

**CASE LAW UPDATE:
A SURVEY OF RECENT TEXAS
PARTNERSHIP AND LLC CASES**

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TABLE OF CONTENTS

Page

I.	Introduction.....	1
II.	Recent Texas Cases Involving Partnerships.....	1
A.	Creation/Existence of General Partnership.....	1
B.	Partner’s Personal Liability; Partner’s Power to Bind Partnership.....	7
C.	Liability Protection of Partners in Limited Liability Partnership.....	11
D.	Fiduciary Duties of Partners and Affiliates.....	12
E.	Partnership Property.....	14
F.	Interpretation and Enforcement of Partnership Agreement.....	15
1.	Fiduciary Duties.....	15
2.	Financial Rights.....	17
3.	Admission of General or Limited Partner.....	17
4.	Authority of General or Limited Partner.....	19
5.	Indemnification.....	22
6.	Fraud.....	24
7.	Arbitration.....	25
8.	Sufficiency of Pleadings.....	26
G.	Rights of Estate of Deceased Limited Partner.....	27
H.	Withdrawal of Partner.....	28
I.	Dissolution/Winding Up.....	30
J.	Accounting.....	33
K.	Standing or Capacity to Sue.....	34
L.	Direct and Derivative Claims.....	39
M.	Personal Jurisdiction.....	41
N.	Attorney’s Fees.....	43
O.	Divorce.....	43
P.	Securities Laws.....	44
III.	Recent Texas Cases Involving Limited Liability Companies.....	46
A.	Nature of Limited Liability Company.....	46
B.	LLC Property and LLC Membership Interest.....	47
C.	Assignment of Interest.....	47
D.	Fiduciary Duties.....	48
E.	Personal Liability of Member of Manager Under Agency or Other Law.....	51
F.	Authority of Member, Manager, or Officer.....	57
G.	Transfer Restrictions and Buyout Provisions.....	59
H.	Access to Books and Records.....	60
I.	Indemnification Provisions.....	61
J.	Capital Contribution Provisions.....	62
K.	Distribution Provisions.....	63
L.	Dissolution/Winding Up.....	64
M.	Forfeiture and Involuntary Termination.....	64
N.	Veil Piercing.....	67
O.	Creditor’s Remedies: Charging Order, Turnover Order, etc.....	71
P.	Attorney’s Fees.....	76
Q.	Standing or Capacity to Sue.....	77

R.	Fraudulent Transfer.....	78
S.	Bankruptcy.....	81
T.	Diversity Jurisdiction.....	83
U.	Personal Jurisdiction.....	83
V.	Pro Se Representation.....	85
W.	Governing Law.....	85

Case Law Update: A Survey of Recent Texas Partnership and LLC Cases

Elizabeth S. Miller

I. Introduction

This paper summarizes recent Texas cases involving issues of partnership and limited liability company law. This paper only includes cases that have appeared since the paper for last year's program was prepared. Case law surveys that include cases from prior years are available on the author's profile page at the Baylor Law School web site.

II. Recent Texas Cases Involving Partnerships

A. Creation/Existence of General Partnership

Phillips v. Boo 2 You, LLC, No. 03–14–00406–CV, 2016 WL 2907971 (Tex. App.–Austin May 13, 2016, no pet. h.) (mem. op.).

The court of appeals affirmed a summary judgment against an individual who alleged the creation of a partnership with the defendant. The court also upheld sanctions based on the plaintiff's "fanciful" damages claim and harassing discovery.

Gary Phillips sued George Steven Smith and Linda Smith, husband and wife, and Boo 2 You, LLC ("Boo") alleging that the parties created a partnership and entered into an agreement relating to the operation of a business selling Halloween products. Phillips asserted that the defendants failed to distribute to him his share of the profits in breach of the partnership agreement. The defendants prevailed on a motion for summary judgment in which they asserted that there was no evidence of one or more of the statutory factors that indicate formation of a partnership.

The defendants' summary judgment proof showed that Boo, an LLC, was a seasonal business that sold Halloween merchandise on consignment. Steven Smith was the managing member of Boo, and Linda, who was not a member, helped him operate the business. For at least two Halloween seasons, Phillips had lent money to Boo for its annual operations. The loans were repaid with interest. In 2010, Phillips inquired about becoming a member of Boo. Smith did not agree to this request, but offered Phillips an opportunity to share profits in three of Boo's stores for the upcoming Halloween season provided that Phillips pay one-half of the expenses and participate in the operation of those stores throughout the Halloween season. Phillips contributed one-half of the expenses of the three stores but failed to help in their operation throughout the season. Thus, Boo did not share profits from the operation of those stores with Phillips. Boo repaid Phillips \$80,000 with interest for the loans that he had made to Boo for the 2010 season.

In his response to the defendants' motion for summary judgment, Phillips relied on a Letter of Understanding (LOU) entered into by the parties in March of 2010. The letter stated that the parties had agreed to open additional Halloween stores and referred to a partnership between the parties as follows: "The partnership between the parties has been agreed to provide for a 50/50 split in the net proceeds of the above mentioned stores. This shall require both parties to equally share in the expenses of opening such stores." The letter also described the tender of \$5,000 by Phillips to pay one-half of a consignment deposit required to be paid to the franchisor.

Phillips appealed the trial court's summary judgment against him, and the court of appeals analyzed the summary judgment evidence in light of the statutory five-factor test for determining if a partnership has been created. In Texas, a general partnership is an association of two or more persons to carry on a business for profit as owners, regardless of whether the persons intend to create a partnership or whether the association is called a "partnership." Tex. Bus. Orgs. Code § 152.051(b). Factors indicating that persons have created a partnership include: (1) receipt or right to receive a share of the profits of the business; (2) expression of an intent to be partners in the business; (3) participation or right to participate in control of the business; (4) agreement to share or sharing losses of the business or liability for claims by third parties against the business; and (5) agreement to contribute or contributing money or property to the business. Tex. Bus. Orgs. Code § 152.052(a). The Texas Supreme Court has adopted a totality-of-the-circumstances test for applying the factors. The court of appeals analyzed the evidence of each factor and concluded that Phillips failed to raise fact issues with respect to four of the five statutory factors.

With respect to the first factor, the Smiths argued that the profit-sharing agreement was not based upon Phillips's co-ownership of the business, but instead upon his performance of work at the stores for the Halloween season. However, Phillips summary judgment proof indicated that he did not have a commitment to work at the stores and was only working there for “fun” to pass the time. Thus, the court concluded that the summary judgment record raised a genuine issue of fact as to this factor.

With respect to the second factor, Phillips relied primarily upon the LOU to establish that the parties intended to form a partnership. The court pointed out that the Texas Supreme Court has said that the intent factor is distinct from the other four factors and must depend on evidence that is not specifically probative of other factors. The court stated that this principle precluded Phillips from relying on the LOU to demonstrate intent because he relied on it to demonstrate the right to receive a share of the profits of the business. Phillips offered no summary judgment proof that the parties referred to each other as partners, held themselves out as partners, or had stationery, letterhead, business cards, or a bank account for the claimed partnership. There was no summary judgment proof that the parties discussed or used the word “partnership” to describe their relationship other than the conclusory, non-probative deposition testimony of Phillips regarding the execution of the LOU and the single mention of “partnership” in the LOU. Thus, the court concluded that there was no summary judgment proof that the parties expressed an intent to be partners in the business.

There was no evidence of the third factor because Phillips admitted in his deposition that he had no control or managerial authority. The court noted that sharing control and sharing profits are generally considered the most important factors in establishing the existence of a partnership.

With respect to the fourth factor, Phillips tried to characterize his loans to Boo as his risk of loss, but the court stated that there was no summary judgment proof that the parties discussed losses or liabilities for claims by third parties, much less agreed that Phillips's loan of \$80,000 for expenses would cap his exposure for losses.

With respect to the fifth factor, the court stated that Phillips's loans, viewed in isolation, might be regarded as partnership contributions, but the court stated that it must look at the loans in the context of the totality of the circumstances. The \$80,000 lent by Phillips for the operation of the business in 2010 was repaid along with 12% interest in less than a year. Phillips characterized the \$80,000 loan as a “capital contribution” with no further explanation or authority. Phillips and the Smiths had a history of a lender-borrower relationship before 2010, and the money lent in 2010 and its repayment with interest were entirely consistent with their past lender-borrower pattern. The funds lent by Phillips appeared less like a contribution from a partner and more like a loan from a lender. Thus, the court concluded that the summary judgment proof did not raise a genuine fact issue on this factor.

In sum, the court found that the only factor as to which Phillips raised a fact issue was an agreement to share profits, and the summary judgment proof was inconsistent with the proposition that Phillips and the defendants formed a partnership. Thus, under the totality-of-the-circumstances test the court concluded that the summary judgment proof failed to raise a genuine issue of fact as to the existence of a partnership. The court of appeals also upheld an order of the trial court sanctioning Phillips by requiring him to pay the defendants \$10,000 in attorney's fees and costs for filing the suit, which the trial court found to be “frivolous and vexatiously prosecuted for the purposes of harassment.” The court of appeals pointed out that the damages sought by Phillips included \$6,250 for the “useful life” of shelves that the defendants had purchased with money that Phillips had lent them even though the loan had been fully repaid with interest. The court stated that Phillips had no legitimate claim to property purchased with funds from his loan. In addition, the court of appeals noted several discovery hearings that were held regarding attempts by Phillips to obtain in discovery the defendants’ financial records reflecting transactions occurring after the time period involved in the lawsuit. Phillips did not defend his damages theory or dispute the discovery hearings, and the court of appeals concluded that the sanctions were not an abuse of discretion by the trial court in light of “the fanciful damage claim (the shelves) and the history of Phillips's harassing discovery battles.”

In re Springwoods Joint Venture, No. 15–32751, 2016 WL 2343028 (Bankr. S.D. Tex. Apr. 29, 2016).

The court concluded that fact issues precluded summary judgment on the issue of whether the debtor in this involuntary bankruptcy proceeding was a partnership.

R. Hassell Holding Company, Inc. (“RHHC”) filed an involuntary petition against Hassell 2012 Joint Venture and Springwoods Joint Venture. In contrast to a typical involuntary petition filed by one or more creditors, the petition was filed by RHHC in its capacity as a general partner of the alleged debtors. In response to motions to dismiss the involuntary petition by several parties, the court issued an opinion in which it determined that Hassell

2012 Joint Venture was a partnership under Texas law. A similar question was presented here with respect to Springwoods Joint Venture. RHHC sought summary judgment on the sole issue of whether Springwoods Joint Venture was a partnership. If Springwoods Joint Venture was not a partnership, then RHHC's motion for summary judgment had to be denied, and the involuntary petition dismissed. If it was a partnership, then the partnership must be given an opportunity to contest the involuntary petition.

RHHC alleged that it began Springwoods Joint Venture with Hassell Construction Company, Inc. ("HCCI") in December 2010 to bid for and perform a road construction project. RHHC relied heavily on a "Partnership Memorandum" letter to demonstrate that the Springwoods Joint Venture was a partnership. The letter set forth terms that could be interpreted as consistent with a partnership arrangement, but HCCI asserted that the letter was a mere unsigned, internally circulated draft which was not sent to RHHC and was intended only to discuss tentative terms under which HCCI would permit RHHC to perform work on projects in which HCCI was the contractor.

The court prefaced its analysis by reciting that an association of two or more persons to carry on a business for profit as owners creates a partnership and listing the five factors set forth in the Texas Business Organizations Code (BOC) that measure whether an association has been formed to carry on a business for profit as owners: (1) receipt or right to receive a share of profits of the business; (2) expression of an intent to be partners in the business; (3) participation or right to participate in control of the business; (4) agreement to share or sharing losses of the business or liability for claims by third parties against the business; and (5) agreement to contribute or contributing money or property to the business. The court further noted that the BOC provides that no one factor is dispositive of whether a partnership exists, and an agreement to share losses is not necessary to establish a partnership.

With respect to the first factor, the court noted that the Texas Supreme Court has held that receipt of a portion of gross revenue, exclusive of costs, is not profit sharing. The court pointed to testimony that HCCI would receive 1% of the gross receipts under the contract for furnishing bond capacity and providing certain accounting services. Even if it cost more to perform under the contract than the contract price, all overages would have been borne by RHHC, and HCCI would continue to receive its 1% of the contract price. The court stated that this testimony was inconsistent with an agreement to share profits. RHHC argued that the court should not interpret the term "profits" in the statute to mean "net profits," but the court stated that "profits" are necessarily net of expenditures. The BOC provides that a party's right to share in gross revenues is not indicative of a partnership arrangement. Thus, the court concluded that this factor weighed against the existence of a partnership.

With respect to the second factor, the court concluded that a genuine issue of material fact existed that must be determined before this factor could be evaluated. The court noted that analysis of intent to form a partnership under the statute involves review of the alleged partners' speech, conduct, and writings. RHHC relied primarily on the "Partnership Memorandum" letter it alleged was sent from Phillip Hassell of HCCI to Royce Hassell of RHHC in December of 2010. RHHC claimed that the letter memorialized the terms and conditions of Springwoods Joint Venture partnership arrangement, but HCCI argued that the letter was only an internal draft that was never sent or signed. The letter referred to a "joint venture/partnership scenario" between HCCI and RHHC and stated HCCI's desire "to be treated as though we truly are your partner and not just anybody." The court stated that the letter demonstrated an expression of HCCI's intent to be a partner in the business if the letter was sent, but it did not evidence HCCI's expression of intent to be a partner in the business if the letter was not sent and was merely an internally circulated draft at HCCI. A fact issue existed as to whether the letter was transmitted to RHHC.

The court next addressed evidence regarding control of the business. The court noted that the right to control a business means the right to make executive decisions. The court identified several sub-factors to consider when determining whether alleged partners have the right to make executive decisions, including: (1) exercise of authority over the business's operation; (2) check writing authority; (3) control over and access to the business's books; and (4) receipt of and management of the business's assets and monies. In support of this factor, RHHC again referred to the "Partnership Memorandum" letter as evidence. The letter contained several statements relevant to these sub-factors, but the court stated that the letter did not indicate whether HCCI and RHHC agreed to operate Springwoods Joint Venture according to the terms in the letter. The letter was not signed by HCCI or RHHC and did not otherwise indicate that the parties assented to its terms. The court noted that assent can be established by course of conduct, but the summary judgment evidence did not demonstrate whether a right to participate in control of the business was evidenced by the parties' conduct. At a minimum, a fact issue existed whether HCCI and RHHC had a right to participate in control of the Springwoods Joint Venture, and the summary judgment evidence was also inconclusive with respect to whether the parties in fact participated in the sharing of control. Based on the summary

judgment record, the court could not conclude whether both parties participated or had the right to participate in the control of the partnership.

Based on unequivocal testimony that any losses that occurred would be borne by RHHC alone, the fourth factor weighed against finding a partnership. RHHC argued that RHHC and HCCI were co-indemnitors on the bond and that HCCI thus agreed to share in the joint venture's losses, but the court relied on a Texas case in which the court found that an agreement to indemnify a surety does not constitute the sharing of losses for the purpose of determining whether a partnership exists. Thus, the court concluded that the status of RHHC and HCCI as co-indemnitors on the bond did not constitute an agreement to share liability for claims by third parties against the alleged partnership.

The fifth factor also weighed against a partnership finding. RHHC and HCCI each allowed its resources to be used in connection with the Springwoods Joint Venture (e.g., bonding capacity, lines of credit, equipment, and personnel), but the court stated that there was scant evidence that either side contributed anything of value without expecting direct compensation. The evidence did not demonstrate either capital or property contributions to the alleged partnership.

In sum, three of the five factors weighed against finding a partnership under Texas law, and there were fact issues with respect to the remaining factors. The court commented that it was unaware of any case applying Texas law in which a court has found a partnership to exist when there was no agreement to share either profits or losses and no evidence of capital or property contributions. The court thus expressed “grave doubts” about the wisdom of expending further resources on this matter.

Flying Crown Land Group v. Reed, No. 3:15-CV-1225-M, 2015 WL 9266903 (N.D. Tex. Dec. 18, 2015).

The court dismissed a claim for fraudulent inducement to enter into a partnership for failure to state a claim under Rule 12(b)(6). The plaintiff alleged that it was fraudulently induced to enter into interactions with the defendants that “constituted a de facto agreement to partner,” “that the two parties expressed intent to form a partnership, held themselves out to be, and acted as a partnership,” and that they “operated as, and represented themselves collectively as a partnership.” The court stated that the plaintiff’s allegations might be sufficient to allege the existence of a partnership under the Texas Business Organizations Code, but the court did not need to reach that question because the plaintiff did not state a claim for fraudulent inducement. The complaint did not reference any misrepresentations made by the defendants, let alone satisfy the requirement of Rule 9(b) to plead them with specificity.

Anderson v. Snoddy, No. 06–14–00096–CV, 2015 WL 5634564 (Tex. App.–Texarkana Sept. 25, 2015, pet. denied) (mem. op.).

The court of appeals held that the trial court did not abuse its discretion in excluding cross examination testimony in which the witness was asked questions about: (1) the effect of contributing property to a partnership with respect to the ownership of the property, (2) a hypothetical based on provisions in the partnership statute addressing property acquired in the name of one or more partners regardless of whether the name of the partnership is indicated in the instrument transferring title, and (3) the witness’s familiarity with the statutory factors for determining whether a partnership is created. The court of appeals relied on the principle that a lay witness is not allowed to make legal conclusions or interpret the law. Also, because a legal conclusion offered by a lay witness does not establish that legal conclusion, the court said that the trial court could have determined that the witness's understanding of the law was irrelevant to the jury's determination of whether a partnership existed.

Trinh v. Elmi, No. 01–14–00204–CV, 2015 WL 5634274 (Tex. App.–Houston [1st Dist.] Sept. 24, 2015, no pet. h.) (mem. op.).

The court of appeals held that the plaintiff was entitled to recover damages for breach of contract rather than quantum meruit because the jury found that there was an agreement between the plaintiff and the defendant to form a partnership and that the defendant breached it. Because the jury found no damages and liability was disputed, the court remanded for a new trial on both liability and damages.

Trinh sued Elmi asserting claims related to an alleged oral partnership agreement. Trinh alleged that Elmi agreed to sell Trinh a 40% interest in her pharmacy for \$30,000. According to Elmi, although she and Trinh discussed the possibility of his purchasing 40% of her pharmacy for \$30,000, they never entered into an agreement. Elmi testified that Trinh paid her \$10,000 but that she later returned the \$10,000 to him. The jury found that Elmi

agreed with Trinh that he would own a 40% interest in her pharmacy and that Elmi and her pharmacy failed to comply with this agreement, but the jury found no damages for breach of contract. The jury awarded a small amount of damages on Trinh's quantum meruit claim.

On appeal, Trinh contended that the trial court erred in rendering judgment on the jury's verdict awarding him no damages on his breach-of-contract claim and no attorney's fees based on this claim. He argued that the jury found that a partnership agreement existed and that Elmi breached that agreement. Because Trinh's expert witnesses provided uncontroverted testimony regarding Trinh's damages and attorney's fees, Trinh argued that the jury's award of no damages or attorney's fees was outside the range of evidence or against the great weight and preponderance of the evidence. The parties disputed the meaning of the jury's answers to the questions in the jury charge. Trinh contended that the jury's answers to the first two questions clearly demonstrated that the jury found that a partnership agreement existed and that Elmi breached it. Elmi argued that the jury's answers to those questions represented a finding that the parties had agreed to form a partnership but that a partnership agreement was never consummated. Elmi argued that the jury could have found that the signing of formal documents and payment of the remaining \$20,000 by Trinh were conditions precedent to Elmi's obligation to perform under the agreement or that Trinh's failure to pay the remaining \$20,000 excused Elmi's nonperformance. The court of appeals stated that Elmi's arguments of condition precedent and material breach were waived by her failure to plead them, present evidence, and request a question or instruction on these arguments. Because the jury found that an agreement existed and that Elmi breached the agreement, Trinh was entitled to recover damages for breach of contract. Trinh was not entitled to recover in quantum meruit. Because liability was disputed and Trinh's damages were unliquidated, the court could not order a separate trial solely on damages. Thus, the court remanded for a new trial on both liability and damages.

Derrick Petroleum Services v. PLS, Inc., No. H-14-1520, 2015 WL 4715071 (S.D. Tex. Aug. 7, 2015).

