

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

In re: §
§
KIRK LEWIS, § Case No. 05-44432
§ Chapter 13
Debtor. §

**MEMORANDUM OPINION AND ORDER ALLOWING IN PART AND
DISALLOWING IN PART PROOF OF CLAIM NO. 4 FILED BY BILLY F. HILL,
MARGIE J. HILL, ERIC B. HILL AND THERESA R. HILL MCCULLOUGH¹**

This matter is before the Court following a hearing on the “Amended Objection to Claim of Billy F. Hill, Margie J. Hill, Eric B. Hill, and Theresa R. Hill McCullough (Claim No. 4)” (the “Objection”) filed by Kirk Lewis (the “Debtor”). Having considered the Objection, the memoranda supporting and opposing the Objection, the arguments of counsel, and the evidence presented at the hearing on the Objection, the Court makes the following findings of fact and conclusions of law:

I. JURISDICTION

The Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§1334(a) and 157(a). The Court has authority to enter a final order in this contested matter since it constitutes a core proceeding as contemplated by 28 U.S.C. §157(b)(2)(A), (B), and (O).

II. PROCEDURAL HISTORY

On August 19, 2005 (the “Petition Date”), the Debtor initiated a proceeding under Chapter 13 of the Bankruptcy Code by filing a voluntary petition with this Court.

¹ This Memorandum Opinion is not designated for publication and shall not be considered as precedent, except under the respective doctrines of claim preclusion, issue preclusion, the law of the case, or as to other evidentiary doctrines applicable to the specific parties in this proceeding.

On January 5, 2006, Billy F. Hill, Margie J. Hill, Eric B. Hill, and Theresa R. Hill McCullough (collectively, the “Hills”) filed Proof of Claim No. 4 in the Debtor’s bankruptcy case. By their proof of claim, the Hills allege a claim against the Debtor’s estate in the amount of \$239,663.14 plus punitive damages.² The Hills allege that their claim is secured by an oil and gas interest.

The Hills’ claim against the Debtor’s estate includes the following:

(1) ½ of \$64,610.84 (the amount of alleged improper Trust (defined *infra*) distributions for which the Hills allege the Debtor is responsible);³

(2) ½ of \$284,366.54 (the amount of the promissory note that the Hills allege the Debtor should have collected on the Trust’s behalf);

(3) \$40,000.00 (the Hills’ attorney’s fees and expenses through December 31, 2005);

(4) \$20,000.00 (the estimated future amount of the Hills’ attorney’s fees and expenses); and

(5) \$5,000.00 (the Hills’ bankruptcy counsel’s fees and expenses).

The Hills allege that the Debtor is responsible for paying these amounts plus punitive damages based on theories of constructive fraud, gross negligence, conversion, unjust enrichment, constructive trust, actual fraud, aiding and abetting a breach of fiduciary duty, civil conspiracy, and breach of fiduciary duty. The Hills do not make clear in their proof of claim or in their briefing which theories of recovery support the particular debts they claim are owed by the Debtor.

The Debtor filed the Objection to the Hills’ proof of claim on February 23, 2006.

A supporting affidavit from the Debtor accompanied the Objection. The Hills raised

² In a post-hearing brief, the Hills assert that the Court should award them not less than \$100,000 in punitive damages.

³ As four of eight beneficiaries under the Trust, the Hills assert a ½ interest in claims relating to Trust assets.

numerous affirmative defenses in their response to the Objection, including estoppel, laches, release and waiver. At the conclusion of the hearing on the Objection on August 15, 2006, the Court set the matter for later ruling.

III. FACTUAL BACKGROUND

A. The Creation of the Trust

Maud Hill executed the Maud Hill Life Insurance Trust Agreement (the “Trust Agreement”) on or about December 28, 1989. By the Trust Agreement, Maud Hill created eight separate trusts to be administered by a single trustee. Each of the trusts was to be separate but equal in value, and each trust was to have its own beneficiary. The Court will refer to these trusts collectively as the “Trust.”

The eight beneficiaries under the Trust Agreement are Billy Hill, Shirley Lewis, Margie Hill, Billy Lewis, Eric Hill, Theresa Hill, Craig Lewis, and Kirk Lewis.⁴ The Trust Agreement provides that, until a beneficiary of the Trust (“Beneficiary”) reaches thirty-five years of age, or until two years had passed after Maud Hill’s death, whichever comes later, the trustee may make distributions to the beneficiaries in the trustee’s sole discretion. After a beneficiary reaches thirty-five years of age, the trustee is to distribute all remaining trust income and principal to the beneficiary.

B. Appointment and Powers of a Trustee

The Trust Agreement provides the trustee with broad discretion over the trust assets. The Trust Agreement attempts to balance this power by creating a “Trust Committee,” which is to be composed of three Beneficiaries. Article 2.2 of the Trust Agreement allows the Trust Committee to remove a trustee at any time by majority vote.

⁴ Billy Hill is Maud Hill’s son. Margie Hill is Billy Hill’s wife. Eric and Theresa Hill are Billy and Margie Hill’s son and daughter. Shirley Lewis is Maud Hill’s daughter. Billy Lewis is Shirley Lewis’ husband. Kirk and Craig Lewis are Billy and Shirley Lewis’ sons.

With respect to the resignation of a trustee, Article 2.1 allows a trustee to resign by providing appropriate written notice and by filing a written instrument in the Real Property Records of Rains County, Texas. Article 2.1 further provides that “[i]f a Trustee shall so resign, the Trust Committee shall appoint a successor trustee” Although Billy Hill, the initial trustee under the Trust Agreement, is also a beneficiary, Article 2.2 of the Trust Agreement prohibits the appointment of a beneficiary as a successor trustee.

The Trust Agreement contains several provisions limiting the liability of a trustee. Article 4.4 provides that “[a]ny Trustee shall be saved harmless from any liability for any action such Trustee may take, or for the failure of such Trustee to take any action, if done in good faith and without gross negligence.” Additionally, Article 4.3 of the Trust Agreement provides that “[a]ny successor trustee is relieved of any duty to examine the acts of any prior fiduciary, without the necessity of any court accounting, and any successor trustee shall be responsible only for those assets which are actually delivered to such trustee.”

C. Funding the Trust

After executing the Trust Agreement, Maud Hill transferred the trust property to her son, Billy H. Hill, as trustee under the Trust Agreement. Pursuant to Article 2.3 of the Trust Agreement, Maud Hill appointed the following individuals as members of the initial Trust Committee: Shirley A. Lewis (Maud Hill’s daughter), Theresa R. Hill (Maud Hill’s granddaughter), and Ivan Alexander, Jr. (the drafter of the Trust Agreement). However, Ivan Alexander and Teresa Hill refused to serve on the Trust Committee, and Shirley Lewis is now deceased. There are currently no Trust Committee members.

