

2. Discovery Control Plan.

When you begin drafting your surcharge action, you should first consider the discovery control plan. See TEX. R. CIV. P 190. Although the penal amount of the bond may be $50,000.00, or less, you should select a Level 2 control plan. This is easily justified where a judgment greater than the bond is being sought. As previously mentioned, the failure of a successor representative to seek a justified excess judgment above the bond limits, in certain instances, may constitute a breach of fiduciary duty by the successor representative.

Almost without exception courts will enter docket control orders of their own that conform to Rule 190.4 of the Texas Rules of Civil Procedure. Where the court does not enter its own docket control order, or if your pleadings are silent as to the control level, a Level 2 discovery control plan will be the default plan. It is important to note that in Level 2 your discovery will end on the earlier of the 30th day before trial or nine (9) months after the first oral deposition or the due date of the first written discovery. See Rule 190.3(b)(1)(B) TEX. R. CIV. P.

3. Expert Designations.

You should be leery of expert designation dates and the necessity for supplementing their responses to Rule 194 requests for disclosures. Unless set by the court or parties, the rules limit designation of experts to 90 days before trial when seeking affirmative relief and 60 days before trial for all other experts. See Rule 195.2 TEX. R. CIV. P It is important to designate early or seek a docket control order before the designation date passes or you will be forced to trial without your expert.

However, all is not lost even if you fail to designate, as some expert testimony, other than testimony on damages, is inadmissible if it involves only questions of law. See *Crum & Forster, Inc. v. Monsanto Company*, 887 S.W.2d 103 (Tex. App. - Texarkana 1994, no writ). An expert may offer his/her opinion as to a mixed question of law and fact as long as proper legal concepts were a basis for the opinion. See *Birchfield v. Texarkana Memorial Hospital*, 747 S.W.2d 361 (Tex. 1987). An expert opinion has been found to involve a mixed question of fact and law when a standard has been fixed by law and the question is whether the person or conduct measured up to that standard. See Ehrhardt, The conflict concerning expert witnesses and legal conclusions. 92 W. VA. L. REV. 645 (1990).

4. Oral Depositions.

When taking the oral depositions of the representative or a third party is necessary, you should ensure that the deposition date is far enough in advance to have any written discovery responses or documents available at the deposition. Responses to requests for production are not due until 30 days after service of the requests. See TEX. R. CIV. P. 196.2. In addition, any probate court administration files, county deed records, and county and district court records should be reviewed before the taking of any oral deposition. Failure to adequately question a personal representative before trial about assets, income, and disbursements of an estate can prove fatal to your case. Often the only evidence that may exist as to a disbursement is a canceled check that was payable to "cash." Without an opportunity to question and confirm the purpose of the disbursement, you will have no way of refuting the oral testimony of the representative at trial.

The deposition process in a surcharge action is most helpful when you are in possession of all of the administration records, especially any records that cover the questionable transactions and dealings of the representative. The representative's pleading should be a starting point in your deposition but, be careful not to tip your hand and allow the representative to discover and cure any pleading defects.

5. Request for Disclosure.

The provisions of Rule 194 request for disclosure may be of little help in a surcharge suit other than to determine the representative's contentions and the designation of experts. A surcharge case will normally not involve the need for medical records and you will already have information on the bond and indemnity agreements through your review of the Probate Court's file. If you are interested in getting a jump on the discovery procedure, you may include a Request for Disclosure in your original petition. See TEX. R. CIV. P 194.2.

6. Interrogatories.

Interrogatory requests can help you to discover from the personal representative additional breaches of fiduciary duty. This is particularly true when the Probate Court file contains only minimal transactions. See TEX. R. CIV. P. 197. With a limit of 25 interrogatories, relying on this discovery process in a

case where there are a large number of transactions will not be productive. Do not waste interrogatories to decide the representative's contentions when requests for disclosure can be used to require the representative to reveal their legal theories or contentions. See TEX. R. CIV. P. 194.2(c).

7. Court File.

Court files can lead you to other public records such as deed records, lawsuits in other courts, records from taxing authorities, secretary of state filings, and bankruptcy records. Even when the only pleadings on file are the initial application, the order appointing the personal representative, and the bond, a close review might reveal assets of the estate. The application may specify the name and location of the estate assets, i.e., John Doe stock certificates, insurance proceeds from John Doe Company, pension or retirement plan at John Doe Company, real property in Harris County.

8. Bond Company File.

Contact the agent for the surety company to learn what information or records they have on file from when they issued the bond. Most bonding applications contain sections requiring the specific identification of assets of an estate. If the surety is represented, request that documentation from its attorney.

9. Public Records.

A quick way to search for public information is obviously the Internet. Many counties have gone online and made all county public records available. Do not forget the county appraisal district website (e.g., www.hcad.org) that most of the counties in Texas now have available. These sites have useful information like ownership history of a specific real property. There are also many search or data companies that can provide a wealth of information for a minimal fee.

Getting the records and documents from the representative early may be the only way to establish the various breaches of fiduciary duty and damages. Remember banks and other financial institutions will usually retain records for only five (5) years. Without records and documents, you are left only with the explanations made by the personal representative and little or no means to construct an effective cross-examination.

V. REMOVAL ACTIONS.

A. Statutory Basis.

Proceedings involving sureties generally, but not always, begin with a removal action. Sections 149C, 222 and 761 of the Texas Probate Code provide the statutory basis for removal. When a personal representative neglects to perform a required duty or if a personal representative is removed for cause, the personal representative and the sureties on the personal representative's bond are liable for: (1) costs of removal and other additional costs incurred that are not authorized expenditures, as defined by this code; and (2) reasonable attorney's fees incurred in removing the personal representative or in obtaining compliance regarding any statutory duty the personal representative has neglected TEX. PROB. CODE § 245. The fees and *expenses* incurred in obtaining the *removal* of the representative can be assessed against the personal representative and his *surety*. *Fillion v. Osborne*, 585 S.W.2d 842 (Tex.Civ.App.-Houston (1st Dist.) 1979, no writ.

1. Removal of Independent Representative with Notice.

Section 149C provides the statutory basis for the removal of an independent executor. This proceeding would not normally involve a surety unless the Court had required a bond pursuant to Section 149.

2. Removal of Dependent Representative without Notice.

Under Section 222(a) the Court may – on its own motion or on the motion of any interested person – order the removal of a personal representative without notice if the representative:

- Neglects to qualify in the manner and time required by law;
- Fails to return within ninety days after qualification, unless such time is extended by order of the court, an inventory of the property of the estate and list of claims that have come to his knowledge;
- Having been required to give a new bond, fails to do so within the time prescribed;
- Absents himself from the State for a period of three months at one time without permission of the court, or removes from the State;
- Cannot be served with notices or other processes because of the fact that the: (i) personal representative's whereabouts are unknown; (ii) personal representative is eluding service; or (iii) personal representative is a nonresident of this state who does not have a resident agent to accept service of process in any probate proceeding or other action relating to the estate; or
- Has misapplied, embezzled, or removed from the State, or is about to misapply, embezzle, or remove from the State, all or any part of the property committed to the personal representative's care (this section requires

presentation of clear and convincing evidence given under oath).

3. Removal of Dependent Representative with Notice.

The court may remove a personal representative on its own motion, or on the complaint of any interested person, with notice, pursuant to TEX. PROB. CODE § 222(b) when:

- Sufficient grounds appear to support belief that the representative has misapplied, embezzled, or removed from the state, or that he is about to misapply, embezzle, or remove from the state, all or any part of the property committed to his care;
- probate). The representative fails to return any account which is required by law to be made;
- The representative fails to obey any proper order of the court having jurisdiction with respect to the performance of his duties;
- The representative is proved to have been guilty of gross misconduct, or mismanagement in the performance of his duties;
- The representative becomes an incapacitated person, or is sentenced to the penitentiary, or from any other cause becomes incapable of properly performing the duties of his trust;
- As executor or administrator, the representative fails to make a final settlement within three years after the grant of letters, unless the time be extended by the court upon a showing of sufficient cause supported by oath; or
- As executor or administrator, the representative fails to timely file the notice required by Section 128A of the Texas Probate Code (dealing with notice to certain entities after Section 761, which deals with guardianships, is nearly identical to Section 222. It differs only in that Section 761 allows removal of a guardian for cruel or neglectful treatment of a ward and for failure to register as a private professional guardian. Section 761 also describes the removal of co-guardians.

Other sections of the Probate Code that provide additional bases for removal include: 1) failure of a joint or co-representatives to execute of file an Inventory, Appraisement, and List of Claims (Sections 260 and 738); 2) provisions dealing with claims procedures (Sections 310 and 797); and 3) failure to deliver a deed or deed of trust under a court-authorized sale of real property (Sections 358 and 837).

In addition, when an independent administration is created and the order appointing an independent executor is entered, any person having a debt against the estate can ask the court to require the distributees of the estate, the heirs at law, or any other person entitled to a portion of the estate under the will to execute and post a bond for an amount equal to the amount of the creditor's claim or the full value of the estate (as shown by the inventory and list of claims, whichever is the smaller). See TEX. PROB. CODE § 148.

4. Recovery of Removal Expenses from Surety.

The Probate Code allows a successor administrator to recover attorney's fees incurred in removing a prior representative and allows recovery of attorney's fees incurred in obtaining the statutory compliance of a prior representative. The successor administrator does not need to pursue both courses of action before becoming eligible to collect attorney's fees from the administrator and the surety. *Lawyers Sur. Corp. v. Larson*, 1993 Tex. App. LEXIS 3149 (Tex. App. – Austin 1993, opinion withdrawn, substituted opinion at 869 S.W.2d 649).

This section was not intended to encourage successors to force an unwilling or incompetent administrator to carry out administrative acts after judicial removal; it was designed to ensure that expenses associated with, and caused by, the administrator's neglect of statutory duties were charged against the culpable administrator and the surety rather than the estate. See *id*.

Likewise, when costs are incurred because a guardian neglects to perform a required duty or if a guardian is removed for cause, the guardian and the sureties on the guardian's bond are liable for: (1) costs of removal and other additional costs incurred that are not authorized expenditures under this chapter; and (2) reasonable attorney's fees incurred in removing the guardian or in obtaining compliance regarding any statutory duty the guardian has neglected. See TEX. PROB. CODE § 668.

VI. CLAIMS AGAINST PERSONAL REPRESENTATIVES FOR WHICH THEIR SURETIES MAY BE LIABLE

A. Standing.[2]

In order to maintain a suit, it is necessary that the complaining party have standing to litigate the matters in issue. See A&M Indus., Inc. v. Day, 977 S.W.2d 738 (Tex. App. – Fort Worth 1998, no pet.); Hunt v. Bass,

[2] The majority of this discussion of standing is an excerpt from Reiner, Probate Surcharge Actions, Attorneys in Tax and Probate (May 6, 2003).

