What is a special relationship?

The legal meaning of the term “special relationship” in Texas jurisprudence is ambiguous. Reported case law and commentaries use the seemingly multi-faceted term with little or no precision or consistency in 1) contact law; 2) tort law; 3) constitutional law; 4) evidence; 5) criminal statutes; 6) criminal law; and 7) family law. The scope of our analysis is limited to special relationships in the context of tort and contract liability.

Special Relationships in Tort

The General Rule and the Exceptions.

As a general rule, no one has a duty to aid or protect another person. Even if one has the practical ability to control a third person to prevent him from physically harming another, he has no duty to exercise such control. The presumption of lack of duty or liability, however, disappears when a special relationship exists between the parties. Texas courts most often look to the RESTATEMENT for guidance in defining special relationships that impose duties of affirmative action as a matter of law in tort cases. Social and moral considerations also dictate that a dutiless individual may, by voluntarily taking “an affirmative course of action” that affects the interests of another person, assume a duty to act with reasonable care.

Section 315 of the RESTATEMENT sets forth two exceptions under which an individual has a duty to control the conduct of third persons: 1) if a special relationship exists between an individual and the third party, the individual has a duty to control the third party’s conduct; or 2) if an individual has special relationship with another, the individual has a duty to protect the other from the wrongful acts of third parties.
Sections 314A, 314B, and 320 detail the special relationships in which an individual has a duty to aid or protect another: 1) a common carrier and passenger; 2) an innkeeper and guests; 3) a possessor of land who holds it open to the public; 4) one who voluntarily assumes control or is required to take control of another; 5) an employer and employee; and 6) one who has custody of another has a duty to protect them from a third party. Relationships in which an individual may owe a duty to control the acts of a third party are listed in sections 316 through 319: 1) a parent and minor child; 2) master and servant; 3) possessor of land or chattels and a licensee; and 4) an individual in charge of a person having dangerous propensities.

Most reported Texas cases dealing with special relationships and their accompanying duties are appeals from dismissals on motions for summary judgment. Dismissals usually spring from a negative answer to the threshold inquiry in a negligence case - whether the defendant owed a duty to the plaintiff. Because the existence of a legal duty under a given set of undisputed facts and circumstances is always question of law, and never a jury question, the duty issue is a fertile field for summary judgments.

The road to understanding the expanding role of duties attendant on special relationships in Texas tort law is fraught with peril and dead ends. As Justice Kilgarlin observed in 1983, “changing social standards and increasing complexities of human relationships in today’s society,” justified expansion of traditional duties under modern tort law. Focusing on the establishment of duty based on special relationships and on common law duty factors, Kilgarlin stated that the courts should consider “foreseeability and likelihood of injury weighed against the social utility of the actor’s conduct, the magnitude of the burden of guarding against the injury and consequences of placing that burden on the employer [or society in general].”

Current State of the Law and the Bird Test.
In *Otis Engineering Corp. v. Clark*, the Texas Supreme Court acknowledged the “no duty” general rule of *RESTATEMENT* Section 315, but citing Sections 316-319, recognized that some special relationships impose, as a matter of law, certain duties upon the parties. In *Golden Spread Council, Inc. of the Boy Scouts of America v. Akins* (1996), the supreme court declared that the 1994 duty analysis it employed in *Bird v. W.C.W.* was appropriate to use to determine whether a special relationship between the parties imposed a duty.

The *Bird* test involved a two-part analysis: 1) First, the court balanced various common law duty factors. 2) If the court decided there was nothing that favored the imposition of a duty, it then determined whether an special relationship existed between the parties.

In *Akins*, the supreme court found a common law duty in the first step of its analysis and concluded that they did not need to “consider whether a special relationship exists.” In contrast to *Bird*, *Akins* held that 1) if the court initially finds a special relationship between the parties, it need not proceed any further in its duty analysis; but 2) if the court finds no special relationship, it should then conduct an analysis of common law duty factors. Since most negligence cases do not involve special relationships, the *RESTATEMENT* provides only part of the information necessary to determine duty under Texas tort law. The rest of the information must come from case law.

