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TEXAS COMMERCE BANK V. GRIZZLE

GILBREATH: The TC's summary judgment in this case is fully supported by the exculpatory clause in the Grizzle trust, and the CA erred in holding otherwise.

The Grizzle trust contains a clause limiting the trustee's liability to acts of gross negligence, bad faith or fraud. Well the CA held that this clause was not a proper basis for summary judgment on the grounds that 1) as a matter of public policy an exculpatory clause cannot relieve a trustee of liability for self dealing; and 2) evidence of a brief delay in reinvesting trust funds is a mishandling of the trust within the meaning of self dealing.

O'NEILL: Who is the settlor of the trust in this case?

GILBREATH: The settlor of the trust in this case would be the TC that created the trust on behalf of Brentley Grizzle.

O'NEILL: And can that bind Grizzle under the property code?

GILBREATH: Yes it can. In this case especially where Brentley Grizzle's guardian ad litem signed and approved the trust. Her mother signed and approved the trust, and the court did so as well.

Now the CA erred because §113.059 of the trust code specifically authorizes exculpatory clauses like the one in the Grizzle trust, and it sets forth the only self dealing exceptions to such clauses.

PHILLIPS: **Couldn't understand the chief's question.**

GILBREATH: Our response to that in our reply brief is that these principles enunciated by Vogert(?) do not apply, because in this case the legislature has authorized the use of exculpatory clauses and has set forth the only two self dealing exceptions to exculpatory clauses. It said these broader principles enunciated by Vogert(?) simply do not apply. The legislature has said which exceptions are necessary and appropriate, and additional exceptions cannot be added by the courts under those circumstances.

HECHT: What would be bad faith?

GILBREATH: Bad faith is not a precisely defined term in this area of the law. I would suggest then that an appropriate starting place for a definition of bad faith would simply be Blacks Law dictionary. And in Blacks it says that the term bad faith is not simply bad judgment or

negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose, or moral obliquity, and says it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with _____ design or ill will.

HECHT: This is not really negligence because presumably the banks knew what was going to happen when they did the merger. Maybe they didn't think about it ahead of time. But they could have thought through it and realized that these would be the consequences of the merger. So it's not really an accident or failure to use ordinary care as you would ordinarily think of it. But it's something to anticipate that this change in business structure is going to cost your customers some money. I don't know what to call it.

GILBREATH: We would say that if anything it might rise to the level of negligence. I know that you don't see it that way, but it could possibly be considered bad judgment, which would still not rise to the level of bad faith. It's certainly not self dealing.

To the extent it's an omission, a failure to consider, in their brief they say that well we failed to take into account the adverse tax consequences and market timing. Well if that's true, then that's simply a mistake in judgment by the trustee. And that's what these exculpatory clauses are designed to protect the trustee from liability for simply a mistake in judgment.

ENOCH: Neither the petitioners or the respondent have discussed restatement in trust §222, which seems to indicate that there may be - the bank for its own benefit decides they are going to transfer these assets. They are going to swap. And it's a good business judgment for the bank. But it does impose some sort of cost or generate some sort of profit to the banks to do so that may or may not be at the expense of some of the beneficiaries. The restatement talks in terms of a category that is not bad faith. It's not gross negligence. It's not fraud. But it's a category of dealing where the trustee profits at the expense of the beneficiary, and the liability that can otherwise be exculpated is reinstated to the limit of the profit recognized. There's not a violation of the trustee's duty except to the extent that the trustee has a profit from the activity. But I didn't see anything in the briefs addressing that. So here it was to the business benefit of Texas Commerce Bank and Frost Bank to transfer it. It appears that there is no dispute. There was some cost to the trust as a result of this transaction that was not absorbed by the bank. So the bank profits to that extent. Why isn't this that very narrow issue of what I would call self dealing where the limit of the liability is just to the amount of the expenses imposed upon the trust for having done this?