The court applied the five-factor statutory test regarding the creation of a partnership and found that only two of the five partnership factors were present in this case, and both were present only to a limited degree. Thus, the court found no basis to alter findings and conclusions made by the court in a previous opinion that the parties did not form a partnership.

In a 2014 memorandum and opinion in this case, the court concluded that PLS, Inc. ("PLS") did not form a partnership with Derrick Petroleum Services ("Derrick"). PLS urged the court to vacate its earlier findings and conclusions and find that PLS and Derrick formed a partnership, but the court found no basis to do so. The court recited the definition of a partnership in the Texas Revised Partnership Act ("an association of two or more persons to carry on a business for profit as owners,") and listed the five factors identified in the statute as showing a partnership: (1) the receipt or right to receive a share of profits of the business; (2) the expression of an intent to be partners in the business; (3) participation or the right to participate in the control of the business; (4) sharing or agreeing to share losses of the business or liability for claims by third parties against the business; and (5) contributing or agreeing to contribute money or property to the business. The court noted that courts consider the totality of the circumstances, and no one factor is determinative.

With respect to the first factor, the court found that the evidence showed that PLS and Derrick shared revenues but not profits. The Texas Supreme Court has held that the receipt of gross revenue is not profit sharing, but PLS argued that the parties shared profits because they shared revenues and each bore the expenses incurred in carrying out its separate responsibilities under their agreement. PLS relied on cases stating that "sharing equally in revenues can equate to sharing in profits when expenditures are also equally shared," but the court stated that the cases make clear that sharing revenues without first making deductions to cover the business's expenses is not profit-sharing. According to the court, the business's expenses were neither consistently deducted from revenue nor equally shared. Thus, profit sharing was not established.

As to the second factor, the court found, and PLS agreed, that when the parties began their business relationship, they intended to form a partnership and expressed that intent in an agreement and in statements to third parties. However, the record showed that within a short time after they began to do business together, the parties failed to take concrete actions demonstrating the intent to become partners and instead conducted themselves in ways inconsistent with finding that intent. The parties did not register an assumed name, sign legal documents on behalf of the business, file taxes as partners, obtain partnership insurance, give each other signature authority on their individual bank accounts, or establish new bank accounts for the business. They negotiated to form a

partnership and failed to do so. They attempted to, prepared to, or did compete with each other during the existence of the relationship. Thus, the court stated that there was limited and conflicting evidence of this factor.

As to the third factor, PLS argued that the court erred in finding that the parties did not share control. The court found and concluded that PLS and Derrick each controlled its own business. There were no shared responsibilities or areas of responsibility that both companies controlled. PLS argued that it had control over some decisions that affected Derrick, but the court did not agree that the examples given by PLS amounted to shared control.

As to the fourth factor, the court found that the parties did not share or agree to share losses or liability for third-party claims. PLS argued that there was testimony showing that the parties shared losses, but the court stated that neither the testimony relied on by PLS nor other evidence in the record showed that this factor was present.

As to the fifth factor, the court found that the parties contributed time and expenses to the business, as well as the use of, or access to, their intellectual property, but the court found and concluded that this factor was present only to a limited extent because neither Derrick nor PLS conveyed an ownership interest in their intellectual property to the other or to the business in which they were engaging together. The parties' agreement required them to "provide" certain property and services, but neither of the parties argued that "provide" reflected an intent to convey an ownership interest in the products or methods used to perform these services. The court said that the consistent meaning of the word "provide" in their agreement was "furnish" or "make available" as opposed to "convey ownership to, in, or of."

In sum, the court found that only two of the five partnership factors were present, and both were present only to a limited degree. Thus, PLS did not demonstrate that the court should alter its earlier findings and conclusions that the parties did not form a partnership.

Martin v. Beitler, No. 03-13-00605-CV, 2015 WL 4197042 (Tex. App.–Austin July 7, 2015, no pet.) (mem. op.).

A party's claim for quantum meruit recovery against one of the defendants turned on whether a partnership existed between that defendant and the other defendant. The jury found that they were not partners, and the court of appeals analyzed the evidence in light of the statutory factors indicating a partnership and concluded that the jury's finding was not against the great weight and preponderance of the evidence.

Martin and his company asserted a number of claims against Beitler and others in connection with a construction project in Horseshoe Bay. The jury found against Martin and his company on all the claims except Martin's quantum meruit claim against Beitler, and Martin sought to recover damages against Beitler on the quantum meruit claim. Beitler argued that whatever work was done by Martin was done for Robbins or his company (the "Robbins Company") rather than Beitler. Whether Martin undertook the services for Beitler depended on whether Beitler and the Robbins Company had a partnership because Martin's only contact on the project was Robbins, and there had been no direct communication between Martin and Beitler.

The jury was asked whether Beitler and the Robbins Company were partners with respect to the construction project, and the jury found that they were not. The jury instruction on this issue defined a partnership as "an association of two or more people or entities to carry on an undertaking or a business as owners, for profit" and listed the five statutory factors indicating the creation of a partnership. The instruction also stated that "no single factor is decisive by itself and you should consider the evidence and what the parties said and did in light of the surrounding circumstances" and instructed the jury not to "consider the parties' unexpressed thoughts or intentions."

The court of appeals cited Section 152.051(b) of the Business Organizations Code (BOC) defining a partnership and Section 152.052(a) setting forth the five factors indicating a partnership, but referred to the statute as the Texas Revised Partnership Act (TRPA). The factors indicating a partnership are: (1) receipt or right to receive a share of profits of the business; (2) expression of an intent to be partners in the business; (3) participation or right to participate in the control of the business; (4) agreement to share or sharing losses of the business or liabilities for claims by third parties against the business; and (5) agreement to contribute or contributing money or property to the business. The court explained that neither direct proof of the parties' intent to form a partnership nor proof of all of the statutory factors is required, and the question of whether a partnership exists should be decided after consideration of all the evidence bearing on the statutory factors. A person's holding out or making statements that another is the person's partner is evidence of an expression of intent that they are partners.

There was evidence that Robbins held Beitler out as his partner in writing and at a town hall meeting at which Beitler was present and that Robbins stated that Beitler had a “big vote” in decisions. The evidence showed that Beitler and Robbins were members of an LLC that spent money on the project and that Robbins used an email address using Beitler's domain. The mayor of Horseshoe Bay testified that it was his impression that Beitler and Robbins were partners, and the city's proposed planned development ordinance referred to Beitler and Robbins as the project developers; however, the mayor also testified that he never had any discussion with Beitler concerning whether he was Robbins's partner on this project. Beitler testified that he and Robbins were partners on another project at the time of the town hall meeting but never had a partnership on this project. Beitler stated that it was always his practice to have a written agreement for partnerships or LLCs and that he had never done a business deal with a partner without a written agreement. Beitler testified that he planned to partner with Robbins later only if Robbins structured the deal with less risk to Beitler in which Robbins contributed, neither of which occurred. On this record, the court could not conclude that the jury's finding that Beitler and Robbins were not partners was against the great weight and preponderance of the evidence. The jury could have reasonably believed Beitler's testimony and disbelieved the evidence of Robbins's partnership claims. The court went on to point out that there was no evidence of any agreement that Beitler would share in any profits or losses. While there was evidence that Beitler contributed money, Beitler testified that these were only advances to the project in the hopes of getting it to a point where it was viable for him to partner with Robbins. Because the court concluded that the evidence was factually sufficient to support the jury's finding that Beitler and Robbins were not partners, the court further concluded that Martin was not entitled to quantum meruit damages against Beitler.

B. Partner’s Personal Liability; Partner’s Power to Bind Partnership

Doctors Hospital at Renaissance, Ltd. v. Andrade, 2016 WL 3157535, __ S.W.3d __ (Tex. 2016).

A limited partnership that operated a hospital argued that it could not be held vicariously liable for a limited partner physician’s negligence. The court of appeals held that the limited partnership failed to establish as a matter of law that it could not be liable for the physician’s negligence, but the Texas Supreme Court concluded that the ordinary course of the partnership’s business did not include a doctor’s medical treatment of a patient and that the doctor was not acting with the authority of the partnership. Thus, the partnership could not be liable for the doctor’s medical negligence, and the supreme court reversed and rendered judgment for the partnership.

The Andrades sued Dr. Lozano, Doctors Hospital at Renaissance, Ltd. (“Renaissance”), and RGV Med, LLC (“RGV”), alleging that Lozano was negligent in delivering their daughter, causing permanent injury to the child. The Andrades alleged that Renaissance and RGV were vicariously liable for Lozano's negligence. Renaissance, a limited partnership, owned and operated the hospital where the delivery took place, and RGV was Renaissance’s general partner. Lozano was an independent contractor with admitting privileges at the hospital and a limited partner of Renaissance. Renaissance and RGV moved for summary judgment, contending that they were entitled to judgment as a matter of law because Lozano was not acting within the scope of the partnership business or with partnership authority when providing obstetrical care. The trial court denied summary judgment but granted an immediate interlocutory appeal.

The parties agreed that the governing statute was Section 152.303 of the Texas Business Organizations Code (BOC), which provides that “[a] partnership is liable for loss or injury to a person, including a partner, or for a penalty caused by or incurred as a result of a wrongful act or omission or other actionable conduct of a partner acting: (1) in the ordinary course of business of the partnership; or (2) with the authority of the partnership.” The court pointed out that the provisions of Chapter 152 (which govern general partnerships) are applicable to limited partnerships to the extent that Chapter 153 is silent. Tex. Bus. Orgs. Code § 153.003(a). Chapter 153 of the BOC specifically limits the liability of a limited partner but does not otherwise address a limited partnership’s liability to third parties for the actions of a limited partner. The parties thus agreed that Section 152.303 applied to Renaissance’s liability as a limited partnership.

Based on the limited partnership agreement and statutes regarding medical care, the court held that the record conclusively demonstrated that Renaissance’s business did not include the provision of medical care. Although a hospital like Renaissance is licensed to provide health care, only a licensed doctor can provide medical care, and only an individual, not a partnership, can be licensed to practice medicine. The court examined the purposes of Renaissance as stated in the limited partnership agreement and rejected the Andrades’ argument that the broad language used in the partnership agreement included the practice of medicine. The court pointed out that

the partnership agreement stated that it was to be construed in accordance with Texas law and that Texas law controlled in the event of any conflict with the terms of the agreement. The court noted that a fact issue as to whether the partnership's ordinary business included the practice of medicine could have been raised if Renaissance exercised control over Lozano's practice, but the Andrades did not allege this kind of control, and the record did not show it.

The Andrades argued that professional-services partnerships can be in the business of providing medical care without controlling the individual physician partners' practice based upon BOC § 152.301, which states that partners are agents of the partnership for purposes of the partnership's business. The court commented that this provision arguably does not even apply to limited partnerships, because limited partnerships, by definition, provide limited partners with less control over and less liability for the business entity. Furthermore, the court stated that a limited partner's agency is limited to the partnership's business even if a limited partner is an agent. Lozano would thus be acting as an agent only if he were engaging in its business, which did not include the provision of medical care. The court stated that the hospital could provide healthcare services (such as obstetrical services and labor and delivery services) generally without providing medical care. As the operator of a hospital, Renaissance could be in the business of providing facilities, support staff, and supplies to assist doctors in the provision of medical care without engaging in the illegal practice of medicine by a business entity. The court stated that it would not be impossible for the Andrades to show enough to raise a fact question as to whether Renaissance was in the illegal practice of medicine, but the Andrades had not done so.

The Andrades also relied on BOC Sections 152.055 and 152.0551, which authorize physicians to form partnerships to perform professional services within the scope of their practices. Each partner must be a physician, and the purpose of the partnership must be to practice medicine within the scope of the physicians' practices. Tex. Bus. Orgs. Code § 152.055(a). But the court pointed out that the statute does not allow the practice of medicine by someone not licensed as a physician or allow a person not licensed as a physician to direct the activities of the physician in the practice of medicine. Tex. Bus. Orgs. Code §§ 152.0551(e), 152.055(d). Assuming without deciding that this kind of partnership can be vicariously liable for the medical negligence of its physician partners, the court stated that Renaissance was not this kind of partnership. Rather, it was a regular limited partnership, with physician and non-physician partners and a broad purpose that included acquisition of real estate and related business. The court characterized partnerships under Section 152.055 as analogous to joint practices organized as professional associations or professional limited liability companies. The court pointed out that professional associations may be vicariously liable for the negligence of their employees or agents, and the Andrades had already sued and nonsuited Lozano's joint practice organization. Because Renaissance was not such an entity, it could not be liable for the negligence of its limited partner.

The court stated that the reliance of the Andrades on *Jones v. Foundation Surgery Affiliates of Brazoria County*, 403 S.W.3d 306 (Tex. App.–Houston [1st Dist.] 2012, pet. denied), was similarly unavailing. Referring to *Jones* as “seemingly the only other case addressing a limited partnership's vicarious liability for the alleged malpractice of a physician-limited partner,” the court distinguished the case on the basis that the partnership in *Jones* seemed to argue, and the court of appeals accepted, that it was a joint practice under BOC Section 152.055. [The partnership in *Jones* was actually identified in that case as a registered limited liability partnership rather than a limited partnership.] The partnership in *Jones* argued that its business was merely to provide the facility, equipment, supplies, and support personnel for its partner surgeons to perform surgery, but the court of appeals found that there was more than a scintilla of evidence that the partnership was actually in the business of providing out-patient surgery, relying primarily on the partnership's description of its purpose in filings with the Secretary of State. The supreme court stated that the court of appeals could have reasonably found that summary judgment should have been denied to the extent that a joint practice partnership under Section 152.055 may be liable for a physician partner's negligence, but the court's analysis in *Jones* was not persuasive in this case because Renaissance was not a Section 152.055 partnership.

The supreme court next addressed whether Renaissance could be liable based on a partnership's liability for wrongful acts of its partners “with the authority of the partnership.” See Tex. Bus. Orgs. Code § 152.303(a)(2). The court stated that the partnership agreement is the source of authority for partners to act on behalf of the partnership (citing Tex. Bus. Orgs. Code § 152.002(a)), and the partnership agreement in this case prohibited limited partners from performing any act on behalf of the partnership unless specifically authorized by the agreement. The agreement did not give limited partners, some of whom were not physicians, any authority to provide medical care at partnership facilities. The agreement specifically gave the general partner authority to act

on behalf of the partnership, but not limited partners. Further, the court stated that the authority of the partnership would typically follow from actions in the ordinary course of the business, and Lozano's medical care of the Andrades was neither in the ordinary course of Renaissance's business nor conducted with its authority. The evidence showed that the limited partners who were also doctors were acting under their separate admitting privileges when they practiced medicine at the hospital. These doctors had the same authority to practice medicine under their own licenses as other doctors who were not also limited partners. Thus, Renaissance could not be liable for Lozano's alleged negligence in providing medical care at the hospital. In a footnote, the court noted that a hospital is generally not vicariously liable for the acts or omissions of a doctor on the hospital's medical staff, and the court saw no reason to upset that general rule just because the hospital was owned by a limited partnership that included doctors as investing limited partners.

Crop Production Services, Inc. v. Keeley, No. 4:14-CV-559, 2016 WL 2758439 (E.D. Tex. May 12, 2016).

Two partners of a general partnership sought to avoid personal liability for a default judgment against the partnership by having the default judgment vacated and/or by amendment or alteration of the judgment against the partners. The partners' argument revolved around the statute of limitations and a doctrine known as the *Frow* doctrine. The court found that the *Frow* doctrine did not apply to this case and that the partners had not shown good cause to vacate the default judgment or avoid their individual liability.

In 2013, the plaintiff sued G&K Farms, a North Dakota general partnership, for unpaid invoices for goods supplied in 2009 by the plaintiff to the partnership. The plaintiff also sued John and Dawn Keeley. The Keeleys were partners in G&K Farms, and John Keeley had also signed a written guaranty. At the beginning of 2015, the court entered a default judgment against the partnership without objection by the Keeleys. In February of 2015, the Texas Supreme Court issued its opinion in *American Star Energy and Minerals v. Stowers*, 457 S.W.3d 427 (Tex. 2015), in which the court held that the limitations period against a partner generally does not begin until after final judgment against the partnership is entered. In May of 2015, the Keeleys moved to vacate the judgment against the partnership, and the court denied the motion in June. In August of 2015, the court found that the Keeleys were jointly and severally liable for the entire default judgment against the partnership under general partnership law and granted the plaintiff a partial summary judgment. In the fall of 2015, after a bench trial on the plaintiff's remaining claims against John Keeley for fraud and liability on the guaranty, the court concluded that the plaintiff was not entitled to relief on those claims against John Keeley. The Keeleys then renewed their motion to vacate the default judgment against the partnership and/or amend and alter the judgment against the Keeleys by eliminating any amounts for invoices outside the statute of limitations period.

The Keeleys argued that a default judgment should not have been entered against the partnership under the *Frow* doctrine, a doctrine based on *Frow v. De La Vega*, 82 U.S. 552 (1972), that addresses when judgment may be entered against one of several defendants in a case where multiple defendants are alleged to be jointly liable. The court explained that there are two schools of thought regarding the interpretation of *Frow*, and the Fifth Circuit has yet to determine which approach it follows. In any event, the district court concluded that relevant case law indicated that the case at hand did not implicate the concerns underlying *Frow*. Many of the cases that discuss *Frow* hold that it would be incongruent to allow a default judgment to be entered against a defendant who is similarly situated to a defendant who is found not to be liable for the same claim. The Keeleys argued that the same four-year limitations period that applied to the suit against John Keeley on the guaranty applied to the contract claims against the partnership, but the court stated that entry of a default judgment against the partnership did not logically conflict with a finding that John Keeley could avoid liability through a statute-of-limitations defense regarding the suit on guaranty against him individually. The plaintiff argued that it could have introduced evidence and made legal arguments under which the statute-of-limitations defense would not have applied to the claims against the partnership. According to the court, the finding of a valid defense on the suit on the guaranty simply did not logically preclude liability on the claims on which the court entered default judgment.

The Keeleys argued that the court should find that the Keeleys established good cause to vacate the default judgment even if the *Frow* doctrine did not apply. The Keeleys made their good-cause argument based on several arguments previously made and rejected by the court when the court first denied their motion to vacate. The Keeleys argued that they had a meritorious defense to the partnership-related claims and that they were justified in their initial failure to object to the entry of the default judgment against the partnership based on the unique circumstances of this case. The meritorious defense relied on by the Keeleys was that the statute of limitations precluded the plaintiff from recovering for all but one invoice, but the court had previously found that the Keeleys

waived this defense since they were aware of the default proceedings and chose not to challenge the default in favor of waiting to assert a personal statute-of-limitations defense. The Keeleys also re-asserted their argument that they were justified in not objecting to the default because they believed that they had a valid defense. The Keeleys argued that the court of appeals' decision in the *American Star* case was the controlling authority regarding the statute of limitations against partners and partnerships at the time that the court granted the default judgment against the partnership in this case, but the court had previously concluded that the Keeleys should have been aware that their defense was at issue before the Texas Supreme Court and that relevant case law suggested that their defense was far from certain. The court once again found that the Keeleys' failure to act at the time of the default was not justified, and the renewed arguments made by the Keeleys did not alter the court's analysis of the Keeleys' culpability or the status of the law at the time that the motion for default judgment was filed. The court also declined to revisit its previous finding that the plaintiff would suffer some prejudice if the plaintiff had to further litigate the claims against the partnership, and the court did not consider the large amount of money at stake as a sufficiently persuasive additional factor in support of the Keeleys' attempt to show "good cause" to set aside the default judgment. In sum, the court remained unconvinced that the Keeleys had shown good cause in view of the prejudice to the plaintiff, the waiver of a theoretically meritorious defense, and the willfulness of the default.

BP Exploration & Production Inc. v. Cashman Equipment Corporation, Civ. A. H-13-3046, 2016 WL 1399259 (S.D. Tex. Apr. 8, 2016).

The court found that an agreement with a third party signed by two companies was an agreement between the third party and a partnership or joint venture between the two companies. The court had earlier concluded that the dispute was a dispute between the third party and each company individually but now agreed with the companies that the contract at issue was with their joint venture. Relying on an 1883 case, the court stated: "Under Texas law if all partners/joint venturers sign a contract, but do not sign the partnership name, the failure to sign the partnership name is immaterial and the contract binds the Joint Venture and the joint venturers in all capacities." The court nevertheless denied the motions of each company for summary judgment because the companies were potentially jointly and severally liable for the joint venture's debt under the Texas Business Organizations Code. The court noted that a plaintiff/creditor may sue a partnership/joint venture and its partner/venturers individually in the same suit, but a judgment against the partnership/joint venture alone is not automatically a judgment against a partner or joint venturer. The plaintiff must also sue the partner/joint venturer individually, either in the same suit or in a separate suit after the partnership/joint venturer has been found liable.