D. The Suit Against Billy Lewis

On September 26, 1997, Billy Hill, as trustee and as attorney-in-fact for Maud Hill, initiated Civil Action No. 97-08779K in the District Court for the 192nd Judicial District, Dallas County, Texas (the “Collection Action”) against Billy Lewis and Eau de Vie, Inc. d/b/a Spirits Liquor Co. (“EDV”). In the Collection Action, Maud and Billy Hill sought to recover \$300,000 that Maud Hill and the Trust had loaned to Billy Lewis and that Billy Lewis allegedly re-loaned to EDV.

The Debtor is Billy Lewis’ son. As of the Petition Date, the Debtor was EDV’s president and owned 4,000 shares of EDV according to his Schedule B (Personal Property). This constituted ownership of more than 99% of EDV’s outstanding stock. The Debtor’s father, Billy Lewis, owns the remainder of EDV’s shares.

On October 22, 1998, Billy Hill, as trustee under the Trust Agreement and as attorney-in-fact for Maud Hill, Billy Lewis, individually, and the Debtor, as president of EDV, executed a document entitled “Compromise and Settlement Agreement” (the “Collection Action Settlement”). Pursuant to the Collection Action Settlement, the Debtor, as the president of EDV, executed two Notes dated October 22, 1998. Maud Hill was the payee under one of the Notes (the “Maud Hill Note”) in the principal amount of \$51,343.33 plus 8% annual interest on unpaid principal and 12% annual interest on matured, unpaid amounts. Billy Hill, as trustee under the Trust Agreement, was the payee under the other Note (the “Trust Note”) in the principal amount of \$383,032.00 plus 8% annual interest on unpaid principal and 12% annual interest on matured, unpaid amounts. EDV’s obligation under each Note was secured by a written agreement

granting Maud Hill and the Trust an interest in all of EDV's property except liquor and inventory.

E. The Suit Against Billy Hill

At some point, Maud Hill formed a belief that her son, Billy Hill, had misappropriated her property and property of the Trust. Accordingly, on February 22, 1999, Maud Hill revoked Billy's power of attorney over her affairs and granted power of attorney to the Debtor, who is one of her grandsons. On that same date, Maud Hill wrote Billy, Billy's wife (Margie), and Billy's son and daughter (Eric and Theresa) out of her will.

On March 1, 1999, the Debtor, as attorney-in-fact for Maud Hill and as a beneficiary under the Trust Agreement, initiated Civil Action No. 99-1402 in the District Court for the 191st Judicial District, Dallas County, Texas against Billy Hill (the "Billy Hill Lawsuit"). By the Billy Hill Lawsuit, the Debtor sought to recover from Billy Hill for, among other things, breach of his fiduciary duty in his capacity as trustee of the Trust and for alleged conversion of Trust property and Maud Hill's property. The Debtor also sought the removal of Billy as trustee under the Trust Agreement.

On March 25, 1999, Billy Hill's attorney, James Eppright ("Eppright"), wrote a letter to EDV's counsel instructing that payments on the Trust Note should be made to Eppright until another trustee was appointed under the Trust Agreement. The Trust Note at that time required monthly payments of \$4,332.00 from EDV to the Trust. EDV, however, ceased making regular monthly payments on the Trust Note beginning with the payment due on December 1, 2000.

On August 17, 2000, the parties to the Billy Hill Lawsuit reached a settlement agreement (the "First Settlement"). In pertinent part, the First Settlement provided that the Trust was to pay at least \$35,000.00 toward the plaintiffs' expert witness fees, legal fees and costs. The First Settlement also provided that the Trust would pay up to \$1,750.00 for the plaintiffs' additional fees and costs. It is unclear whether these costs were ever actually incurred.

Additionally, under the First Settlement, Billy Hill consented to the appointment of Dan Curtis ("Curtis"), the Debtor's uncle, as trustee under the Trust Agreement. Curtis agreed to serve as trustee at the Debtor's request. The Debtor provided Curtis with a copy of the First Settlement for his signature.

On September 21, 2000, the state court dismissed the Billy Hill Lawsuit for want of prosecution. On October 23, 2000, the parties filed an "Agreed Motion for Reinstatement and Appointment of Substitute Trustee." In their agreed motion, the parties explained that they had entered into the First Settlement but that the agreement had not yet been fully documented and performed.

The state court subsequently reinstated the Billy Hill Lawsuit. On November 2, 2000, the state court entered an "Agreed Order Appointing Substitute Trustee" pursuant to which Curtis was appointed as trustee of the Trust.

On June 12, 2001, the Debtor filed his Fourth Amended Petition in the Billy Hill Lawsuit. In the Fourth Amended Petition, the Debtor alleged that Billy Hill had fraudulently induced him to enter into the First Settlement. The Debtor also alleged that the Trust Committee members had breached their duties by failing to remove Billy Hill as trustee.

Effective October 18, 2001, Curtis, as trustee under the Trust Agreement, and each of the beneficiaries under the Trust Agreement, including Billy Hill and the Debtor, entered into a second settlement agreement to resolve the Billy Hill Lawsuit (the “Second Settlement”). The Second Settlement superseded the First Settlement. Under the Second Settlement, the Trust was to pay \$35,000.00 (less \$4,548.25 already paid under the First Settlement Agreement) to Maud Hill for legal and other professional fees incurred in the Billy Hill Lawsuit. The Second Settlement also reduced the principal amount due under the Trust Note and reduced the monthly payment due to the Trust under the Trust Note to \$2,766.00.

The Second Settlement, like the first settlement, was not presented to or approved by the state court in the Billy Hill Lawsuit. Paragraph 11 of the Second Settlement stated that “[u]pon receipt of the Final Settlement Payment, the Parties will file a Dismissal with Prejudice in the Litigation which provides that costs will be borne by the party incurring same.” In addition, Paragraph 10 of the Second Settlement also contained the following release (the “Release”):

[Billy] Hill, Margie J. Hill, Eric B. Hill, and Theresa R. Hill, as beneficiaries of the Trust, hereby approve the terms of repayment to the Trust as well as the payment of attorneys’ fees, accountants’ fees, and expert witness fees and release Maud Hill, Kirk Lewis, Craig Lewis, Billy Lewis, Danny J. Curtis, as Trustee of the Trust and their attorneys from any claims relating to the subject matter of the Litigation regarding the Trust.

In October 2001, Billy Hill wrote a check for \$23,731.85 payable to the Trust pursuant to the Second Settlement. The check was delivered to the Debtor’s attorneys. The Debtor, however, did not forward the check to Curtis. The Debtor’s testimony that he believed at the time that there was no longer any Trust was not credible – particularly

in light of the bank account he subsequently opened as trustee for the Trust, which is discussed more fully below.