**Observations on Special Relationships in Tort.**

In the absence of a contract, Texas tort law bases its interpretation of special relationships on the 1965 *RESTATEMENT (SECOND) OF TORTS*. Just as Justice Kilgarlin prophesied in *Otis*, the *RESTATEMENT* reflects more duties created as tort law evolves in our changing society. How future Texas courts will determine duty in the absence of an established special relationship will determine, in large part, the course of Texas tort law as a whole. The Texas Supreme Court has
not had the last word on how common law duty factors co-exist with the existence or absence of a special relationship. If tort cases follow *Bird*, a balancing test of tort duty facts will overwhelm any consideration of special relationships found in Restatement section 315 and its subparts. If the courts chose to follow the recent *Akins* case, however, special relationships as defined in the *RESTATEMENT* may take center stage in every tort suit considered by Texas courts.

**Special Relationships in Contract**

Texas courts have long considered the fiduciary relationship as the touchstone for finding the existence of a special relationship in contracts. As such, an examination of the various forms of the fiduciary relationship provides a logical starting point for the next phase of our discussion: special relationships in contract law.

**Fiduciary relationships.**

Courts refer to a fiduciary relationship as a “special relationship.” But there are at least two types of fiduciary relationship: 1) A true, formal “fiduciary relationship” exists only in a few situations such as partner/partner, agent/principal or trustee/cestui que trust. These relationships are readily identifiable and, because they are traditionally and historically based on trust and confidence, they impose strict duties as a matter of law. 2) A second type of fiduciary relationship, the “informal” or “confidential relationship,” arises not from a business or contractual interaction, but from a moral, social, domestic or purely personal relationship. This subjective, informal type of special relationship exists where influence has been acquired and abused and confidence reposed and betrayed.

A third “special relationship” arises when Texas courts impose extracontractual duties of good faith and fair dealing. These duties generally arise from unequal bargaining positions between parties to a contract.
Tort damages under contract law.

The Supreme Court of Texas reluctantly transforms contract claims into tort claims. In fact, it never does. But, where a party’s negligence or deliberate failure to perform a contract also breaches a common law duty, independent tort liability arises.35 Despite plaintiffs’ efforts to persuade courts to expand the list of special relationships, they have met with little success. When courts do find special relationships, they generally impose less stringent duties than those associated with traditional fiduciary or agency relationships.

“Duty Apart.”

The general rule in Texas is that parties may, without fear of tort liability, subjectively pursue their own interests under a contract, or even fail to perform their contractual duties.36 Before tort damages accrue from a contractual matter, liability must arise “independent of the fact that a contract exists between the parties,”37 and defendant must breach a duty apart from those duties imposed by the contract terms.

A “duty apart” is defined in the 1947 case of Montgomery Ward & Co., v. Scharrenbeck38 in which Ward incompetently repaired a water heater in plaintiff’s home. Not only was Ward’s obligated by contract to restore the water heater to good working order, it had a common law duty to refrain from injuring persons or property. By failing to repair the heater, Ward breached its duties under the contract and, because plaintiff’s home was destroyed as a direct result of Ward’s improper repair, it breached an independent common law duty. Ward was liable for tort damages on a negligence theory.39

Familiar examples of a “duty apart” from contractual obligations include those duties owed by doctors and lawyers to their patients and clients. Physicians have a duty to treat their
patients with proper professional skill, which flows from their special consensual relationship. Lawyers’ duty of care arises from their inherent special agency relationships with their clients.

*English v. Fischer.*

In 1983, the Supreme Court of Texas denied punitive damages for breach of contract in the case of *English v. Fischer.* In a sweeping pronouncement the court said to allow such damages “would abolish our system of government.” However, the concurring opinion by Justice Spears states that in certain situations, punitive damages are available for breach of contract. The oft-cited Spears concurrence lists instances where parties have incurred unique duties of good faith and fair dealing because Texas courts “read” those duties into contractually-based transactions arising from a special relationship between the parties. Close scrutiny of the cases cited, however, reveals that his examples fail to support his argument.

Of all the cases cited by Justice Spears, *G.A. Stowers Furniture Co. v. American Indemnity Co.* comes closest to encompassing a special relationship under the “rule” articulated in the concurrence. Nevertheless, it is not easy to fit Stowers into the Spears rules. Stowers does not discuss any special relationship nor any duty of good faith and fair dealing. The opinion focuses on the agency role of a third-party insurer when it assumes the defense of its insured. If an insurer negligently refuses to settle a claim within policy limits when the opportunity arises, thereby exposing the insured to additional damages above policy limits, the Stowers doctrine operates to penalize the insurer for its negligence. What sets Stowers apart from the other examples cited by Justice Spears is that the insurer’s obligation under Stowers, while agency based, is neither a fiduciary duty or a good faith duty.