Crop Production Services, Inc. v. Keeley, No. 4:14-CV-559, 2015 WL 4885345 (E.D. Tex. Aug. 14, 2015).

The court granted the plaintiff partial summary judgment holding two individual partners of a general partnership liable for a default judgment against the partnership based on the personal liability of partners for the obligations of the partnership.

The plaintiff sought summary judgment holding two individuals, John and Dawn Keeley, liable for a default judgment entered against G&K Farms, a North Dakota general partnership. The plaintiff asked the court to find that John and Dawn Keeley were both general partners at the time G&K Farms incurred the debt at issue, that the plaintiff obtained a default judgment against G&K Farms, and that the Keeleys were jointly and severally liable for the entire judgment as general partners of G & K Farms. The Keeleys did not dispute that they were general partners at the time G&K Farms incurred the alleged debt. The Keeleys disputed the liability of G&K Farms to the plaintiff, but the plaintiff had already obtained a default judgment against G&K Farms regarding the debt incurred. The court relied on Section 152.304 of the Texas Business Organizations Code to describe the personal liability of partners for all obligations of the partnership subject to certain limited exceptions. The plaintiff initially referred to the law of various states in connection with its claims, but later clarified its position, asserting that Texas law applied to partnership liability but that the outcome would not change under North Dakota law with regards to liability for general partners. The court stated that the Keeleys appeared to agree that Texas law applied to the application remedy of collecting on a default judgment. The court concluded that the Keeleys were both general partners at the time G&K Farms incurred the debt at issue, that the plaintiff obtained a default judgment against G&K Farms relating to the debt, and that the Keeleys were thus jointly and severally liable for the entire judgment as general partners of G&K Farms.

Medical Discount Pharmacy, L.P. v. State of Texas, No. 01–13–00963–CV, 2015 WL 4100483 (Tex. App.–Houston [1st Dist.] July 7, 2015, pet. filed) (mem. op.).

In this suit for civil sanctions based on violations of the Texas Food, Drug, and Cosmetic Act, the State sued Medical Discount Pharmacy, L.P. (“MDP”). The State also sued the corporate general partner of MDP and the president of MDP. The general partner argued that there was no evidence that it received and delivered the stolen prescription drugs at issue in the case, but the State responded that the general partner’s liability was based on its status as general partner of MDP and that the State was thus not required to present evidence against the general partner apart from the evidence of MDP’s liability. However, the court pointed out that the State was not merely attempting to hold the general partner liable for MDA’s obligations; it was attempting to hold the general partner liable *in addition to* MDA’s liability. The court did not think that the statute permitted the State to collect the penalty twice by naming MDA and its general partner unless both personally participated in the wrongdoing. The court found that there was sufficient evidence to hold the president of MDA individually liable because he negotiated the purchase of the stolen drug on behalf of MDA. The court stated that, even if the president of MDA was also an officer of MDP’s general partner, there was no evidence that he was acting on behalf of the general partner or that the general partner actively participated in the receipt and delivery of the stolen drug. Any proceeds from the sales of the stolen drugs shipped by MDP to retail pharmacies would have been paid to MDP, not to the general partner. Any benefit to the general partner would have been indirect, and there was no evidence, other than merely being the general partner of MDP, that the general partner “participated in the wrongdoing.” Accordingly, the court sustained the general partner’s challenge to the jury findings of liability and civil penalties against it.

C. Liability Protection of Partners in Limited Liability Partnership

Fleming v. Kirklin Law Firm, P.C., No. 14-14-00202-CV, 2015 WL 7258700 (Tex. App.–Houston [14th Dist.] Nov. 17, 2015, no pet. h.) (mem. op.).

The court of appeals held that the trial court did not err in refusing to hold an individual partner of a law firm liable for the contractual obligations of the firm because the law firm was registered as a limited liability partnership and presented evidence, which the plaintiffs failed to refute, that the firm had complied with the financial responsibility requirements of the Texas Revised Partnership Act.

The plaintiffs sued Fleming & Associates, LLP (the “Fleming Firm”), and George Fleming (“Fleming”) alleging that the firm breached referral agreements with the plaintiffs relating to Fen-Phen cases. After the plaintiffs obtained a favorable jury verdict, they filed a motion seeking a determination of whether the Fleming Firm had complied with the financial responsibility requirements of the LLP provisions of the Texas Revised Partnership Act. (The referral agreements at issue were entered into in 2001, and the court assumed without deciding that the Texas Revised Partnership Act (TRPA), which has been replaced by the Business Organizations Code, applied to the case.) The court of appeals explained that the LLP requirements in TRPA include a financial responsibility requirement that could be met by alternative methods. The alternative methods of establishing financial responsibility include carrying at least \$100,000 of liability insurance or maintaining \$100,000 of funds specifically designated and segregated for the satisfaction of judgments against the partnership through a bank letter of credit. The court stated that TRPA places the burden of proof of compliance on the person seeking the protection of limited liability, but individual partner liability is not automatically imposed once an LLP is found liable for a contract debt. In response to the plaintiffs’ motion, Fleming and the Fleming Firm filed a response in which they argued that Fleming was not individually liable because the Fleming Firm had, since its formation in 1999, continuously complied with the financial responsibility requirements set forth in TRPA. By affidavit attached to the response, Fleming testified that the Fleming Firm had carried general liability insurance with policy limits between \$1,000,000 and \$2,000,000 and had access to a multimillion dollar letter of credit. The response requested a jury trial to resolve any fact issues related to the Fleming Firm’s compliance with the financial responsibility requirements. The plaintiffs did not provide any evidence disputing Fleming’s affidavit and did not file a motion for summary judgment. There also was no jury trial on the issue of Fleming’s individual liability.

The court of appeals concluded that Fleming and the Fleming Firm presented evidence conclusively demonstrating compliance with TRPA’s financial responsibility provisions. In the face of Fleming’s evidence of compliance, the burden passed to the plaintiffs to file a motion for summary judgment to establish as a matter of law that the Fleming Firm failed to comply with the financial responsibility requirements of the LLP statute, or

submit the issue to a jury for resolution. Because the plaintiffs did neither, they waived the issue of Fleming's individual liability for the Fleming Firm's contract debt, and the trial court did not err in failing to hold Fleming individually liable.

D. Fiduciary Duties of Partners and Affiliates

Shurberg v. La Salle Industries Limited, No. 04-15-00320-CV, 2016 WL 1128291 (Tex. App.–San Antonio Mar. 23, 2016, no pet. h.) (mem. op.).

The personal representative of a deceased limited partner sued individually and derivatively on behalf of the limited partnership, and the defendants challenged his standing to assert the claims. The personal representative argued that he had become a limited partner based on Section 153.113 of the Texas Business Organizations Code, the terms of the partnership agreement, or the consent of the other partners. The court of appeals rejected these arguments and held that the personal representative was a mere assignee who did not have standing as such to assert derivative claims for breach of fiduciary duty, fraud, negligent misrepresentation, and breach of contract. Furthermore, the court held that the personal representative's claims for injunctive relief, removal of the general partner, receivership, and accounting were derivative rather than direct claims, and the personal representative thus also lacked standing to assert those claims.

Shurberg, the personal representative (and surviving spouse and sole heir) of a deceased limited partner of a family limited partnership, sued the general partner and those in control of the general partner alleging various causes of action amounting to mismanagement of the limited partnership. Shurberg also sought access to the partnership's books and records, injunctive relief, appointment of a receiver, and an accounting. Shurberg eventually sued the other limited partners as nominal defendants. The limited partner defendants as well as the other defendants filed pleas to the jurisdiction on the basis that all of Shurberg's claims were derivative and that Shurberg was at best a mere assignee who lacked standing to bring the claims. The trial court granted the pleas to the jurisdiction and dismissed Shurberg's claims, and Shurberg appealed.

On appeal, Shurberg argued that he was a limited partner rather than a mere assignee, but the court rejected his arguments and held that he was only an assignee. After determining that Shurberg was not a limited partner, the court addressed the question of whether Shurberg had standing to pursue his claims. The court considered the applicable law distinguishing between derivative and direct claims and concluded that Shurberg's claims for accounting, removal of the general partner, injunctive relief, and appointment of a receiver were all derivative. Shurberg cited Section 152.204 of the BOC for the proposition that his accounting claim was direct because Section 152.204(a) states that “[a] partner owes to the partnership, the other partners, and a transferee of a deceased partner's partnership interest as designated in Section 152.406(a)(2): (1) a duty of loyalty; and (2) a duty of care.” The court stated that Shurberg appeared to be arguing that he as the transferee of a deceased limited partner's interest had a direct claim for an accounting because the general partners violated an independent duty of loyalty and care owed to him. However, Shurberg did not plead that the defendants breached a duty of loyalty and care owed to him in violation of Section 152.204. He instead alleged that the defendants owed a duty of fiduciary care to the deceased limited partner's estate based on Section 113.151 of the Texas Property Code, which governs trusts and provides a beneficiary may demand an accounting by a trustee. In addition, Shurberg demanded an accounting “in order to ascertain the amount due to the limited partners, including the Estate.” Thus, he sought an accounting to determine the injury to all the limited partners, including himself, as a result of the defendants' breach of fiduciary duty owed to the limited partnership. Because Shurberg's accounting claim was based on his claim for breach of fiduciary duty, which was an undisputed derivative claim, the court concluded that Shurberg's demand for an accounting was also a derivative claim.

Edelman v. Drexel Highlander Limited Partnership, No. 3:14-CV-4109-P, 2015 WL 5714728 (N.D. Tex. Sept. 28, 2015).

Edelman appealed a judgment of the bankruptcy court in which he was held liable for actual and exemplary damages for breach of fiduciary duty to a limited partnership. Edelman directly and indirectly owned limited partner interests in the limited partnership and was the vice-president of the LLC general partner of the limited partnership. On appeal, Edelman argued that he did not owe a fiduciary duty to the limited partnership, but the district court concluded that he owed a fiduciary duty to the limited partnership based on his control over the LLC general partner in his role as vice president of the LLC.

The bankruptcy court found Edelman liable for actual and exemplary damages for breach of fiduciary duty to Drexel Highlander Limited Partnership (DHLP) based on the following: (1) the occupancy by Edelman and his wife of a unit of the condominium complex owned by DHLP without a lease and without paying rent; (2) Edelman's authorization of payment of illegal commissions by DHLP to Edelman's wife, who was not a licensed real estate broker or sales person; and (3) Edelman's improperly directing an affiliated development company to draw funds under DHLP's loan agreement. One of Edelman's arguments on appeal was that DHLP did not prove that Edelman owed it a fiduciary duty.

The court cited Fifth Circuit case law for the proposition that "under Texas law, the issue of control has always been the critical fact looked to by the courts in determining whether to impose fiduciary responsibilities on individuals whose actions directly determine the conduct of a general partner of a limited partnership." Edelman argued that he lacked the necessary control over DHLP to create a fiduciary relationship because he was neither an officer nor a general partner. (The general partner was an LLC, the sole member of which was another individual.) Edelman also contended that his functions and authority as vice president of DGP, LLC (DGP), the general partner of DHLP, were expressly limited by the DGP certificate of resolution that appointed him. Edelman's argument focused on the language of the certificate of resolution, which he asserted limited his role to sales of condominium units at the condominium complex owned by DHLP. The bankruptcy court found that, although the certificate of resolution described Edelman's authority to sell condominium units, it did not place any actual limits on Edelman's control and management of the LLC general partner and, in turn, DHLP. Additionally, the bankruptcy court made numerous other factual findings indicating Edelman controlled all aspects of DHLP's business operations during the relevant time period. The district court saw no clear error in those factual findings.

The DHLP partnership agreement vested the management and control of DHLP exclusively in the general partner. The partnership agreement further allowed the general partner to designate one or more parties to act as agents to carry out its duties and responsibilities to DHLP. Thus, DHLP was managed and controlled exclusively by whoever DGP designated to carry out its duties to DHLP. The court thus analyzed the certificate of resolution of DGP that designating Edelman as vice president of DGP and described his authority. The certificate of resolution stated:

RESOLVED, that Robert Edelman ("Designated Officer") is the Vice President of the LLC [DGP] and is authorized to act for the LLC, in its capacity as general partner of the Partnership [DHLP]; and

RESOLVED, that the Designated Officer is authorized for, in the name of, and on behalf of the LLC, in its capacity as general partner of the Partnership, to negotiate the terms and conditions of the sale of the Property [Drexel Highlander] as the Designated Officer deems best and is authorized to carry out the sale of said Property, and to consummate such sale by executing and delivering a deed or deeds to the Property, and any other documents as may be necessary or desirable to consummate the sale of the Property, for and in behalf of the LLC, in its capacity as general partner of the Partnership; and

RESOLVED, that the Designated Officer is hereby authorized and directed to do all other acts and things as may be required to carry out, perform, and give effect to the terms and provisions of these resolutions and the aforesaid documents for and in behalf of the LLC, in its capacity as general partner of the Partnership[.]

The court pointed out that the three quoted paragraphs were written in the conjunctive, and the court stated that Edelman ignored the entire first and third paragraphs. The court stated that the first paragraph (which authorized him to act for DGP in its capacity as general partner) might alone be enough to find that Edelman had the requisite control over DHLP to create a fiduciary relationship. The court said that the certificate of resolution not only did not limit the authority conferred in the first paragraph, but it went on in the third paragraph to expand his authority to authorize and direct him "to do *all other acts and things* as may be required to carry out, perform, and give effect to the terms and provisions of these resolutions and the aforesaid documents for and in behalf of the LLC, in its capacity as general partner" of DHLP. The court thus concluded that the express terms of the certificate of resolution, along with the bankruptcy court's factual findings, demonstrated that Edelman was

authorized to, and in fact did, exercise total control over DHLP during the relevant period and that Edelman accordingly owed a fiduciary duty to DHLP.

Shafraan v. Avital, No. H-15-140, 2015 WL 5457059 (S. D. Tex. Sept. 17, 2015).

The plaintiff sued the defendant alleging that the plaintiff, the defendant, and a third individual had a partnership or joint venture to engage in a real estate “flip” transaction. The plaintiff sought an accounting and damages for various causes of action, including breach of fiduciary. The defendant sought dismissal of all the claims based on Rule 12(b)(6) for failure to state a claim. The defendant argued that the plaintiff's claim for breach of fiduciary duty should be dismissed because a fiduciary duty in a business transaction must arise prior to, and apart from, the agreement made the basis of the lawsuit. The court stated that the breach of fiduciary duty alleged in this case, however, was the duty owed by one partner to another. Relying on *M.R. Champion, Inc. v. Mizell*, 904 S.W.2d 617, 618 (Tex. 1995), the court stated that “[p]artners owe each other and their partnership a duty in the nature of a fiduciary duty in the conduct ... of partnership business, and are liable for a breach of that duty.” The court thus found that the claim for breach of fiduciary duty survived dismissal at the pleading stage.

E. Partnership Property

In the Interest of K.R.C., No. 05-13-01419-CV, 2015 WL 7731784 (Tex. App.-Dallas Dec. 1, 2015, no pet. h.).

The court of appeals affirmed a monetary judgment against the husband in a divorce action, holding that the divorce court did not err in ordering the husband to pay an amount as reconstitution of amounts he fraudulently caused the couple's community property limited partnership to pay an employee with whom the husband was romantically involved.

Husband and wife were the sole limited partners of a medical services billing limited partnership and the sole owners of the general partner. Husband became romantically involved with an employee of the partnership, and the evidence showed that the employee was overpaid by the partnership over a period of several years. Husband's adultery and its role in the dissolution of the marriage were not in dispute, and the trial court specifically found that husband was at fault in the breakup of the marriage and guilty of adultery. Further, husband wasted community assets and engaged in fraud on the community estate, and husband was ordered to pay reconstitution of the community estate in the amount of \$195,000 based on the evidence of overpayment of the employee.

Husband argued that partnership funds are not community property, and that any reconstitution that included \$195,000 for compensation paid by the partnership was error because the funds used were not community property. Husband argued that he did not deprive wife of any interest in the partnership and that the partnership made payments to its employees in the course of doing business. Wife argued that husband did not have the unfettered right to deplete a community asset.

The court of appeals concluded the case relied on by husband, *Lifshutz v. Lifshutz*, 61 S.W.3d 511, 518 (Tex. App.-San Antonio 2001, pet. denied), was distinguishable. In *Lifshutz*, the husband's interests in certain companies were his separate property. During the divorce, the wife attempted to pierce the corporate veil of the husband's companies and reach company assets for distribution as part of the community estate. The court of appeals cited the Texas Revised Partnership Act for the proposition that a partner's spouse has no community property right in partnership property. A trial court may not award specific partnership assets to a non-partner spouse in the event of a divorce; the court may only award the spouse an interest in the partnership. If the husband's interest in a partnership is separate property, it cannot be awarded to the wife, and the wife cannot pierce the partnership and acquire partnership assets for distribution.

In this case, however, the partnership was owned one-hundred percent by husband and wife, and wife did not seek to pierce the partnership and acquire partnership assets. She sought reconstitution of amounts fraudulently paid by the partnership in which she was a 50% owner. The court stated that husband in effect used the partnership to deprive wife of her interest in the partnership by fraudulently paying approximately \$195,000 to the employee. The evidence supported the money judgment against husband, and the trial court did not abuse its discretion in entering the judgment.

Saks v. Broadway Coffeehouse LLC, No. 04–14–00734–CV, 2015 WL 6511192 (Tex. App.–San Antonio Oct. 28, 2015, pet. denied) (mem. op.).

The assignee/grantee of a partner’s interest in 5321 Broadway Partners (the “Partnership”) and the real property located at 5321 Broadway (the “Property”) (legal title to which was held in the name of the partners, and equitable title to which was held by the Partnership) brought this action for: (1) a declaration of the ownership of the Property and Partnership; (2) a winding up and termination of the Partnership; (3) a partition of the Property; and (4) a declaration that certain deeds and assignments signed by one of the defendants relating to the Partnership and Property were void. The trial court entered a judgment granting this relief, and the defendants appealed. The court of appeals affirmed the judgment.

The defendants argued that the partnership agreement prohibited capital withdrawals and that the plaintiff thus lacked standing to request a partition. Because the defendants cited no authority for this proposition, the issue was waived, but the court of appeals went on to state that the argument assumed the partition would result in a capital withdrawal. According to the court, the partition could not have resulted in a capital withdrawal because the trial court ordered the Partnership terminated and wound up effective as of the same date the trial court ordered the partition by sale.

The defendants contended that the trial court erred in ordering the Partnership terminated because fact issues precluded summary judgment. In its motion for partial summary judgment, the plaintiff asserted the Partnership should be terminated and wound up under Sections 11.051(4) and 11.057(c) of the Texas Business Organizations Code because (1) the partition of the Property by sale would complete the particular undertaking for which the Partnership was formed, and (2) result in the sale of all or substantially all of the property of the Partnership. In addition, the plaintiff asserted the Partnership should be terminated and wound up under Section 11.314 because of ongoing litigation involving the other partner that (1) unreasonably frustrated the economic purpose of the Partnership and (2) made it not reasonably practicable to carry on business in partnership with the other partner. The other partner was a trust involved in litigation in probate court, and the settlor was refusing to comply with the probate court’s orders and made fraudulent filings claiming ownership of the Partnership. In their appellate brief, the defendants did not challenge all of the four grounds asserted in the summary judgment motion as bases for the termination and winding up of the partnership. Because the defendants did not challenge every basis on which the trial court could have ordered the Partnership terminated and wound up, the court rejected this complaint.

Finally, the defendants argued that the trial court erred in granting summary judgment because fact issues existed with regard to the ownership of the Property and Partnership. The court noted that the defendants did not raise an issue challenging the trial court’s declaration that documents purporting to terminate the trust and convey the trust’s partnership interest to the beneficiaries were void. The probate court’s judgment in the prior proceeding conclusively established the trust’s ownership of its interest in the Partnership. In addition, after reviewing all of the summary judgment evidence the court held that: (1) the evidence conclusively established the plaintiff’s ownership of a 25% interest in the Partnership; and (2) record title to the Property was owned by the trust and the plaintiff.