In or around November 2001, the Debtor filed a “Motion to Dismiss Case with Prejudice.” The state court entered an order granting the motion and dismissing the Billy Hill Lawsuit on November 29, 2001.

G. Disbursements by Curtis as Trustee under the Trust Agreement

In November of 2000, Eppright transferred \$72,830.74 that he was holding for the Trust to Curtis. Curtis took the money he received from Eppright and established a bank account for the Trust at Prime Vest Financial in the name of the “Maud A. Hill Life Insurance Trust.” The Debtor had no signing powers or check-writing authority on this account.

As previously discussed, EDV executed the Trust Note as part of the settlement of the Collection Action. Pursuant to the Trust Note, as modified by the Second Settlement, EDV was to make monthly payments of \$2,766.00 to the Trust. However, Curtis received only one payment of \$5,165.24 from EDV during his tenure as trustee of the Trust. Curtis assumed this was a payment on the Trust Note, and EDV’s books and records showed it as a payment to the Trust. Curtis asked the Debtor why EDV (which was owned by the Debtor and the Debtor’s father) was not making all of the required payments on the Trust Note, but Curtis did not make any demand for payment upon the Debtor or EDV.

While Curtis was trustee of the trust, Curtis disbursed funds at the Debtor’s instruction. The Debtor referred his accountant, Jay Smith d/b/a JJS IV Co., to Curtis for

assistance in connection with the Trust. Additionally, the Debtor’s attorney, Eppright, had several discussions with Curtis regarding the operation of the Trust.

The Hills allege that certain payments to Eppright, Jay Smith, the Debtor, Maud Hill, and the attorneys and accountants for the Debtor and Maud Hill were improper. In particular, the Hills allege that the following disbursements of Trust funds (collectively, the “Disbursements”) were improper:

Date	Recipient	Amount
12/30/2000	Kirk Lewis	\$36,750.00
1/10/2001	Maud Hill	\$9,060.00
1/11/2001	JJS IV Co.	\$1,496.25
1/11/2001	Todd Welty, attorney	\$9,915.03
1/18/2001	James Eppright, attorney	\$192.44
2/10/2001	JJS IV Co.	\$233.10
2/12/2001	US Postmaster	\$14.57
2/28/2001	The Roberts Law Firm	\$1,290.00
3/13/2001	JJS IV Co.	\$1,688.40
3/14/2001	The Roberts Law Firm	\$969.57
4/4/2001	IRS-tax deposit	\$1,046.00
4/10/2001	The Roberts Law Firm	\$375.00
4/20/2001	JJS IV Co.	\$520.80
5/26/2001	The Roberts Law Firm	\$1,575.00
6/1/2001	IRS-tax deposit	\$1,046.00
6/4/2001	JJS IV Co.	\$49.35
6/10/2001	JJS IV Co.	\$737.10
6/14/2001	Jackson & Rhodes P.C.	\$5,082.07
6/14/2001	The Roberts Law Firm	\$3,621.00
7/25/2001	The Roberts Law Firm	\$3,324.25
8/27/2001	The Roberts Law Firm	\$3,340.99
10/4/2001	IRS-tax deposit	\$1,046.00
12/24/2001	Maud Hill Estate	\$2,333.61
	TOTAL:	85,706.53

H. Transactions Between the Trust and the Maud Hill Estate

Maud Hill died on November 30, 2001. The Debtor is the independent executor of her estate (the “Maud Hill Estate”). According to an Inventory, Appraisal and List

of Claims (the “Inventory”) prepared by the Debtor, as executor, the value of Maud Hill’s estate was \$449,888.82. The Debtor testified at the hearing on the Objection that he did not know whether the probate proceeding had been closed.

The Debtor and his brother inherited certain oil and gas royalty mineral leases (the “O&G Interests”) from Maud Hill upon her death, and the Debtor has been receiving income from the O&G Interests. Although the Debtor did not list any value for the O&G Interests in his Inventory of the Maud Hill Estate, the Debtor’s Schedule B (Personal Property) values “oil royalties” at \$5,000.00. The Debtor testified that he, as the executor for the Maud Hill Estate, did not sign any deed conveying the O&G Interests from Maud Hill prior to filing his bankruptcy petition.

On December 31, 2001, the Trust executed a promissory note in the amount of \$73,656.00, along with a security agreement to secure the note, in favor of the Maud Hill Estate. The Debtor signed both instruments on the Trust’s behalf as “Acting Trustee.” In 2002, the Debtor caused a 1041 IRS form to be filed on the Trust’s behalf for the 2001 tax-year. The Debtor was listed as “Trustee” on this form. Additionally, at some point, Curtis transferred all of the Trust’s documents to the Debtor.

The Debtor established a bank account for the “Maud A. Hill Life Insurance Trust” at Legacy Bank in November or December of 2001. The Debtor listed himself as trustee on the account. The Debtor endorsed the settlement check from Billy Hill to the Trust and deposited the check into the Trust’s account at Legacy Bank. Additionally, on January 31, 2002, EDV (d/b/a Spirits Liquors) wrote a check for \$39,650.00 payable to the Trust. The Debtor deposited this payment in the Trust’s account at Legacy Bank.

Within approximately one month, the Debtor all but emptied the Trust's account at Legacy Bank by writing a check to EDV dated February 23, 2002, in the amount of \$66,860.71. Ten dollars remained in the Trust's account after the transfer to EDV. The Debtor never made any attempt to recover this transfer from EDV or to collect EDV's obligations under the Trust Note.

On October 31, 2003, Eppright, as the attorney for Billy Hill, sent a letter to Curtis and the Debtor demanding an accounting of the Trust assets "from whomever of the two of you purports to be the trustee of the Trust." In response, Curtis stated that he had turned over to the Debtor all books, records and assets of the Trust. In a letter to Eppright dated November 7, 2003, the Debtor advised Billy Hill that Curtis had resigned as trustee and that he, the Debtor, had assumed the role of trustee under the Trust Agreement.

I. Suit Against the Debtor and Curtis

In June 2004, Billy Hill filed a Petition and Application for Appointment of Receiver in Cause No. DV-04-05012-J in the District Court for the 191st Judicial District, Dallas County, Texas (the "Receiver Action"). This petition named the Debtor as trustee of the Trust and Dan Curtis as trustee of the Trust as defendants. Billy Hill asserted, among other things, that Curtis and the Debtor had failed and refused to provide an accounting of all transactions since November 30, 2000. Billy Hill sought, among other things, the appointment of a receiver for the Trust. Billy Hill also sought a judgment against Curtis (individually and as trustee) and against the Debtor (individually, as trustee, and as independent executor of the Maud Hill Estate), jointly and severally, for any amounts Curtis and/or the Debtor owed the Trust.