GILBREATH: I think the key to the answer to you question is when you say self dealing. And I agree with you. That would be considered a type of self dealing. And again, we say that when the legislature enacted §113.059 and provided two specific self dealing exceptions, it did not contemplate the addition of any other self dealing exceptions. So under fundamental principles of statutory construction, the restatement exception that you are referring to would not apply, because the legislature has already said, Here's what we consider to be necessary and appropriate self dealing exceptions to a set lawyer's power to relieve a trustee of liability. And neither one of those apply in this case.

ENOCH: Those are exceptions to the duties imposed by common law as I read the trust code. So you have duties imposed by the common law, and then you have an exception to those duties, responsibilities and liabilities. The common law had a number of things within it that a trustee was not permitted to do. And irrespective of whether the trustee profited from it, the trustee just could not do business with itself. And so the statute comes in and says, Well we understand the common law would not permit them to do this, but we're going to say you can under the statute. Does that necessarily exclude a more specific obligation under common law that prohibited trustees from self dealing? You describe this as a function of self dealing, but couldn't the common law say, We don't allow trustees to deal with themselves with the corporates of the trust. But that's not necessarily where the trustee profits at the expense of the beneficiary. There's a separate rule that says a trustee can't violate fiduciary duties. What in the statute would indicate that the most fundamental responsibility of a fiduciary can be released under the trust agreement, which is the fiduciary no longer has an obligation of fiduciary?

GILBREATH: I think the answer to your question might be twofold, and that is we maintain again that the legislature has specified the only self dealing section that it believes appropriate. Additionally, the type of self dealing that you are referring to as an overly broad, we would submit concept of self dealings. The Risser court for example said that the type of conduct you are referring to where the trustee gained some advantage to the detriment of the trust would be considered self dealing. That conception of self dealing we would submit is far too broad and that true self dealing consists only of a situation where the trustee is either loaning trust property to himself or selling his property to the trust or purchasing property from the trust. That is true self dealing under the common law. And so even if §113.059 would permit a self dealing exception beyond what the legislature contemplated it would still be limited in that respect and would not encompass the conduct that we are charged with by the respondents in this case.

ENOCH: The code of federal regulations that were decided has provision that a bank is free to reorganize these funds, but the bank has to absorb the cost of the reorganization of the fund. In this case would there be a claim by the beneficiary against the bank for having passed through some charges, the accounting charges or whatever were incurred or the losses, the tax consequences as a result of cashing out a fund just so the bank can do this transfer, swapping of banks? Would the CFR provision give the beneficiary the claim against the bank to reimburse those costs?

GILBREATH: We do not think so, because in this case the Grizzle trust specifically permits a trustee to charge reasonable fees. So it would be a question of whether this was a reasonable fee in connection with the merger. And I think that would be a matter within the trustee's judgment. Particularly under the exculpatory clause if someone were to disagree with the trustee and say well we think you're wrong that that's not an appropriate fee, well then the exculpatory clause would cover that type of a claim.

O'NEILL: What if the bank had sent out notices to people who had trust accounts there and said, in connection with the merger your account is going to be liquidated and reinvested, and therefore you have a certain period of time to transfer your trust to another branch of the same bank.

Would that have killed the merger?

GILBREATH: There is no evidence of course of that in the record. I do not know the answer to that question because I wasn't privy to the negotiations in the merger transaction. I see no indication in the record though that would have killed the merger.

O'NEILL: Well the other side has argued that the bank should have done that. And that they didn't because it would have affected the merger and, therefore, there was benefit to the bank by not notifying customers.

GILBREATH: We would disagree with that because this merger - it was not simply a transaction where we wanted their trust accounts in Dallas, and they wanted our trust accounts in Corpus Christi. That was not the purpose of the merger. The merger was a merger between the banks for all purposes. And it was not focused on the trust accounts. So I would say no, that would not have put the ______ on the merger.

O'NEILL: And my understanding is their argument is that that should have been done. If that had been done they would not have suffered this loss.