The Stowers duty is one of ordinary care, as opposed to the fiduciary duties of care and loyalty. Under Stowers, the insurer is the “sole and exclusive agent” of the insured and must
give the insured’s interests at least as great consideration as the insurer gives to its own interests.48 The Stowers doctrine holds insurers “to that degree of care and diligence which a man of ordinary care and prudence would exercise in the management of his own business.”49

Ranger County Mut. Ins. Co. v. Guin,50 “[a] negligent breach of an agency relationship constitutes an independent tort for which an action for damages will lie.”51 (emphasis added) Stowers and its prodigy are clearly founded, not on a theory of special relationship, but on a theory of special agency which gives rise to special duties and special damages.

The difference between the various relationships.

Obviously, the supreme court distinguishes between duties owed in a fiduciary relationship and those owed in a special relationship.52 A special relationship establishes a duty of good faith and fair dealing from which tort damages result, similar to damages from the violation of a fiduciary duty. But, the two duties have a different standards of care.

“Although a fiduciary duty encompasses at the very minimum a duty of good faith and fair dealing, the converse is not true.”53 The duty of good faith and fair dealing only requires the parties to “deal fairly” with one another,54 whereas the party owing the duty in a fiduciary duty must, if the need arises, put the interests of the beneficiary ahead of its own.55

A fiduciary relationship exists when a special confidence is placed in another, who with equity and good conscience, is bound to act in good faith and with due regard to the interests of the one placing confidence.56 When this relationship is established, the bound party is under a duty to act for or give advice on matters within the scope of the relationship for the benefit of the beneficiary.57 However, neither the transaction between the parties alone nor mere subjective trust can establish a fiduciary relationship.58
The supreme court did not enforce the fiduciary duties normally arising from an agency relationship with the Stowers doctrine. To hold an insurance company to the standards of a fiduciary would require insurers to always elevate their insureds’ interests above those of the insurers who would then face financial disaster or be forced to charge astronomical premiums.59 As Stowers now stands, an insurer who acts as defender or special agent for the insured has the same objective standard of care a person or ordinary prudence would exercise in the management of his own business. This negligence standard is not the same as “bad faith.”60 The good faith standard implies the absence of an improper motive and a reasonable basis for the insurer’s conduct.61

**Special relationships after English v. Fischer.**62

During the 13 years since English v. Fischer, Texas courts found only a handful of cases where a special relationship required a duty of good faith and fair dealing:

1. Holders of executive rights to mineral interests.63
2. First-party insurers’ duties to their insureds.64
3. Cable TV providers.65
4. Debtor/Creditor.66
5. HMO’s and dentists.67
6. Insurance companies and recording agents.68
7. Surety and principal.69

The most familiar of the above is the second case in this array, *Arnold v. National County Mutual Fire Ins. Co.*70 *Arnold*, which came sixty years after the Stowers decision, expressly recognizes a special relationship apart from a fiduciary relationship. The supreme court considered the unequal bargaining power between a first party insurer and its insured, examined the nature of the insurance contract, and acknowledged that an insurer has complete control over the claims evaluation process. By imposing a duty of good faith and fair dealing to prevent
unscrupulous insurers from unduly taking advantage of their insureds, the court intended to remove insurers’ financial incentives to deny or delay meritorious claims.

The supreme court recently removed the uncertainty of whether and to what extent an Arnold special relationship imposes a duty of good faith and fair dealing in the context of third-party claims as opposed to the insured’s direct claims against an insurer. We now know there is no such duty. In the absence of an express position by the supreme court, the lower courts were previously mixed in their decisions.