664 S.W.2d 323, 324 (Tex. 1984). "Generally speaking, standing consists of some interest peculiar to the person individually and not as a member of the general public." See id.; see also Mitchell v. Dixon, 168 S.W.2d 654, 656 (1943). "However, the probate code generally places a heavier burden on the would-be litigant in probate matters, requiring that the party qualify as an 'interested person.'" See id.; see TEX. PROB. CODE ANN. §§ 76, 93, 222. "Interested persons" under the Probate Code are heirs, devisees, spouses, creditors, or "any others having a property right in, or claim against, the estate being administered." TEX. PROB. CODE § (3). (see Appendix 2 for an example of an Original Petition, supplied courtesy of John Yow).

The fundamental principle that keeps an uninterested party from interfering in the probate of a will applies in the area of estate administration. See *A&M Indus*., 977 S.W.2d at 742. "A mere interloper has no more right to intervene in the administration of a decedent's estate than he does in the admission of a decedent's will to probate." See *id.*

1. Successor Representatives:

Courts will often appoint a lawyer to act as successor representatives or representatives de bonis non "a successor administrator of an unsettled estate", when the Probate Court is forced to remove a representative. Whether you represent the successor representative or the Probate Court appoints you as the successor representative, during the pendency of an administration, it is the successor representative who maintains the necessary standing to bring a surcharge action. A successor representative derives its authority to file a surcharge from §§224, 225, 763, and 764 of the Texas Probate Code. See *Fillion v. Osborne*, 585 S.W.2d 842 (Tex. Civ. App.-Houston [1st Dist.] 1979, no writ) (wherein the appellate court said: "Successor representatives have the duty and thus the standing, to bring actions challenging accounts and actions of predecessors."); *di Portanova v. Hutchison*, 766 S.W.2d 856 (Tex.App.-Houston [1st Dist.] 1989, no writ); *Drake v. Trinity Universal Ins. Co.*, 600 S.W.2d 768 (Texas, 1980).

The Texas Probate Code suggests that a successor representative needs to obtain court permission prior to initiating a surcharge action against a prior personal representative. See TEX. PROB. CODE §§ 234. This authorization may not be necessary where the surcharge suit is filed in the court where the administration is pending. See *Maxwell v. Mason*, 682 S.W.2d 640 (Tex. App. – Houston [1st Dist.] 1984, writ ref'd, n.r.e).

2. Heirs or Beneficiaries:

Generally, neither beneficiaries nor heirs possess the necessary standing to prosecute a surcharge action unless:

a. The estate has been closed and the representative has been discharged from his/her position, or
b. A vacancy exists in the office of the personal representative, or
c. A personal representative breached his fiduciary duty, will not act or cannot act, or
d. The cause of action for surcharge has been assigned, or
e. The representative's interest is antagonistic to that of the heirs wanting to sue.

See *Evans v. First National Bank of Bellville*, 946 S.W.2d 367 (Tex. App. -Houston [1st Dist.] 1997, writ denied) where the court permitted the beneficiaries to continue with the surcharge suit against the original representative after a successor was appointed and refused to act. See *Burns v. Burns*, 2 S.W.3d 339 (Tex. App. - San Antonio, 1999, no writ) where a beneficiary brought suit against the executor who resigned, and the court ruled that once the Probate Court had appointed a successor and had intervened in surcharge suit, the beneficiary had no standing to maintain the action; and see *In re Estate of York*, 951 S.W.2d 122 (Tex. App.-Corpus Christi 1997, no writ). Where the Probate Court has approved the final accounting and closed the estate, the heirs or beneficiaries must file a bill of review; however, where the order approving the final accounting and closing the administration is set aside, the Probate Court's jurisdiction over the estate will be re-established. See *Nicholson v. Nicholson*, 125 S.W. 965 (Tex. Civ. App. 1910, error refused), *Pemberton v. Leatherwood*, 218 S.W.2d 500 (Tex. Civ. App. - Eastland 1949, ref. n.r.e.). In *McDonald v. Carroll*, 783 S.W.2d 286 (Tex. App - Dallas 1989, writ denied) the court held that a bill of review was proper to correct an error in the estate's final distribution; *Tasin v. Reed*, 212 S.W.2d 958 (Tex. Civ. App. - San Antonio 1948, no writ). In *American Surety Co. of New York v. Fitzgerald*, 36 S.W.2d 1104 (Tex. Civ. App. - Dallas 1931, error refused) the heirs of a deceased ward brought a bill of review. Once the Probate Court has granted the bill of review, it is preferable to have the beneficiary or heir appointed successor representative to prosecute the surcharge action.

3. Creditors:

A creditor of an estate is an interested person as defined by §§ 3(R) and 601(15) of the Texas Probate Code. In certain instances a creditor may have standing to prosecute a surcharge action. See §§ 297, 319, 321, 328. In *Chandler v. Welborn*, 294 S.W.2d

801 (Tex., 1956) the appellate court found that a suit by creditors to recover property conveyed by a Decedent before death and during a period of incapacity was proper since the representative would not sue as she was a grantee under the deed; *Jenkins v. First National Bank*, 101 S.W.2d 845 (Tex. Civ. App. - Austin 1937, no writ); *Ertel v. O'Brien*, 852 S.W.2d 17 (Tex. App. - Waco 1993, rehearing denied, writ denied, rehearing of writ of error overruled). In *Pinkston v. Pinkston*, 266 S.W.2d 515, 519 (Tex. Civ. App. - Waco 1954, writ ref'd n.r.e.) the appellate court allowed a creditor's surcharge action to continue against the personal representative who wrongfully paid an indebtedness barred by statute of limitations.

4. Restored Ward:

Infrequently, situations arise when a restored Ward has standing to bring an action against the former guardian. The authority for a former ward to bring a surcharge action occurs when a minor reaches his/her majority or an adult Ward is restored to his/her competency. See *Tharp v. Blackwell*, 570 S.W.2d 154 (Tex. Civ. App.-Texarkana, 1978, no writ) which was an action brought by Wards who have attained majority; *Williamson v. Bowman*, 98 S.W.2d 449 (Tex. Civ. App.-Texarkana, 1936, error refused). In *Dickerson v. Dickerson*, 167 S.W.2d 218 (Tex. Civ. App.-San Antonio, 1942, writ refused) the appellate court permitted a former ward who had been restored to bring a surcharge action.

5. Guardian ad Litem.

Although rare, the Probate Court can appoint a guardian ad litem to file a surcharge action where a guardian of the estate has refused to act in their fiduciary capacity. Where the court has given a guardian ad litem surcharge authority, it may be more cost effective to move to show-cause to remove the guardian. The ad litem's motion should seek to remove the guardian for failure to prosecute the claim for the guardianship. Before beginning a surcharge action, it is important to ascertain whether the appointment order specifically empowers the ad litem to bring the surcharge action.

B. Necessary Parties.

Rule 31 of the Texas Rules of Civil Procedure states: "No surety shall be sued unless his principal is joined with him, or unless a judgment has previously been rendered against his principal, except in cases otherwise provided for in the law and these rules."

The exception in "cases otherwise provided for in the law and these rules" is codified in TEX. CIV. PRAC. & REM. CODE § 17.001 (Vernon 1997), which reads as follows:

> (a) Except as provided by this section, the acceptor of a bill of exchange or a principal obligor on a contract may be sued alone or jointly with another liable party, but a judgment may not be rendered against a party not primarily liable unless judgment is also rendered against the principal obligor.
>
> (b) The assignor, endorser, guarantor, or surety on a contract or the drawer of an accepted bill may be sued without suing the maker, acceptor, or other principal obligor, or a suit against the principal obligor may be discontinued, if the principal obligor:
>
> (1) is a nonresident or resides in a place where he cannot be reached by the ordinary process of law;
> (2) resides in a place that is unknown and cannot be ascertained by the use of reasonable diligence;
> (3) is dead; or
> (4) is actually or notoriously insolvent.

C. Statutory Claims for which Sureties can be Liable.

In the case of a guardian or dependent administrator, it is possible to sue the representatives and sureties while leaving the fiduciaries in place.

1. Failure to File Accounting or Exhibits.

Should any personal representative of an estate fail to return any annual account required by the Texas Probate Code, or fail to file any exhibit or report required by the Code, any person interested in the estate may cite the personal representative to appear and to show cause for such failure. If the representative fails to return the account after being cited, or fails to show good cause for his failure to do so, the court, upon hearing, may revoke his letters, and fine him a sum not to exceed $500.00, for which both the representative and his or her surety are liable. Failure to file any other exhibit or report required by the Code can result in a fine not to exceed $1,000.00. In addition, the surety and the representative may be liable for all damages and costs sustained by reason of the representative's failure. TEX. PROB. CODE §§ 400, 403.

2. Failure to Give Notice.

Under TEX. PROB. CODE § 297, failure to give notice of the probate of an estate makes the representative of the estate – as well as his or her surety – liable for any damages to a claimant caused by the failure to do so. *Gilbert v. Jennings*, 890 S.W.2d 116 (Tex. App. – Texarkana 1994, writ denied). This requirement applies to guardians as well. See TEX. PROB. CODE § 785

D. Common Law Causes of Action Involving Sureties.

Some common law causes of action involving sureties include breach of fiduciary duty, negligence, gross negligence, and conversion.

1. Burden of Proof.

A plaintiff has the burden of proving that the terms of the bond have been breached. See *Fidelity & Deposit Co. of Maryland v. Schelper*, 83 S.W. 871, 873 (Tex. Civ. App. 1993, no writ).

2. Breach of Fiduciary Duty.

The most common claim against a personal representative and the surety involves allegations that the representative breached a fiduciary duty to the estate and the beneficiaries. In order to sustain a cause of action for breach of fiduciary duty, the Plaintiff must prove: 1) the existence of a fiduciary relationship; 2) that the defendant breached its fiduciary duty to Plaintiff; and 3) that the defendant's breach resulted in injury to Plaintiff or benefit to the defendant. See *Burrow v. Arce*, 997 S.W.2d 229, 238-39 (Tex. 1999) *Kinzbach Tool Co. v. Corbett-Wallace Corp*., 160 S.W. 2d 509, 513-14 (Tex. 1942); *Hawthorne v. Guenther*, 917 S.W.2d 924, 934-35 (Tex. App. – Beaumont 1996, writ denied) *Dearing Inc. v. Spiller*, 824 S.W.2d 728, 733-34 (Tex. App. – Fort Worth 1992, writ denied); *Mims v. Beall*, 810 S.W.2d 876, 879-80 (Tex. App. – Texarkana 1991, no writ) *Hartford Cas. Ins. Co. v. Walker Cty. Agency, Inc.*, 808 S.W.2d 681, 687-88 (Tex. App. – Corpus Christi 1991, no writ).

In the probate context, the most common fiduciary relationships are those between executors and administrators and beneficiaries and estates, and between guardians and wards. As noted earlier, the purpose of requiring a bond (in theory) is to ensure the fiduciary lives up to his or her responsibilities and obligations. The bond also provides an injured or damaged party with a monetary remedy.

a. Some fiduciary duties of representatives to beneficiaries.