GILBREATH: Yes. They take that position that that should have been done. I don't know that they can follow through and say they wouldn't have suffered this loss. But they contend that we should have given them notice. And again we would say that the exculpatory clause if anything that would rise to the level of a mistake in judgment not doing that. And that the exculpatory clause would cover any claims based on that assertion. It doesn't rise to the level of gross negligence, bad faith or fraud, and there is no summary judgment evidence in the record to support a claim for gross negligence, bad faith or fraud.

BAKER: Is there any connection between the issue involving the tender under the DTPA and the bank's position that they caused no damage or not liable for any when they tender an amount that was requested through the attorney's fees?

GILBREATH: Not directly. I mean the causation argument and the DTPA tender I would say are not linked. The causation argument is that she didn't suffer a loss because at the time of the merger, she had about $195,000 worth of investments. After the merger and after the liquidation she had about $195,000 in cash.

BAKER: But that's not really their claim. The claim is what you did caused tax consequences, which in turn give them tax liabilities and other costs.

GILBREATH: That's their contention. We would disagree that the tax loss is damages. I mean we would contend that it's actually a benefit to the trustee...

BAKER: I presume then your viewpoint about the settlement tender was one to at least

avoid the consequences of a DTPA cause of action instead of admitting liability on the trust claim.

GILBREATH: The tender was just one basis for negating the DTPA claim, and didn't negate the DTPA claim through the exculpatory clause. The tender was simply an alternative basis and we were not attempting to avoid the merits of the DTPA claim. And we put on summary judgment evidence that there were no misrepresentations, and no reliance as well, and no damages. So we attacked all of the claims on the merits. The tender was just simply an additional basis to avoid the claim.

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RESPONDENT

ENOCH: In the briefing you make the point that had your clients been advised of this intended bank swap, your client would have had the opportunity to move the trust to a different branch of the bank. Ostensibly avoiding the realization of the tax consequence or the recognition of the tax consequence. But there wasn't a response to it, and it's not clear to me if in fact that was available from the record. Did you establish that you could have avoided the tax consequence by simply moving it to a Frost Bank in San Antonio as opposed to the Frost Bank in Dallas?

NORTHRUP: Actually there isn't any evidence that that could have been done except from our expert, James Bethens, whose affidavit is part of the record, and he indicated that that was an option that was available. He is a former VP of the trust department of Nations Bank. And that is very frequently something that is done with respect to trust when there are mergers or buy out agreements such as the one in this case. That was not available to our clients. It was never an option that was provided to our clients. And that is the essence of our complaint is that that option should have been given to them. And our belief is that it was not provided to them because it would have undermined this bank swap.

The consideration on both sides of this transaction, the parts of it that were roughly equal were the amount of fees that were being generated by the trust departments. And to say that the trust departments didn't enter into that transaction, I think ignores the truth of what this transaction was about. The banks were swapping - basically it was an even trade - swapping branches. And if the beneficiaries or various trusts in that trust department had walked down the street and gone to another branch, then it would have undermined the transaction. And it might not have gone through.

ENOCH: You also make a reference to the code of federal regulations, §9.18, that talks about costs, reorganizing a fund. Does the record demonstrate that accounting fees or whatever are those types of funds that are supposed to be absorbed by the banks when they do this?

NORTHRUP: I believe that those are funds that are to be absorbed by the banks. And our contention is that it was wrong to pass them along to the beneficiaries of these trusts. They would not have been incurred had this transaction not occur. The office of the comptroller of currency,

which is the regulating authority for federally insured banks, has described a bank's investment in proprietary funds as one that gives rise to a conflict of interest. And this is something that is not cited in our briefs. It's available on West Law. It comes out of the comptroller's handbook for asset management, and is part of appendix E of the examiner's handbook. It's at 2000 West Law, 914097. In that particular publication, they have described the investment in a bank's proprietary funds as giving rise to a conflict of interest. I believe that's why title 12 CFR 9.18 is required so that it authorizes a bank to go ahead and invest in that. However, in spite of that the bank isn't allowed to go forward and still put its interests above the beneficiary's interests. Which is precisely what occurred in this particular instance.

