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JOHN F. WARREN
COUNTY CLERK
DALLAS COUNTY

NO. PR-11-3238-1

IN RE: ESTATE OF	§	**IN THE PROBATE COURT**
	§	
MAX D. HOPPER,	§	
	§	
DECEASED	§	
	§	
JO N. HOPPER,	§	
	§	
Plaintiff,	§	**NO. 1**
	§	
v.	§	
	§	
JPMORGAN CHASE BANK, N.A., STEPHEN B. HOPPER and LAURA S. WASSMER,	§	
	§	
	§	
	§	**DALLAS COUNTY, TEXAS**
Defendants.		

JPMORGAN CHASE BANK, N.A.'S BENCH BRIEF
RE: CHAPTER 33 AND ESTATES CODE §§ 404.0037 AND 352.051

I. Texas Civil Practice & Remedies Code § 33.003: Proportionate Responsibility

Chapter 33 applies to "***any cause of action based on tort*** in which a defendant, settling person, or responsible third party is found responsible for a percentage of the harm for which relief is sought." TEX. CIV. PRAC. & REM. CODE § 33.002 (emphasis added). Section 33.003 states:

> (a) The trier of fact, ***as to each cause of action asserted***, ***shall*** determine the percentage of responsibility, stated in whole numbers, for the following persons with respect to each person's causing or contributing to ***cause in any way the harm for which recovery of damages is sought***, whether by negligent act or omission, by any defective or unreasonably dangerous product, by other conduct or activity that violates an applicable legal standard, or by any combination of these:
>
> (1) each claimant;
> (2) each defendant;
> (3) each settling person; and
> (4) each responsible third party who has been designated under Section 33.004.

> (b) This section does not allow a submission to the jury of a question regarding conduct by any person without sufficient evidence to support the submission.

TEX. CIV. PRAC. & REM. CODE § 33.003.

a. Application of Chapter 33 to Mrs. Hopper's and the Heirs' Breach of Fiduciary Duty Claims.

The Dallas Court of Appeals held that "a person must be submitted in both the liability and percentage-of-responsibility questions if she falls within one of the categories listed in Section 33.003(a) and if sufficient evidence supports her submission."*Janga v. Colombrito*, 358 S.W.3d 403, 409 (Tex. App.—Dallas 2011, no pet.). A "cause of action based on tort" includes negligence, products liability, and any other conduct that "violates an applicable legal standard." *JCW Elecs., Inc. v. Garza*, 257 S.W.3d 701, 705 (Tex. 2008); *Dugger v. Arredondo*, 408 S.W.3d 825, 832 (Tex. 2013) (recognizing that when the Legislature intends to exempt a cause of action from Chapter 33, it will create "specific exceptions for matters that are outside the scope of proportionate responsibility.").

Therefore, Chapter 33 plainly applies to Mrs. Hopper's and the Heirs' breach of fiduciary duty claims. *Underwriters at Lloyds v. Edmond, Deaton & Stephens Ins. Agency, Inc.*, No. 14-07-00352-CV, 2008 WL 5441225, at *3 (Tex. App.—Houston [14th Dist.] Dec. 30, 2008, no pet.) (holding that Chapter 33 applies to negligent misrepresentation, negligence, and breach of fiduciary duty); *Seven Seas Petroleum, Inc. v. CIBC World Markets Corp.*, No. CIV.A. H-08-3048, 2013 WL 3803966, at *22 (S.D. Tex. July 19, 2013) (rejecting the argument that Chapter 33 did not apply to aiding and abetting breach of fiduciary duty and that Chapter 33 "applies to all tort claims except those specifically excluded").

Thus, as long as there is sufficient evidence[1] to support the submission, the jury must apportion responsibility in whole numbers for every tort claim against JPMorgan among: Mrs. Hopper and the Heirs (as a claimants and settling persons), JPMorgan (as the defendant), and Gary Stolbach and Glast, Phillips & Murray ("GPM") (as responsible third parties and settling persons with respect to the Heirs' claims). The Court should include separate lines for each of the above-listed individuals/entities in the jury charge. *Janga,* 358 S.W.3d at 405 (remanding for a new trial when the trial court failed to include settling person in the charge after appellants at trial argued that two settling individuals should have been included on separate lines in both the charge's first question (which identified parties whose negligence had proximately caused the injury) and second question (which determined the negligent parties' percentage of responsibility).

II. Estates Code §§ 404.0037 and 352.051

a. <u>Questions of Fact</u>

Whether JPMorgan defended Mrs. Hopper's removal action in good faith and the reasonable amount of fees incurred in defending that action are questions of fact that should be submitted to the jury. *See* JPMorgan's First Amended Proposed Charge at Question 22-23. Section 404.0037 states:

> (a) An independent executor who defends an action for the independent executor's removal in ***good faith***, whether successful or not, ***shall*** be allowed out of the estate the independent executor's necessary expenses and disbursements, ***including reasonable attorney's fees***, in the removal proceedings.