Some general duties owed by fiduciaries include: 1) a duty of loyalty and utmost good faith; 2) a duty of candor; 3) a duty to refrain from self-dealing; 4) a duty to act with integrity of the strictest kind; 5) a duty of fair, honest dealing; and 6) a duty of full disclosure. See *Kinzbach*, 160 S.W.2d at 512; *Hawthorne*, 917 S.W.2d at 934; *Welder v. Green*, 985 S.W.2d 170, 175 (Tex. App. – Corpus Christi 1998, pet. denied); *Dearing*, 824 S.W.2d at 733; *Hartford*, 808 S.W.2d at 687-88; *Johnson v. Peckham*, 120 S.W.2d 786, 788 (Tex. 1938).

The relationship between an executor and an estate's beneficiaries gives rise to a fiduciary duty as a matter of law. *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996). The duty is based on the executor's status as trustee of the property of the estate. *Humane Soc'y v. Austin Nat'l Bank*, 531 S.W.2d 574, 577 (Tex. 1975). Under the Texas Probate Code, a decedent's estate immediately vests in the beneficiaries of the estate, subject to payment of the decedent's debts. TEX. PROB. CODE ANN. § 37. Therefore, the executor holds the estate in trust for the benefit of those who have acquired a vested right to the decedent's property. See *id*.

As noted above, one of the fiduciary duties owed to the beneficiaries of an estate by an executor includes a duty of full disclosure of all material facts known to the executor that might affect the beneficiaries' rights. *Montgomery v. Kennedy*, 669 S.W.2d 309, 313 (Tex. 1984). When an independent executor takes the oath and qualifies in that capacity, he or she assumes all duties of a fiduciary as a matter of law which, in addition to other duties, includes the duty to avoid commingling of funds. *Humane Soc'y*, 531 S.W.2d at 577; *Geeslin v. McElhenney*, 788 S.W.2d 683, 686-87 (Tex. App. – Austin 1990, no writ).

The administrator may also have a formal fiduciary duty to preserve the assets of the estate. *Bandy v. First State Bank*, 835 S.W.2d 609 (Tex. 1992) (dissent). Note, however, that the fiduciary obligation does not extend to nonprobate assets. See *Punts v. Wilson*, 137 S.W.3d 889 (Tex. App. – Texarkana 2004, no pet.) (holding independent executor owed no fiduciary duty to residuary beneficiary concerning accounts not included in decedent's estate). Also note that, with regard to social security benefits, unless the funds are paid directly to the guardianship, they form no part of the corpus of the ward's estate. See generally *Tharp v. Blackwell*, 570 S.W.2d 154, 161 (Tex. App. – Texarka 1978, superceded by statute on other grounds). If the funds are commingled with guardianship estate funds they must be accounted for by the guardian to the satisfaction of the court. See *id*. Likewise, veteran's benefits likely will not form part of the Decedent's probate estate. See 38 U.S.C. § 5301(a) (any payments made to or on account of a beneficiary under any of the laws relating to veterans are exempt, either before or after receipt by the beneficiary, from the claims of creditors and state and local taxation).

However, there are other independent causes of action that may also form the basis of a claim for breach of fiduciary duty. For example, if an administrator or executor misappropriates funds belonging to the probate estate, this may be counted as a breach of his or her fiduciary duty. Regarding misappropriation, there are other considerations affecting the surety that are involved as well. For example, if an administrator or executor misappropriates funds, "he is charged with the continuing duty to account for the misappropriated

funds and reimburse the estate." *Cross v. Old Republic Sur. Co*., 983 S.W.2d 771, 776 (Tex. App. – San Antonio 1998, pet. denied (citing *Ward v. Maryland Cas. Co*., 166 S.W.2d 117, 120 (1942); *Fidelity Union Ins. Co. v. Hutchins*, 133 S.W.2d 105, 110-112 (1939); *Beaumont Bank, N.A. v. Buller*, 806 S.W.2d 223, 226 (Tex. 1991)). "Indeed, once funds are traced into the administrator's possession, he is presumed to 'possess the entire amount traced, and it becomes his 'burden to show [he is] not in possession of all or part of the traced amount.' See *id.* (citing *Buller*, 806 S.W.2d at 226). "If the administrator fails to carry this burden, he breaches the condition of his bond to well and truly perform his duties as administrator, and his surety becomes liable to the estate for the misappropriated funds up to the face amount of the bond." See *id*. (citations omitted). "If a surety is held liable on its bond, it is also liable for prejudgment interest commencing on the date demand was made." See *id*. (citing *Howze v. Surety Corp. of America*, 584 S.W.2d 263, 268 (Tex.1979); *Ward*, 166 S.W.2d at 120).

b. No fiduciary duties between sureties and principals.

An interesting, related question is whether the surety owes the principal a fiduciary duty. In *Associated Indem. Corp.*, 964 S.W.2d at 281, the principal argued that there was evidence of an informal fiduciary relationship or confidential relationship between the principal and surety. The principal contended that the surety's actions induced the principal to trust and rely on the surety, thereby creating such a relationship. The Texas Supreme Court noted that an informal fiduciary duty may arise from a moral, social, domestic or purely personal relationship of trust and confidence, generally called a confidential relationship. See *id.* (citing *Thigpen v. Locke*, 363 S.W.2d 247, 253 (Tex. 1962). The Court also stated that the law recognizes the existence of confidential relationships in those cases 'in which influence has been acquired and abused, in which confidence has been reposed and betrayed.'" See *id.* (citing *Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp*823 S.W.2d 591, 594 (Tex. 1992); *Texas Bank & Trust Co. v . Moore*, 595 S.W.2d 502, 507 (Tex. 1980). The Court noted it does not create this duty lightly and to impose an informal fiduciary duty in a business transaction, the special relationship of trust and confidence must exist prior to, and apart from, the agreement made the basis of the suit. See *id*. (citing *Transport Ins. Co. v. Faircloth*, 898 S.W.2d 269, 280 (Tex. 1995).

In *Associated*, the Court ultimately held there was no evidence of such a preexisting relationship between the surety and principal because, in support of its claim of a confidential relationship, the principal relied only on the contractual indemnity agreement and the surety's conduct in investigating the claim. The indemnity agreement, the Court held, was an arms-length transaction entered into for the parties' mutual benefit. Lastly, the Court noted there were no prior dealings between principal and surety justifying a special relationship of trust and confidence and that the principal could not recover for breach of fiduciary duty.

A claim for breach of fiduciary duty often subsumes other claims which themselves individually sound in tort. Individual causes of action that also support a claim for breach of fiduciary duty include fraud, conversion, and gross and regular negligence.

3. Fraud.

To prevail on a fraud claim, a plaintiff must prove that: (1) the defendant made a material representation that was false; (2) the defendant knew the representation was false or made it recklessly as a positive assertion without any knowledge of its truth; (3) the defendant intended to induce the plaintiff to act upon the representation; and (4) the plaintiff actually and justifiably relied upon the representation and thereby suffered injury. See *Trenholm v. Ratcliff*, 646 S.W.2d 927, 930 (Tex. 1983).

4. Negligence.

The elements of a negligence cause of action are the existence of a legal duty, a breach of that duty, and damages proximately caused by the breach. D. Houston, Inc. v. Love, 92 S.W.3d 450, 454 (Tex. 2002). Regarding gross negligence, the court analyzes whether: "(1) viewed objectively from the standpoint of the actor, the act or omission must involve an extreme degree of risk, considering the probability and magnitude of the potential harm to others, and (2) the actor must have actual, subjective awareness of the risk involved, but nevertheless proceed in conscious indifference to the rights, safety, or welfare of others." Transp. Ins. Co. v. Moriel, 879 S.W.2d 10, 23 (Tex. 1994).

5. Conversion.

Conversion is defined as "the wrongful exercise of dominion and control over another's property in denial of or inconsistent with his rights." Tripp Village Joint Venture v. MBank Lincoln Centre, N.A., 774 S.W.2d 746, 750 (Tex. App. – Dallas 1989, writ denied). In support of a claim for conversion, a plaintiff must prove: (1) that the plaintiff owned, had legal possession of, or was entitled to possession of the property; (2) that the defendant assumed and exercised dominion and control over the property in an unlawful and unauthorized manner, to the exclusion of and inconsistent with plaintiff's rights; (3) that the plaintiff made a demand for the property; and (4) that the defendant refused to return the property. Ojeda v. Wal-

Mart Stores, 956 S.W.2d 704, 707 (Tex. App. – San Antonio 1997, pet. Denied): Apple Imports, Inc. v. Koole, 945 S.W.2d 895, 899 (Tex. App. – Austin 1997, writ denied); Whitaker v. Bank of El Paso, 850 S.W.2d 757, 760 (Tex. App. – El Paso 1993, no writ). Conversion pleadings are appropriate where the personal representative has possession of estate property and refuses to turn it over to the successor after demand is made. Money can be converted if it can be identified as a specific item; money cannot be converted if it is a debt that can be discharged by payment. See Estate of Townes v. Townes, 867 S.W.2d 414, 419 (Tex. App. – Houston [14th Dist.] 1993, writ denied). In order to qualify as an identifiable specific item, money must be 1) delivered for safekeeping; 2) intended to be kept segregated; 3) substantially in the form in which it is received or an intact fund; and 4) not the subject of a title claim by its keeper. See id.

VII. DEFENSES OF PRINCIPALS AND SURETIES

A. Defenses of Principals.[3]

The representative of an estate does not possess many defenses to an action for breach of fiduciary duty. Certainly, the representative cannot deny that there exists a fiduciary relationship since he/she needs only to look at their order of appointment and the requirement that they be bonded. The representative is also unable to argue that any action that he/she may have taken during the appointment was outside the scope of his/her relationship unless the action occurred after the representative was discharged from his/her duties and responsibilities. (See Appendix 3 for an example of a cross-claim.)

The only defenses that are available to benefit the representative are:

1. Setoffs.

The representative may be entitled to claim a credit for any valid setoffs that he/she may possess in the surcharge action. See *Fidelity & Deposit, Co. v. Schelper*, 83 S.W. 871 (Tex. Civ. App. 1904, writ ref.). Where properly plead for, the surety may also prove and recover all credits that the representative was entitled to claim. When a representative has not been removed or found to have breached his/her fiduciary duty, he/she may be permitted to use the statutory commission as a credit to be offset against any liability. A guardian was allowed to receive a commission from the estate even though he/she was found liable for the loss of interest when failing to invest surplus funds. See *Reed v. Timmins*, 52 Tex 84 (1879). Under the current status of the Probate Code commission provisions, the representative will more than likely not be permitted a setoff for commissions where the court has found that he/she has not taken care of or managed the estate as required by the Probate Code. See §§ 241 and 665 Texas Probate Code.