HECHT: You say it's not allowed to that by what?

NORTHRUP: It is not allowed to do that, and let me respond to your question by responding to the argument that has been made by the banks. The banks have argued that §9.18 required them to divest the proprietary funds of the predecessor bank. In fact if you look at that section it doesn't say anything about a bank being able to hold another bank's proprietary funds. In fact, it doesn't prohibit that at all. All it does is it authorizes a bank to purchase its own proprietary funds.

JEFFERSON: What sort of deference do we have to give to that?

NORTHRUP: As the regulating authority, I believe this court has to give deference to that authority's interpretation of its own regulations.

JEFFERSON: Is there a case that says that?

NORTHRUP: I do not have one with me. This citation is also part of the handbook for examiners, and it's at 1994 West Law 59811. In that publication it indicates that a bank examiner has the authority based upon a fund-by-fund basis to make exceptions and make determinations with respect to whether a bank should retain a fund or invest in another fund, including proprietary funds. And I submit to you that that was one option that these banks had in this case was to request the examiner to authorize them to maintain those funds of the predecessor bank.

HECHT: But is there any evidence or authority that that is usually done in these kinds of ______?

NORTHRUP: There is no evidence that that is usually done.

HECHT: Or authority?

NORTHRUP: The authority that we have and that we would rely upon is that in the affidavit of James Bevins, which is in the record, and is part of our motion for summary judgment.

HECHT: Does it support this argument?

NORTHRUP: I believe it does. My recollection is that that was one thing that he indicated was an option, in addition to the option of giving the beneficiaries the right to go down the street and go to another branch of the same overall bank.

PHILLIPS: Let me ask you some questions about your damages. You have three elements I believe of actual damages. The first is the tax loss. Is that correct?

NORTHRUP: Yes.

PHILLIPS: There was a gain that that was offset against _______?

NORTHRUP: I believe in the record there is an indication that that was offset by the gain. At least in Linda Grizzle's case. In other class member's classes there were losses. In Marilyn Rucker's case, I believe there was a loss that was never fully able to be written off before she passed away. So she was never able to take full advantage to the extent that that is an advantage.

PHILLIPS: Then the second are the fees that you say the comptroller can ____________? And the third is a failure to reinvest the money for ____________?

NORTHRUP: Yes.

PHILLIPS: Surely there are instances when you just put the money under a mattress might be the best thing, or at least better than investing it...

NORTHRUP: I will concede that there are instances where parking it in some noninterest drawing account might be appropriate. If the court looks at the Risser case, which is cited in our briefs, that court seems to indicate that putting money into a noninterest bearing account is a violation of the fiduciary responsibility.

PHILLIPS: Even for a day?

NORTHRUP: I don't think for a day.

PHILLIPS: What's the cutoff date?

NORTHRUP: I don't know that there is a bright line test on that. And let me say this about the Risser case. The CA in our case cited Risser for that proposition. Our opinion on that particular proposition is that the CA may very well have gotten that interpretation of Risser wrong. What the court was talking about in Risser in addressing that was an allegation that was made by the parties, and the court then goes on to address that allegation jointly with other allegations and never individually singles it out as a violation of the fiduciary duty. But we are not saying in our case, and this is where the CA below I think misinterpreted our position, we are not saying that the failure to invest funds in and of itself is a breach of fiduciary duty. We are saying that this is a consequential

damage that would not have happened but for the fact that the banks liquidated those funds, and then parked them for months in some cases in very low interest drawing accounts at a time when the market was doing very well and as a result our clients missed out on some wonderful market opportunities.

PHILLIPS: Are you taking Dell computer stock and comparing that against where the money was parked _______?