**Relationships which are not special relationships.**

During the 13 years since *English v. Fischer* was decided, plaintiffs have attempted to expand the short list of special relationship. In addition to the recent decision of no duty under *Arnold* for third-party insurance claims, no special relationships were found in the following situations:

1. Insurer and insurance agency.
2. Insurer and third-party claimant.
3. Insurance agent and insured.
4. Insurance agent and workers’ compensation claimant.
5. Workers’ compensation insurer and spouse of injured worker.
7. Drug testing lab and prospective employee.
8. Employer and terminated employee.
9. Government employer and “public employee.”
10. Employer and injured employee.
11. Mortgagor and mortgagee.
12. Mortgage insurer and mortgagor.
13. Creditor and guarantor.
15. Majority stockholder and minority stockholder.
16. Corporate officer and minority shareholder.
17. Lender or bank and borrower or customer.
18. Franchisor and franchisee.
19. Manufacturer and retailer.
20. Supplier and distributor.
21. Distributor and terminated supplier.
Swanson v. Schlumberger Technology Corp.,\textsuperscript{115} a contractually-based controversy concerning the mining of diamonds from the sea, has been pending before the Texas Supreme Court since October 1995. Hopefully, the forthcoming opinion will clarify and distinguish the terms “special relationship,” “confidential relationship,” and “fiduciary relationship.”\textsuperscript{116}

If the Supreme Court of Texas grants writ in Associated Indemnity v. CAT,\textsuperscript{117} a case concerning a performance bond surety and its principal, special relationships in the context of contractually-based transactions will fall under careful scrutiny. Several factors increase the
chances for writ to be granted in *CAT* above the statistical one-in-eight average: (1) both sides applied for writ; (2) the supreme court took a strong stand in 1995 when it found there was no special relationship between the same type of surety and its obligee,118 (3) one justice made a compelling dissent in *CAT*, and (4) the subject matter is important to Texas commerce and jurisprudence.

The relationship between an HMO and its subscribers looks a lot like an *Arnold* special relationship. Public annoyance with contemporary HMO practices will likely cause subscribers to bring bad faith claims in Texas courts, to the extent those claims are not preempted by ERISA. A recent article on health care suggests eleven possible bases for subscribers to bring their bad faith causes of action under the banner of a special relationship.119

**Observations on Special Relationships in Contract**

There is an extensive laundry list of contractually-based transactions in which Texas courts found no special relationship between or among the parties. If decisions involving similar facts repeatedly hold that no special relationships exist, the issue will become settled as a matter of law. If a defendant’s conduct is sufficiently egregious, however, Texas courts may look at the problem on a case by case basis and find a special relationship to provide a tort remedy for contractually-based transactions.

**Conclusions**

In attempting to define special relationship in Texas tort and contract law, the authors have been faced with a problem analogous to catching lightning in a bottle. The special relationship is, like the common law system in which it exists, constantly evolving and changing, subject to the pressures and concerns of the society which it reflects and serves.
Mr. Simpson is Of Counsel in the Houston Litigation Section of Jackson & Walker, L.L.P.

Ms. Selden is a Senior Staff Attorney at the Fourteenth Court of Appeals, Houston.

See Doe v. Raines County Indep. Sc. Dist., 66 F.3d 1402, 1414n.6 (5th Cir. 1995), citing to Walter v. Alexander, 44 F. 3rd 1297, 1302-04, and n.4 (5th Cir. 1995).

See, e.g. Brazos Graphics, Inc. v. Arvin Industries, Inc., 574 S.W.2d 240, 244 (Tex. Civ. App.-Waco 1978), writ ref’d n.r.e. per curiam, 586 S.W.2d 841 (Tex. 1979).


See, e.g., Eggemeyer v. Eggemeyer, 554 S.W.2d 137, 147 (Tex. 1977).


Otis at 309.


Comment (a) to 314A also refers the reader to Chapter 14 of the RESTATEMENT (SECOND) OF AGENCY for the duty to protect an employee against the conduct of third persons.

RESTATEMENT (SECOND) OF TORTS §§ 314A; 314B; 320 (1965).

RESTATEMENT (SECOND) OF TORTS §§ 316; 317; 318; 319 (1965).


Clark v. Otis Engineering Corp., 633 S.W.2d 538 (Tex. App. -- Texarkana 1982), aff’d, sub nom. Otis Engineering Corp. v. Clark, 668 S.W.2d 3076 (Tex. 1984).The supreme court’s holding in Otis would have presented a clearer picture of how a proper duty analysis should be performed by lower courts if the supreme court had found it possible to affirm the court of appeals judgment to reverse and remand. Otis at 10.