2. Estoppel.

A representative cannot assert the defense of estoppel until he/she makes a full accurate disclosure of his/her acts, including the fraudulent acts. In addition, the beneficiary must have knowledge of the fraudulent acts, and then accept receipt of the estate assets that he/she is entitled to receive. See *Haggard v. McFarland*, 133 S.W.2d 313 (Tex. Civ. App. - Fort Worth, 1939) (affirmed 155 S.W.2d 797); Tharp v. Blackwell, 570 S.W.2d 154 (Tex. Civ. App. - Texarkana 1978, no writ) where a Ward was estopped from attacking disbursements made by guardian for lack of supporting vouchers when the ward received the disbursements and then made admissions to the court of their benefit.

3. Release.

When the representative has delivered all of the estate's assets to the interested persons entitled to such and obtained a signed receipt which contains a release from the interested person, the release may still not be valid where proper consideration does not support it. See *McDonald v. Carroll*, 783 S.W.2d 286 (Tex. App. - Dallas 1989, writ denied) where an heir had signed a receipt and release of an interest in the estate yet was not estopped from asserting a bill of review.

B. Defenses of Principals and Sureties.

1. Limitations.

A person must bring suit on the bond of an executor, administrator, or guardian not later than four years after the day of the death, resignation, removal, or discharge of the executor, administrator, or guardian. TEX. CIV. PRAC. & REM. CODE § 16.004. This limitations rule applies to suits against sureties as well. See Lawyers Sur. Corp. v. Hall, 1994 Tex. App. LEXIS 1906 (Tex. App. – Houston [1st Dist.] 1994, writ denied) (holding that TEX. PROB. CODE ANN. § 245 could not serve as the statutory basis for recovery of attorney's fees as costs in a successor administrator's suit against the surety of a former administrator, where the suit was filed outside the limitations period provided in TEX. CIV. PRAC. & REM. CODE ANN. § 16.004(b). With sureties, as other debtors, the statutes of limitation will run from the time a cause of action accrues against them. Crawford v. Lawyers Surety Corp., 321 S.W.2d 640 (Tex. App. – Austin 1959, writ ref'd n.r.e.

[3] This section on defenses of principals is excerpted from Reiner, Probate Surcharge Actions, Attorneys in Tax and Probate (May 6, 2003).

Causes of action against sureties are subject to the discovery rule as well. See *Mills v. Baird*, 147 S.W.2d 312, 316 (Tex. Civ. App. – Austin 1941, writ ref'd). A surety is only secondarily liable and cannot be sued without the principal; thus, the cause of action accrues against the principal and surety at the same time. See *id*.; *Associated Indem. Corp. v. CAT Contracting Inc*., 918 S.W.2d 580 (Tex. App. – Corpus Christi 1996, writ granted). A surety binds itself to the principal voluntarily, and agrees to compensate injured parties for injurious behavior on the part of the principal.

A plaintiff will also want to consider some potential methods to stop the running of the statute of limitations such as when the representative dies. See § 16.062 TEX. CIV. PRAC. & REM CODE. If the defendant representative is absent from the state, this can suspend the limitations period until he/she returns. See § 16.063 TEX. CIV. PRAC. & REM. CODE. However, remember to be very careful because while these potential tolling statutes apply to suits against the representative, they will not apply as against the surety.

2. Bond Irregularities.

A surety has the burden of proof regarding the affirmative defense of alteration. See *Peveler v. Peveler*, 54 Tex. 53, 55 (Tex. 1880); see also *Reliance Ins. Co. v. Dahlstrom Corp.*, 568 S.W.2d 733, 736 (Tex. Civ. App. – Eastland 1978, writ ref'd n.r.e).

3. Incorporation of Principal's Defenses.

The surety, being secondarily liable, is further entitled to assert all defenses that its principal has to an action. For example, if the principal's actions cause the estate no damages, or the principal is entitled to certain offsets or credits, the surety should assert those defenses as well.

4. Timing of the Principal's Actions.

If the actions of the principal being complained of occurred before the issuance of the bond, or after the bond was discharged, the surety will not be liable for such. TEX. PROB. CODE § 209.

C. Subrogation.

Once a surety performs in place of its principal, the surety obtains a subrogation right with respect to any amounts that it paid for the claims against the principal. A surety's right of subrogation includes the right to assert non dischargeable claims in bankruptcy against the principal under 11 U.S.C. § 523(a)(4). *Richardson v. Old Republic Surety Company*, 193 B.R. 378 (U.S. B.C. – Dist. Columbia, 1995).

VIII. PLAINTIFF'S REMEDIES

A. Actual Damages.

Actual damages – also called compensatory damages – are damages meant to compensate an injured property for loss that results directly from the injury. In the probate context, plaintiffs often request awards of actual damages for loss of property, loss of liquid assets, improper payments, depreciation and waste suffered by the estate.

B. Disgorgement.

Disgorgement is a derivative remedy to which a claimant is entitled only upon proof of breach of fiduciary duty. *Burrow v. Arce* 997 S.W.2d 229, 240-241 (Tex. 1999); *Green v. Brantley*, 11 S.W.3d 259, 268 (Tex. App. – Fort. Worth 1999, pet. denied). If a representative has received commissions or attorney fees, for example, he can be ordered to disgorge those benefits to the estate.

C. Pre-judgment Interest.

"Prejudgment interest is compensation allowed by law as additional damages for lost use of the money due as damages during the lapse of time between the accrual of the claim and the date of judgment." See *Lee v. Lee*, 47 S.W.3d 767, 799-800 (Tex. App. – Houston [14th Dist.] 2001, pet. Denied) (citing *Johnson & Higgins of Texas, Inc. v. Kenneco*, 962 S.W.2d 507, 528 (Tex. 1998); *Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549 (Tex. 1985). The two legal sources for an award of prejudgment interest are general principles of equity, and an enabling statute. See *id*.; *Kenneco*, 962 S.W.2d at 528. Statutory provisions for prejudgment interest apply only to cases involving claims of wrongful death, personal injury, property damage, and condemnation. See *id*.; TEX. FIN. CODE ANN. §§ 304.102, 304.201 (Vernon Supp. 2000). A court may award pre-judgment interest above bond limits. See *Old Republic Surety Co. v. Cross*, 27 S.W.3d 35 (Tex. App. – San Antonio 2000, r'hrg overruled).

D. Damages in Excess of the Bond.[4]

A principal is primarily liable for the faithful performance of his/her statutory duties. Also, the individual liability of the principal is not limited to the penal amount of the bond. If the bond is insufficient to satisfy a loss, you must seek to recover an excess judgment against the principal for all amounts above the bond limits. Additionally, you should make certain that your judgment states the recoveries for breaches of fiduciary duties are not dischargeable in bankruptcy:

E. Bankruptcy of Principal.[5]

(a) A discharge under section 727, 1141, 1228(a), 1228(b), and 1328(b) of this

[4] See Reiner at 23.
[5] See *id*.

> title does not discharge an individual debtor from any debt . . .
>
> ***
>
> (4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny; . . .

See 11 U.S.C. § 523. Under Texas law, an estate occupies a position of trust to all parties who have an interest in the estate, especially to creditors when the estate is insolvent, and that the executor's duty to creditors extends to the United States, *i.e.* IRS, *In re Tomlin*, 266 B.R. 350 (U.S. BC - N.D. Tex. 2001).

In *In re Waskew v. Semilof*, 191 BR 34 (U.S.BC. - S.D. New York, 1995) the court found that: "[The] discharge exception for fraud or defalcation while acting in fiduciary capacity applies only if fiduciary relationship was created pursuant to state statute, common law, or formal trust agreement. Fiduciary defalcation, within the meaning of the discharge exception for fraud or defalcation while acting in fiduciary capacity, extends to innocent defaults, so as to include all fiduciaries who for any reason were short on their accounts, . . ."

F. Loss of Interest.

If an estate loses interest because of mismanagement on the part of the fiduciary, a surety may be liable for recovery. See *Ward v. Maryland Cas. Co.*, 166 S.W.2d 117, 120 (Tex. 1942). The surety is liable for the interest lost at the time the loss occurs. See *Gabriel v. Snell*, 613 S.W.2d 810, 814-15 (Tex. Civ. App. – Houston [14th Dist.] 1981, no writ).

G. Penal Code Violations.[6]

When a personal representative misappropriates estate assets, they may also have criminal implications under §32.45 of the Texas Penal Code, which provides:

> (a) For purposes of this section:
>
> (1) "Fiduciary" includes:
>
> (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 Chapter XII, Texas Probate Code; ...
>
> (2) "Misapply" includes:
>
> (A) an agreement under which the fiduciary holds the property; or
> (B) a law prescribing the custody or disposition of the property.
>
> (b) A person commits an offense if he intentionally, knowingly, or recklessly misapplies property he holds as a fiduciary or property of a financial institution in a manner that involves substantial risk of loss to the owner of the property or to a person for whose benefit the property is held.

IX. REPRESENTATIVE'S ATTORNEY FEES

There is no statutory basis for a former representative's recovery of fees, even if his or her defense is successful, other than for an award of sanctions for frivolous pleadings. This should be kept in mind when a representative is considering resignation. A request for a release in exchange for the resignation is imperative. If removal is inevitable, however, a graceful resignation looks much better to a jury in the soon to follow lawsuit by the successor. Watch costs; these can inhibit defense, provide Plaintiff with an incentive to push forward and maybe force a settlement.

X. CROSS-CLAIMS OF SURETIES AGAINST PRINCIPALS

A. Indemnification.

Unlike an insurance policy where an insurer typically pays the cost of defense and often indemnifies its insured to the extent the insured has any liability in accordance with the terms of the insurance policy, a surety generally does neither. When a principal/fiduciary is sued, the principal's surety is typically sued along with the principal. More often than not, the surety will assert a cross-claim against its principal seeking to recover from its principal all losses ultimately sustained by the surety under its bond, as well as all attorney's fees and other costs incurred by the surety on account of having issued the bond. Typically, when a surety issues a bond at the request of its principal, it requires, as a condition precedent to doing so, that the principal execute an indemnity agreement. The typical indemnity agreement will also give the surety the absolute right, in its sole discretion, to settle any claim, with the consequence that the principal will be liable to the surety for any amounts paid by the surety in settlement. (See Appendix 4 for

[6] See Reiner at 23.

examples of an Original Answer, Cross-Claim, and Third-Party Petition).

The typical indemnity agreement will contain a paragraph similar to the following:

> [Principal] agrees to indemnify and keep indemnified the surety and to hold and save the surety harmless from and against any and all liability, damage, loss, cost and expense of whatsoever kind or nature, including counsel and attorney's fees, which the surety may at any time sustain or incur by reason or in consequence of having executed or procured the execution of the bond or enforcing this agreement against any of the undersigned or in procuring or in attempting to procure its release from liability under the bond.