NORTHRUP: Not being a damage expert, I guess I would say that that analysis probably needs to be undertaken. I'm not sure how easy it would be to measure that. I think what would need be done is not to look at Dell stock, but look at the proprietary funds that the money should have been put in, compare that performance to where the money was parked for those months, and take the difference from that.

ENOCH: I have a little bit of difficulty with an exculpatory clause that says investment decisions are not going to be a basis for bringing a claim back against except for bad faith, gross negligence or fraud. My difficulty with Risser is it seems to say that in this case where they parked it and perhaps you're arguing you should have gotten a better interest rate than the interest rate here, when you allow that to be a recovery for damages how can you still have a viable exculpatory clause for investments - I mean what is the element that makes the bad investment outside of the exculpatory clause and inside a breach of fiduciary duty without eviscerating the exculpatory clause entirely?

NORTHRUP: I'm not sure I understand your question.

ENOCH: The argument of the banks are, we made a bad decision; we parked it in a low interest account; and we didn't get you the best investment we could. If that constitutes a general breach of fiduciary duty, then what in the heck is the exculpatory clause all about, which everybody concedes you can put in the trust agreement?

NORTHRUP: I think the answer to that is something that maybe has to be struggled with on a general basis in terms of weighing the enforceability of the exculpatory clause on one end and whether there is any remaining fiduciary obligation on the other end, which is the very essence of the trust relationship. And I think if you accept the bank's position here, then it reduces our clients to a point that's even less than what an ordinary depository might have with the bank. It completely eliminates the trust relationship.

HECHT: But they agreed to that. They agreed to the clause.

NORTHRUP: There's a question about that, that what was agreed to was a clause that - there is some question about its enforceability, and some question about what it means.

HECHT: Well Judge Enoch wants to know what is exculpated if you're right?

NORTHRUP: If I'm right, I say that...

HECHT: What's left?

NORTHRUP: There is nothing left, which is my point, that it eliminates the entire fiduciary responsibility.

OWEN: So what do we do with the statute?

NORTHRUP: And that's a very good question. I don't think that this can be evaluated in view of just the statute alone. And here's the reason for that. If you look at that statute what it says is that first of all there must be a settlor, because it uses the term settlor. And I submit that this trust as a property code, ch. 142 trust, has no settlor. And if you construe this as I think exculpatory provisions generally need to be construed strictly, then it should not apply here. But there's another reason that it should not apply here, and that is that the provision itself says that the trust may not relieve the trustee from any duty, liability or restriction imposed by this subtitle.

Now my question is. What are those duties, restrictions and liabilities imposed by that subtitle? Surely not breach of contract. That's not dealt with. And in fact I will point out that Frost's motion for summary judgment with respect to the exculpatory clause limits itself only to tort theories of liability. So contrary to what the petitioners have argued at the outset of their argument, the motion for summary judgment as to the exculpatory clause does not eliminate every cause of action. Nonetheless, I do think that there are duties, liabilities and restrictions that have been raised as part of our claims that are not encompassed within the trust code. Surely the trust code if you look at it does not encompass all common law concepts of breach of fiduciary duty. And in fact it doesn't. The common law has long recognized...

OWEN: Doesn't this chapter impose some fiduciary duties?

NORTHRUP: It imposes the same but the common law imposes some that are broader than what are contained in the trust code.

OWEN: So what's the point of the statute?

NORTHRUP: The point of the statute - actually I think the statute has no point. I think that an exculpatory clause could be inserted subject to the restatement sec. 222. And public policy, I think an exculpatory clause could be inserted in a trust instrument, a contract, a lease instrument. And they are all the time. The question is whether public policy will permit an exculpatory clause to be so broad that it eviscerates the fiduciary responsibilities and eliminates the trust.

O'NEILL: Let me make sure I understand. I thought you said that you didn't have so much complaint with that investment decision that that was not the focus or your argument. The argument really starts with the liquidation. And the cost of liquidation resulted in self dealing and

self profit, that's where you are hanging your hat. So we don't need to go to the bad investment analysis.