Otis at 309.

668 S.W.2d 307, 309 (Tex. 1983).


Akins at 1008.

Id. at 1008.

Id. at 1008.

Including, but not limited to balancing risk, foreseeability, and the likelihood of injury against the social utility of the actor’s conduct, the magnitude of the burden of guarding against injury, and the consequences of placing the burden on the actor, etc. Id. at 1008.

Id. at 1008.

For a more complete picture of the evolution of the law in this area, a review of the following cases is necessary: Clark v. Otis Engineering Corp., 633 S.W.2d 538 (Tex. App.—Texarkana 1982), aff’d sub nom. Otis Engineering Corp. v. Clark, 668 S.W.2d 307 (Tex. 1984); Greater Houston Transp. v. Phillips, 801 S.W.2d 523 (Tex. 1990); Graff v. Beard, 858 S.W.2d 918 (Tex. 1993); Verduer v. King Hospitality Corp., 872 S.W.2d 301 (Tex. App.—Fort Worth 1994 writ denied); Pinkham v. Apple Computer, Inc., 884 S.W.2d 206 (Tex. App.—Fort Worth 1985, writ ref’d n.r.e.); DeLuna v. Guynes Printing Co. of Texas, Inc., 884 S.W.2d 206 (Tex. App.—El Paso 1994, writ denied); Doe v. Boys Club of Greater Dallas, 868 S.W.2d 942 (Tex. App.—Amarillo 1994), aff’d, 907 S.W.2d 472 (Tex. 1995); Moore v. Shoreline Ventures, Inc., 903 S.W.2d 900 (Tex. App.—Beaumont 1995, no writ); Howell v. City Towing Assoc., Inc., 717 S.W.2d 729 (Tex. App.—San Antonio 1986, writ ref’d n.r.e.); Miles v. Melrose, 882 F.2d 976 (5th Cir. 1989); Triplex Communications, Inc. v. Riley, 900 S.W.2d 716 (Tex. 1995); Rodriguez v. Spencer, 902 S.W.2d 37 (Tex. App.—Houston [1st Dist.] 1995, no writ); Ryan v. Riesenhahn, 911

See Thigpen v. Locke, 363 S.W.2d 247, 253 (Tex. 1962).


See also Hallmark v. Port/Cooper, 907 S.W.2d 586, 592 (Tex. App. -- Corpus Christi 1995, no writ).

See also City Prod. Corp. v. Berman, 610 S.W.2d 446, 450 (Tex. 1981) (distinct wilful tort in connection with a suit on contract may also give rise to punitive damages).

St. John v. Pope, 901 S.W.2d 420, 423 (Tex. 1995).

Duval County Ranch Co. v. Alamo Lumber Co., 663 S.W.2d 627, 633 (Tex. App. - Amarillo 1983, writ ref'd n.r.e.).


The court went on to say that settled rules of law would be replaced by subjective jury findings, and noted that the “novel” theory of good faith and fair dealing was adopted only by California courts. 660 S.W.2d at 522.

Id. at 524.


Stowers, at 548 (quoting from Douglas v. United States Fid. & Guar. Co., 81 N.H. 371, 127 A. 708 (1924)).

See also Blakely v. American Employers' Ins. Co., 424 F.2d 728, 734 (5th Cir. 1970).


Guin at 660.


Id. at 594.

Id. at 594.


Id.


Id. at 902.

The Dallas court of appeals declined to recognize a fiduciary relationship between the insured and the insurer. Caserotti v. State Farm Ins. Co., 791 S.W.2d 561, 565 (Tex. App.—Dallas 1990, writ denied). In a later opinion, the court noted that fiduciary relationships involve “a greater degree of trust and confidence than a customer ordinarily reposes in his insurance company.” Tectonic Reality v. CNA Lloyds of Texas, 812 S.W.2d 647, 651 (Tex. App.—Dallas 1991, writ denied).


725 S.W.2d 165 (Tex. 1987).


Coley v. Hall, 864 S.W.2d 563 (Tex. App. -- Dallas 1993, dismayed w.o.j.).


Floors Unlimited, Inc. v. Fieldcrest Cannon, Ltd., 55 F.3d 181, 188 (5th Cir. 1995).