F. Interpretation and Enforcement of Partnership Agreement

1. Fiduciary Duties

Edelman v. Drexel Highlander Limited Partnership, No. 3:14-CV-4109-P, 2015 WL 5714728 (N.D. Tex. Sept. 28, 2015).

Edelman appealed a judgment of the bankruptcy court in which he was held liable for actual and exemplary damages for breach of fiduciary duty to a limited partnership. Edelman directly and indirectly owned limited partner interests in the limited partnership and was the vice-president of the LLC general partner of the limited partnership. On appeal, Edelman argued that he did not owe a fiduciary duty to the limited partnership, but the district court concluded that he owed a fiduciary duty to the limited partnership based on his control over the LLC general partner in his role as vice president of the LLC.

The bankruptcy court found Edelman liable for actual and exemplary damages for breach of fiduciary duty to Drexel Highlander Limited Partnership (DHLP) based on the following: (1) the occupancy by Edelman and his wife of a unit of the condominium complex owned by DHLP without a lease and without paying rent; (2)

Edelman's authorization of payment of illegal commissions by DHLP to Edelman's wife, who was not a licensed real estate broker or sales person; and (3) Edelman's improperly directing an affiliated development company to draw funds under DHIP's loan agreement. One of Edelman's arguments on appeal was that DHLP did not prove that Edelman owed it a fiduciary duty.

The court cited Fifth Circuit case law for the proposition that ““under Texas law, the issue of control has always been the critical fact looked to by the courts in determining whether to impose fiduciary responsibilities on individuals whose actions directly determine the conduct of a general partner of a limited partnership.”” Edelman argued that he lacked the necessary control over DHLP to create a fiduciary relationship because he was neither an officer nor a general partner. (The general partner was an LLC, the sole member of which was another individual.) Edelman also contended that his functions and authority as vice president of DGP, LLC (DGP), the general partner of DHLP, were expressly limited by the DGP certificate of resolution that appointed him. Edelman's argument focused on the language of the certificate of resolution, which he asserted limited his role to sales of condominium units at the condominium complex owned by DHLP. The bankruptcy court found that, although the certificate of resolution described Edelman's authority to sell condominium units, it did not place any actual limits on Edelman's control and management of the LLC general partner and, in turn, DHLP. Additionally, the bankruptcy court made numerous other factual findings indicating Edelman controlled all aspects of DHLP's business operations during the relevant time period. The district court saw no clear error in those factual findings.

The DHLP partnership agreement vested the management and control of DHLP exclusively in the general partner. The partnership agreement further allowed the general partner to designate one or more parties to act as agents to carry out its duties and responsibilities to DHLP. Thus, DHLP was managed and controlled exclusively by whoever DGP designated to carry out its duties to DHLP. The court thus analyzed the certificate of resolution of DGP that designating Edelman as vice president of DGP and described his authority. The certificate of resolution stated:

RESOLVED, that Robert Edelman (“Designated Officer”) is the Vice President of the LLC [DGP] and is authorized to act for the LLC, in its capacity as general partner of the Partnership [DHLP]; and

RESOLVED, that the Designated Officer is authorized for, in the name of, and on behalf of the LLC, in its capacity as general partner of the Partnership, to negotiate the terms and conditions of the sale of the Property [Drexel Highlander] as the Designated Officer deems best and is authorized to carry out the sale of said Property, and to consummate such sale by executing and delivering a deed or deeds to the Property, and any other documents as may be necessary or desirable to consummate the sale of the Property, for and in behalf of the LLC, in its capacity as general partner of the Partnership; and

RESOLVED, that the Designated Officer is hereby authorized and directed to do all other acts and things as may be required to carry out, perform, and give effect to the terms and provisions of these resolutions and the aforesaid documents for and in behalf of the LLC, in its capacity as general partner of the Partnership[.]

The court pointed out that the three quoted paragraphs were written in the conjunctive, and the court stated that Edelman ignored the entire first and third paragraphs. The court stated that the first paragraph (which authorized him to act for DGP in its capacity as general partner) might alone be enough to find that Edelman had the requisite control over DHLP to create a fiduciary relationship. The court said that the certificate of resolution not only did not limit the authority conferred in the first paragraph, but it went on in the third paragraph to expand his authority to authorize and direct him “to do *all other acts and things* as may be required to carry out, perform, and give effect to the terms and provisions of these resolutions and the aforesaid documents for and in behalf of the LLC, in its capacity as general partner” of DHLP. The court thus concluded that the express terms of the certificate of resolution, along with the bankruptcy court's factual findings, demonstrated that Edelman was authorized to, and in fact did, exercise total control over DHLP during the relevant period and that Edelman accordingly owed a fiduciary duty to DHLP.

2. Financial Rights

Shafraan v. Avital, No. H-15-140, 2015 WL 5457059 (S. D. Tex. Sept. 17, 2015).

The plaintiff sued the defendant alleging that the plaintiff, the defendant, and a third individual had a partnership or joint venture in which they would work together to “flip” a real estate transaction by effectuating an assignment of the purchaser’s rights under an earnest money contract obtained by the third individual. The proceeds from the transaction were to be divided equally, and the plaintiff alleged that the defendant also was to seek from the buyer arrangements for additional future compensation to be derived from the property, which also was to be equally divided three ways. Eventually, a company purchased the earnest money contract, and the plaintiff, defendant, and third individual equally divided the profit among them. The plaintiff sought an accounting and damages for various causes of action, including breach of partnership agreement. The defendant sought dismissal of all the claims based on Rule 12(b)(6) for failure to state a claim. The defendant moved to dismiss the plaintiff’s claim for breach of partnership agreement on the basis that the plaintiff failed to allege that there had been a sale or disposition of the property at issue that would entitle the defendant to compensation under the alleged executory part of the deal. Although the plaintiff did not plead that a resale of the property had occurred, the plaintiff’s complaint alleged that the partnership arrangement provided for a sharing of income “from rents, operations, and possibly sale of the” the property over a potentially long period of time. The plaintiff alleged that the defendant had not accounted for the profits and proceeds to the plaintiff and that the plaintiff believed the defendant had kept the profits and proceeds for himself. At this stage of the litigation, the issue was whether the plaintiff was entitled to offer evidence to support his claims, and the court concluded that the plaintiff had pled facts sufficient to state a claim.

3. Admission of General or Limited Partner

Shurberg v. La Salle Industries Limited, No. 04-15-00320-CV, 2016 WL 1128291 (Tex. App.–San Antonio Mar. 23, 2016, no pet. h.) (mem. op.).

The personal representative of a deceased limited partner sued individually and derivatively on behalf of the limited partnership, and the defendants challenged his standing to assert the claims. The personal representative argued that he had become a limited partner based on Section 153.113 of the Texas Business Organizations Code, the terms of the partnership agreement, or the consent of the other partners. The court of appeals rejected these arguments and held that the personal representative was a mere assignee who did not have standing as such to assert derivative claims for breach of fiduciary duty, fraud, negligent misrepresentation, and breach of contract. Furthermore, the court held that the personal representative’s claims for injunctive relief, removal of the general partner, receivership, and accounting were derivative rather than direct claims, and the personal representative thus also lacked standing to assert those claims.

Shurberg, the personal representative (and surviving spouse and sole heir) of a deceased limited partner of a family limited partnership, sued the general partner and those in control of the general partner alleging various causes of action amounting to mismanagement of the limited partnership. Shurberg also sought access to the partnership’s books and records, injunctive relief, appointment of a receiver, and an accounting. Shurberg eventually sued the other limited partners as nominal defendants. The limited partner defendants as well as the other defendants filed pleas to the jurisdiction on the basis that all of Shurberg’s claims were derivative and that Shurberg was at best a mere assignee who lacked standing to bring the claims. The trial court granted the pleas to the jurisdiction and dismissed Shurberg’s claims, and Shurberg appealed.

On appeal, Shurberg argued that he was a limited partner rather than a mere assignee. Shurberg asserted three grounds for his argument that he was a limited partner: (1) Section 153.113 of the Texas Business Organizations Code (BOC); (2) provisions of the limited partnership agreement; and (3) previous conduct by the general and limited partners that Shurberg argued showed they consented to his becoming a limited partner.

The court first rejected Shurberg’s argument that he became a limited partner pursuant to Section 153.113 of the BOC, which provides:

If a limited partner who is an individual dies ... the limited partner's ... legal representative may exercise all of the limited partner's rights and powers to settle the limited partner's estate or

administer the limited partner's property, including the power of an assignee to become a limited partner under the partnership agreement.

Shurberg argued that this statutory provision made him a de facto limited partner by giving him, as legal representative of the deceased limited partner's estate, all the deceased limited partner's rights and powers to settle her estate or administer her property. The court noted the absence of case law regarding the construction and application of Section 153.113, and the court applied principles of statutory construction to analyze the words of the provision and consider their plain meaning. After considering the plain language of Section 115.113, the court concluded that the statute did not transform Shurberg, acting as personal representative of the estate, into a limited partner. The court stated that interpreting Section 153.113 as automatically transforming an estate representative into a limited partner would render the last part of the provision mere surplusage. By its plain language, the last portion of the statute ("including the power of an assignee to become a limited partner under the partnership agreement") indicates that a legal representative is not automatically transformed into a limited partner, but may become one if the partnership agreement permits it. Thus, the court held that the statute did not automatically make Shurberg, as personal representative, a limited partner, but merely gave him the power to become a limited partner should the terms of the partnership agreement permit it.

Shurberg next argued that the successors-and-assigns provision of the partnership agreement expressly recognized his rights as a personal representative, and that he was a defacto limited partner under the terms of the partnership agreement. The provision relied upon by Shurberg provided:

This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, executors, administrators, legal representatives, successors and assigns where permitted by this Agreement.

Shurberg also pointed to language in the original assignment from the founder of the limited partnership under which the founder assigned to his niece (whose estate Shurberg now represented) a limited partnership interest. That assignment stated that "an assignee may exercise all the rights and powers of a limited partner."

The court applied the law of contracts to the construction of the partnership agreement and concluded that there was nothing in the language of the successors-and-assigns provision to suggest an assignee or successor was automatically transformed into a limited partner. Moreover, the partnership agreement expressly provided that an assignment did not automatically give the assignee the right to become a limited partner. The partnership agreement provided:

Any assignment made to anyone, not already a partner, shall be effective only to give the assignee the right to receive the share of the profits to which his assignor would otherwise be entitled ... *and shall not give the assignee the right to become a substituted Limited Partner.* [Emphasis added.]

Thus, the plain language of the partnership agreement provided that an assignment did not automatically transform an assignee into a substituted limited partner. To the extent the language in the original assignment from the founder of the partnership to his niece conflicted with the plain language of the partnership agreement, the court stated that the partnership agreement controlled. Shurberg argued that this provision of the partnership agreement applied only to assignees who received a partnership interest by a sale rather than upon death, pointing to the title of the provision—"Permitted Sales." However, the court pointed out that the agreement specifically stated that headers were to be "used for administrative purposes only" and that headers did "not constitute substantive matter to be considered in construing the terms of" the agreement. Thus, harmonizing and giving effect to each of the provisions in the partnership agreement, the court concluded that the partnership agreement did not automatically transform Shurberg into a limited partner.

Finally, Shurberg argued he was a limited partner based on the consent of the other limited partners. The court agreed with Shurberg that consent by the other limited partners was a valid means for him to be given limited partner status. Shurberg relied on Section 153.253 of the BOC, which governs how an assignee of a limited partnership interest becomes a limited partner if the partnership agreement does not otherwise provide, as was the

case in this instance. That provision states that “an assignee of a partnership interest ... may become a limited partner if and to the extent that: (1) the partnership agreement provides; or (2) all partners consent.”

After reviewing the evidence provided by Shurberg with his response to the plea to the jurisdiction, the court concluded that it did not establish that the other limited partners consented to him becoming a limited partner. The evidence established that one of the other limited partners (who also controlled the general partner) recognized that Shurberg (as the personal representative of the estate of a deceased limited partner) was the owner of a partnership interest, and the evidence established that this individual also recognized that Shurberg had a right to information regarding that partnership interest because he was the new owner. The evidence showed that this individual interacted with Shurberg only as the owner of the deceased limited partner’s partnership interest. Further, the court stated that Shurberg did not point to any evidence of consent on the part of any other limited partners. Instead, Shurberg argued that the other limited partners treated another surviving spouse of a deceased limited partner like a limited partner. According to the court, treatment of another spouse as a limited partner did not establish evidence of consent to Shurberg being a limited partner.

Benavides v. JEK Lending, LLC (In re Rose Pearl, Ltd.), Case No. 14-34605, Adv. No. 15-03012-hdg, 2015 WL 3988415 (Bankr. N.D. Tex. May 26, 2015).

Deposition testimony of Benavides that he was the general partner of the debtor limited partnership did not create a genuine issue of material fact as to the identity of the general partner where the certificate of limited partnership, the limited partnership agreement, four amendments to the limited partnership agreement, the debtor’s statement of financial affairs, and a *lis pendens* filed by the limited partnership all identified an LLC as the sole general partner. Benavides contended that he was confused when he testified in his deposition, and he made corrections to his deposition to indicate that the general partner was an LLC owned by Benavides rather than Benavides in his individual capacity. The claimants in this action sought to hold Benavides liable for the limited partnership’s debts to the claimants as general partner, but the court concluded that Benavides was entitled to summary judgment. The court pointed out that the partnership agreement governs the relations of the partners and between the partners and the partnership, and the agreement provided that the LLC was the general partner. The partnership agreement contained an integration clause and provided that it could only be amended by unanimous written agreement of all the partners. There was no evidence of a removal of the general partner. The only evidence to support the contention that Benavides was the general partner was his deposition testimony, which he explained and corrected, and a Texas Franchise Tax Public Information Report that stated that another individual was the owner of the LLC general partner when Benavides claimed he was the sole member of the LLC. The court stated this discrepancy in the report only bore on the credibility of Benavides; it did not provide any evidence that he was the general partner. Because of the controlling effect of the limited partnership agreement and its amendments, and because the claimants failed to identify any evidence that created a genuine issue of material fact for trial, Benavides was granted summary judgment on the claims regarding whether Benavides is or ever was the general partner of the limited partnership.

4. Authority of General or Limited Partner

Doctors Hospital at Renaissance, Ltd. v. Andrade, 2016 WL 3157535, __ S.W.3d __ (Tex. 2016).

A limited partnership that operated a hospital argued that it could not be held vicariously liable for the negligence of a limited partner physician’s negligence. The court of appeals held that the limited partnership failed to establish as a matter of law that it could not be liable for the physician’s negligence, but the Texas Supreme Court concluded that the ordinary course of the partnership’s business did not include a doctor’s medical treatment of a patient and that the doctor was not acting with the authority of the partnership. Thus, the partnership could not be liable for the doctor’s medical negligence, and the supreme court reversed and rendered judgment for the partnership.

The Andrades sued Dr. Lozano, Doctors Hospital at Renaissance, Ltd. (“Renaissance”), and RGV Med, LLC (“RGV”), alleging that Lozano was negligent in delivering their daughter, causing permanent injury to the child. The Andrades alleged that Renaissance and RGV were vicariously liable for Lozano's negligence. Renaissance, a limited partnership, owned and operated the hospital where the delivery took place, and RGV was Renaissance’s general partner. Lozano was an independent contractor with admitting privileges at the hospital and a limited partner of Renaissance. Renaissance and RGV moved for summary judgment, contending that they were

entitled to judgment as a matter of law because Lozano was not acting within the scope of the partnership business or with partnership authority when providing obstetrical care. The trial court denied summary judgment but granted an immediate interlocutory appeal.

The parties agreed that the governing statute was Section 152.303 of the Texas Business Organizations Code (BOC), which provides that “[a] partnership is liable for loss or injury to a person, including a partner, or for a penalty caused by or incurred as a result of a wrongful act or omission or other actionable conduct of a partner acting: (1) in the ordinary course of business of the partnership; or (2) with the authority of the partnership.” The court pointed out that the provisions of Chapter 152 (which govern general partnerships) are applicable to limited partnerships to the extent that Chapter 153 is silent. Tex. Bus. Orgs. Code § 153.003(a). Chapter 153 of the BOC specifically limits the liability of a limited partner but does not otherwise address a limited partnership’s liability to third parties for the actions of a limited partner. The parties thus agreed that Section 152.303 applied to Renaissance’s liability as a limited partnership.

Based on the limited partnership agreement and statutes regarding medical care, the court held that the record conclusively demonstrated that Renaissance’s business did not include the provision of medical care. Although a hospital like Renaissance is licensed to provide health care, only a licensed doctor can provide medical care, and only an individual, not a partnership, can be licensed to practice medicine. The court examined the purposes of Renaissance as stated in the limited partnership agreement and rejected the Andrades’ argument that the broad language used in the partnership agreement included the practice of medicine. The court pointed out that the partnership agreement stated that it was to be construed in accordance with Texas law and that Texas law controlled in the event of any conflict with the terms of the agreement. The court noted that a fact issue as to whether the partnership’s ordinary business included the practice of medicine could have been raised if Renaissance exercised control over Lozano’s practice, but the Andrades did not allege this kind of control, and the record did not show it.

The Andrades argued that professional-services partnerships can be in the business of providing medical care without controlling the individual physician partners’ practice based upon BOC § 152.301, which states that partners are agents of the partnership for purposes of the partnership’s business. The court commented that this provision arguably does not even apply to limited partnerships, because limited partnerships, by definition, provide limited partners with less control over and less liability for the business entity. Furthermore, the court stated that a limited partner’s agency is limited to the partnership’s business even if a limited partner is an agent. Lozano would thus be acting as an agent only if he were engaging in its business, which did not include the provision of medical care. The court stated that the hospital could provide healthcare services (such as obstetrical services and labor and delivery services) generally without providing medical care. As the operator of a hospital, Renaissance could be in the business of providing facilities, support staff, and supplies to assist doctors in the provision of medical care without engaging in the illegal practice of medicine by a business entity. The court stated that it would not be impossible for the Andrades to show enough to raise a fact question as to whether Renaissance was in the illegal practice of medicine, but the Andrades had not done so.

The Andrades also relied on BOC Sections 152.055 and 152.0551, which authorize physicians to form partnerships to perform professional services within the scope of their practices. Each partner must be a physician, and the purpose of the partnership must be to practice medicine within the scope of the physicians’ practices. Tex. Bus. Orgs. Code § 152.055(a). But the court pointed out that the statute does not allow the practice of medicine by someone not licensed as a physician or allow a person not licensed as a physician to direct the activities of the physician in the practice of medicine. Tex. Bus. Orgs. Code §§ 152.0551(e), 152.055(d). Assuming without deciding that this kind of partnership can be vicariously liable for the medical negligence of its physician partners, the court stated that Renaissance was not this kind of partnership. Rather, it was a regular limited partnership, with physician and non-physician partners and a broad purpose that included acquisition of real estate and related business. The court characterized partnerships under Section 152.055 as analogous to joint practices organized as professional associations or professional limited liability companies. The court pointed out that professional associations may be vicariously liable for the negligence of their employees or agents, and the Andrades had already sued and nonsuited Lozano’s joint practice organization. Because Renaissance was not such an entity, it could not be liable for the negligence of its limited partner.

The court stated that the reliance of the Andrades on *Jones v. Foundation Surgery Affiliates of Brazoria County*, 403 S.W.3d 306 (Tex. App.–Houston [1st Dist.] 2012, pet. denied), was similarly unavailing. Referring to *Jones* as “seemingly the only other case addressing a limited partnership’s vicarious liability for the alleged

malpractice of a physician-limited partner,” the court distinguished the case on the basis that the partnership in *Jones* seemed to argue, and the court of appeals accepted, that it was a joint practice under BOC Section 152.055. [The partnership in *Jones* was actually identified in that case as a registered limited liability partnership rather than a limited partnership.] The partnership in *Jones* argued that its business was merely to provide the facility, equipment, supplies, and support personnel for its partner surgeons to perform surgery, but the court of appeals found that there was more than a scintilla of evidence that the partnership was actually in the business of providing out-patient surgery, relying primarily on the partnership’s description of its purpose in filings with the Secretary of State. The supreme court stated that the court of appeals could have reasonably found that summary judgment should have been denied to the extent that a joint practice partnership under Section 152.055 may be liable for a physician partner’s negligence, but the court’s analysis in *Jones* was not persuasive in this case because Renaissance was not a Section 152.055 partnership.