TEX. ESTATES CODE § 404.0037(a) (emphasis added) (previously TEX. PROB. CODE § 149C(c)). Courts have consistently held that the jury/ factfinder is to decide whether an independent

[1] *See, e.g., Janga,* 358 S.W.3d at 409 (testimony as to nurses' negligence sufficient); *see also Hauschildt v. Cent. Freight Lines, Inc.,* No. 10-10-00185-CV, 2011 WL 455264, at *3 (Tex. App.—Waco Feb. 9, 2011, pet. denied).

executor (or administrator) defended a removal action in good faith. *Evans v. First Nat. Bank of Bellville*, 946 S.W.2d 367, 380 (Tex. App.—Houston [14th Dist.] 1997, writ denied) ("In answer to question one, the jury found James defended the action in good faith."); *Lesikar v. Rappeport*, 809 S.W.2d 246, 252 (Tex. App.—Texarkana 1991, no writ) ("The trial court, ***in accordance with the jury findings***, found that Mrs. Rappeport had defended in good faith the action to remove her as an independent executrix, and that she did not breach her fiduciary duty to the other beneficiaries of the estate. Thus, whether she was successful or not on the appeal, she would be entitled to attorney's fees pursuant to Section 149C(c).") (emphasis added); *Lee v. Lee*, 47 S.W.3d 767, 794 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) ("Although the jury charge phrased the "good faith" requirement negatively, we construe the jury's affirmative finding to be a finding that appellee did not defend against removal in good faith."); *Kanz v. Hood*, 17 S.W.3d 311, 313 (Tex. App.—Waco 2000), order withdrawn (Apr. 26, 2001) (good faith was a finding of fact).[2] Moreover, the reasonableness of the attorneys' fees is also a question for the jury. *Klein v. Klein,* 641 S.W.2d 387, 388 (Tex. App.—Dallas 1982, no pet.) (trial court submitted to jury issues related to the "amount of time spent by the attorneys, reasonable hourly charges for their services, and the amount of other expenses.").[3]

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[2] Good faith findings in similar provisions of the Estates Code are also questions of fact for the jury. For example, Section 352.052(a) of the Estates Code allows for the recovery of attorneys' fees if executor defends a will in "good faith and with just cause," and courts have held the question of good faith is to be a question of fact for the jury. TEX. EST. CODE § 352.052(a); *see Alldridge v. Spell*, 774 S.W.2d 707, 711 (Tex. App.—Texarkana 1989, no writ); *Harkins v. Crews*, 907 S.W.2d 51, 64 (Tex. App.—San Antonio 1995, writ denied) ("[T]he jury's finding that the 1990 will was offered in good faith was adequately supported."); *In re Estate of Longron*, 211 S.W.3d 434, 442 (Tex. App.—Beaumont 2006, pet. denied).

[3] Further, *In re Estate of Lynch*, the court submitted questions to the jury on "reasonable and necessary" attorney's fees and on "good faith." *In re Estate of Lynch*, 350 S.W.3d 130, 140–41 (Tex. App.—San Antonio 2011, pet. denied); *see also In re Estate of Johnson*, 340 S.W.3d 769, 787 (Tex. App.—San Antonio 2011, pet. denied) (submitting issue of reasonableness of fees to the jury).

Section 352.051 also contains fact questions and states:

> On proof satisfactory to the court, a personal representative of an estate is entitled to: . . . (2) ***reasonable*** attorney's ***fees necessarily incurred*** in connection with the proceedings and management of the estate.

TEX. EST. CODE § 352.051 (emphasis added) (previously TEX. PROB. CODE § 242). Just like the questions in Section 404.0037, the amount of reasonable attorneys' fees necessarily incurred in connection with the proceedings and management of the Estate (*see* JPMorgan's First Amended Proposed Charge at Question 24) is a question for the jury. *See, e.g., In re Estate of Williams*, No. 05-15-00392-CV, 2016 WL 3136933, at *2 (Tex. App.—Dallas June 6, 2016, no pet.).

b. Timing of Factual Finding.

The Heirs contend that it is "too late" for JPMorgan to seek the above factual findings pursuant to Sections 404.0037 and 352.051 simply because it paid its attorneys' fees as it incurred them, as opposed to waiting for a final judgment from the Court. But that simply cannot be the case, and there is no authority to support the Heirs' position. JPMorgan should not be precluded from receiving factual findings from the jury, especially when there is strong statutory authority to suggest that JPMorgan had a right to pay its fees out of the Estate.

Respectfully submitted,

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ATTORNEYS FOR JPMORGAN CHASE BANK, N.A. IN ITS CAPACITY AS INDEPENDENT ADMINISTRATOR OF THE ESTATE OF MAX D. HOPPER, DECEASED AND IN ITS CORPORATE CAPACITY

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been served on the following counsel of record via the electronic service manager and/or by email on this 20th day of September, 2017.

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