In *Old Republic Surety Co. v. Palmer*, 5 S.W.3d 357 (Tex. App.--Texarkana 1999, no pet), the court set forth an overview of Texas law regarding indemnity agreements. Opining that Texas law regarding the right of a surety to strictly enforce its indemnity agreement was well settled in Texas, the court reiterated the following principals of Texas indemnity law:

1) When a surety is granted the contractual right to settle a claim without a judicial determination of liability, that right will be enforced as written, and the principal will be bound to reimburse the surety for the amount it has paid in settlement. *Associated Indem. Corp. v. CAT Contracting, Inc.*, 964 S.W.2d at 282-85; *Safeco Ins. Co. of Am. v. Gaubert*, 829 S.W.2d 274, 282 (Tex. App.--Dallas 1992, writ denied).
2) Common-law principles such as reasonableness of the settlement and a requirement of potential liability do not apply where the indemnity contract expressly gives the surety the right to settle claims without an adjudication. *Associated Indem. Corp. v. CAT Contracting, Inc.*, 964 S.W.2d at 285 (citing *Ford v. Aetna Ins. Co.*, 394 S.W.2d 693 (Tex. Civ. App.--Corpus Christi 1965, writ ref'd n.r.e).
3) Where the surety is given the unqualified right to settle claims, it is immaterial whether the surety and its principal are legally liable on the bond. *Safeco, Ins. Co. of Am. v. Gaubert*, 829 S.W.2d at 282; *Ford v. Aetna Ins. Co* 394 S.W.2d at 698.
4) Moreover, the surety does not owe a common-law duty of good faith and fair dealing to its principal. *Great Am. Ins. Co. v. North Austin Mun. Util. Dist. No. 1*, 908 S.W.2d 415 (Tex. 1995).

Thus, it cannot be stressed enough to the principal that believes it has valid defenses to a claim that he or she advise the surety of those defenses and defend itself vigorously. The failure to do so may very well result in the surety electing to settle the Plaintiff's cause of action (as to the surety only) with the result being that the surety will look to its principal to indemnify it accordingly.

XI. OTHER CONSIDERATIONS

The timing involved in joining the bonding company presents its own issues. As a plaintiff, be aware that the principal is usually responsible for paying not only his attorney fees but the attorney fees for the surety as well under the terms of the typical indemnity agreement. In this sense, a bond is less like an insurance policy and more like a bail bond. Additionally, unlike an insurance policy, a surety has no duty to defend under the bond and perhaps of more significance to the plaintiff's attorney, a default against the principal will not be binding on the surety. See *Trinity Universal Insurance Company v. Briarcrest Country Club Corporation*, 831 S.W.2d 453 (Tex. App.--Houston [14th Dist.] 1992, writ denied; and *Mayfield v. Hicks*, 575 S.W.2d 571 (Tex. App.--Dallas 1978, writ ref'd n.r.e.).

XII. CONCLUSION

Corporate surety litigation is increasingly becoming a specialized area of practice. It presumes a familiarity with the Texas Probate Code and insurance law that those experienced solely in commercial litigation often are lacking. It may be in an attorney's best interest to hire co-counsel experienced in these areas once litigation has begun.

APPENDIX 1

TEXAS BONDING COMPANY

PROBATE AND FIDUCIARY BONDS APPLICATION

Type of Bond _____
Hearing Date _/_ _/

Bond No. _____
Amount $ _____
Premium $ _____
Case No. _____

THIS APPLICATION MUST BE COMPLETED IN DETAIL BEFORE BOND IS APPROVED FOR FILING.

For Office Use Only		
DESCRIPTION	BY	DATE
UNDERWRITTEN		
REVIEWED		
APPROVED		

Estate Name _____

Name _____ Tel. # _____
Address _____ State _____ Zip _____
Social Security No. _____ Driver's License # _____ State _____
Your Net Worth $ _____ Date of Birth _____
Employer/Retired _____ Position/Previous Position _____
Address _____ City _____ State _____ Zip _____
Tel. # _____ Length of Employment _____
Do you own a home? _____ Rent? _____ Other _____
Your Bank _____ Bank Account # _____
Bank Address _____
What is your relationship to Decedent/Conservatee/Minor Daughter
What is your share of this estate (Decedents estate only) _____
Have you had a criminal conviction? _____ Lost a civil judgment? _____
If yes, explain _____
Have you or your spouse filed a personal bankruptcy? _____ If yes, when? _____
Are you indebted to Decedent/Conservatee? _____ If yes, amount $ _____
Secured? Yes_____ No_____ How? _____

Attorney handling this case _____
Law Firm _____ Tel. # _____
Address _____
City _____ State _____ Zip _____

To reach the branch office closest to you, CALL 800-787-3896

Continued on next page...

ESTATE INFORMATION

Name of Decedent/Conservatee/Minor _____

Date of Birth of Conservatee/Minor _____

Estate Cash _____ Securities _____ Real Property _____

Other Assets _____ Annual Income (All Sources) _____

Bank where ESTATE ACCOUNT will be opened _____

Address _____

City _____ State _____ Zip _____

Where will securities be kept? _____
(Safe deposit box, Brokerage – including Name and Address)

Does the estate contain a going business? _____ If yes, name _____

Type _____ Will it be continued? _____

If yes, do you understand you must have a court order to continue business? _____

Do you understand that the first year's bond premium is not refundable? _____

Do you understand all increases and reductions of the bond must be ordered by the court? _____

Do you understand the bond is in effect until a final discharge is signed by the judge and a copy delivered to the surety?

_____

Do you understand the bond premium is to be paid annually? _____

Do you understand you must retain an attorney throughout the administration of this estate/~~conservatorship~~? _____

INDEMNITY AGREEMENT - READ CAREFULLY AND SIGN

The undersigned Applicant and Indemnitor certifies that all the foregoing answers given are the truth without reservation and are made to induce the Surety to become Surety on any or all bond(s) required to be posted by the Principal named herein as a result of his duties and obligations in administering the above-mentioned Estate. In consideration of the Surety executing any such bond(s) as may be required of Principal, the undersigned agrees as follows:

1. To reimburse Texas Bonding Company ("Surety") upon demand for all payments made for and to indemnify Surety from:
   a) all loss, contingent loss, liability and contingent liability, claim, expense, including attorneys' fees, for which Surety shall become liable or shall become contingently liable by reason of such suretyship, whether or not Surety shall have paid same at the time of demand; and
   b) to pay Surety an advance premium for the first year or a fractional part thereof that is fully earned and to pay annually thereafter such annual premium for suretyship as is billed until satisfactory evidence of discharge or release of liability shall be furnished to Surety by the obligee.
   c) Upon written demand, to deposit with the Surety a sum of money requested by Surety to cover any claim, suit, expense or judgment that Surety in its absolute discretion determines necessary and the deposit shall be pledged as collateral security on any bond or other bonds the Surety may have issued for the undersigned.
2. Surety and undersigned agree that the place of performance of this agreement, including the promise to pay Surety, shall be in Harris County, Texas and venue for any suit, arbitration, mediation or any other form of dispute resolution shall be in Harris County, Texas.
3. Surety is authorized to investigate, at any time, the undersigned's credit, employment history, and department of motor vehicle records.

Regardless of the date of signature, this indemnity is effective as of the date of execution and renewal of the aforementioned bond(s) and is continuous until Surety is satisfactorily discharged from liability pursuant to the terms and conditions contained herein and in the bond(s).

Signed this _____ day of _____, _____.

X _____
SIGNATURE, APPLICANT

To reach the branch office closest to you, CALL 800-787-3896

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APPENDIX 2

No. 312,145-403[7]

PLAINTIFF, SUCCESSOR ADMINISTRATOR OF THE ESTATE OF [DECEASED], DECEASED	§	**IN THE PROBATE COURT**
VS.		
[FORMER REPRESENTATIVE], INDIVIDUALLY AND AS FORMER ADMINISTRATOR OF THE ESTATE OF [DECEASED], DECEASED	§	**NUMBER _____ OF**
and	§	
[SURETY COMPANY]	§	**_____ COUNTY, TEXAS**

OBJECTION TO ANNUAL AND FINAL ACCOUNT AND PLAINTIFF'S ORIGINAL PETITION FOR SURCHARGE

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW _____, Plaintiff and Successor Administratrix of the Estate of [DECEDENT], Deceased ("PLAINTIFF"),and makes this her Objection to Annual and Final Account and Plaintiff's Original Petition for Surcharge ("OBJECTIONS and SURCHARGE") complaining of [FORMER REPRESENTATIVE], INDIVIDUALLY AND AS PRIOR ADMINISTRATOR OF THE ESTATE OF [DECEDENT], DECEASED ("DEFENDANT REPRESENTATIVE") and [SURETY COMPANY] ("DEFENDANT SURETY"), and as grounds for said objections and for her cause of action and claim for relief would respectfully show the Court the following:

I. JURISDICTION

An Application for Appointment of Administrator was originally filed in this Court on _____. DEFENDANT REPRESENTATIVE was appointed Administrator of the Estate of [DECEDENT], Deceased on _____ and qualified on _____. DEFENDANT REPRESENTATIVE was removed as Administrator of the Estate of [DECEDENT] on _____. PLAINTIFF was appointed Successor Administratrix of the Estate of [DECEDENT], Deceased on _____ and qualified on _____. PLAINTIFF as

[7] The authors thank John Yow and Whitney Neighbors of John Yow & Associates for the use of this petition. It is meant to be only an example of the type of petition that may be filed in a surcharge action because each case is dependent on the facts of that case. There may be additional claims to assert or claims that are contained in this form that are not appropriate for your suit.

Successor Administratrix of the Estate of [DECEDENT], Deceased, brings this OBJECTIONS and SURCHARGE pursuant to her authority under Sections 224 and 225 of the Texas Probate Code, as amended.

Pursuant to Texas Rule of Civil Procedure 190.1, Plaintiff herein alleges that discovery in this cause be conducted under level two (2) in accordance with Texas Rule of Civil Procedure 190.3.

II. PARTIES AND VENUE

PLAINTIFF is an individual residing in _____, Texas. DEFENDANT REPRESENTATIVE is an individual, and Prior Administrator of the Estate of [DECEDENT], Deceased, who may be served with the Objection to Annual and Final Account and Plaintiff's Original Petition for Surcharge by serving him at his last known residence located at _____, _____ County, Texas _____. DEFENDANT [SURETY COMPANY] is a company duly qualified to do business within the State of Texas, and may be served with process by serving by certified mail, return receipt requested, by the Clerk of the Court where this cause is pending to its registered agent, _____ for [SURETY COMPANY], _____, _____, Texas _____.

III. SUMMARY OF OBJECTIONS AND SURCHARGE

A. Objection to Annual and Final Account
B. Plaintiff's Original Petition for Surcharge
1. Facts
2. Causes of Action

a. Breach of Statutory Duties

1) Inventory, Appraisal and List of Claims
2) Previous Annual Accountings
3) Applications for Attorneys' Fees
4) Applications for Administrator's Fees

b. Breached Duty of Loyalty
c. Breached Duty of Disclosure
d. Breached Duty to Protect and Preserve Estate Assets and Duty of Reasonable Care
e. Conversion

3. Denial of Offset Claims
4. Claim Against Bond

C. Conclusion

IV.

A. Objections to Annual and Final Account

PLAINTIFF objects to DEFENDANT REPRESENTATIVE's Annual and Final Accounting in that the beginning balance and values of personal and real property on Page 2 have been mis-stated with exaggerated values.