The supreme court next addressed whether Renaissance could be liable based on a partnership’s liability for wrongful acts of its partners “with the authority of the partnership.” See Tex. Bus. Orgs. Code § 152.303(a)(2). The court stated that the partnership agreement is the source of authority for partners to act on behalf of the partnership (citing Tex. Bus. Orgs. Code § 152.002(a)), and the partnership agreement in this case prohibited limited partners from performing any act on behalf of the partnership unless specifically authorized by the agreement. The agreement did not give limited partners, some of whom were not physicians, any authority to provide medical care at partnership facilities. The agreement specifically gave the general partner authority to act on behalf of the partnership, but not limited partners. Further, the court stated that the authority of the partnership would typically follow from actions in the ordinary course of the business, and Lozano’s medical care of the Andrades was neither in the ordinary course of Renaissance’s business nor conducted with its authority. The evidence showed that the limited partners who were also doctors were acting under their separate admitting privileges when they practiced medicine at the hospital. These doctors had the same authority to practice medicine under their own licenses as other doctors who were not also limited partners. Thus, Renaissance could not be liable for Lozano’s alleged negligence in providing medical care at the hospital. In a footnote, the court noted that a hospital is generally not vicariously liable for the acts or omissions of a doctor on the hospital’s medical staff, and the court saw no reason to upset that general rule just because the hospital was owned by a limited partnership that included doctors as investing limited partners.

Arlington Surgicare Partners, Ltd. v. CFLS Investments, LLC, No. 02-15-00090-CV, 2015 WL 5766928 (Tex. App.–Fort Worth Oct. 1, 2015, no pet.) (mem. op.).

The court interpreted a provision of a limited partnership agreement that prohibited a limited partner from investing in specified types of competing healthcare facilities absent written consent by the general partner. The court held that the provision did not limit the authority of the general partner to grant consent.

Certain limited partners of Arlington Surgical Center (“ASC”) invested in Baylor Orthopedic and Spine Hospital of Arlington (“BOSHA”), and limited partners of ASC who did not invest in BOSHA sued the limited partners of ASC who invested in BOSHA for breaching the limited partnership agreement of ASC. The defendant limited partners sought summary judgment on the basis that they had obtained the general partner’s written consent to invest in BOSHA pursuant to the limited partnership agreement of ASC. The limited partnership agreement of ASC contained the following provision:

12.1 Offer of Participation. Each Limited Partner (other than the General Partner as to any Limited Partner Units it may own) agrees that ... neither the Limited Partner nor any of its Affiliates shall, directly or indirectly, *without the prior written consent of the General Partner, which consent may be withheld in its sole and absolute discretion*, acquire an ownership interest in or participate in the management of any (i) ambulatory surgery center or other licensed health care facility at which ambulatory surgery is performed, or (ii) short stay hospital which is identified by patient stays of three days or less located within fifteen (15) miles of the Center for so long as the Limited Partner is a Limited Partner and for a one (1) year period following the termination of such Limited Partner's status as Partner.... [Emphasis added.]

The only issue presented in this appeal was whether Section 12.1 limited the ability of the general partner to consent to investment in the types of facilities identified in Section 12.1. The trial court held that the silence of

the provision as to the standard that applies to giving consent limited the general partner's ability to grant consent. The parties agreed that the general partner had the authority to consent to investments described in Section 12.1, but the plaintiffs argued that the general partner did not have "sole and absolute discretion" to grant consent. Construing Section 12.1 of the partnership agreement according to its plain meaning by giving "consent" its ordinary meaning (i.e., acceptance or approval of what is planned or done by another or acquiescence), the court refrained from superimposing standards for, or degrees of, consent that would modify the word's plain meaning. Giving Section 12.1 its plain meaning, interpreting it so as to not render any words meaningless, and considering it with reference to the entire partnership agreement, the court held as a matter of law the general partner had authority to give written consent to the defendants' investments in BOSHA, rejecting the trial court's construction that silence in Section 12.1 as to the standard that should apply to the general partner in giving consent limited the general partner's ability to grant consent.

5. Indemnification

Lake v. Cravens, 2016 WL 1724469, __ S.W.3d __ (Tex. App.–Fort Worth 2016, no pet. h.).

The court held that an individual was entitled to indemnification under a limited partnership agreement even though the individual was found liable for fraud because the jury found that the individual acted in good faith, which was the standard for indemnification under the partnership agreement. The indemnification provision of the partnership agreement did not exclude fraud from the obligation to indemnify (although the agreement excluded fraud from exculpation), and the individual was not precluded from indemnification by the statutory provision prohibiting indemnification of persons found liable to the enterprise for willful or intentional misconduct since the jury questions inquiring about the individual's liability for fraud were all phrased in terms of alleged liability to the limited partner rather than the partnership.

Dr. Cravens, a neurosurgeon, wanted to construct and own a neurosurgical hospital in Fort Worth, and he and a developer formulated a plan under which Dr. Cravens became the limited partner in a newly formed limited partnership, RCC Medical District Facilities, Ltd. (the "Partnership"). The project failed to come to fruition, and the Partnership and Dr. Cravens sued various parties, including the developer and its vice-president, alleging fraud and numerous other causes of action. Dr. Cravens and the Partnership obtained a favorable jury verdict and final judgment for damages.

One of the issues on appeal related to a claim for indemnification asserted by Rian Maguire. (Rian Maguire was identified in the court's opinion as the developer's vice-president, but it appears he may also have been an officer of the general partner since he made a claim for indemnification under the provision below. In addition, the court at one point referred to the provision as providing indemnification "of an officer like Rian," and the jury question inquiring into good faith inquired as to the good faith of the general partner and another individual who was an officer of the general partner in addition to Rian. Rian Maguire was referred to in the court's opinion as "Rian" since his twin brother Rory Maguire was also involved in the transactions at issue.) The appellants argued that the trial court erred in refusing to grant Rian's motion for judgment on his indemnification claim.

The Partnership Agreement contained the following indemnification provision:

Neither the General Partner, nor any member, manager, shareholder, director or officer thereof shall, however, be liable, responsible or accountable in damages or otherwise to any Partner for any acts performed by it or him in good faith and within the scope of this Agreement or any failure to act unless such act or failure to act is the result of gross negligence or fraud. To the fullest extent allowed by the [Texas Business Organizations Code] and other applicable law, the Partnership shall indemnify, defend against and save harmless the General Partner and its officers ... (each an "*Indemnified Person*") from any expenses (including reasonable attorney's fees and court costs)[,] liabilities, claims, causes of action, losses or damages incurred by reason of any act or omission performed or omitted by any Indemnified Person in good faith on behalf of the Partnership or any other Partner and in a manner reasonably believed by the Indemnified Person to be within the scope of the authority granted to it by this Agreement

The jury was asked if the LLC general partner and two individuals, including Rian, acted in good faith on behalf of the Partnership or any other partner and in a manner reasonably believed by them to be within the scope

of authority granted to them by the Partnership Agreement. The jury found that Rian acted in good faith but that the general partner and the other individual did not. Based on the indemnification provision in the Partnership Agreement and the jury's finding of good faith, the court of appeals held that the trial court erred in denying Rian's motion for judgment on his indemnity claim. The Partnership argued that Rian's claim for indemnity was barred by fraud findings against Rian in answers to two other jury questions and that the Texas Business Organizations Code does not permit indemnification of a person who has been found liable to the enterprise for willful or intentional misconduct in the performance of the person's duty to the enterprise.

The Partnership argued that the fraud findings against Rian precluded indemnification based on the first sentence of the provision above, but the court pointed out that the sentence relates to liability and does not address indemnification. Under that sentence, *liability* "to a Partner" could result from gross negligence or fraud, but the sentence does not apply to the Partnership's *indemnification* of an officer.

The Partnership further argued that the trial court properly denied Rian's claim for indemnity because Rian was found liable for willful or intentional misconduct. The Partnership relied on the following provision of the Texas Business Organizations Code (BOC):

(b) Indemnification under this subchapter of a person who is found liable to the enterprise or is found liable because the person improperly received a personal benefit:

....

(3) may not be made in relation to a proceeding in which the person has been found liable for:
(A) wilful or intentional misconduct in the performance of the person's duty to the enterprise.

Tex. Bus. Orgs. Code § 8.102(b).

The court stated that this provision of the BOC did not preclude Rian's claim for indemnity because he was not "found liable to the enterprise." The jury was not asked whether Rian had any liability to the Partnership; all of the jury questions asking about Rian's conduct related to alleged liability to Dr. Cravens rather than the Partnership. In response to the only jury question asking about Rian's conduct toward the Partnership, the jury found that Rian acted in good faith. Thus, Rian was not found liable to the Partnership, and this provision of the BOC did not preclude his claim for indemnity.

The Partnership next argued that there was no evidence that Rian actually incurred attorney's fees in the case, apparently relying on Section 8.102(a) of the BOC, which provides in part that an enterprise may indemnify a governing person or delegate against expenses "that are reasonable and *actually incurred* by the person in connection with a proceeding" (emphasis added). The BOC does not define "actually incur" or "incur," nor did the court locate any cases analyzing "actually incurred" as used in this provision. The court noted, however, that the supreme court has addressed a provision in Chapter 74 of the Texas Civil Practice and Remedies Code that contains similar language. Relying on these cases, the court concluded that testimony of one of the appellants' attorneys constituted some evidence that Rian actually incurred attorney's fees in this litigation. The attorney testified that his law firm represented the developer, general partner, Rian, and another individual in the litigation. The attorney generally described the services that he and the other attorneys had performed on these parties' behalf as well as the law firm's billing practices. The attorney acknowledged that he did not know who among his firm's clients reviewed the law firm's bills and authorized payment, but the court stated that even if another of the appellants paid or advanced money for Rian's attorney's fees, Rian was still "personally liable in the first instance" for the attorney's fees. Although the trial court erred in failing to grant Rian's motion for judgment on his indemnification claim, the court of appeals concluded that it could not render judgment for Rian because the amount of attorney's fees found by the jury included more than those incurred by Rian in his defense. The amount of attorney's fees found by the jury included fees for the defense of the general partner and another individual and attorney's fees for prosecuting counterclaims. The attorney who testified did not segregate these different types of attorney's fees during his testimony. Thus, the court of appeals remanded the matter to the trial court for reconsideration of the amount that Rian should receive as indemnification under the Partnership Agreement.

6. Fraud

Lake v. Cravens, 2016 WL 1724469, __ S.W.3d __ (Tex. App.–Fort Worth 2016, no pet. h.).

A doctor claimed that he was fraudulently induced to become a limited partner in a limited partnership that was formed for the purpose of building a hospital. The limited partner obtained a judgment for damages based on statutory fraud under Section 27.01 of the Texas Business & Commerce Code, which provides for a cause of action for “fraud in a transaction involving real estate.” The appellants argued that Section 27.01 did not apply to the facts of this case because (1) acquiring a partnership interest through an agreement that incidentally deals with real estate is not within the scope of Section 27.01, and (2) the limited partner was not a party in his individual capacity to the agreement under which the limited partnership acquired real estate. The court rejected the appellants’ arguments on the basis that the appellants viewed the transaction in an overly narrow manner and ignored the unique way in which the limited partner obtained his interest in the partnership.

Dr. Cravens, a neurosurgeon, wanted to construct and own a neurosurgical hospital in Fort Worth, and he and a developer formulated a plan under which Dr. Cravens became a limited partner in a newly formed limited partnership, RCC Medical District Facilities, Ltd. (the “Partnership”). The partnership agreement of the Partnership (“Partnership Agreement”) identified Dr. Cravens as a Class A limited partner with a 99.8% limited partnership interest before payout. The Partnership Agreement credited Dr. Cravens with a \$3.32 million initial capital contribution based on the future contribution of property (on which the new hospital was to be built) by Willmar Investments, Ltd. (“Willmar”), a family limited partnership of which Dr. Cravens was the general partner. Several other agreements were executed contemporaneously with the Partnership Agreement. Willmar's conveyance of its property to the Partnership was governed by a Property Contribution Agreement. As contemplated by the Partnership Agreement, Willmar agreed to contribute the property to the Partnership. About seven months after the Partnership was formed, Willmar contributed the property to the Partnership, and interim financing was obtained. Dr. Cravens became frustrated over development fees that were being charged and delays in obtaining a construction loan. A little over a year after the interim financing was obtained, Dr. Cravens removed the Partnership’s general partner and elected Willmar in its place. About a month after that, Dr. Cravens, the Partnership, Willmar, and an entity that leased facilities on the Partnership’s property sued the developer and several other parties involved in the development of the project, alleging numerous other claims and causes of action, including a statutory fraud claim under Section 27.01 of the Texas Business and Commerce Code. At the time of trial, Dr. Cravens and the Partnership were the only plaintiffs, and they obtained a favorable jury verdict and elected to recover on claims that included the statutory fraud claim.

The appellants argued that the trial court erred by awarding Dr. Cravens final judgment on his statutory fraud claim under Section 27.01 of the Texas Business and Commerce Code. Section 27.01 provides for recovery for fraud in a transaction involving real estate. As relevant in this case, the claim requires a false representation that is made to induce a person to enter into a contract and that is relied on by that person in entering into the contract. The appellants argued that Section 27.01 did not apply to the facts of this case because (1) Dr. Cravens only acquired a partnership interest through an agreement that incidentally dealt with real estate, and (2) Dr. Cravens was not a party to the Property Contribution Agreement in his individual capacity. The court stated that the first argument viewed the transaction too narrowly, and the second ignored a key aspect of the unique transaction formulated by the parties. On the same date as the Partnership Agreement was executed, the Property Contribution Agreement as well as a Lease Agreement and Option Agreement were executed. The court stated that Texas law required that all of these agreements be construed together, and the Contribution Agreement obviously memorialized a real estate transaction—specifically, Willmar's agreement to convey its property to the Partnership. The delay in contributing the property to the Partnership did not transform the transaction into something other than one involving real estate. Construing all the agreements together, the court said that the appellants' characterization of the transaction as only an acquisition of a limited partnership interest was inaccurate. The court characterized the argument that Section 27.01 did not apply because Dr. Cravens was not a party to the Contribution Agreement individually as more compelling but ultimately unpersuasive. The parties devised a unique transaction whereby Dr. Cravens received a capital contribution credit in the amount of \$3.32 million and a corresponding 99.8% limited partnership interest in exchange for Willmar's contribution of its property. Because Willmar and the Partnership clearly intended to secure a benefit for Dr. Cravens and contracted directly for his benefit, the court held that Dr. Cravens was not prohibited from securing a judgment in his individual capacity against the appellants for statutory fraud under Section 27.01.

The court next addressed the sufficiency of the evidence of actionable misrepresentations that induced Dr. Cravens to enter into the Partnership Agreement and to sign a deed conveying property to the Partnership on behalf of Willmar. The court analyzed the evidence relating to multiple jury questions inquiring with regard to multiple parties during two different time periods. The court found that the evidence was sufficient with respect to the fraud findings as to some parties but not others.

The analysis with respect to certain challenges to the fraud findings involved the interpretation or effect of the Partnership Agreement or related agreements. For instance, Dr. Cravens alleged that he was induced to enter into the Partnership by fraudulent statements that developer fees would not be paid until the construction loan was secured. The appellants argued that Dr. Cravens could not have justifiably relied on the alleged oral representations regarding the developer fees as a matter of law based on the circumstances surrounding execution of the Partnership Agreement and provisions contained in the Partnership Agreement. Dr. Cravens was represented by counsel during the drafting of the Partnership Agreement, and the executed Partnership Agreement was the result of an arm's length transaction. The Partnership Agreement specifically allowed for the payment of developer fees, and the Partnership Agreement contained an integration clause as well as a provision stating: "Such Limited Partner has read in full and completely understands the terms of this Agreement, understands the investment objectives of the Partnership, and has (or has had the opportunity to) consulted with legal counsel regarding this Agreement." The court of appeals thus held that the evidence was legally insufficient to show that Dr. Cravens justifiably relied upon any representation that developer fees would not be paid until after a construction loan was secured.

Another fraud finding that was impacted by the agreements entered into by Dr. Cravens was the jury's finding that certain parties committed fraud by nondisclosure during a specified time period (from the date of the Partnership Agreement until the conveyance of Willmar's property to the Partnership) that induced Dr. Cravens to sign a deed conveying Willmar's property to the Partnership. The court agreed with the appellants that this jury question contained reversible error and should have been disregarded. The Partnership Agreement and Property Contribution Agreement legally obligated Dr. Cravens to cause Willmar to contribute the Property to the Partnership concurrently with the closing of the interim loan. As a matter of law, Dr. Cravens's act of signing the deed was the performance of the promise that he had made before the time period specified in the jury question, and his execution of the deed could not have been the result of fraudulent nondisclosures occurring after the contractual obligation arose.

7. Arbitration

Garg v. Pham, 485 S.W.3d 91 (Tex. App.–Houston [14th Dist.] 2015, no pet.).

The court concluded that a partner's claims against the other partner and related parties for fraud, negligent misrepresentation, breach of fiduciary duty, breach of contract, misappropriation and unfair competition, conversion, promissory estoppel, quantum meruit, and civil conspiracy were encompassed within the arbitration clause of the partnership agreement and that a nonsignatory could invoke the arbitration clause.

Pham was an attorney at the law firm Smith & Garg, LLC. Pham alleged that Sarita Garg and Brian Smith, as partners of Smith & Garg, LLC and Smith & Garg, PC, entered into a compensation agreement with Pham under which Pham was to become a partner and receive as compensation a portion of fees acquired from hours billed by associate attorneys and a percentage of the revenues of Smith & Garg, LLC and Smith & Garg, PC. Pham alleged he was not compensated as agreed by the parties, and he subsequently entered into a partnership agreement with Smith & Garg, LLC. The partnership agreement included the following arbitration clause:

In the event that any party to this Partnership Agreement contest[s] any provision herein or has a dispute with regard to this Agreement or any issues related to the Partnership, business, or any other logically related entity or business associated with Smith and Garg, [LLC,] Brian Smith, Sarita Garg, or Stephen Pham, the parties agree to mediation followed by binding arbitration in accordance with AAA standards.

After Pham was locked out of the firm, he sued Smith & Garg, LLC, Brian Smith, Sarita Garg, and Garg & Associates, P.C. (a firm in which Garg was also a shareholder) (collectively, the "Garg Parties"), asserting claims for fraud, negligent misrepresentation, breach of fiduciary duty, breach of contract, misappropriation and unfair

competition, conversion, promissory estoppel, quantum meruit, and civil conspiracy. The Garg Parties moved for arbitration of all Pham's claims, and the trial court denied the motion. The Garg Parties appealed.

Pham asserted that his claims did not relate entirely to the partnership agreement but instead related in part to an earlier oral compensation agreement and thus fell outside the scope of the arbitration clause. The court examined Pham's allegations with respect to each of his claims and concluded that Pham's claims all related "to the Partnership, business, or any logically related entity or business associated with Smith and Garg, [LLC,] Brian Smith, Sarita Garg, or Stephen Pham" and were arbitrable under the plain language of the arbitration clause.

Pham argued that Garg & Associates, PC could not compel arbitration because it was not a signatory to the partnership agreement. Generally, an arbitration clause cannot be invoked by a nonparty to the arbitration contract, but a nonsignatory may enforce an arbitration agreement in some circumstances. Because (1) Pham was a signatory to the partnership agreement; (2) Pham agreed to arbitrate "any issues related to the Partnership, business, or any logically related entity or business associated with Smith and Garg, [LLC,] Brian Smith, Sarita Garg, or Stephen Pham," which includes Garg & Associates, PC; and (3) Garg & Associates, PC's liability could not be determined without reference to the partnership agreement, the court held that the doctrine of equitable estoppel applied. Thus, Garg & Associates, PC, was entitled to compel arbitration.

The court addressed and rejected arguments by Pham that the Garg Parties waived their right to arbitration by invoking the judicial process and that the arbitration clause was unconscionable due to the cost of arbitration.

S.C. Maxwell Family Partnership, Ltd. v. Kent, 472 S.W.3d 341 (Tex. App.–Houston [1st Dist.] 2015, no pet.).

The single issue in this appeal was whether the trial court erred by denying the defendant's motion to compel arbitration in this declaratory judgment action filed by the plaintiffs to declare their partnership with the defendant valid. The disputed partnership agreement contained an arbitration clause, but the defendant was contending that there was a lack of consideration to support enforcement of the partnership agreement with the plaintiffs. Because the defendant alleged a lack of consideration as a defense to enforcement of the partnership agreement with the plaintiffs, and that allegation, if true, undermined the very existence of the contract containing the arbitration clause, the trial court did not err in denying the motion to compel arbitration.