NORTHRUP: We don't. Although I will say that I believe the assessment of the fees was also a separate self dealing type or profit making...

O'NEILL: But again, doesn't involve investment decisions.

NORTHRUP: Correct.

O'NEILL: So the exculpatory clause you would agree could involve bad investment decisions that would be excused under the clause, or you don't need to go there according to your argument?

NORTHRUP: I say that they are not excused for the reasons set out in the restatement in terms of anytime you make a profit that is self dealing.

O'NEILL: My point exactly. My understanding is the only reason you think that the bank profited or self dealt was as a result of the liquidation and not as a result of bad decisions made and investments. And I think that's an important distinction that you appear to be drawing. I hear the argument going the way of this is going to subject trustees to all sorts of liability for bad investment decisions if we read the exculpatory clause as broadly as you would like us to. But that's not really the focus of your argument.

NORTHRUP: It is not.

OWEN: Let me understand this. They liquidated and then after they liquidated they should have invested that day or the very next day, and because they didn't invest for 40 some odd days, that's a separate decision that you're trying to tag them for. So it is an investment decision.

NORTHRUP: We're not attempting to attack that decision. We're attempting to attack that as a consequential damage.

OWEN: Well it wasn't consequential of liquidation. They could have liquidated and reinvested the same day or the next day, and you would not have this claim. Is that correct?

NORTHRUP: That is correct.

OWEN: So what you are saying is after the liquidation they made a bad decision on how to invest the funds after the liquidation. So they aren't really part and parcel of the liquidation are they?

NORTHRUP: I disagree. I think that it is part of that, and that they would not have been put

in that particular place had it not been for the liquidation.

OWEN: But they still had to make a decision about what to do with the funds post-liquidation.

NORTHRUP: And with the predicate assumption that they liquidated them. Yes.

OWEN: The particular damages you're talking about would not necessarily flow from the liquidation?

NORTHRUP: I respectfully disagree. I think they do flow from that.

O'NEILL: In other words, absent the liquidation you wouldn't have a claim here?

NORTHRUP: Absent the liquidation there would not be a claim.

ENOCH: In the briefing it's not clear to me that people have teed up the issue of who was the trustee and what point in time decisions were made. Frost bank and Texas Commerce agreed to swap banks, and then this account was liquidated. And either Frost Bank made the decision to liquidate the account or Texas Commerce bank made the decision to liquidate the account. Who was the trustee at the time it occurred? As I understand it, Texas Commerce bank now had control of the assets and liquidated it. Is that what happened?

NORTHRUP: That is true. Three weeks after this event.

ENOCH: And the agreements and the laws permit the automatic substitution of trustees and so do you have a claim against Texas Commerce Bank who was not the trustee at the time they were liquidated, or do you only get there through your conspiracy theory?

NORTHRUP: We do have a claim. I think why you are thinking of Frost because it was Texas Commerce Bank that liquidated Linda Grizzle's claim. And to the extent that the banks knew that this was going to happen in advance, that the liquidation was required and that they are making that argument, then I submit that they both are on the hook for that.

I would ask that the court take a look at the evidence in connection with these issues on the motion for summary judgment. This motion reads like a no evidence motion. There isn't any evidence submitted in connection with this, and for that reason, we would ask that the court affirm the CA's decision to reverse and remand.

HECHT: I believe you said under your view there really isn't any point to this statute unless it allows exculpation of additional duties that are imposed by statute that are not imposed by the common law.

NORTHRUP: That's probably true. I guess as an example, I would say, the duty to account, that probably imposed it.

HECHT: And the second point is that under your view of exculpatory clauses apart from this statute what can those clauses exculpate? What decision by the trustee that cost the beneficiary money can the clause exculpate?