A true and correct copy of the Annual and Final Account is attached hereto as Exhibit "A" and incorporated herein by reference. (See Exhibit "A.") A true and correct copy of the Appraisal of the real property has been provided as Exhibit "B" and is hereby incorporated by reference herein. (See Exhibit "B.")

PLAINTIFF objects to Page 2, Paragraph 4 of the Annual and Final Account in that it indicates receipts and disbursements in the amount of $2,800,000.00 in US Treasury Bills when actually the Treasury Bills Matured and were reinvested; $2,800,000.00 did not actually come into and leave the hands of DEFENDANT REPRESENTATIVE for the Estate. This statement is a misrepresentation to the Court.

The US Treasury Bills are all short term and therefore mature frequently and are then reinvested in new US Treasury Bills. Therefore, DEFENDANT REPRESENTATIVE was essentially churning the estate assets to generate the appearance of compensable transactions as he did throughout his administration. The statements from Treasury Direct state the total value of the US Treasury Bills is $500,000.00; there are a total of three "T-Bills" in the amounts of $300,000.00, $100,000.00, and $100,000.00. (See Exhibit "C.")

The funds invested in the US Treasury Bills originated from the initial assets that were on hand on the date of Decedent's death. Regardless of how many times the funds are transferred or reinvested, their origin is that of original funds on hand on the date of Decedent's death. Therefore, only interest generated by these funds should be considered as an increase in cash and only bank fees associated with maintaining these funds should be considered a decrease in cash. The assertion that each time the funds are reinvested is both a receipt and disbursement of cash to and from the Estate is a gross mis-characterization of Estate assets.

B. PETITION FOR SURCHARGE

1. FACTS

DEFENDANT REPRESENTATIVE was appointed Administrator of the Estate of [DECEDENT], Deceased by this Court on _____. DEFENDANT REPRESENTATIVE qualified as such on _____ after posting a bond in the amount of $_____. The Bond was later increased to the amount of $_____ on _____. A true and correct certified copy of the current said bond is attached as Exhibit "D" and incorporated herein by reference, in its entirety and is fully copied and set forth at length and was at all times material to this action in full force and effect. Said bond was properly executed by DEFENDANT REPRESENTATIVE and DEFENDANT SURETY COMPANY and delivered to the Judge under this cause wherein the Judge executed said

bond thereby binding DEFENDANTS REPRESENTATIVE and DEFENDANT SURETY COMPANY. DEFENDANT REPRESENTATIVE has not been discharged from said bond.

DEFENDANT REPRESENTATIVE mismanaged the assets of the Estate. Based upon PLAINTIFF'S discovery of malfeasance and mismanagement, PLAINTIFF filed numerous objections to DEFENDANT REPRESENTATIVE's Applications for Expenses and Accountings. PLAINTIFF has requested a hearing on her numerous objections to DEFENDANT REPRESENTATIVE's Applications for Expenses and Accountings and for DEFENDANT REPRESENTATIVE to pay over to the PLAINTIFF the sum of money in an amount the Court finds appropriate.

DEFENDANT REPRESENTATIVE'S mishandling and mismanagement of the Estate property and his failure to well and truly perform his duties and responsibilities as Administrator have resulted in loss and waste of the Estate property and in the Estate incurring unnecessary expenses; DEFENDANT REPRESENTATIVE has breached his fiduciary duties and responsibilities as Administrator of the Estate of [DECEDENT], Deceased. DEFENDANT REPRESENTATIVE has not made any reimbursement for the loss and waste in which he is liable for his capacity as Administrator of the Estate.

2. CAUSES OF ACTION

A personal representative of an estate is held to the same fiduciary standards as a trustee; as a fiduciary, the personal representative has a duty to protect the beneficiaries' interest by fair dealing in good faith with fidelity and integrity, and his personal interests may not conflict with his fiduciary obligations to the estate. *McLendon v. McLendon*, 862 S.W.2d 662, 670 (Tex.App.–Dallas 1993, writ denied). DEFENDANT REPRESENTATIVE had a fiduciary relationship with and duty to the heirs of this estate. DEFENDANT REPRESENTATIVE breached those duties by continuously misrepresenting to this Court the cash flow of this estate, failing to maintain the real property in the estate, and failing to properly and prudently manage the estate assets. *See* TEX. PROB. CODE ANN. §§ 230 and 231 (Vernon 2003).

DEFENDANT REPRESENTATIVE breached his fiduciary duty to the estate by not performing his duties as Administrator. *See* TEX. PROB. CODE ANN. §§ 230 and 231 (Vernon 2003).

1) Inventory, Appraisal and List of Claims

PLAINTIFF complains of DEFENDANT REPRESENTATIVE'S Inventory, Appraisement and List of Claims in that it fails to accurately represent all assets that were belonging to the Estate at Decedent's date of death as

required by Section 250 of the Texas Probate Code. DEFENDANT REPRESENTATIVE also improperly valued assets that were listed. The items not included on the inventory are:

(1) [DESCRIBE]

(2) [DESCRIBE]

The items improperly valued are:

(1) [DESCRIBE]

Inventory Value : $
Date of Death Value: $

(2) [DESCRIBE]

Inventory Value: $
Date of Death Value: $

A true and correct copy of the Inventory, Appraisal and List of Claims is attached hereto as Exhibit "E" and incorporated herein by reference. (See Exhibits "B" and "E.")

2) Objections to Previous Accountings

Texas law allows for Previous Accountings to be re-examined on a final account of an estate; the right to challenge the predecessor's accountings, is not barred by limitations. *diPortanova v. Hutchinson*, 766 S.W.2d 856, 858 (Tex. App–Houston[1st] 1989). While the *diPortanova* case applied these rules to a Guardianship Estate, it derived its policy from a Decedent Estate's Case citing *Thomas v. Hawpe*, 80 S.W. 129, 131 (Tex.Civ.App. 1904, writ ref'd). *diPortanova* holds that a Successor Representative is required to account for all of the Estate that came into the hands of its predecessor and is entitled to any order in the Court's power that is necessary to enforce the delivery of the estate. *diPortanova v. Hutchinson*, 766 S.W.2d at 857; *See also* TEX. PROB. CODE ANN. § 224 (Vernon 2003). This applies to funds previously expended that were originally part of the Estate, but have been misapplied by DEFENDANT REPRESENTATIVE by way of misrepresentations to the Court; PLAINTIFF makes the following objections to previous accountings and applications made by DEFENDANT REPRESENTATIVE.

a) Annual Accounting 200___

PLAINTIFF complains of DEFENDANT REPRESENTATIVE's 200___ Annual Accounting in that the beginning and balance values of personal and real property on Page 2 have been mis-stated with exaggerated values contrary to Section 399 of the Texas Probate Code. (See Exhibit "B.") A true and correct copy of the 200___ Annual Account is attached hereto as Exhibit "F" and incorporated herein by reference. (See Exhibit "F.") PLAINTIFF requests that the Court re-examine the pleading, set aside the Order approving this Annual Accounting, and require DEFENDANT REPRESENTATIVE to re-state the Annual Accounting.

PLAINTIFF complains of DEFENDANT REPRESENTATIVE's 200___ Annual Accounting in that it indicates on Page 2, the table of increases and decreases, a beginning balance of $_____ for Bank Account No. _____; the correct beginning balance should be $_____. PLAINTIFF requests that the Court re-examine the pleading, set aside the Order approving this Annual Accounting, and require DEFENDANT REPRESENTATIVE to re-state the Annual Accounting.

PLAINTIFF complains of DEFENDANT REPRESENTATIVE's 200___ Annual Accounting in that no evidence was presented that the Administrator had taken care of and managed the estate property prudently, and the Court made no finding that the Administrator had taken care of and managed the estate property prudently. PLAINTIFF requests that the Court re-examine the pleading and set aside the Order approving this Annual Accounting.

a) Application for Expenses #2

Without waiver of the foregoing, PLAINTIFF complains of DEFENDANT REPRESENTATIVE's Application for Expenses #2 for Attorney's Fees in that the Attorney Billed the Estate, in hourly increments, the following:

1)

2)

3)

This is a misuse of the Estate funds. A true and correct copy of the Application for Expenses #2 is attached hereto as Exhibit "L" and incorporated herein by reference. *See* Exhibit "L." PLAINTIFF requests that the Court re-examine and set aside the Order approving this Application.

4) Applications for Administrator's Fees

PLAINTIFF asserts a general complaint of all Applications for Expenses relating to administrator's' fees incurred by DEFENDANT REPRESENTATIVE in DEFENDANT REPRESENTATIVE'S administration of the estate. DEFENDANT REPRESENTATIVE did not have standing to be appointed Administrator of this Estate and therefore should not have incurred or earned any administrator's fees acting as administrator of the Estate. TEX. PROB. CODE ANN. §§ 3(r) and 76 (Vernon 2003). DEFENDANT REPRESENTATIVE is not an heir of the Decedent and in the original application for letters testamentary, DEFENDANT REPRESENTATIVE states that the Decedent died intestate. *See* Exhibits "I" and "J."

Section 241 of the Texas Probate Code states that:

> "...administrators shall be entitled to receive a commission of five per cent (5%) on all sums they may actually receive in cash, and the same per cent on all sums they may actually pay out in cash...provided, no commission shall be allowed for receiving funds belonging to the testator or intestate which were on hand or were held for the testator or intestate at the time of his death..." TEX. PROB. CODE ANN. §241 (Vernon 2003).

The complaints below demonstrate that DEFENDANT REPRESENTATIVE was not applying Section 241 of the Texas Probate Code when he applied for Administrator's Compensation.

The amount of receipts and disbursements presented by DEFENDANT REPRESENTATIVE was clearly a misstatement of facts made for the purpose of taking advantage of the alternate rule in Texas Probate Code Section 241(a), in which the lesser of the two values of 5% paid in and out, or 5% of the total value of the Estate, is paid as commissions.

DEFENDANT REPRESENTATIVE applied to be paid 5% of the total Estate as an alternate, lower amount. This would not have been an option for DEFENDANT REPRESENTATIVE had he followed the "5 in/5 out" rule on sums actually received in cash or paid out in cash, as that calculation would have yielded $_____ in compensation. Therefore, the funds of the Estate have been misapplied in paying the DEFENDANT REPRESENTATIVE any amount for administrator's compensation over $_____. PLAINTIFF requests that the Court re-examine and set aside the Order approving this Application.

b. Breached Duty of Loyalty

DEFENDANT REPRESENTATIVE breached his fiduciary duty of loyalty, in that he used the position of Administrator to benefit himself at the expense of or placed himself in a position to which his self-interests conflicted with his obligations to protect the interests of the Estate. DEFENDANT REPRESENTATIVE'S acts in breach of his fiduciary duty of loyalty include using the estate attorney to attempt to claim the estate for himself. This resulted in a direct benefit to DEFENDANT REPRESENTATIVE in that DEFENDANT REPRESENTATIVE was able to use estate assets to pay for his personal attorney fees.