Schwartz v. Pully, No. 05–14–00615–CV 2015 WL 4607423 (Tex. App.–Dallas Aug. 3, 2015, no pet.) (mem. op.).

The court held that the arbitration clauses in the limited partnership agreements of two hedge funds encompassed disputes between the funds and a limited partner/lawyer/CPA employed by the general partner of the funds regarding the limited partner's claim that the funds waived performance fees that would otherwise have been charged under the partnership agreement for the limited partner and his family.

8. Sufficiency of Pleadings

Moran v. Williamson, 2016 WL 2929084, __ S.W.3d __ (Tex. App.–Houston [1st Dist.] 2016, no pet. h.).

The plaintiffs sued the defendant alleging fraud and other tort claims, and the defendant asserted various tort claims as counterclaims, in a dispute over a real estate transaction. In a bench trial, the trial court attempted to resolve the dispute on the basis that it was an "oral partnership agreement gone bad." The trial court stated that the pleadings were not as clear as it would have liked, but the trial court thought that they were sufficient to raise the issue based on several references to a partnership agreement and joint ownership. The trial court orally ruled that it was going to hold that the parties take nothing on their tort claims but that he was going to treat the case as a partnership accounting or breach of partnership agreement. The trial court signed a final judgment awarding the defendant damages and attorney's fees based on breach of partnership agreement and breach of contract. The court of appeals reversed, holding that the pleadings did not allege a cause of action for breach of a partnership agreement or breach of contract, and the issues were not tried by consent. The plaintiff's attorney had repeatedly expressed his opposition to the absence of pleadings and the opportunity to prepare for trial.

G. Rights of Estate of Deceased Limited Partner

Shurberg v. La Salle Industries Limited, No. 04-15-00320-CV, 2016 WL 1128291 (Tex. App.–San Antonio Mar. 23, 2016, no pet. h.) (mem. op.).

The personal representative of a deceased limited partner sued individually and derivatively on behalf of the limited partnership, and the defendants challenged his standing to assert the claims. The personal representative argued that he had become a limited partner based on Section 153.113 of the Texas Business Organizations Code, the terms of the partnership agreement, or the consent of the other partners. The court of appeals rejected these arguments and held that the personal representative was a mere assignee who did not have standing as such to assert derivative claims for breach of fiduciary duty, fraud, negligent misrepresentation, and breach of contract. Furthermore, the court held that the personal representative's claims for injunctive relief, removal of the general partner, receivership, and accounting were derivative rather than direct claims, and the personal representative thus also lacked standing to assert those claims.

Shurberg, the personal representative (and surviving spouse and sole heir) of a deceased limited partner of a family limited partnership, sued the general partner and those in control of the general partner alleging various causes of action amounting to mismanagement of the limited partnership. Shurberg also sought access to the partnership's books and records, injunctive relief, appointment of a receiver, and an accounting. Shurberg eventually sued the other limited partners as nominal defendants. The limited partner defendants as well as the other defendants filed pleas to the jurisdiction on the basis that all of Shurberg's claims were derivative and that Shurberg was at best a mere assignee who lacked standing to bring the claims. The trial court granted the pleas to the jurisdiction and dismissed Shurberg's claims, and Shurberg appealed.

On appeal, Shurberg argued that he was a limited partner rather than a mere assignee. Shurberg asserted three grounds for his argument that he was a limited partner: (1) Section 153.113 of the Texas Business Organizations Code (BOC); (2) provisions of the limited partnership agreement; and (3) previous conduct by the general and limited partners that Shurberg argued showed they consented to his becoming a limited partner.

The court first rejected Shurberg's argument that he became a limited partner pursuant to Section 153.113 of the BOC, which provides:

If a limited partner who is an individual dies ... the limited partner's ... legal representative may exercise all of the limited partner's rights and powers to settle the limited partner's estate or administer the limited partner's property, including the power of an assignee to become a limited partner under the partnership agreement.

Shurberg argued that this statutory provision made him a de facto limited partner by giving him, as legal representative of the deceased limited partner's estate, all the deceased limited partner's rights and powers to settle her estate or administer her property. The court noted the absence of case law regarding the construction and application of Section 153.113, and the court applied principles of statutory construction to analyze the words of the provision and consider their plain meaning. After considering the plain language of Section 153.113, the court concluded that the statute did not transform Shurberg, acting as personal representative of the estate, into a limited partner. The court stated that interpreting Section 153.113 as automatically transforming an estate representative into a limited partner would render the last part of the provision mere surplusage. By its plain language, the last portion of the statute ("including the power of an assignee to become a limited partner under the partnership agreement") indicates that a legal representative is not automatically transformed into a limited partner, but may become one if the partnership agreement permits it. Thus, the court held that the statute did not automatically make Shurberg, as personal representative, a limited partner, but merely gave him the power to become a limited partner should the terms of the partnership agreement permit it.

Shurberg next argued that the successors-and-assigns provision of the partnership agreement expressly recognized his rights as a personal representative, and that he was a de facto limited partner under the terms of the partnership agreement. The provision relied upon by Shurberg provided:

This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, executors, administrators, legal representatives, successors and assigns where permitted by this Agreement.

Shurberg also pointed to language in the original assignment from the founder of the limited partnership under which the founder assigned to his niece (whose estate Shurberg now represented) a limited partnership interest. That assignment stated that “an assignee may exercise all the rights and powers of a limited partner.”

The court applied the law of contracts to the construction of the partnership agreement and concluded that there was nothing in the language of the successors-and-assigns provision to suggest an assignee or successor was automatically transformed into a limited partner. Moreover, the partnership agreement expressly provided that an assignment did not automatically give the assignee the right to become a limited partner. The partnership agreement provided:

Any assignment made to anyone, not already a partner, shall be effective only to give the assignee the right to receive the share of the profits to which his assignor would otherwise be entitled ... *and shall not give the assignee the right to become a substituted Limited Partner.* [Emphasis added.]

Thus, the plain language of the partnership agreement provided that an assignment did not automatically transform an assignee into a substituted limited partner. To the extent the language in the original assignment from the founder of the partnership to his niece conflicted with the plain language of the partnership agreement, the court stated that the partnership agreement controlled. Shurberg argued that this provision of the partnership agreement applied only to assignees who received a partnership interest by a sale rather than upon death, pointing to the title of the provision—“Permitted Sales.” However, the court pointed out that the agreement specifically stated that headers were to be “used for administrative purposes only” and that headers did “not constitute substantive matter to be considered in construing the terms of” the agreement. Thus, harmonizing and giving effect to each of the provisions in the partnership agreement, the court concluded that the partnership agreement did not automatically transform Shurberg into a limited partner.

Finally, Shurberg argued he was a limited partner based on the consent of the other limited partners. The court agreed with Shurberg that consent by the other limited partners was a valid means for him to be given limited partner status. Shurberg relied on Section 153.253 of the BOC, which governs how an assignee of a limited partnership interest becomes a limited partner if the partnership agreement does not otherwise provide, as was the case in this instance. That provision states that “an assignee of a partnership interest ... may become a limited partner if and to the extent that: (1) the partnership agreement provides; or (2) all partners consent.”

After reviewing the evidence provided by Shurberg with his response to the plea to the jurisdiction, the court concluded that it did not establish that the other limited partners consented to him becoming a limited partner. The evidence established that one of the other limited partners (who also controlled the general partner) recognized that Shurberg (as the personal representative of the estate of a deceased limited partner) was the owner of a partnership interest, and the evidence established that this individual also recognized that Shurberg had a right to information regarding that partnership interest because he was the new owner. The evidence showed that this individual interacted with Shurberg only as the owner of the deceased limited partner’s partnership interest. Further, the court stated that Shurberg did not point to any evidence of consent on the part of any other limited partners. Instead, Shurberg argued that the other limited partners treated another surviving spouse of a deceased limited partner like a limited partner. According to the court, treatment of another spouse as a limited partner did not establish evidence of consent to Shurberg being a limited partner.

H. Withdrawal of Partner

Jafar v. Mohammed, No. 14–14–00512–CV, 2016 WL 1455978 (Tex. App.–Houston [14th Dist.] Apr. 12, 2016, no pet. h.) (mem. op.).

A 50% partner withdrew from the partnership and demanded payment of the redemption value of his partnership interest. The withdrawn partner accepted an offer by the remaining partners to determine the value of the partnership and pay him 50% of the appraised amount, but the parties did not move forward on that agreement. After the withdrawn partner’s second written notice of redemption went unanswered, he sued the other partners to recover the fair value of his interest. The trial court entered a judgment in favor of the withdrawn partner for the fair value of his interest as determined by the withdrawn partner’s expert. The court of appeals affirmed.

On appeal, the court first upheld the trial court's exclusion of the defendants' expert witness for failure to timely designate. The court also held that the trial court did not abuse its discretion in admitting the testimony and appraisal report of the withdrawn partner's expert. The defendants challenged the expert's reliability on the following bases: (1) the expert's use of information pertaining to stores categorized under NAICS code 51332 Telecommunication Systems, which the defendants argued represented much larger, complex stores (such as Sprint, T-Mobile, Verizon, or Cricket) than the cell phone store operated by the partnership; (2) the expert's preparation of the report three years after the termination of the partnership; (3) the expert's use of many statistics that were not pertinent to the type of store in this case; and (4) the expert's failure to review the bank records of the business. The court of appeals considered each of these arguments and concluded that the expert's testimony and report were reliable. With respect to the first and third complaints, the court stated that the expert used this information only to determine the business's value under the market approach, which he found was \$175,000. However, the expert concluded that the income approach was more accurate in this case, and the trial court adopted his value of \$171,000 under the income approach rather than the market approach. With respect to the fact that the expert prepared the report three years after the partner's withdrawal, the court pointed out that the financial records, interest rates, and other economic data the expert relied upon in his report all reflected conditions at the time of the plaintiff's withdrawal. The defendants pointed out that the business deteriorated after the plaintiff's withdrawal, but the defendants did not show how that deterioration undermined the reliability of the expert's opinion of the business's value at the time of the withdrawal. With respect to the failure to examine banking records, the court of appeals stated that the expert testified that the information he had (e.g., weekly sales reports, quarterly sales tax reports, and operating expense report) was sufficient to perform the appraisal. The evidence showed that the income method selected by the expert calculated discretionary earnings by subtracting operating expenses, and this calculation would not be affected by how much of the remaining earnings the partners chose to accumulate as cash or to withdraw. Any additional cash on hand would have been treated as an asset under that method, which would have resulted in a higher value for the business than the one provided by the expert and adopted by the trial court.

The court of appeals next addressed the defendants' challenge to the legal sufficiency of the evidence to support the trial court's finding that the plaintiff should recover \$85,500 on his claim for redemption of his 50% partnership interest (one-half of the fair market value of the partnership under the income method). The defendants first argued that the trial court's award was based on an incorrect redemption formula. The defendants argued that the plaintiff wrongfully withdrew from the partnership and thus should have received the lower of (1) the fair value of his interest on the date of withdrawal, or (2) the amount he would have received if the partnership had been required to wind up at the time he withdrew. *See* Tex. Bus. Orgs. Code § 152.602(b). Although the trial court's findings and conclusions did not include an express finding that the plaintiff's withdrawal was not wrongful, the court of appeals said that such a finding could be implied based on the trial court's award of 50% of the fair market value of the partnership in accordance with Section 152.602(a) (which provides that a withdrawing partner is entitled to receive the fair value of the partner's interest on the date of withdrawal). The defendants argued that the plaintiff's withdrawal was wrongful because he "abandoned the store entrusted to him, fired all the employees, and left the business destitute." The trial court, however, granted summary judgment against the defendants' claim that the plaintiff breached the duty of loyalty, and the court of appeals stated that none of the defendants' allegations would constitute wrongful withdrawal even if they were true. Under Section 152.503(b) of the Texas Business Organizations Code, a withdrawal is wrongful only if:

- (1) The withdrawal breaches an express provision of the partnership agreement;
- (2) In the case of a partnership that has a period of duration, is for a particular undertaking, or is required under its partnership agreement to wind up the partnership on occurrence of a specified event, before the expiration of the period of duration, the completion of the undertaking, or the occurrence of the event, as appropriate:
 - (A) the partner withdraws by express will;
 - (B) the partner withdraws by becoming a debtor in bankruptcy; or
 - (C) in the case of a partner that is not an individual, a trust other than a business trust, or an estate, the partner is expelled or otherwise withdraws because the partner willfully dissolved or terminated; or
- (3) the partner is expelled by judicial decree under section 152.501(b)(5).

The defendants did not identify any express provision of the partnership agreement that the plaintiff violated by withdrawing, nor did they claim that he withdrew prior to a stated period of duration or the completion of a particular undertaking. There was also no evidence the plaintiff was expelled from the partnership by judicial decree. Thus, the evidence was sufficient to support the trial court's implied finding that the plaintiff's withdrawal was not wrongful.

The defendants also challenged the legal sufficiency of the evidence supporting the trial court's award by pointing to other evidence that conflicted with the expert's \$171,000 valuation of the partnership, but the court of appeals was required to assume the trial court resolved disputed facts in favor of its ruling. The plaintiff's expert testimony was reliable and provided the trial court with sufficient evidence to support its redemption award.

I. Dissolution/Winding Up

Akuna Matata Investments, Limited v. Texas Nom Limited Partnership, 814 F.3d 277 (5th Cir. 2016).

In this suit by a partner in an oil and gas partnership to dissolve the partnership and determine the partner's ownership share, the court of appeals affirmed the district court's order dissolving the partnership and awarding the partner a share of partnership profits and attorney's fees. The court concluded that earlier litigation in state court, in which damages had been adjudicated only nine months before the filing of this federal suit, did not dissolve the partnership, and the plaintiff was not barred by res judicata from bringing this action. A dissenting opinion argued that the plaintiff ought not to be able to recover lost profits in this proceeding when it chose to disaffirm the partnership and get its investment back in the state court proceeding.

In 2002, the plaintiff sued the defendant in state court alleging various claims, and in 2004, the state trial court determined that the parties had entered into an oral partnership to develop multiple oil and gas leases and awarded the plaintiff \$225,309 for the defendant's breach of oral partnership and breach of fiduciary and contractual duties. This amount was equal to the plaintiff's net investment in the partnership. The defendant appealed, and the court of appeals affirmed the trial court. Neither the trial court nor the court of appeals expressly dissolved the partnership. In 2005, the plaintiff brought this case seeking dissolution and determination of its ownership interest in the partnership. The district court found that the rancor between the parties required a winding up of the partnership and awarded \$213,354 in partnership profits to the plaintiff.

The defendant argued that this suit was barred by res judicata because the plaintiff was requesting from the federal court the same relief it had requested and received in state court. The court discussed the two suits and concluded that they did not involve the same transaction because the state court litigation was predicated only on claims for breach of contract and fiduciary duty, and the state court did not specifically decree dissolution or winding up of the partnership. To the contrary, in finding that a partnership existed between the parties, the state appellate court noted that any missing terms, such as the duration of the partnership, in an oral partnership agreement are supplied by the Texas Revised Partnership Act (which is now expired but applied to the partnership in this case because it was formed in 1997). Under Texas partnership law, winding up of a partnership occurs only after certain events take place or after a judicial decree based on certain specific findings. None of the requirements of those provisions were fulfilled; therefore, the court said it would be inconsistent with the state court's decision to infer a winding up contrary to statute. According to the court, "[t]he aim of Texas law to prescribe winding up procedures for the benefit of the partnership's creditors and the public, as well as the partners themselves, would be seriously undermined by our finding an exception for 'implied dissolution' based only on inconclusive court rulings."

In addition, the court rejected the defendant's argument that the state court's award of "reliance damages" equivalent to the plaintiff's net investment in the partnership reduced the plaintiff's partnership interest to "zero" or impliedly substituted for findings necessary to institute a judicial dissolution. Although the plaintiff had not offered sufficient proof of lost profits from the wells, the state court decided that the plaintiff had produced sufficient evidence at least to show that its investment had been recovered by the partnership's income because the partnership had generated substantial net profits. The complaint sought recovery for breach of contract and fiduciary duty, and reliance damages may be awarded for such causes of action under these circumstances. The court stated that an award of reliance damages in an amount equal to a partner's contribution thus does not necessarily dissolve a partnership or result in that partner's ownership percentage becoming zero, citing Section 1.101(2) of the Texas Revised Partnership Act under which a partner's capital account includes profits as well as the partner's initial contribution. Because the plaintiff's complaint did not seek rescission, the court said there was

no reason to make the leap that the court, while declaring that the parties entered into a partnership, simultaneously rescinded the parties' agreement via its measure of damages. The court added that partners may sue each other under Texas law without necessarily causing dissolution of the partnership (citing Section 4.06 of the Texas Revised Partnership Act). The court noted that there was a bit of ambiguity in the state appellate court's discussion due to its description of reliance damages as "restor[ing] the statute quo at the time before the contract," but the court stated that breach-of-contract damages, not rescission damages, was the focus of that discussion.

Because the parties actually litigated the issues surrounding partnership termination, the defendant argued that the state court must have decided those questions. The court acknowledged that the dissension revealed in the state court litigation might have supported findings and a judgment requiring winding up of the partnership, but the court pointed out that the winding up process consists of more than a showing of "irreconcilable differences." The partnership's creditors must be satisfied and the remaining assets distributed, and the defendant did not act as if the partnership was being wound up following the state court judgment.

The defendant requested a trial in this case, but the district court determined that there was no need for a trial. The district court ordered the parties to submit written findings and arguments concerning the value and ownership of the partnership. The defendant contended that the district court improperly resolved the issues in a summary disposition because the evidence created issues of material fact, but the court disagreed. The court said that the record showed that the nature of the proceeding approximated a trial on the merits because the district court conducted a factual inquiry, assessed credibility, and weighed the evidence.

A dissenting opinion stated that the case was simpler than it had been framed (as a case involving difficult questions of partnership law and res judicata). According to the dissenting justice, the plaintiff had achieved in two suits what it could not achieve in one because a party suing for breach of contract under Texas law may recover for its lost profits or its lost investment, but not both.

Saks v. Broadway Coffeehouse LLC, No. 04–14–00734–CV, 2015 WL 6511192 (Tex. App.–San Antonio Oct. 28, 2015, pet. denied) (mem. op.).

The assignee/grantee of a partner's interest in 5321 Broadway Partners (the "Partnership") and the real property located at 5321 Broadway (the "Property") (legal title to which was held in the name of the partners, and equitable title to which was held by the Partnership) brought this action for: (1) a declaration of the ownership of the Property and Partnership; (2) a winding up and termination of the Partnership; (3) a partition of the Property; and (4) a declaration that certain deeds and assignments signed by one of the defendants relating to the Partnership and Property were void. The trial court entered a judgment granting this relief, and the defendants appealed. The court of appeals affirmed the judgment.

The defendants argued that the partnership agreement prohibited capital withdrawals and that the plaintiff thus lacked standing to request a partition. Because the defendants cited no authority for this proposition, the issue was waived, but the court of appeals went on to state that the argument assumed the partition would result in a capital withdrawal. According to the court, the partition could not have resulted in a capital withdrawal because the trial court ordered the Partnership terminated and wound up effective as of the same date the trial court ordered the partition by sale.

The defendants contended that the trial court erred in ordering the Partnership terminated because fact issues precluded summary judgment. In its motion for partial summary judgment, the plaintiff asserted the Partnership should be terminated and wound up under Sections 11.051(4) and 11.057(c) of the Texas Business Organizations Code because (1) the partition of the Property by sale would complete the particular undertaking for which the Partnership was formed, and (2) result in the sale of all or substantially all of the property of the Partnership. In addition, the plaintiff asserted the Partnership should be terminated and wound up under Section 11.314 because of ongoing litigation involving the other partner that (1) unreasonably frustrated the economic purpose of the Partnership and (2) made it not reasonably practicable to carry on business in partnership with the other partner. The other partner was a trust involved in litigation in probate court, and the settlor was refusing to comply with the probate court's orders and made fraudulent filings claiming ownership of the Partnership. In their appellate brief, the defendants did not challenge all of the four grounds asserted in the summary judgment motion as bases for the termination and winding up of the partnership. Because the defendants did not challenge every basis on which the trial court could have ordered the Partnership terminated and wound up, the court rejected this complaint.