On September 9, 2005, Eppright sent a letter to Curtis' counsel demanding that Curtis, as trustee under the Trust, take action to collect the amounts due to the Trust under the Trust Note. On May 11, 2006, Billy Hill filed an amended complaint in the Receiver Action. The amended complaint added the Debtor's father, Billy Lewis, as a defendant, and the amended complaint added Margie J. Hill, Eric B. Hill and Theresa R. Hill-McCullough as plaintiffs.

On April 25, 2006, the Texas District Court entered an "Order Granting Plaintiff's Application for Appointment of Receiver and Appointing a Receiver" (the "Receiver Order"). Pursuant to the Receiver Order, G. Dennis Sullivan was appointed as receiver (the "Receiver") for the Trust with the power to collect the Trust Note for the Trust. The Hills state in their briefing that they are not waiving any claims held by the Receiver on the Trust Note.

IV. DISCUSSION

The issue before the Court is the Debtors' Objection to the Hills' claim against the Debtor's estate in the amount of \$239,663.14 plus punitive damages. In their proof of claim, the Hills assert that they are secured by an "oil and gas interest" of an unknown value. The Hills attach a summary of their claim to their proof of claim form as well as a copy of the petition they filed in state court seeking the appointment of a receiver, the Trust Agreement, the First Settlement in the Billy Hill Lawsuit, the Second Settlement in the Billy Hill Lawsuit, the letter from Eppright dated October 31, 2003, and the letter from the Debtor dated November 7, 2003.

In his Objection, the Debtor states that he owes no debt to the Hills. He argues that the claims asserted by the Hills actually belong to the Maud Hill Estate. The Debtor

denies that there is a valid Trust. The Debtor also asserts that he was never appointed as a trustee of the Trust and never served as a trustee of the Trust. The Debtor argues that the Hills have already been provided with an accounting of Trust funds, and that the accounting revealed that Billy Hill owes the Debtor \$49,204.00. The Debtor also asserts, among other things, that the Hills' claim "is not a secured claim as there is no lien to secure such claim."

A. Burden of Proof

A proof of claim, if it is executed and filed in accordance with the Federal Rules of Bankruptcy Procedure, constitutes *prima facie* evidence of the validity and amount of that claim. FED. R. BANKR. P. 3001(f); *Matter of Fidelity Holding Co., Ltd.*, 837 F.2d 696 (5th Cir. 1988). Bankruptcy Rule 3001 generally sets forth the requirements for filing a proof of claim, and one of those requirements states that:

when a claim . . . is based on a writing, the original or a duplicate shall be filed with the proof of claim. If the writing has been lost or destroyed, a statement of the circumstances of the loss or destruction shall be filed with the claim.

FED. R. BANKR. P. 3001(c). Likewise, if a creditor claims a security interest in property of the debtor, Bankruptcy Rule 3001(d) requires the creditor to accompany his proof of claim with evidence that the creditor perfected a security interest.

The burden of persuasion under the bankruptcy claims procedure always lies with the claimant, who must comply with Bankruptcy Rule 3001 by alleging facts in the proof of claim that are sufficient to support the claim. If the claimant satisfies these requirements, the burden of going forward with the evidence then shifts to the objecting party to produce evidence at least equal in probative force to that offered by the proof of claim and which, if believed, would refute at least one of the allegations that is essential

to the claim's legal sufficiency. If the objecting party meets this evidentiary requirement, then the burden of going forward with the evidence shifts back to the claimant to sustain its ultimate burden of persuasion to establish the validity and amount of the claim by a preponderance of the evidence. *See In re Consumers Realty & Dev. Co.*, 238 B.R. 418 (B.A.P. 8th Cir. 1999); *In re Alleghany Int'l, Inc.*, 954 F.2d 167, 173-74 (3d Cir. 1992).

B. The Nature of the Hills' Claim (Secured vs. Unsecured)

As an initial matter, the Hills allege that their claim against the Debtor's bankruptcy estate is secured by the O&G Interests that the Debtor inherited from Maud Hill upon her death. The Hills' argument is premised on an alleged claim against Maud Hill and a resulting statutory lien against the Maud Hill Estate. *See TEX. PROBATE CODE §37*. The Hills specifically assert that Maud Hill owed a debt to them based on the improper payments made to her or for her benefit by Curtis and the Debtor, as trustees under the Trust Agreement, from Trust assets.

Section 37 of the Texas Probate Code addresses the passage of title to property upon intestacy and under a will. *See TEX. PROBATE CODE §37*. Section 37 provides in pertinent part that "when a person dies, leaving a lawful will, all of his estate devised or bequeathed by such will ... shall vest immediately in the devisees or legatees of such estate...; subject, however, to the payment of the debts of the testator" As a general matter, devisees are not personally liable for the testatrix' debts, and creditors of the testatrix are limited to enforcement of the statutory lien against the devised property. In *McFarland v. Shaw*, 45 S.W.2d 193 (Tex. Com. App. 1932), the court construed a statute substantially the same as the present §37 of the Texas Probate Code as follows:

Our Supreme Court has established a well-settled rule that heirs, devisees or legatees who receive property belonging to an estate, against which an

unpaid claim exists, do not thereby become personally liable to the claimant for the value of the property so received; the remedy being to enforce the statutory lien against the property in their hands. It is also equally well settled that, if the heirs, devisees, or legatees have disposed of the property or so changed its form as to render it impossible of identification, a personal judgment or recovery may be had of them for its value.

45 S.W.2d at 198 (citations omitted). *See also* TEX. JUR. 3d *Wills* s 338 (2006) (collecting cases addressing liability for debts of testator).

In other words, the statutory lien provided by §37 of the Texas Probate Code is a general lien on all the property of a decedent's estate. No lien can be successfully asserted against any particular property of an estate until the claim has been established. *Jackson v. Hubert*, 234 S.W.2d 414 (Tex. 1950); *Neyland v. Brammer*, 146 S.W.2d 261, 263 (Tex. Civ. App. 1941, error dismissed). The unpaid creditor has the burden of proof in an action to seek recovery from the decedent's estate or heirs. *See, e.g., Potts v. W.Q. Richards Memorial Hospital*, 558 S.W.2d 939 (Tex. Civ. App. 1977). If such a claim is established, a devisee or legatee is personally liable only to the extent of his proportionate interest in the estate and only if he disposes of the property he received from the estate or causes the property to be unidentifiable. *See Potts v. W. Q. Richards Memorial Hospital*, 558 S.W.2d 939, 942(Tex. Civ. App. 1977) (citing *McFarland v. Shaw*, 45 S.W.2d 193 (Tex. Com. App. 1932)).