DEFENDANT REPRESENTATIVE breached his fiduciary duty of loyalty, in that DEFENDANT REPRESENTATIVE has misrepresented the characterization of assets for the purpose of increasing the amount of funds eligible for compensable fees on each of Application for Expenses #5 for Administrator's compensation for his personal financial gain. The assets belong to the heirs of the Estate and the figures should not have been manipulated to convert Estate assets into DEFENDANT REPRESENTATIVE's name.

DEFENDANT REPRESENTATIVE breached his fiduciary duty of loyalty, in that DEFENDANT REPRESENTATIVE has paid for the utilities of the real property of the estate of his own funds, for the benefit of another person, and has made an application to this Court for reimbursement. DEFENDANT REPRESENTATIVE was not collecting rent from the person he allowed to live on the property and that person created a junk yard of the property. The Estate should not pay for someone to live on the property at a financial detriment to the Estate.

c . Breached Duty of Disclosure

DEFENDANT REPRESENTATIVE breached his fiduciary duty of disclosure, in that DEFENDANT REPRESENTATIVE failed to disclose to the Court that he permitted a person to reside on the real property of the estate and did not charge rent. *See* TEX. PROB. CODE ANN. §358 (Vernon 2003). Additionally, DEFENDANT REPRESENTATIVE paid for the utilities for the real property out of the estate funds on more than one occasion. DEFENDANT REPRESENTATIVE breached his fiduciary duty to disclose in that DEFENDANT REPRESENTATIVE failed to disclose $147,900.00 as cash assets of the Estate on the Inventory, Appraisement and List of Claims.

d. Breached Duty to Protect and Preserve Estate Assets
and
Breached Duty of Reasonable Care

DEFENDANT REPRESENTATIVE breached his fiduciary duty to protect and preserve estate assets, in that DEFENDANT REPRESENTATIVE, through misrepresentations of the cash flow of the estate, claimed $_____ in administrator's compensation. Additionally, DEFENDANT REPRESENTATIVE breached his fiduciary duty to protect and preserve estate assets by:

9. not obtaining insurance for the real property belonging to the estate;

10. not maintaining the real property belonging to the estate and letting it waste to become a worthless asset (one structure on the property has partially collapsed, the other is in very poor condition). *See* Exhibit "Q";

11. not selling automobiles belonging to the estate and allowing them to decrease in value;

12. applying for previous administrator's fees and not performing his duties, thereby wrongfully taking money from the estate;

13. including money he paid to himself as disbursements for calculating his commissions;

14. not preserving the assets of the estate in a proper manner to retain their value.

See TEX. PROB. CODE ANN. §§222(b)(1), 222(b)(4), 230, and 358 (Vernon 2003).

e. Conversion

DEFENDANT REPRESENTATIVE misrepresented to this Court the amount of funds received in and paid out of this estate with the intent that the Court would rely on those representations and authorize an excessive amount of funds to be paid to DEFENDANT REPRESENTATIVE by way of the administrator's compensation, causing the value of the estate to be unnecessarily diminished.

3. Denial of Offset Claims

PLAINTIFF believes that as a matter of law and based on the actions and failures to act of DEFENDANT REPRESENTATIVE that there exists no entitlement to any offsets for his actions and breaches of duty.

4. Claim Against Bond

Pursuant to Section 194 of the Texas Probate Code, DEFENDANT REPRESENTATIVE as Administrator was required to obtain a bond to protect the probate Court and the Decedent's Estate from any losses due to DEFENDANT REPRESENTATIVE'S breach of his statutory and fiduciary duties. DEFENDANT [SURETY COMPANY] issued a Corporate Surety Bond No. _____ in _____, in the sum of $_____, for the DEFENDANT REPRESENTATIVE as Administrator and such bond remains in full force and effect.

III. CONCLUSION

DEFENDANT REPRESENTATIVE has not taken care of or managed the estate property prudently and in compliance with the Texas Probate Code.

DEFENDANT REPRESENTATIVE has not performed his fiduciary duties as the personal representative of the estate. Additionally, he has breached his fiduciary duty to the estate and the heirs by failing to maintain and properly managed the estate assets.

PLAINTIFF has brought this OBJECTION AND SURCHARGE in good faith and for just cause.

Because of the failure of DEFENDANT REPRESENTATIVE to take care of and manage estate property prudently, he should be denied any and all attorney's fees and costs which he may accrue responding to this OBJECTION AND SURCHARGE.

CLAIMS FOR RELIEF

The above described actions of DEFENDANT REPRESENTATIVE constitute failures on his part to well and truly perform his duties and well and truly perform the responsibilities of his position as Administrator of the Estate as set out in Sections 230, 232, 233 and 399 of the Texas Probate Code, as amended. By his actions, DEFENDANT REPRESENTATIVE has failed to well and truly perform his duties and obligations as Administrator and has thereby caused loss or waste to the Estate which has resulted in damage to the Estate in the amount equal to at least

$_____ DEFENDANT REPRESENTATIVE has not made reimbursement for that loss and waste to the Estate which he is liable to therefore.

DEFENDANT [SURETY COMPANY] for certain consideration agreed to be bonded as surety for the true performance of DEFENDANT REPRESENTATIVE as Administrator of the Estate of [DECEDENT], Deceased. This bond remained in force at all times relevant herein. DEFENDANT REPRESENTATIVE has failed to well and truly perform such duties and obligations and DEFENDANT [SURETY COMPANY] is thus jointly and severally liable for damages, costs and expenses which have accrued to the Estate of [DECEDENT], Deceased.

PLAINTIFF requests this Court to re-examine past commissions paid to DEFENDANT REPRESENTATIVE, and order forfeiture and disgorgement of those fees back to the Estate.

WHEREFORE, PREMISES CONSIDERED, PLAINTIFF respectfully prays that both DEFENDANTS be cited to appear and answer herein, and that upon final trial thereof, the Court finds that:

1) PLAINTIFF brought this motion in good faith and for just cause;

2) DEFENDANT REPRESENTATIVE has not taken care of or managed the estate property prudently and in compliance with the Texas Probate Code;

3) PLAINTIFF'S objections to the Annual and Final Account be sustained and that DEFENDANT REPRESENTATIVE restate same to reflect the true condition of the estate for the time specified;

4) The Inventory, Appraisal and List of Claims be re-examined and the Order set aside, and DEFENDANT REPRESENTATIVE and his attorneys be ordered to restate same to reflect the condition of the estate for the time specified;

5) The 200___ Annual Account be re-examined and the Orders set aside, and DEFENDANT REPRESENTATIVE and his attorneys be ordered to restate same to reflect the condition of the estate for the time specified and to reimburse the estate all amounts that this Court finds the estate is due within 30 days of the Order requiring reimbursement;

6) The Previous Application for Attorney's Fees #2 be re-examined and the Orders set aside, and DEFENDANT REPRESENTATIVE be ordered to reimburse the estate all amounts that this Court finds the estate is due within 30 days of the Order requiring reimbursement;

7) The Previous Application for the Administrator's Fees #5 be re-examined and the Orders set aside, and DEFENDANT REPRESENTATIVE be ordered to reimburse the estate all amounts that this Court finds the estate is due within 30 days of the Order requiring reimbursement;

8) DEFENDANT REPRESENTATIVE breached his Fiduciary Duty to the Estate;

9) DEFENDANT REPRESENTATIVE be denied any and all attorneys' fees and costs he may accrue responding to this OBJECTIONS AND SURCHARGE;

10) PLAINTIFF be reimbursed her attorney's fees and costs she has accrued in bringing the estate into:

11) compliance with the Texas Probate Code and for bringing this action to recover estate assets;

12) Any funds this Court declares DEFENDANTS to reimburse the estate be paid with interest accruing from the date that this demand was made on DEFENDANT REPRESENTATIVE to date of Judgment at the maximum permissible rate, for all administrative costs and expenses suffered by reason of DEFENDANT REPRESENTATIVE'S actions, for reasonable and necessary attorney's fees for the prosecution of this suit;

13) PLAINTIFF is entitled to receive said sum of money plus interest from DEFENDANT

REPRESENTATIVE and PLAINTIFF have and recover judgment of, from and against DEFENDANTS, jointly and severally, in an amount equal to at least $_____ plus interest on the principal amount from the date that this demand was made on DEFENDANT REPRESENTATIVE to date of Judgment at the maximum permissible rate, for all administrative costs and expenses suffered by reason of DEFENDANT REPRESENTATIVE'S actions, for reasonable and necessary attorney's fees for the prosecution of this suit;

14) And for any other relief both in law and in equity to which she may justly be entitled.

Respectfully submitted,

JOHN O. YOW & ASSOCIATES

_____

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APPENDIX 3

NO. _____

[REPRESENTATIVE], SUCCESSOR ADMINISTRATOR OF THE ESTATE OF [DECEDENT], Deceased,	§	**IN THE PROBATE COURT**
	§	**_____ COUNTY, TEXAS**
VS.	§	
§ [FORMER REPRESENTATIVE] NUMBER _____ OF INDIVIDUALLY AND AS PRIOR ADMINISTRATOR OF THE ESTATE OF [DECEDENT], Deceased,	§	

and

[SURETY COMPANY]

[FORMER REPRESENTATIVE'S] ORIGINAL CROSS-CLAIM

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Cross-Plaintiff [FORMER REPRESENTATIVE], filing this, his Original Cross-Claim against [THIRD PARTY DEFENDANTS], Cross-Defendants. In support thereof, Cross-Plaintiff respectfully will show as follows:

I.

1. Cross-Plaintiff is the former administrator of the above-styled estate (hereinafter "Estate"). His letters of administration were revoked on approximately _____, after Decedent's heirs were located and asserted their priority to be administrator. [His letters of administration were cancelled at the time of his resignation on _____.]

2. Plaintiff [SUCCESSOR REPRESENTATIVE] succeeded [FORMER REPRESENTATIVE] as administrator and filed a claim with this Court alleging that [FORMER REPRESENTATIVE] mismanaged Estate assets.

3. Plaintiff alleges this mismanagement includes, but is not limited to, improper payments of Estate assets to [THIRD PARTY DEFENDANTS], an attorney [or accountant] who assisted [FORMER REPRESENTATIVE] with the management and probate of the Estate in addition to representing him. Plaintiff also alleges [FORMER REPRESENTATIVE] made misstatements to the Court in the process of administering Decedent's estate, and miscalculated his commissions.

4. Accordingly, [FORMER ADMINISTRATOR] files this Original Cross-Claim requesting contribution and indemnity from [THIRD PARTY DEFENDANTS]. [FORMER ADMINISTRATOR] also asserts a claim of legal [accounting] malpractice, and violation of the Texas Deceptive Trade Practices Act against [THIRD PARTY DEFENDANTS]. Notice of the DTPA violation is impracticable by reason of the necessity of filing suit in order to

prevent the expiration of the statute of limitations. This claim is also a cross-claim against an existing cross-defendant.

II.