Finally, the defendants argued that the trial court erred in granting summary judgment because fact issues existed with regard to the ownership of the Property and Partnership. The court noted that the defendants did not raise an issue challenging the trial court's declaration that documents purporting to terminate the trust and convey the trust's partnership interest to the beneficiaries were void. The probate court's judgment in the prior proceeding conclusively established the trust's ownership of its interest in the Partnership. In addition, after reviewing all of the summary judgment evidence the court held that: (1) the evidence conclusively established the plaintiff's ownership of a 25% interest in the Partnership; and (2) record title to the Property was owned by the trust and the plaintiff.

Faulkner v. Kornman, Misc. Case No. 10-00301, 2015 WL 6444955 (Bankr. S.D. Tex. Oct. 23, 2015).

As a result of the forfeiture of a corporate general partner's privileges and charter for failure to pay franchise taxes under the Texas Tax Code, neither the sole shareholder of the corporation nor the corporation had standing to request a liquidator of the limited partnership, which had been dissolved due to the forfeiture of the general partner and cancelled by the Delaware Secretary of State for failure to pay taxes in Delaware. The court entertained the possibility that the corporate general partner would have standing if its charter was reinstated, and the court granted leave to file a renewed motion in the event of reinstatement of the charter.

To facilitate collection of a multi-million dollar judgment entered against an individual in the bankruptcy of an affiliated entity of the individual, the receiver and trustee of the creditor's trust sought appointment of a liquidator of a Delaware limited partnership. The receiver of the creditor's trust succeeded to the ownership of the general partner, a Texas corporation, in 2010 from Kornman, the judgment debtor. Kornman, the sole shareholder of the corporation, conveyed the stock to the receiver pursuant to a turnover order that ordered Kornman to turn over all of his interest in several entities. The limited partners of the partnership were two trusts, and Kornman was the primary beneficiary of one of the trusts.

A couple months before the stock of the corporate general partner was conveyed to the receiver, the corporation forfeited its existence with the Secretary of State due to failure to pay franchise taxes. In 2013, the limited partnership's certificate of limited partnership was cancelled on the records of the Delaware Secretary of State for failure to pay certain taxes. The limited partnership actually dissolved in 2010, several years before its cancellation on the records of the Delaware Secretary of State, based on the provisions of the Delaware limited partnership statute and the partnership agreement. The Delaware limited partnership statute provides that a limited partnership dissolves upon the withdrawal of a general partner, which includes the expiration of 90 days after the revocation of a corporate general partner's charter if reinstatement of the charter does not occur within the 90 days. Additionally, under the limited partnership agreement, the partnership was to be dissolved and liquidated on the withdrawal of the sole general partner if the limited partners did not elect to reconstitute the partnership and continue it with a new general partner. In the absence of a general partner, the partnership called for the limited partners to appoint a liquidator. The limited partners did not appoint a liquidator after the events triggering dissolution, and the receiver and the trustee of the creditor's trust joined in this proceeding to pursue dissolution of the limited partnership by requesting the court to appoint a liquidator to distribute the partnership's assets.

The court concluded that the receiver, as sole shareholder of the corporate general partner, lacked standing to request the court to appoint a liquidator based on the corporation's forfeited status. The court explained that the Texas Tax Code provides for forfeiture of a corporation's corporate privilege to bring and defend suits in Texas courts, state or federal, for failure to satisfy certain tax liabilities. Additionally, a corporation may also forfeit its charter under which the State of Texas permits the corporation to conduct business. The court stated that these forfeitures do not constitute dissolution, and the corporation maintains legal title to all of its assets until dissolution occurs. According to the court, a shareholder only holds beneficial title to corporate assets, and may not bring a corporate cause of action in the shareholder's own name, until dissolution occurs. The corporate general partner in this case had forfeited both its litigation privileges and its right to conduct business. The receiver first obtained an interest in the corporate general partner a little over two months after the forfeiture of its charter. The court stated that the corporate general partner may have had standing at that time to pursue dissolution of the limited partnership. However, as a result of the corporation's forfeiture, neither the receiver (the sole shareholder) nor the corporation had standing to enforce dissolution of the limited partnership. The court stated that the corporation may have standing to pursue dissolution of the limited partnership if the corporation's corporate charter was reinstated, and the court granted leave to file a renewed motion in the event of a reinstatement.

The court analyzed the Alaskan spendthrift trusts that were limited partners of the partnership and concluded that they were valid in Texas. Thus, the court noted that dissolution of the limited partnership may be of little practical benefit as it would cause the assets to be distributed primarily to the spendthrift trusts.

J. Accounting

Moran v. Williamson, 2016 WL 2929084, ___ S.W.3d ___ (Tex. App.–Houston [1st Dist.] 2016, no pet. h.).

The plaintiffs sued the defendant alleging fraud and other tort claims, and the defendant asserted various tort claims as counterclaims, in a dispute over a real estate transaction. In a bench trial, the trial court attempted to resolve the dispute on the basis that it was an “oral partnership agreement gone bad.” The trial court stated that the pleadings were not as clear as it would have liked, but the trial court thought that they were sufficient to raise the partnership claims based on several references to a partnership agreement and joint ownership. The trial court orally ruled that it was going to hold that the parties take nothing on their tort claims but that he was going to treat the case as a partnership accounting or breach of partnership agreement. The trial court signed a final judgment awarding the defendant damages and attorney’s fees based on breach of partnership agreement and breach of contract. The court of appeals reversed, holding that the pleadings did not allege a cause of action for breach of a partnership agreement or breach of contract, and the issues were not tried by consent. The plaintiff’s attorney had repeatedly expressed his opposition to the absence of pleadings and the opportunity to prepare for trial.

Shurberg v. La Salle Industries Limited, No. 04-15-00320-CV, 2016 WL 1128291 (Tex. App.–San Antonio Mar. 23, 2016, no pet. h.) (mem. op.).

The personal representative of a deceased limited partner sued individually and derivatively on behalf of the limited partnership, and the defendants challenged his standing to assert the claims. The personal representative argued that he had become a limited partner based on Section 153.113 of the Texas Business Organizations Code, the terms of the partnership agreement, or the consent of the other partners. The court of appeals rejected these arguments and held that the personal representative was a mere assignee who did not have standing as such to assert derivative claims for breach of fiduciary duty, fraud, negligent misrepresentation, and breach of contract. Furthermore, the court held that the personal representative’s claims for injunctive relief, removal of the general partner, receivership, and accounting were derivative rather than direct claims, and the personal representative thus also lacked standing to assert those claims.

Shurberg, the personal representative (and surviving spouse and sole heir) of a deceased limited partner of a family limited partnership, sued the general partner and those in control of the general partner alleging various causes of action amounting to mismanagement of the limited partnership. Shurberg also sought access to the partnership’s books and records, injunctive relief, appointment of a receiver, and an accounting. Shurberg eventually sued the other limited partners as nominal defendants. The limited partner defendants as well as the other defendants filed pleas to the jurisdiction on the basis that all of Shurberg’s claims were derivative and that Shurberg was at best a mere assignee who lacked standing to bring the claims. The trial court granted the pleas to the jurisdiction and dismissed Shurberg’s claims, and Shurberg appealed.

The parties did not dispute that Shurberg’s breach of fiduciary duty, fraud, negligent misrepresentation and breach of contract claims were derivative and must be brought by a limited partner. However, Shurberg argued that his claims for accounting, access to books and records, removal of the general partner, injunctive relief, and appointment of a receiver were direct claims because the estate suffered a direct and “unique” injury separate and apart from any injury to the limited partnership. The defendants argued that these claims were derivative in nature because the claims referred to injuries directed against the limited partnership. The defendants agreed that Shurberg’s claim for access to books and records was direct, but the defendants argued that there was no justiciable controversy because they had given Shurberg access to the limited partnership’s books and records and stipulated he was free to access them again.

The court considered the applicable law distinguishing between derivative and direct claims and concluded that Shurberg’s claims for accounting, removal of the general partner, injunctive relief, and appointment of a receiver were all derivative. The court cited partnership and corporate case law in explaining that an individual stakeholder in a legal entity does not have a right to recover personally for harms done to the legal entity. Specifically, a limited partner does not have standing to sue for injuries to the limited partnership that merely diminish the value of that partner’s interest. But an individual stakeholder has a direct claim for wrongs done to the

stakeholder in cases where the wrongdoer violates a duty that arises from a contract or otherwise that is owed directly by the wrongdoer to the stakeholder, and a wrongful act that causes an injury that is separate and distinct from a corporate injury will give rise to a direct cause of action.

With respect to Shurberg's claim for removal of the general partner, injunctive relief, and appointment of a receiver, the court focused on whether the alleged injuries suffered by Shurberg were separate and distinct from an injury suffered by the limited partnership. Based on his pleading, the court concluded that Shurberg's removal claim and applications for injunctive relief and appointment of a receiver were based on his assertion that the defendants breached their fiduciary duties to the limited partnership and the express terms of the partnership agreement, thereby causing injury to the limited partnership. Thus, the court held that Shurberg's removal claim and applications for injunctive relief and appointment of a receiver were derivative.

Shurberg relied on a Utah case in connection with his argument that his accounting claim was a direct claim, but the court of appeals pointed out that the Utah appellate court also recognized that not all accounting claims are direct. The Utah court stated that an accounting claim might be a derivative claim if it was asserted as part of another derivative claim, and the court of appeals agreed with the Utah court's analysis that an accounting claim asserted as part of a derivative claim is also a derivative claim. Shurberg cited Section 152.204 of the BOC for the proposition that his accounting claim was direct because Section 152.204(a) states that "[a] partner owes to the partnership, the other partners, and a transferee of a deceased partner's partnership interest as designated in Section 152.406(a)(2): (1) a duty of loyalty; and (2) a duty of care." The court stated that Shurberg appeared to be arguing that he as the transferee of a deceased limited partner's interest had a direct claim for an accounting because the general partners violated an independent duty of loyalty and care owed to him. However, Shurberg did not plead that the defendants breached a duty of loyalty and care owed to him in violation of Section 152.204. He instead alleged that the defendants owed a duty of fiduciary care to the deceased limited partner's estate based on Section 113.151 of the Texas Property Code, which governs trusts and provides a beneficiary may demand an accounting by a trustee. In addition, Shurberg demanded an accounting "in order to ascertain the amount due to the limited partners, including the Estate." Thus, he sought an accounting to determine the injury to all the limited partners, including himself, as a result of the defendants' breach of fiduciary duty owed to the limited partnership. Because Shurberg's accounting claim was based on his breach of fiduciary duty claim, which was an undisputed derivative claim, the court concluded that Shurberg's demand for an accounting was also a derivative claim.

Shafran v. Avital, No. H-15-140, 2015 WL 5457059 (S. D. Tex. Sept. 17, 2015).

The plaintiff sued the defendant alleging that the plaintiff, the defendant, and a third individual had a partnership or joint venture to engage in a real estate "flip" transaction. The plaintiff sought an accounting and damages for various causes of action. The defendant sought dismissal of all the claims based on Rule 12(b)(6) for failure to state a claim. The court concluded that the plaintiff had sufficiently alleged facts to state a claim for an accounting. The plaintiff alleged that the agreement among him, the defendant, and the third individual "gave rise to a joint enterprise, joint venture, or general partnership." The court stated that Texas law allows a partner to maintain an action for an accounting, citing Tex. Bus. Orgs. Code § 152.211. Thus, the plaintiff alleged sufficient facts to state a claim for an accounting, and the court denied the defendant's motion to dismiss that claim.

K. Standing or Capacity to Sue

Haddox v Federal National Mortgage Association, No. 03-15-00350-CV, 2016 WL 2659695 (Tex. App.—Austin May 6, 2016, no pet. h.) (mem. op.).

The court of appeals held that the successor to a limited partnership whose right to transact business had been forfeited by the Secretary of State under Chapter 153 of the Texas Business Organizations Code did not lack capacity to bring a forcible entry and detainer action after foreclosing under the deed of trust acquired from the limited partnership.

The Haddoxes obtained a loan from a limited partnership in 1999 to buy a house and executed a deed of trust in favor of the limited partnership. In 2006, the Secretary of State forfeited the limited partnership's right to transact business in Texas. The limited partnership assigned the loan to IndyMac Federal Bank sometime before 2010, but the record did not indicate when the assignment occurred. In 2010, the FDIC succeeded to the loan from IndyMac and assigned the loan to another bank. That bank foreclosed on the deed of trust in 2011, and Fannie Mae

bought the property at the foreclosure sale. The Haddoxes failed to vacate the property, and Fannie Mae brought this forcible detainer action.

The Haddoxes challenged Fannie Mae's standing to bring the suit based on Section 153.309 of the Texas Business Organizations Code (BOC), which states that a limited partnership that forfeits its right to transact business may not maintain an action or proceeding in a Texas court and that the limited partnership's successor or assignee may not maintain an action or proceeding in a Texas court on a right, claim, or demand arising from the transaction of business by the limited partnership in Texas. The court characterized the Haddoxes' challenge as a challenge to Fannie Mae's capacity rather than standing. Fannie Mae had standing because it had a justiciable interest in the mortgage as purchaser of the mortgage. The Haddoxes did not claim that the mortgage or deed of trust were void or invalid, and Section 153.309 provides that the forfeiture of a limited partnership's right to transact business does not impair the validity of any contract or act of the limited partnership. Although the Haddoxes failed to properly raise the issue of capacity by their failure to verify their pleadings, the court concluded that they did not establish that Fannie Mae lacked capacity to bring the suit in any event.

Because the record did not reveal when the limited partnership assigned the deed of trust to IndyMac, the court could not determine the status of the limited partnership's right to do business at the time of the assignment. The court agreed with the analysis in *Hofrock v. Federal National Mortgage Association*, No. A-13-CV-1013-LY, 2014 U.S. Dist. LEXIS 185344, at *16-18 (W.D.Tex. Mar. 18, 2014) (Lane, M.J.), approved and accepted, 2014 U.S. Dist. LEXIS 185345, at *3-4 (W.D.Tex. May 9, 2014) (Yeakel, J.), which held that the transfer of a deed did not fall within the definition of the "transaction of business." Section 153.309 provides that if a limited partnership forfeits its right to transact business, it "may not maintain an action, suit, or proceeding in a court of this state," and its successor or assignee "may not maintain an action, suit, or proceeding in a court of this state on a right, claim, or demand arising from the transaction of business by the limited partnership in this state." Tex. Bus. Orgs. Code § 153.309(a). "Transaction of business" is not defined for purposes of Chapter 153. The *Hofrock* court thus looked to Chapter 9 of the BOC, which governs foreign entities. Section 9.251 lists activities that do not constitute transaction of business, including the acquisition of "a mortgage or other security interest in real or personal property," "enforcing a right in property that secures a debt due the entity," and, with respect to "a debt secured by a mortgage or lien" on real property, "enforcing or adjusting a right or property securing the debt" or "taking an action necessary to preserve and protect the interest of the mortgagee in the security." Tex. Bus. Orgs. Code § 9.251(7), (8), (12). The court of appeals agreed with the court in *Hofrock* that the description of "transacting business" in Chapter 9 was useful in light of the absence of a definition in Chapter 153. Although *Hofrock* was not binding on the court of appeals, it found it to be well-reasoned and based on sound logic, and thus the court of appeals held that Fannie Mae's forcible detainer suit did not amount to the transaction of business subject to Section 153.309. Since the Haddoxes did not establish that Fannie Mae lacked standing or capacity to bring the suit, and Fannie Mae established that it owned the property, that the Haddoxes were tenants at sufferance, and that Fannie Mae had a superior right to immediate possession, the trial court properly found in favor of Fannie Mae in the forcible detainer action.

Lake v. Cravens, 2016 WL 1724469, __ S.W.3d __ (Tex. App.—Fort Worth 2016, no pet. h.).

The defendants in an action brought by a limited partner argued that the limited partner lacked standing to recover in his individual capacity for damages suffered by the partnership and two other entities of which the limited partner was an owner. The court of appeals rejected the defendants' argument on the basis that the defendants confused the concept of injury, which a party must suffer in order to have standing, with the concept of the right to recover damages, which was actually the subject of the defendants' challenge.

Dr. Cravens, a neurosurgeon, wanted to construct and own a neurosurgical hospital in Fort Worth, and he and a developer (Realty Capital Corp. or "RCC") formulated a plan under which RCC would be the project's developer and Dr. Cravens would be a limited partner in a newly formed limited partnership, RCC Medical District Facilities, Ltd. (the "Partnership"). The partnership agreement of the Partnership ("Partnership Agreement") identified RCC as the developer, GenPar, LLC ("GenPar") as the general partner, and Dr. Cravens as a Class A limited partner with a 99.8% limited partnership interest before payout. The Partnership Agreement credited Dr. Cravens with a \$3.32 million initial capital contribution based on the future contribution of property (on which the new hospital was to be built) by Willmar Investments, Ltd. ("Willmar"), a family limited partnership of which Dr. Cravens was the general partner. About seven months after the Partnership was formed, Willmar contributed the property to the Partnership, and interim financing was obtained. Dr. Cravens became frustrated over payment of

development fees that were being charged and delays in obtaining a construction loan. A little over a year after the interim financing was obtained, Dr. Cravens removed GenPar as the Partnership's general partner and elected Willmar in GenPar's place. About a month after that, Dr. Cravens, the Partnership, Willmar, and an entity that leased facilities on the Partnership's property (Center for Neurological Disorders Hospital, LP or "CNDH") sued RCC and several other parties involved in the development of the project, alleging fraud and numerous other claims and causes of action. At the time of trial, Dr. Cravens and the Partnership were the only plaintiffs, and they obtained a favorable jury verdict and final judgment for damages.

RCC and certain other appellants argued on appeal that Dr. Cravens lacked standing to recover damages in his individual capacity. The appellants contended that Dr. Cravens was not personally aggrieved and did not personally incur any harm or loss because he did not invest in or contribute anything of value to the Partnership. The appellants argued that any legal right to recover damages belonged to Willmar, CNDH, or the Partnership because Willmar, rather than Dr. Cravens, contributed the property to the Partnership and because CNDH, rather than Dr. Cravens, paid rent to the Partnership. The court concluded that the appellants misconstrued what it means to be personally aggrieved.

The court of appeals explained that standing is a component of subject matter jurisdiction, and the injury requirement for standing is often summarized by stating that "a plaintiff must be personally aggrieved." By arguing that Dr. Cravens sought and recovered *damages* for the value of what other entities contributed to the Partnership and lost profits that he purportedly would have received as a limited partner in the Partnership had the hospital been completed and operational, the court of appeals stated that the appellants confused the *injury* that Dr. Cravens must have suffered for purposes of having standing with the *damages* that he either sought or was awarded by the jury. The court distinguished the concept of damages from the legal injury from which damages arise. The court explained that "injury" refers to the illegal act or legal wrong while the term "damages" means the sum recoverable as redress for the wrong. The appellants argued that Dr. Cravens lacked standing to recover individually based on an opinion of the Texas Supreme Court holding that an individual stakeholder in a legal entity cannot recover personally for harms done to the legal entity. The court of appeals found it interesting, however, that the terms "standing," "justiciability," and "subject matter jurisdiction" did not appear in the majority opinion in that case. Instead the issue was repeatedly phrased as a matter of "recovering damages." The court also cited *Sneed v. Webre*, 465 S.W.3d 169, 186 (Tex.2015), in which the Texas Supreme Court considered whether the business judgment rule deprived a shareholder of standing to assert a derivative proceeding on behalf of a closely held corporation and observed that the defendants confused the right to obtain relief with the jurisdiction of the court to afford it. The court stated that "insofar as Dr. Cravens may have sought, and the jury may have improperly awarded, any damages that belong to the Partnership or some other entity, that issue is more appropriately raised through a direct challenge to the damages award, a merits-based inquiry, not via an argument premised upon a lack of standing, a jurisdictional inquiry." The court stated that it would be improper to conflate the standing requirement that Dr. Cravens suffer a personal injury with his ability or inability to recover damages that were arguably incurred by a different entity. Because Dr. Cravens pleaded and testified that the appellants fraudulently induced him to enter into the Partnership agreement by misrepresenting their ability to develop the project and obtain construction financing, the court held that Dr. Cravens met his initial burden to show that he was personally aggrieved by the acts or omissions of the appellants for purposes of demonstrating standing to recover damages individually.