NORTHRUP: I think so long as the decision is not one that can be characterized as self dealing or in my view under the restatement bad faith, intentional conduct. And I define self dealing the way Black's Law dictionary does: One in which the trustee benefits from the transaction and the beneficiary has a detriment from the transaction. Which is precisely what I believe occurred here.

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REBUTTAL

KRYDER: J. Enoch, you asked about who was the trustee. Frost was no longer the trustee by operation of law. Under the CA's erroneous interpretation of what self dealing is, they said it was failure to properly reinvest and that was evidence of mishandling. We disagree strongly on that. But Frost did not liquidate the funds. It was no longer trustee by operation of federal law. It had no role in the decision whether to invest or not.

J. Enoch, you also asked about changing banks. The trust instrument does not permit the beneficiary to change her trustees or to choose her trustee. This was a court approved trust, approved by the guardian ad litem as well as Ms. Grizzle. And it expressly contemplated successor trustees by merger.

Another thing, there was discussion of this examiner's manual. The summary judgment evidence shows Ms. Grizzle testified she had no objection to the investments when they were made by Frost or those when they were later made by TCB when there was about a 35% increase in her account.

ENOCH: If the code of federal regulations requires the bank to absorb administrative costs for a fund that it reorganizes, would that contemplate cashing out a fund and reinvesting the fund, the expenses associated with that where you decide that the fund needs to be audited as a result of this cashing out and reinvesting it. Would that money need to be absorbed by the bank under the federal regulations?

KRYDER: I think you would have to look at each individual trust instrument. But under the instrument in question, the expenses of administering the trust properly are chargeable to the trust. Here if it were something strictly under the code of federal regulations that has to be absorbed by the bank they certainly would have to.

ENOCH: If you rely on the federal regulations and statutes to permit the bank to do this,

which was intentional, but to avoid the bad faith exception to the duties can you then rely on the trust instrument permitting you to pass through charges that are different than the federal statute that says you've got to absorb the fees? You're saying the federal statute says we do all this, therefore, it can't be bad faith. But at the one point where the federal statute says you can't charge the fund for it and you do, and you claim well that's because the trust instrument lets us do that, isn't that somewhat inconsistent?

KRYDER: Justice Jefferson asked the deference we have to give to the federal government in a different context in this case. We have to give deference to them in terms of the approval of this merger. And it had to be done in accordance with federal law, and we believe it was done.

We have objected to any evidence, and believe there was not properly evidence before the TC about there being audit fees or any other expenses. And those weren't pled as specific elements of damage nor a part of the summary judgment record as we saw it.

But we do believe you are correct that you there would be certain charges that the banks would have to absorb and there would be other incidental normal charges of administering a trust that could be passed along. And I think you would have to look at each one of those. That's one of the reasons this never would have been proper as a class action.

ENOCH: If the restatement 222 is to be believed, what they've written, it appears that it acknowledges that the trust agreement can absolve trustees of a lot of responsibility, and a lot of liability primarily focusing on the investment decisions. The trustee just ought not to be liable for making bad investment decisions. And it seems to me that it's pretty well focused that unless it's bad faith, unless it's fraud or gross negligence, you can absolve them of any other activity they do except the restatement seems to identify a profit to the trustee. But if the activity results in a profit to the trustee, then to the extent of that profit there is no exculpation. How would that play here if the bank is supposed to absorb costs to a fund that it liquidates, but by the trust agreement it passes that through to the trust, under this circumstance why would that not implicate that part of the restatement?

KRYDER: I think that the type of profiting by a trustee that the legislature has focused on and has said may not be excluded are the trustee using its own property and the trustee loaning money to itself. That is the kind of profiting at the expense of the beneiiciary that the legislature is specifically saying you cannot exclude. In this instance, the trustees, the banks, did not profit at the expense of the beneficiary. The merger was wholly independent from the trust relationship. So they didn't enter into the merger in any sense using trust property or loaning money to themselves.