Here, the precise legal basis for the Hills' claim against Maud Hill is unclear. The Hills had not yet settled on a legal theory at the hearing on the Objection.⁵ In their closing argument, the Hills seemed to argue that Maud Hill and her estate are liable for

⁵ The Court questioned counsel for the Hills about the Hills' legal theories during closing arguments. Counsel offered to file a post-hearing brief to further explain the Hills' claims. However, in their post-hearing brief, the Hills simply assert that "[b]oth Maud Hill and Lewis were bound to [repay the improper payments] under numerous legal doctrine[s] including, inter alia, unjust enrichment"

the acts of the Debtor, who acted as her agent by causing certain debts owed by Maud Hill to be paid with Trust assets. The Hills, however, failed to establish by a preponderance of the evidence that Curtis or the Debtor were acting as agents of Maud Hill or her estate at the time the disputed payments were made. Maud Hill had no authority over the disposition of Trust assets, and the power of attorney held by the Debtor for Maud Hill authorized only lawful acts on her behalf. Thus, the Court finds and concludes that the Hills failed to establish a claim against Maud Hill or a statutory lien on the portion of the O&G Interests inherited by the Debtor.

In a post-hearing brief, the Hills argued that they nonetheless have a claim against Maud Hill with respect to the Disbursements based on the equitable principal of “unjust enrichment.” Unjust enrichment occurs when a person obtains a “benefit from another by fraud, duress, or the taking of an undue advantage.” *Villarreal v. Grant Geophysical, Inc.*, 136 S.W.3d 265, 270 (Tex. App.-San Antonio 2004, pet. denied) (quoting *Heldenfels Bros., Inc. v. City of Corpus Christi*, 832 S.W.2d 39, 41 (Tex. 1992)). The term “unjust enrichment” characterizes the result of a failure to make restitution of benefits either wrongfully or passively received under circumstances which give rise to an implied or quasi-contractual obligation to repay. *City of Corpus Christi v. Heldenfels Bros.*, 802 S.W.2d 35, 40 (Tex. App. - Corpus Christi 1990), *aff'd*, 832 S.W.2d 39 (Tex. 1992).

In this case, as discussed more fully below, the Hills failed to establish fraud, duress or the taking of undue advantage by the Debtor or Curtis while acting on behalf of Maud Hill. Unjust enrichment is not a proper remedy merely because it “might appear expedient or generally fair that some recompense be afforded for an unfortunate loss” to the claimant, or because the benefits to the person sought to be charged amount to a

windfall.” *Heldenfels Bros., Inc. v. City of Corpus Christi*, 832 S.W.2d at 42 (quoting *Austin v. Duval*, 735 S.W.2d 647, 649 (Tex. App. - Austin 1987, writ denied)). For this reason and all the foregoing reasons, the Court finds and concludes that the Hills have failed to establish that their claim against the Debtor is secured.

C. Liability for Improper Disbursements by Curtis

The essence of this portion of the Hills’ claim is that the Debtor is liable for the allegedly improper Disbursements by Curtis. In their briefs and at the hearing on the Objection, the Hills specifically argued that: (1) the Debtor is the trustee under the Trust Agreement and has a fiduciary duty to recover the allegedly improper Disbursements by Curtis pursuant to §114.002 of the Texas Trust Code; and (2) the Debtor is directly liable to the Trust for the amount of the Disbursements because he directed Curtis to make the Disbursements in contravention of the Second Settlement. The Hills allege breach of fiduciary duty, gross negligence, fraud (actual and constructive),⁶ aiding and abetting a breach of fiduciary duty and civil conspiracy as grounds for recovering the Disbursements from the Debtor.

1. Debtor’s Duty to Recover Improper Disbursements Made Prior to Debtor’s Term as Trustee

With respect to the Debtor’s alleged assumption of the role of trustee for the

⁶ Under Texas law, “[a] person commits fraud by (1) making a false, material representation (2) that the person either knows to be false or asserts recklessly without knowledge of its truth (3) with intent that the misrepresentation be acted upon, (4) and the person to whom the misrepresentation is made acts in reliance upon it (5) and is injured as a result.” *Fondren Construction Co., Inc. v. Briarcliff Housing Development Associates, Inc.*, 196 S.W.3d 210, 217 (Tex. App. – Houston [1st Dist.] 2006) (citing *Formosa Plastics Corp., USA v. Presidio Eng’rs & Contractors, Inc.*, 960 S.W.2d 41, 47-48 (Tex. 1998)). A misrepresentation made to one person generally does not form the basis for a fraud action by another person. See 41 TEX.JUR. *Fraud and Deceit* § 65 (Generally; persons who may sue). Here, the Hills’ fraud claim is based on alleged misrepresentations made by the Debtor to Curtis regarding the Disbursements. The Hills have not offered any authority that would support an exception from the general rule that a person making a representation is accountable for its truth only to the person he seeks to influence. See *id.*

Trust, the Debtor and Curtis clearly failed to follow the terms of the Trust Agreement for the appointment of a successor trustee. *See also* TEX. PROBATE CODE § 113.083(a). The Debtor has nonetheless acted as the trustee under the Trust Agreement since approximately December 31, 2001. On that date, as discussed *supra*, the Debtor signed a promissory note on the Trust's behalf as "Acting Trustee." The Debtor, by his own admission, assumed the role of trustee under the Trust Agreement and is now precluded from taking an inconsistent position to the Hills' disadvantage. *See, e.g., Bott v. J.F. Shea Co., Inc.*, 299 F.3d 508 (5th Cir. 2002); *Steubner Realty 19, Ltd. v. Cravens Road 88, Ltd.*, 817 S.W.2d 160, 164 (Tex. App. - Houston [14th Dist.] 1991, no writ).

However, the Hills' argument that the Debtor, as successor trustee, is responsible for recovering the Disbursements made by Curtis fails because it ignores the express language contained in Article 4.3 of the Trust Agreement. Article 4.3 of the Trust Agreement provides, in pertinent part, that "[a]ny successor Trustee is relieved of any duty to examine the acts of any prior fiduciary, without the necessity of any court accounting, and any successor Trustee shall be responsible only for those assets which are actually delivered to such Trustee." Thus, pursuant to the terms of the Trust Agreement, the Debtor was under no duty to account for or recover assets that had gone out of the Trust before the Debtor became trustee.⁷

2. Civil Conspiracy

Next, the Court addresses the Hills' claim for a civil conspiracy between the Debtor and Curtis. To prevail on a civil conspiracy claim under Texas law, the Hills

⁷ The Texas Trust Code provides that (with certain exceptions not applicable here) the terms of a trust govern when there is a conflict between the terms of the trust and the Texas Trust Code. *See* TEX. TRUST CODE §111.0035(a).

must establish the following elements: (1) a combination of two or more persons; (2) the objective to be accomplished is an unlawful purpose or a lawful purpose by unlawful means; (3) a meeting of minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as the proximate result. *Ins. Co. of N. Am. v. Morris*, 981 S.W.2d 667, 675 (Tex. 1998). Civil conspiracy requires specific intent “to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means.” *Triplex Commc'ns, Inc. v. Riley*, 900 S.W.2d 716, 719 (Tex. 1995). In this case, however, the Hills failed to establish such specific intent by a preponderance of the evidence.

