

SUBJECT: Limiting liability of a trustee that directs powers to third parties

COMMITTEE: Business and Industry — favorable, without amendment

VOTE: 4 ayes — Oliveira, Fletcher, Rinaldi, Romero

1 nay — Collier

2 absent — Simmons, Villalba

WITNESSES: For — Dave Folz, Texas Bankers Association; (*Registered, but did not testify*: Jack Roberts, Bank of America; Karen Neeley, Independent Bankers Association of Texas; David Emerick, JPMorgan Chase; Celeste Embrey and Janice Torgeson, Texas Bankers Association)

Against — Jeffrey Myers; (*Registered, but did not testify*: Kristi Elsom; Craig Hopper)

BACKGROUND: Property Code, sec. 114.003 regulates a trustee or other person's power to direct certain actions related to the management of a trust to another party. A holder of a power to direct is liable for any loss that results from a breach of their fiduciary duty.

Some trusts authorize the trustee to delegate certain responsibilities, such as investment decisions, to third parties. Current law holds a trustee liable for the decisions of these third parties.

DIGEST: HB 3190 would limit the liability of a trustee in cases where the trustee had directed certain powers to a third-party advisor. A person would be considered an advisor and a fiduciary, unless the terms of the trust provided otherwise, if he or she had the authority under the terms of the trust to direct, consent to, or disapprove a trustee's actual or proposed decisions, including investment decisions. An "investment decision" would mean a transaction affecting the ownership of, rights in, or value of the investment. A protector would be considered an advisor.

Unless the terms of a trust provided otherwise, a trustee required to act with an advisor when making decisions, including investment decisions, would not have the duty to:

- monitor the conduct of the advisor;
- provide advice to the advisor or consult with the advisor; or
- inform any beneficiary or third party concerning instances in which the trustee would have acted differently from the manner directed by the advisor.

The bill would specify that a trustee following the direction of an advisor would not be liable for any loss resulting from that direction, unless the trustee acted with wilful misconduct.

A trustee that was required by the terms of a trust to make decisions with the consent of an advisor would not be liable for any loss that resulted from the advisor's failure to give consent after the trustee requested it. An exception would apply to a trustee that acted with wilful misconduct or gross negligence.

The bill would create a presumption that the actions of a trustee related to matters within the scope of the advisor's authority were administrative actions taken by the trustee unless there was clear and convincing evidence to the contrary. Administrative actions would not be considered an undertaking by the trustee to monitor the advisor or otherwise participate in actions within the scope of the advisor's authority.

The bill would repeal Property Code, sec. 114.003 to conform to the changes noted above.

This bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2015.