5. [FORMER ADMINISTRATOR] is involved in this case solely because he relied on the legal advice of his attorney [accountant], _____, in making payments and distributions of Estate assets (which include disbursements payable to _____ and his firm for legal [accounting] fees and costs), and making representations to the Court, orally and in writing. In addition, the misstatements of which Plaintiff complains were drafted and conveyed to the Court by [attorney] and [attorney] calculated the commissions paid to [FORMER REPRESENTATIVE] with Court approval.

6. If it is found that Estate assets were mismanaged or otherwise wrongfully disbursed, [FORMER REPRESENTATIVE] claims such conduct was caused or contributed to by _____ (in his role as attorney [accountant] and advisor) and his professional corporation.

7. Assuming, *arguendo*, Plaintiff's allegations are true, [FORMER REPRESENTATIVE] will show [THIRD PARTY DEFENDANT] filed a number of motions with the Court in which he makes representations regarding his entitlement to attorney fees and [FORMER REPRESENTATIVE'S] entitlement to commissions and inheritance. Accordingly, [THIRD PARTY DEFENDANT] should indemnify Cross-Plaintiff – or be held liable for contribution – for an amount at least equal to the amount he benefited or was enriched.

8. To the extent that Plaintiff's damages are traceable to [THIRD PARTY DEFENDANTS'] conduct and advice as attorney [accountant] to Cross-Plaintiff regarding management of the Estate, or filings of any kind made on his behalf, [THIRD PARTY DEFENDANT] should be held responsible and should indemnify Cross-Plaintiff or contribute to any damages awarded Plaintiff as against Cross-Plaintiff for such conduct.

9. The actions [THIRD PARTY DEFENDANT'S] took in his role as attorney [accountant] and advisor to [FORMER REPRESENTATIVE] constitute negligence and legal malpractice.

10. An attorney-client relationship existed between [THIRD PARTY DEFENDANT] and [FORMER REPRESENTATIVE], individually for a brief period of time and formerly as administrator, with [FORMER REPRESENTATIVE] – unsophisticated in the areas of probate and estate administration – relying exclusively on the advice and counsel of [THIRD PARTY DEFENDANT], an attorney who is board-certified in the area of probate and estate planning.

11. [THIRD PARTY DEFENDANT INDIVIDUAL'S] actions are the sole and proximate cause-in-fact of [FORMER REPRESENTATIVE'S] injuries and [THIRD PARTY DEFENDANT INDIVIDUAL'S] firm, [THIRD PARTY DEFENDANT CORPORATION] is vicariously liable for [THIRD PARTY DEFENDANT INDIVIDUAL'S] actions as well. [THIRD PARTY DEFENDANT INDIVUDAL] has caused [FORMER REPRESENTATIVE] to suffer actual damages from (1) incurring costs to defend Plaintiff's allegations, and (2) the failure of the estate to pay [FORMER REPRESENTATIVE] his reimbursement and commissions earned but not approved by the court, and if [FORMER REPRESENTATIVE] is held liable to Plaintiff, he will suffer additional damages.

12. The above-described course of conduct also supports a cause of action for gross negligence. [THIRD PARTY DEFENDANT'S] acts involved an extreme degree of risk, considering the probability and magnitude of the potential harm to [FORMER REPRESENTATIVE]. [THIRD PARTY DEFENDANT] had actual, subjective awareness of the risk involved, but nevertheless proceeded in conscious indifference to the rights and welfare of [FORMER REPRESENTATIVE], and he was aware of the likelihood of serious injury. In short, [THIRD PARTY DEFENDANT] knew about the peril, but by his acts and omissions demonstrated that he did not care.

13. [THIRD PARTY DEFENDANT] also violated sections of the Texas Deceptive Trade Practices Act because he engaged in unconscionable actions and made express misrepresentations of material facts that cannot be characterized as advice, judgment, or opinion (i.e., holding himself out as an attorney [accountant] with special knowledge of probate and estate planning) upon which [FORMER REPRESENTATIVE] relied. In addition, [THIRD PARTY DEFENDANT] failed to make known the duties and obligations of an administrator and the risks associated with filings he made on [FORMER REPRESENTATIVE'S] behalf. He also failed to adequately explain the administration process and disclose the attendant risks and potential for personal liability as a result of the various pleadings filed on his behalf. These actions were a producing cause of actual damage to [FORMER REPRESENTATIVE] entitling him to economic and additional damages and attorney fees.

14. [FORMER REPRESENTATIVE] also seeks relief afforded by TEX. BUS. & COMM. CODE § 17.50(b)(4) if the Court deems it proper – namely, revocation of [THIRD PARTY DEFENDANT'S] license to practice law in the State of Texas and/or Texas Board of Legal Specialization certification if the judgment against him in this proceeding is not satisfied within three (3) months of the date of judgment.

III.

15. WHEREFORE, PREMISES CONSIDERED, Defendant [FORMER REPRESENTATIVE] respectfully requests this Court grant his Original Cross-Claim in the above-captioned cause, enter judgment in his favor against [THIRD PARTY DEFENDANT INDIVIDUAL] and [THIRD PARTY DEFENDANT CORPORATION], award him actual and economic damages, punitive and additional damages, attorney fees and costs, pre-judgment and post-judgment interest, revocation of [THIRD PARTY DEFENDANT'S] license to practice law and/or certificate of legal specialization should a judgment go unpaid, and for such other and further relief to which [FORMER REPRESENTATIVE] may be justly entitled.

Respectfully submitted,

GALLIGAN & MANNING

_____

TAMMY C. MANNING
T.B.N. 12950800
JASON A. COX
T.B.N. 24036411
802 W. Alabama
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(713) 522-9220 Telephone
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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing instrument has been sent by certified mail, return receipt requested, to the following counsel-of-record, on this the ___ day of _____, 2005.

_____
Tammy C. Manning

APPENDIX 4

NO. _____

IN THE MATTER OF	§	IN THE PROBATE COURT
	§	
_____,	§	_____OF
	§	
DECEASED.	§	_____ COUNTY, TEXAS

_____	§	
	§	
_____	§	
_____	§	
	§	
VS.	§	
	§	
_____	§	
_____	§	
_____	§	
AND	§	
_____	§	

DEFENDANT'S ORIGINAL ANSWER, CROSSCLAIM AND THIRD PARTY ACTION

TO THE HONORABLE JUDGE OF SAID COURT

Comes now _____and files this its original answer, cross-claim and third-party action, and in support thereof would respectfully show the court as follows:

ORIGINAL ANSWER

I.

As authorized by Rule 92 of the Texas Rules of Civil Procedure, Defendant _____ enters a general denial of all matters pled by the Plaintiff and requests that the Court require the Plaintiff to prove her charges and allegations by a preponderance of the evidence as required by the constitution and the laws of the state of Texas.

CROSSCLAIM

II.

Comes now _____, now acting as Cross-Plaintiff herein, and brings this cross-claim against _____, also known as _____, and shows the following:

III.

Cross-Defendant _____, also known as _____may be served with process herein at _____.

IV.

_____resigned as administratrix of the _____, Deceased (hereafter the "Estate") on or about _____. Plaintiff_____, Successor Administratrix of the Estate filed the above-styled action against _____and _____on _____, alleging that _____, while acting as administratrix of the Estate failed, among other things, to carry out her duties and failed to well and truly perform the responsibilities of her position as Administratrix. _____was sued as surety.

V.

In the unlikely event that the damages of the Estate, if any, were proximately caused by Cross-Defendant _____'s failure, if any, to faithfully perform her duties as administratrix of the Estate, or in the event that _____pays or is required to pay any sums under the bond on which Plaintiff has sued _____, or otherwise sustains any loss or expense in connection with having issued the subject bond, _____would show that it is entitled to complete indemnification, or alternatively, contribution, from _____. In that regard, _____would show that _____as principal, applied for and requested that _____issue a bond on her behalf, originally in the sum of $_____. _____did in fact issue such bond. Thereafter, at _____' request, _____increased the bond penalty from $_____to $_____. Both the bond and the rider were conditioned that _____, as principal, would well and truly perform all the duties required of her by law under her appointment as administratrix. In consideration for the issuance of such bond and rider thereto (hereafter the "Bond"), _____agreed to indemnify _____from and against any liability, loss, cost and expenses, including attorney's fees, which _____might sustain as surety on such Bond.

VI.

In the event that _____pays or is required to pay any sums to Plaintiff under the Bond issued on behalf of _____, _____ is entitled, both by contract and under common and/or statutory law, to be indemnified by _____for all such sums, as well as for all expenses incurred, or other losses sustained, as a result of _____'s conduct.

VII.

All conditions precedent to the relief requested herein have been performed or satisfied, or have been waived or are excused by law.

THIRD-PARTY ACTION

VIII.

Comes now _____and brings this third-party action against _____ and shows the following:

IX.

Third-Party Defendant _____, may be served with process herein at his place of business located at _____.

X.

_____would show that if Estate assets were converted or otherwise wrongfully disposed of, such conduct was caused or contributed to by Third-Party Defendant _____. _____would show that Plaintiff has alleged that _____, while acting as attorney for _____in her capacity as administratrix of the Estate, obtained custody and/or control and/or possession of certain assets of the Estate, without approval from the court. As further alleged by Plaintiff, _____received at least the amount of $_____ostensibly in payment of attorney's fees. Such fees were alleged to have been received by _____without court approval and without _____seeking ratification from the probate court for payment of such amount. In the event that Plaintiff's allegations are true, _____was fully aware that he was not entitled to receive such payment without court approval. To the extent that any of Plaintiff's damages are the result of _____'s conduct, _____is responsible for such.

XI.

Additionally and/or alternatively, _____, upon being retained as attorney for _____in her capacity of administratrix of the Estate, became a fiduciary with respect to assets of the Estate. _____breached his fiduciary duty as attorney for _____in not ensuring that assets of the Estate were not wasted, converted, or otherwise improperly disposed of. Moreover, _____acted negligently or, alternatively, intentionally, in connection with his participation and involvement in the handling of assets of the Estate.

XII.

_____seeks indemnification, or alternatively, contribution from _____for any sums _____may pay or become obligated to pay herein, as well as for any losses or expenses incurred by _____, as a result of _____'s conduct.

XIII.

All conditions precedent to the relief requested herein have been performed or satisfied, or have been waived or are excused by law.

WHEREFORE, PREMISES CONSIDERED, _____, prays for judgment as follows:

1. Judgment that Plaintiff take nothing by reason of this suit and that _____be discharged with its costs and attorney's fees;
2. Judgment against _____in an amount within the jurisdictional limits of this court for all sums, losses, fees, and expenses incurred by _____as set forth above;
3. Judgment against _____, jointly and severally with the judgment against _____, for all damages caused by _____as set forth above;
4. Pre- and post-judgment interest against _____and _____, jointly and severally, as allowed by law;
5. Reasonable attorney's fees against _____and _____, jointly and severally;
4. All costs of court; and
5. Such other and further relief to which _____may be justly entitled to receive.

Respectfully submitted,