3. Breach of Fiduciary Duty

Finally, the Hills assert a claim against the Debtor for breach of fiduciary duty. The elements of a breach of fiduciary duty are: (1) a fiduciary relationship; (2) a breach of that duty; and (3) the breach must have resulted in injury to the plaintiff or benefit to the defendant. *Id.* (citation omitted). If a third party knowingly participates in the breach of a fiduciary duty he may become liable as a joint tortfeasor with the fiduciary. *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 160 S.W.2d 509, 514 (Tex. 1942). Exemplary damages may be imposed upon a finding that such conduct was engaged in with malice. See TEX.CIV.PRAC. & REM.CODE ANN. § 41.003(a); and see, e.g., *Taiwan Shrimp Farm Village Ass'n v. U.S.A. Shrimp Farm Dev.*, 915 S.W.2d 61, 73 (Tex.App.-Corpus Christi 1996, writ denied).

Here, the Disbursements occurred prior to the Debtor's assumption of the role of trustee. The Debtor was not a fiduciary at the time of the Disbursements, even if he directed the Disbursements in contravention of the First and Second Settlements. A contractual obligation generally does not give rise to a fiduciary duty. See *Johnson v.*

Brewer & Pritchard, P.C., 73 S.W.3d 193, 203 (Tex. 2003). The Court, therefore, concludes that the Debtor is not liable to the Hills for a breach of fiduciary duty with respect to the Disbursements.⁸

The Debtor, however, knew that Curtis was the trustee of the Trust at the time he instructed Curtis to make the Disbursements. Curtis is the Debtor's uncle and was serving as trustee at the Debtor's request. The Debtor was also aware that, as trustee, Curtis owed the Trust and its Beneficiaries a fiduciary duty. *See Jones v. Blume*, 196 S.W.3d 440, 447 (Tex. App. – Dallas 2006) (“Fiduciary duties arise as a matter of law in certain formal relationships, including ... trustee relationships.”) (citing *Meyer v. Cathey*, 167 S.W.3d 327, 331 (Tex. 2005)). Indeed, the Debtor sued Billy Hill in the Billy Hill Lawsuit for breach of Billy Hill's fiduciary duty to the Trust while Billy Hill was acting as trustee of the Trust.

The challenged Disbursements include payments to the attorney's and accountants for the Debtor and Maud Hill in the Billy Hill Lawsuit, namely, the Roberts Law Firm, Todd Welty, Jackson and Rhodes, P.C. The challenged Disbursements also include a payment to the Maud Hill Estate. With respect to the propriety of these payments, the Debtor and Maud Hill had received all amounts that were due from the Trust for legal and accounting fees under the Second Settlement as a result of the payment of \$36,750.00 in December 2000 and the payment of \$9,060.00 in January 2001. There were no further disbursements authorized from the Trust to Maud Hill or to the

⁸ Although breach of contract is not one of the claims asserted by the Hills in the Receiver Action or Claim No. 4, the Court notes that any instruction to Curtis to make improper disbursements was a breach of the First and Second Settlements. The Debtor, on his own behalf as Beneficiary and as attorney-in-fact for Maud Hill, agreed to be bound by the First and Second Settlement's terms and payment amounts. A written settlement agreement is enforceable as a contract between the parties to the agreement under Texas law. *See, e.g., Mantas v. Fifth Court of Appeals*, 925 S.W.2d 656, 659 (Tex. 1996).

attorneys and accountants employed by the Debtor, as Maud Hill's attorney-in-fact, in the Billy Hill Lawsuit.

Nonetheless, Curtis used Trust assets to make additional payments to Maud Hill and the accountants and counsel for Maud Hill and the Debtor. The Debtor aided and abetted Curtis in breaching Curtis' fiduciary duty by providing Curtis with invoices for payment and/or instructing Curtis to make disbursements to the Roberts Law Firm, Todd Welty, Jackson and Rhoades, P.C., and the Maud Hill Estate. The total amount improperly disbursed to these individuals and entities was \$33,514.92.⁹

The disputed Disbursements also include \$4,725.00 paid to Jay Smith d/b/a JJS IV Co., between January and June 2001. According to Curtis, Jay Smith provided unspecified accounting services to the Trust. Although the amount disbursed to Jay Smith seems high for such a small account, the Hills failed to establish by a preponderance of the evidence that the Disbursements to Jay Smith were improper.

For all the foregoing reasons, the Court finds and concludes that the Hills have established, by a preponderance of the evidence, \$33,514.92 in improper disbursements from the Trust. The Court further finds and concludes that the Debtor is liable for this amount because he knowingly participated in Curtis' breach of his fiduciary duty as trustee for the Trust in connection with the improper Disbursements. The Court will address the Hills' claim for damages based on the Debtor's failure to sue on the Trust Note and the Hills' request for punitive damages below.

⁹ The challenged Disbursements include a payment to Billy Hill's attorney, Eppright, in the amount of \$192.44 on January 18, 2001. In light of Curtis' testimony that he spoke with Eppright several times regarding the Trust, the Plaintiff failed to establish that Eppright provided no services to the Trust or that the payment to Eppright was improper by a preponderance of the evidence.

D. Debtor's Improper Distribution of Trust Assets

As previously discussed, the Debtor became trustee of the Trust no later than December 31, 2001. EDV stopped making the regular monthly payments due on the Note in December of 2000. However, on January 31, 2002, EDV made a payment to the Trust in the amount of \$39,650.00.

The Debtor's testimony that he did not believe the Trust existed at this time was not credible and was contradicted by his own actions in creating the account at Legacy Bank. The Debtor's testimony also was contradicted by the fact that EDV's books and records show that the \$39,650.00 payment to the Trust was a payment on the Trust Note. This payment was sufficient to satisfy the principal payments due from EDV for the months of December of 2000 through January of 2002 as well as part of the payment due for February of 2002.¹⁰ However, within approximately one month of the Trust's receipt of these funds, the Debtor emptied the Trust's account of all but \$10.00 by writing a check to EDV in the amount of \$66,860.71.