Importantly in looking at these accounts the day before the merger these accounts have the same value as they did the day after the merger. If you look at the account statement it was the same amount of money the day before as it was the day after. They didn't incur a loss. And that's what the summary judgment record was and that's what the fact was.

BAKER: What was the purpose to liquidate those trusts if there was no change from one day to the next?

KRYDER: Because the code of federal regulations provision that we cited that Frost could not hold the common funds of TCB, and Texas Commerce likewise could not hold their funds. So they needed to liquidate those because they could not hold them.

But there was no cost to the beneficiary. It was the same value in her account the day before as the day after. And importantly the tax consequence it was there regardless of the merger. It was the product of market forces in the stock market. So that tax loss was there regardless of the merger and it would have had to have been recognized at some point. But clearly it was not caused by the merger itself.

O'NEILL: What if the summary judgment record showed that a common practice is to notify depositors or notify people who have trusts that this merger is about to occur and they can transfer the trust to another account that would not result in liquidation. If that were the normal practice and TCB did not notify them of the right to do that, wouldn't that be some benefit to TCB that they retained the account?

KRYDER: There is nothing in the summary judgment record to that effect. But 12 U.S.C., §215 prescribes the type of notice that shall be required for federal banks. And it is cited in our briefing. But it expressly states that no other action on the part of any court or anyone shall be necessary. So there not only was no requirement for that notice, but no court, no common law ruling by a TC or respectfully this court could impose additional requirements.

O'NEILL: If we can't read that authority that way, that regulation that way, and if there were some practice or some evidence that this could have been done, would that not be some evidence of self dealing that by not notifying customers they were retaining the accounts in their own banks and therefore there was a benefit to them?

KRYDER: Well they didn't retain the accounts. As they merged the Cullen Frost Corpus Christi bank took over all the accounts of TCB and TCB took over all the Dallas...

O'NEILL: My point exactly. If the people who have the trust had moved it to another Frost branch bank that wouldn't have happened. It moved into TCB's column as a result of not notifying that they had the option to move it. Again, my question is, assuming with me that it could have been done and that it often is done that depositors are given this option to change their account, then would that not be some evidence of benefits to TCB from...

KRYDER: I would respectfully say it would not. And I think that again the...

O'NEILL: Why would it not if it allows them to retain the account?

KRYDER: You may call it benefitted. But it would certainly not be self dealing. And self dealing as prescribed by the legislature is we believe limited to dealing in loaning money to yourself and buying and selling property for yourself as provided in §113...

O'NEILL: Why would not holding to an account be having property for yourself?

KRYDER: Well they didn't hold onto the account. So that actually is the ____ of self dealing. They transferred the account. Keeping the account I don't see would be self dealing at all.

OWEN: You said on this topic that they could not have transferred the trust to a different Frost branch. Why not?

KRYDER: The trust instrument does not provide for the beneficiary to be able to change her trustees...

OWEN: But the settlor could have.

KRYDER: The settlor could have.

OWEN: So if she had been notified, she could have gone to the court and said I want to move my account from this branch of Frost bank to another branch?

KRYDER: On the other hand, under federal statute, 12 U.S.C. 215(e), there is no notice requirement. And in fact it expressly says in that statute that upon the merger that the successor bank will succeed to all rights, not just as a trust, but leases, all contracts, everything without any court approval or otherwise.

OWEN: No I'm just saying pre-merger Frost bank could have sent out notice to its trust accounts saying we're about to merge and this may have tax consequences or other consequences and you have the option of moving your trust account to another branch of Frost bank.

KRYDER: I don't' know whether they would have had that option. The only practice in which I am aware is to follow the federal statute. I do not know of anything in the federal statute that would have precluded that. I certainly know that if a bank follows as these two banks did the federal requirements that that notice requirement cannot be second guessed by any other court. They have followed federal law for the merger of national banks. And no court can prescribe the requirements whether it's notice or otherwise. So we think that they fully complied with the federal law.