As trustee, the Debtor owed a fiduciary duty to the Trust and the Beneficiaries. *Blume*, 196 S.W.3d at 447 (citation omitted). The Court finds that the Debtor breached his fiduciary duty by disbursing \$66,860.71 from the Trust to EDV. The Court further

¹⁰ The Hills argued at the hearing on the Objection and in their post-hearing briefing that the Debtor should be liable for all payments on the Trust Note that were due more than four years ago on the theory that the Receiver might be barred from collecting these payments by a four-year statute of limitations. *See* TEX. CIV. PRAC. REM. CODE §16.004; *see also* 50 TEX. JUR. 3d, *Limitation of Actions*, §105 (Actions for debt; money owed or payable – in installments). However, EDV made all principal payments due and owing through January 31, 2002. Moreover, the Hills have provided this Court with no authority to support their argument that “[the debtor] should be held liable for *potentially* time-barred debt of EDV.” Hills’ Post-Hearing Brief at page 10 (emphasis added).

finds and concludes that the Debtor is liable to the Trust and the Beneficiaries for the full amount of \$66,860.71.¹¹

E. The Scope of the Release

With respect to the Debtor's liability on the various claims asserted by the Hills, the Debtor argues that the Second Settlement in the Billy Hill Lawsuit expressly releases him from any claim by the Hills related to the Trust. The Debtor urges the Court to interpret the Release as a general release of any claims the Hills' may have against Curtis and the Debtor for any issues relating to the Trust. The Debtor asserts that any other interpretation would render the Hills' release meaningless and would be contrary to the well-established rules of contract interpretation.

In construing a written contract (such as the Second Settlement) under Texas law, a court's primary concern 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). To achieve this objective, courts should examine and consider the entire writing in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless. *Id.* No single provision taken alone will be given controlling effect -- rather, all the provisions must be considered with reference to the whole instrument. *Id.*

In this case, the Second Settlement contains the Release whereby the Hills agreed to release the Debtor, among others, from any claims "relating to the subject matter of the Litigation." The term "Litigation" is defined in the Second Settlement as the Billy Hill

¹¹ The Hills' proof of claim includes a claim for the unpaid balance of the Trust Note. However, the Debtor is not liable under the Trust Note, which was issued by EDV, and the Debtor did not guaranty the Trust Note. In their post-hearing briefing, the Hills clarify that their request for the unpaid balance of the Trust Note is really a request for damages incurred as a result of EDV's failure to make all the required payments under the Trust Note, arguing that "[i]t is reasonable to assess damages against [the Debtor] equal to the entire unpaid balance of the Note since it was his action which has prevented timely collection efforts and the ultimate collection of the Note is in question." *See Hills' Post-Hearing Brief* at page 11.

Lawsuit. The Debtor brought the Billy Hill Lawsuit in order to recover amounts that he alleged had been improperly disbursed from the Trust by Billy Hill. The Debtor did not purport to be the trustee under the Trust Agreement, and the Billy Hill Lawsuit did not involve any claims by the Hills against the Debtor for the Disbursements or for the Debtor's alleged assumption of the role of trustee under the Trust Agreement.

When the Settlement Agreement is reviewed as a whole, it is clear that the Release was intended to relate only to potential claims the Hills might assert relating to the improper payments alleged in the Billy Hill Lawsuit. The interpretation suggested by the Debtor is overly broad and ignores the express definition of the term "Litigation." The Debtor's interpretation also ignores the fact that the parties knew how to draft a broader release and did so with respect to claims against Maud A. Hill in another section of the Second Settlement. The Court finds and concludes that the Hills' claims against the Debtor's bankruptcy estate fall outside of the subject matter of the Billy Hill Lawsuit. The Court further finds and concludes that the Hills did not intend to -- and did not -- release the Debtor from liability for those claims.

F. Attorneys' Fees

The Hills claim \$65,000.00 for attorneys' fees in their proof of claim. In their post-hearing brief, the Hills assert that they have actually incurred more than \$90,108.79 in attorneys' fees. Of this amount, the Hills assert that \$36,300 was incurred pre-petition. The Hills argue that the Debtor is liable for all of their attorney's fees under Chapter 38 of the Texas Civil Practice and Remedies Code and under Texas Trust Code §§ 113.151 and 114.001(c) based on the Debtor's alleged breach of the Trust Agreement.

As an initial matter, the Hills are – at best – an undersecured creditor. General unsecured or under-secured creditors are not entitled to post-petition attorney’s fees on their claims from a bankruptcy estate. *See In re Pride Cos., L.P.*, 285 B.R. 366, 372-73 (Bankr. N.D. Tex. 2002). For an unsecured or under-secured claim, the allowance of attorney fees is limited by §502(b), which provides that “the court ... shall determine the amount of such claim as of the date of the filing of the petition....”

With respect to an award of pre-petition or post-petition attorney’s fees under the Texas Trust Code, §113.151(a) provides, in pertinent part, that if a beneficiary is successful in a suit to compel an accounting, “the court may, in its discretion, award all or part of the costs of the court and all of the suing beneficiary’s reasonable and necessary attorney’s fees and costs against the trustee in the trustee’s individual capacity or in the trustee’s capacity as trustee.” TEX. PROP. CODE §113.151(a). Section 114.001(c) provides in pertinent part that “[a] trustee who commits a breach of trust is chargeable with any damages resulting from such breach of trust ...” such as “any profit made by the trustee through the breach of trust....” Section 114.001(c) does not expressly allow attorney’s fees, and the Court has been unable to discover any court awarding attorney’s fees based on §114.001(c) of the Texas Property Code.

In this case, the Hills requested an accounting and the appointment of a receiver, among other things, in the Receiver Action. The state court entered an interlocutory order appointing a receiver over the Trust for the purpose of collecting the EDV Note and Guaranty. The state court did not, however, grant the Hills’ request for an accounting or award the Hills their attorneys’ fees. Thus, under the circumstances, the Hills have not

established a right to any pre-petition attorneys' fees based on §113.151 of the Texas Trust Code.

With respect to §114.001(c), the Hills likewise failed to provide this Court with any authority that would support an award of attorney's fees based on this provision. Section 114.001(c) addresses the damages a court may award where there has been a breach of trust. Attorneys' fees, as a general rule, are not recoverable as an item of damages. *See, e.g., Houghton v. Wholesale Electronic Supply*, 435 S.W.2d 216 (Tex. Civ. App. Waco 1968, writ refused n.r.e) (interpreting statute providing damages against lessor for breach of contract).

Finally, with respect to the Hills' claim for attorney's fees under Chapter 38 of the Texas Civil Practice and Remedies Code, §38.001 provides that:

A person may recover reasonable attorneys fees from an individual or corporation, in addition to the amount of a claim and costs, if the claim is for: (1) rendered services; (2) performed labor; (3) furnished material; (4) freight or express overcharges; (5) lost or damaged freight or express; (6) killed or injured stock; (7) a sworn account; or (8) an oral or written contract.

TEX. CIV. PRAC. & REM. CODE §38.001. The attorney's usual and customary fees are presumed to be reasonable. TEX. CIV. PRAC. & REM. CODE §38.003. To recover attorney's fees, (1) the party claiming fees must be represented by an attorney; (2) the claimant must present the claim to the opposing party; and (3) payment must not have been tendered before the expiration of the 30th day after the presentation of the claim. TEX. CIV. PRAC. & REM. CODE §38.003.

In this case, the Hills failed to present any evidence that they prevailed on any of the claims set forth in §38.001 or that they followed the procedures set forth in 38.003. Moreover, the Hills' proof of claim does not include a claim for breach of contract or any

of the other claims set forth in §38.001 which may give rise to an award for reasonable attorneys' fees.¹² The underlying litigation upon which the Hills' proof of claim is based likewise does not include any of the claims set forth in §38.001.¹³

G. Punitive Damages

The Hills claim that they are entitled to punitive damages in this case. The Hills assert in their post-hearing brief that the Debtor intentionally breached his fiduciary duty and induced Curtis to breach his fiduciary duty for the purpose of benefiting himself by avoiding the payments owed by EDV to the Trust. The Hills cite *Gannet Outdoor Co. v Kubecka*, 710 S.W.2d 79, 90 (Tex. App. – Houston [14th Dist.] 1986, no writ), for the proposition that, since the Debtor behaved willfully and fraudulently, an award of punitive damages may include the Hills' reasonable attorney's fees in the amount of approximately \$100,000.00.

In bankruptcy, penalties and awards of punitive damages are disfavored because they often serve only to punish a debtor's creditors. As the Court explained in *In re Rally Partners*, 306 B.R. 165, 170 (Bankr. E.D. Tex. 2003) (Bill Parker):

In the bankruptcy context, it is well-established that [p]enalties are not in harmony with the overall philosophy of the Bankruptcy Code which is to effectuate a fair and equitable distribution of the assets to creditors. A penalty is discordant with this philosophy because it serves the function of preferring one creditor at a detriment to other creditors of the estate. A

¹² Here, in their proof of claim, the Hills assert that their claim arises under the following legal theories: constructive fraud, gross negligence, conversion, unjust enrichment, constructive trust, actual fraud, aiding and abetting a breach of fiduciary duty and civil conspiracy. The Hills also rely on the causes of action set forth in the Second Amended Original Petition filed in the Receiver Action on April 21, 2005, namely, a claim for an accounting, a claim for breach of fiduciary duty, an application for the appointment of receiver, and a request for attorney's fees.

¹³ In their Third Amended Original Petition filed on May 11, 2006, in the Receiver Action, the Hills allege the following claims: (1) an accounting, (2) breach of fiduciary duty; (3) actual fraud; (4) constructive fraud; (5) conversion; (6) unjust enrichment; (7) constructive trust; (8) equitable lien; (9) gross negligence; (10) aiding and abetting a breach of fiduciary duty; (11) civil conspiracy; and (12) attorney's fees.

bankruptcy court is essentially a court of equity and will therefore not enforce a penalty. *In re Stewart*, 190 B.R. 846, 851-52 (Bankr. C.D. Ill. 1996) (citations and quotations omitted). This principle has arisen most often in the context of the treatment of punitive damage claims in mass tort bankruptcy cases. *See, e.g., In re Hillsborough Holdings Corp.*, 218 B.R. 617, 620 (Bankr. M.D. Fla. 1991) [sustaining debtor's objection to portion of judgment creditor's proof of claim reflecting punitive damages awarded in prior state court lawsuit because allowance of the punitive damages "would serve more to punish unsecured creditors than it would to punish the debtor"]; *In re Johns-Manville Corp.*, 68 B.R. 618, 627 (Bankr. S.D.N.Y. 1986) ["The purpose of punitive damages ... is to punish tortfeasors and deter them from their wrongful conduct Neither purpose would be served by permitting the recovery of punitive damages in this reorganization."] This protection for creditors was also recognized under the old Bankruptcy Act. *Matter of GAC Corp.*, 681 F.2d 1295, 1301 (11th Cir. 1982) [affirming a bankruptcy court's determination that punitive damage claims "are not appropriate in the bankruptcy context because the rationale for punitive damages is to punish the wrongdoer, whereas allowing such claims in bankruptcy would have the effect of punishing innocent third parties, i.e., the other creditors"]. But it can arise in traditional contract disputes as well, and "elements of damages which are classified as penalties ... are unenforceable." *In re Orfa Corp. of Philadelphia*, 129 B.R. 404, 425 (Bankr. E.D. Pa. 1991)

306 B.R. 165, 170 (Bankr. E.D. Tex. 2003). Here, the Debtor's bankruptcy schedules include several unsecured creditors whose pro rata share of any disbursements to creditors would be diluted by an award of punitive damages to the Hills.¹⁴

Moreover, the Hills have not established by clear and convincing evidence that the Debtor acted with the requisite malice for an award of punitive damages under Texas law. *See* TEX. CIV. PRAC. & REM. CODE § 41.003(a). Under current Texas law, the term "malice" is defined as "a specific intent by the defendant to cause substantial injury or harm to the claimant." TEX. CIV. PRAC. & REM. CODE § 41.001(7). Exemplary damages

¹⁴ The Debtor's schedules list three unsecured creditors. Billy Hill is listed as an unsecured creditor in an unknown amount. The Debtor also lists a claim for attorneys' fees in the amount of \$50,000 for Roach LLP and a claim for attorneys' fees in the amount of \$10,000 for West & Petrocchi. The Debtor's schedules also list an unknown liability for a collection action filed in New Jersey. During the pendency of this bankruptcy case, however, the lawsuit resulted in an award of \$68,470 against Maud Hill's probate estate (not the Debtor, individually).

are authorized under the Texas Civil Practice and Remedies Code when the claimant proves by clear and convincing evidence that the harm results from fraud, malice, or gross negligence. TEX. CIV. PRAC. & REM. CODE §41.003(a). In this case, the Court is not convinced that the Debtor specifically intended to harm the Hills by his actions.

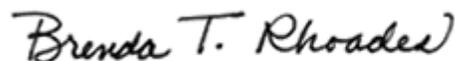
To the extent that any finding of fact is construed to be a conclusion of law, it is hereby adopted as such. To the extent any conclusion of law is construed to be a finding of fact, it is hereby adopted as such. The Court reserves the right to make additional findings as necessary or as requested by any party.

V. CONCLUSION

For all the foregoing reasons, the Court finds and concludes that the Hills have established a claim against the Debtor for aiding and abetting Curtis' breach of fiduciary duty in the total amount of \$33,514.92. The Hills also have established by a preponderance of the evidence, a claim against the Debtor for breaching his own fiduciary duty by making an improper disbursement in the amount of \$66,860.71. It is, therefore,

ORDERED that Claim No. 4 shall be, and hereby is, allowed as an unsecured claim in the amount of \$50,187.82 (which is ½ of \$100,375.63).

Signed on 3/14/2007

 MD

HONORABLE BRENDA T. RHOADES,
UNITED STATES BANKRUPTCY JUDGE