Shurberg v. La Salle Industries Limited, No. 04-15-00320-CV, 2016 WL 1128291 (Tex. App.–San Antonio Mar. 23, 2016, no pet. h.) (mem. op.).

The personal representative of a deceased limited partner sued individually and derivatively on behalf of the limited partnership, and the defendants challenged his standing to assert the claims. The personal representative argued that he had become a limited partner based on Section 153.113 of the Texas Business Organizations Code, the terms of the partnership agreement, or the consent of the other partners. The court of appeals rejected these arguments and held that the personal representative was a mere assignee who did not have standing as such to assert derivative claims for breach of fiduciary duty, fraud, negligent misrepresentation, and breach of contract. Furthermore, the court held that the personal representative's claims for injunctive relief, removal of the general partner, receivership, and accounting were derivative rather than direct claims, and the personal representative thus also lacked standing to assert those claims.

Shurberg, the personal representative (and surviving spouse and sole heir) of a deceased limited partner of a family limited partnership, sued the general partner and those in control of the general partner alleging various

causes of action amounting to mismanagement of the limited partnership. Shurberg also sought access to the partnership's books and records, injunctive relief, appointment of a receiver, and an accounting. Shurberg eventually sued the other limited partners as nominal defendants. The limited partner defendants as well as the other defendants filed pleas to the jurisdiction on the basis that all of Shurberg's claims were derivative and that Shurberg was at best a mere assignee who lacked standing to bring the claims. The trial court granted the pleas to the jurisdiction and dismissed Shurberg's claims, and Shurberg appealed.

On appeal, Shurberg argued that he was a limited partner rather than a mere assignee. After determining that Shurberg was not a limited partner, the court addressed the question of whether Shurberg had standing to pursue his claims. The parties agreed that Section 153.402 of the BOC identifies who may bring a derivative claim. Section 153.402 provides that the plaintiff in a derivative action "must be a limited partner when the action is brought and...must have been a limited partner at the time of the transaction that is the subject of the action; or [the status of] limited partner must have arisen by operation of law or under the terms of the partnership agreement from a person who was a limited partner at the time of the transaction." Thus, Shurberg lacked standing to bring any derivative claims because he was not a limited partner.

The parties did not dispute that Shurberg's breach of fiduciary duty, fraud, negligent misrepresentation and breach of contract claims were derivative and must be brought by a limited partner. However, Shurberg argued that his claims for accounting, access to books and records, removal of the general partner, injunctive relief, and appointment of a receiver were direct claims because the estate suffered a direct and "unique" injury separate and apart from any injury to the limited partnership. The defendants argued that these claims were derivative in nature because the claims referred to injuries directed against the limited partnership. The defendants agreed that Shurberg's claim for access to books and records was direct, but the defendants argued that there was no justiciable controversy because they had given Shurberg access to the limited partnership's books and records and stipulated he was free to access them again.

The court considered the applicable law distinguishing between derivative and direct claims and concluded that Shurberg's claims for accounting, removal of the general partner, injunctive relief, and appointment of a receiver were all derivative. The court cited partnership and corporate case law in explaining that an individual stakeholder in a legal entity does not have a right to recover personally for harms done to the legal entity. Specifically, a limited partner does not have standing to sue for injuries to the limited partnership that merely diminish the value of that partner's interest. But an individual stakeholder has a direct claim for wrongs done to the stakeholder in cases where the wrongdoer violates a duty that arises from a contract or otherwise that is owed directly by the wrongdoer to the stakeholder, and a wrongful act that causes an injury that is separate and distinct from a corporate injury will give rise to a direct cause of action.

With respect to Shurberg's claim for removal of the general partner, injunctive relief, and appointment of a receiver, the court focused on whether the alleged injuries suffered by Shurberg were separate and distinct from an injury suffered by the limited partnership. Based on his pleading, the court concluded that Shurberg's removal claim and applications for injunctive relief and appointment of a receiver were based on his assertion that the defendants breached their fiduciary duties to the limited partnership and the express terms of the partnership agreement, thereby causing injury to the limited partnership. Although Shurberg argued that he was injured by the wrongdoing, he did not allege any injury separate and distinct from that of the limited partnership and thus did not have a separate and independent right to bring the claims. Thus, the court held that Shurberg's removal claim and applications for injunctive relief and appointment of a receiver were derivative.

Shurberg relied on a Utah case in connection with his argument that his accounting claim was a direct claim, but the court of appeals pointed out that the Utah appellate court also recognized that not all accounting claims are direct. The Utah court stated that an accounting claim might be a derivative claim if it was asserted as part of another derivative claim, and the court of appeals agreed with the Utah court's analysis that an accounting claim asserted as part of a derivative claim is also a derivative claim. Shurberg cited Section 152.204 of the BOC for the proposition that his accounting claim was direct because Section 152.204(a) states that "[a] partner owes to the partnership, the other partners, and a transferee of a deceased partner's partnership interest as designated in Section 152.406(a)(2): (1) a duty of loyalty; and (2) a duty of care." The court stated that Shurberg appeared to be arguing that he as the transferee of a deceased limited partner's interest had a direct claim for an accounting because the general partners violated an independent duty of loyalty and care owed to him. However, Shurberg did not plead that the defendants breached a duty of loyalty and care owed to him in violation of Section 152.204. He instead alleged that the defendants owed a duty of fiduciary care to the deceased limited partner's estate based on Section

113.151 of the Texas Property Code, which governs trusts and provides a beneficiary may demand an accounting by a trustee. In addition, Shurberg demanded an accounting “in order to ascertain the amount due to the limited partners, including the Estate.” Thus, he sought an accounting to determine the injury to all the limited partners, including himself, as a result of the defendants’ breach of fiduciary duty owed to the limited partnership. Because Shurberg’s accounting claim was based on his breach of fiduciary duty claim, which was an undisputed derivative claim, the court concluded that Shurberg’s demand for an accounting was also a derivative claim.

Faulkner v. Kornman, Misc. Case No. 10-00301, 2015 WL 6444955 (Bankr. S.D. Tex. Oct. 23, 2015).

As a result of the forfeiture of a corporate general partner’s privileges and charter for failure to pay franchise taxes under the Texas Tax Code, neither the sole shareholder of the corporation nor the corporation had standing to request a liquidator of the limited partnership, which had been dissolved due to the forfeiture of the general partner and cancelled by the Delaware Secretary of State for failure to pay taxes in Delaware. The court entertained the possibility that the corporate general partner would have standing if its charter was reinstated, and the court granted leave to file a renewed motion in the event of reinstatement of the charter.

To facilitate collection of a multi-million dollar judgment entered against an individual in the bankruptcy of an affiliated entity of the individual, the receiver and trustee of the creditor’s trust sought appointment of a liquidator of a Delaware limited partnership. The receiver of the creditor’s trust succeeded to the ownership of the general partner, a Texas corporation, in 2010 from Kornman, the judgment debtor. Kornman, the sole shareholder of the corporation, conveyed the stock to the receiver pursuant to a turnover order that ordered Kornman to turn over all of his interest in several entities. The limited partners of the partnership were two trusts, and Kornman was the primary beneficiary of one of the trusts.

A couple months before the stock of the corporate general partner was conveyed to the receiver, the corporation forfeited its existence with the Secretary of State due to failure to pay franchise taxes. In 2013, the limited partnership’s certificate of limited partnership was cancelled on the records of the Delaware Secretary of State for failure to pay certain taxes. The limited partnership actually dissolved in 2010, several years before its cancellation on the records of the Delaware Secretary of State, based on the provisions of the Delaware limited partnership statute and the partnership agreement. The Delaware limited partnership statute provides that a limited partnership dissolves upon the withdrawal of a general partner, which includes the expiration of 90 days after the revocation of a corporate general partner’s charter if reinstatement of the charter does not occur within the 90 days. Additionally, under the limited partnership agreement, the partnership was to be dissolved and liquidated on the withdrawal of the sole general partner if the limited partners did not elect to reconstitute the partnership and continue it with a new general partner. In the absence of a general partner, the partnership called for the limited partners to appoint a liquidator. The limited partners did not appoint a liquidator after the events triggering dissolution, and the receiver and the trustee of the creditor’s trust joined in this proceeding to pursue dissolution of the limited partnership by requesting the court to appoint a liquidator to distribute the partnership’s assets.

The court concluded that the receiver, as sole shareholder of the corporate general partner, lacked standing to request the court to appoint a liquidator based on the corporation’s forfeited status. The court explained that the Texas Tax Code provides for forfeiture of a corporation’s corporate privilege to bring and defend suits in Texas courts, state or federal, for failure to satisfy certain tax liabilities. Additionally, a corporation may also forfeit its charter under which the State of Texas permits the corporation to conduct business. The court stated that these forfeitures do not constitute dissolution, and the corporation maintains legal title to all of its assets until dissolution occurs. According to the court, a shareholder only holds beneficial title to corporate assets, and may not bring a corporate cause of action in the shareholder’s own name, until dissolution occurs. The corporate general partner in this case had forfeited both its litigation privileges and its right to conduct business. The receiver first obtained an interest in the corporate general partner a little over two months after the forfeiture of its charter. The court stated that the corporate general partner may have had standing at that time to pursue dissolution of the limited partnership. However, as a result of the corporation’s forfeiture, neither the receiver (the sole shareholder) nor the corporation had standing to enforce dissolution of the limited partnership. The court stated that the corporation may have standing to pursue dissolution of the limited partnership if the corporation’s corporate charter was reinstated, and the court granted leave to file a renewed motion in the event of a reinstatement.

The court analyzed the Alaskan spendthrift trusts that were limited partners of the partnership and concluded that they were valid in Texas. Thus, the court noted that dissolution of the limited partnership may be of little practical benefit as it would cause the assets to be distributed primarily to the spendthrift trusts.

L. Direct and Derivative Claims

Lake v. Cravens, 2016 WL 1724469, __ S.W.3d __ (Tex. App.–Fort Worth 2016, no pet. h.).

The defendants in an action brought by a limited partner argued that the limited partner lacked standing to recover in his individual capacity for damages suffered by the partnership and two other entities of which the limited partner was an owner. The court of appeals rejected the defendants' argument on the basis that the defendants confused the concept of injury, which a party must suffer in order to have standing, with the concept of the right to recover damages, which was actually the subject of the defendants' challenge.

Dr. Cravens, a neurosurgeon, wanted to construct and own a neurosurgical hospital in Fort Worth, and he and a developer (Realty Capital Corp. or "RCC") formulated a plan under which RCC would be the project's developer and Dr. Cravens would be a limited partner in a newly formed limited partnership, RCC Medical District Facilities, Ltd. (the "Partnership"). The partnership agreement of the Partnership ("Partnership Agreement") identified RCC as the developer, GenPar, LLC ("GenPar") as the general partner, and Dr. Cravens as a Class A limited partner with a 99.8% limited partnership interest before payout. The Partnership Agreement credited Dr. Cravens with a \$3.32 million initial capital contribution based on the future contribution of property (on which the new hospital was to be built) by Willmar Investments, Ltd. ("Willmar"), a family limited partnership of which Dr. Cravens was the general partner. About seven months after the Partnership was formed, Willmar contributed the property to the Partnership, and interim financing was obtained. Dr. Cravens became frustrated over delays in obtaining a construction loan and payment of development fees that were being charged. A little over a year after the interim financing was obtained, Dr. Cravens removed GenPar as the Partnership's general partner and elected Willmar in GenPar's place. About a month after that, Dr. Cravens, the Partnership, Willmar, and an entity that leased facilities on the Partnership's property (Center for Neurological Disorders Hospital, LP or "CNDH") sued RCC and several other parties involved in the development of the project, alleging fraud and numerous other claims and causes of action. At the time of trial, Dr. Cravens and the Partnership were the only plaintiffs, and they obtained a favorable jury verdict and final judgment for damages.

RCC and certain other appellants argued on appeal that Dr. Cravens lacked standing to recover damages in his individual capacity. The appellants contended that Dr. Cravens was not personally aggrieved and did not personally incur any harm or loss because he did not invest in or contribute anything of value to the Partnership. The appellants argued that any legal right to recover damages belonged to Willmar, CNDH, or the Partnership because Willmar, rather than Dr. Cravens contributed the property to the Partnership and because CNDH, rather than Dr. Cravens, paid rent to the Partnership. The court concluded that the appellants misconstrued what it means to be personally aggrieved.

The court of appeals explained that standing is a component of subject matter jurisdiction, and the injury requirement for standing is often summarize by stating that "a plaintiff must be personally aggrieved." By arguing that Dr. Cravens sought and recovered *damages* for the value of what other entities contributed to the Partnership and lost profits that he purportedly would have received as a limited partner in the Partnership had the hospital been completed and operational, the court of appeals stated that the appellants confused the *injury* that Dr. Cravens must have suffered for purposes of having standing with the *damages* that he either sought or was awarded by the jury. The court distinguished the concept of damages from the legal injury from which damages arise. The court explained that "injury" refers to the illegal act or legal wrong while the term "damages" means the sum recoverable as redress for the wrong. The appellants argued that Dr. Cravens lacked standing to recover individually based on an opinion of the Texas Supreme Court holding that an individual stakeholder in a legal entity cannot recover personally for harms done to the legal entity. The court of appeals found it interesting, however, that the terms "standing," "justiciability," and "subject matter jurisdiction" did not appear in the majority opinion in that case. Instead the issue was repeatedly phrased as a matter of "recovering damages." The court also cited *Sneed v. Webre*, 465 S.W.3d 169, 186 (Tex.2015), in which the Texas Supreme Court considered whether the business judgment rule deprived a shareholder of standing to assert a derivative proceeding on behalf of a closely held corporation and observed that the defendants confused the right to obtain relief with the jurisdiction of the court to afford it. The court stated that "insofar as Dr. Cravens may have sought, and the jury may have improperly awarded, any damages that belong to the Partnership or some other entity, that issue is more appropriately raised through a direct challenge to the damages award, a merits-based inquiry, not via an argument premised upon a lack of standing, a jurisdictional inquiry." The court stated that it would be improper to conflate the standing requirement that Dr. Cravens suffer a personal injury with his ability or inability to recover damages that were arguably incurred by a different entity.

Because Dr. Cravens pleaded and testified that the appellants fraudulently induced him to enter into the Partnership agreement by misrepresenting their ability to develop the project and obtain construction financing, the court held that Dr. Cravens met his initial burden to show that he was personally aggrieved by the acts or omissions of the appellants for purposes of demonstrating standing to recover damages individually.

Shurberg v. La Salle Industries Limited, No. 04-15-00320-CV, 2016 WL 1128291 (Tex. App.–San Antonio Mar. 23, 2016, no pet. h.) (mem. op.).

The personal representative of a deceased limited partner sued individually and derivatively on behalf of the limited partnership, and the defendants challenged his standing to assert the claims. The personal representative argued that he had become a limited partner based on Section 153.113 of the Texas Business Organizations Code, the terms of the partnership agreement, or the consent of the other partners. The court of appeals rejected these arguments and held that the personal representative was a mere assignee who did not have standing as such to assert derivative claims for breach of fiduciary duty, fraud, negligent misrepresentation, and breach of contract. Furthermore, the court held that the personal representative's claims for injunctive relief, removal of the general partner, receivership, and accounting were derivative rather than direct claims, and the personal representative thus also lacked standing to assert those claims.

Shurberg, the personal representative (and surviving spouse and sole heir) of a deceased limited partner of a family limited partnership, sued the general partner and those in control of the general partner alleging various causes of action amounting to mismanagement of the limited partnership. Shurberg also sought access to the partnership's books and records, injunctive relief, appointment of a receiver, and an accounting. Shurberg eventually sued the other limited partners as nominal defendants. The limited partner defendants as well as the other defendants filed pleas to the jurisdiction on the basis that all of Shurberg's claims were derivative and that Shurberg was at best a mere assignee who lacked standing to bring the claims. The trial court granted the pleas to the jurisdiction and dismissed Shurberg's claims, and Shurberg appealed.

On appeal, Shurberg argued that he was a limited partner rather than a mere assignee. After determining that Shurberg was not a limited partner, the court addressed the question of whether Shurberg had standing to pursue his claims. The parties agreed that Section 153.402 of the BOC identifies who may bring a derivative claim. Section 153.402 provides that the plaintiff in a derivative action "must be a limited partner when the action is brought and...must have been a limited partner at the time of the transaction that is the subject of the action; or [the status of] limited partner must have arisen by operation of law or under the terms of the partnership agreement from a person who was a limited partner at the time of the transaction." Thus, Shurberg lacked standing to bring any derivative claims because he was not a limited partner.

The parties did not dispute that Shurberg's breach of fiduciary duty, fraud, negligent misrepresentation and breach of contract claims were derivative and must be brought by a limited partner. However, Shurberg argued that his claims for accounting, access to books and records, removal of the general partner, injunctive relief, and appointment of a receiver were direct claims because the estate suffered a direct and "unique" injury separate and apart from any injury to the limited partnership. The defendants argued that these claims were derivative in nature because the claims referred to injuries directed against the limited partnership. The defendants agreed that Shurberg's claim for access to books and records was direct, but the defendants argued that there was no justiciable controversy because they had given Shurberg access to the limited partnership's books and records and stipulated he was free to access them again.

The court considered the applicable law distinguishing between derivative and direct claims and concluded that Shurberg's claims for accounting, removal of the general partner, injunctive relief, and appointment of a receiver were all derivative. The court cited partnership and corporate case law in explaining that an individual stakeholder in a legal entity does not have a right to recover personally for harms done to the legal entity. Specifically, a limited partner does not have standing to sue for injuries to the limited partnership that merely diminish the value of that partner's interest. But an individual stakeholder has a direct claim for wrongs done to the stakeholder in cases where the wrongdoer violates a duty that arises from a contract or otherwise that is owed directly by the wrongdoer to the stakeholder, and a wrongful act that causes an injury that is separate and distinct from a corporate injury will give rise to a direct cause of action.

With respect to Shurberg's claim for removal of the general partner, injunctive relief, and appointment of a receiver, the court focused on whether the alleged injuries suffered by Shurberg were separate and distinct from an injury suffered by the limited partnership. Based on his pleading, the court concluded that Shurberg's removal

claim and applications for injunctive relief and appointment of a receiver were based on his assertion that the defendants breached their fiduciary duties to the limited partnership and the express terms of the partnership agreement, thereby causing injury to the limited partnership. Although Shurberg argued that he was injured by the wrongdoing, he did not allege any injury separate and distinct from that of the limited partnership and thus did not have a separate and independent right to bring the claims. Thus, the court held that Shurberg's removal claim and applications for injunctive relief and appointment of a receiver were derivative.

Shurberg relied on a Utah case in connection with his argument that his accounting claim was a direct claim, but the court of appeals pointed out that the Utah appellate court also recognized that not all accounting claims are direct. The Utah court stated that an accounting claim might be a derivative claim if it was asserted as part of another derivative claim, and the court of appeals agreed with the Utah court's analysis that an accounting claim asserted as part of a derivative claim is also a derivative claim. Shurberg cited Section 152.204 of the BOC for the proposition that his accounting claim was direct because Section 152.204(a) states that "[a] partner owes to the partnership, the other partners, and a transferee of a deceased partner's partnership interest as designated in Section 152.406(a)(2): (1) a duty of loyalty; and (2) a duty of care." The court stated that Shurberg appeared to be arguing that he as the transferee of a deceased limited partner's interest had a direct claim for an accounting because the general partners violated an independent duty of loyalty and care owed to him. However, Shurberg did not plead that the defendants breached a duty of loyalty and care owed to him in violation of Section 152.204. He instead alleged that the defendants owed a duty of fiduciary care to the deceased limited partner's estate based on Section 113.151 of the Texas Property Code, which governs trusts and provides a beneficiary may demand an accounting by a trustee. In addition, Shurberg demanded an accounting "in order to ascertain the amount due to the limited partners, including the Estate." Thus, he sought an accounting to determine the injury to all the limited partners, including himself, as a result of the defendants' breach of fiduciary duty owed to the limited partnership. Because Shurberg's accounting claim was based on his breach of fiduciary duty claim, which was an undisputed derivative claim, the court concluded that Shurberg's demand for an accounting was also a derivative claim.

M. Personal Jurisdiction

Cornerstone Healthcare Group Holding, Inc. v. Nautic Management VI, L.P., 2016 WL 3382159, __ S.W.3d __ (Tex. 2016).

Three nonresident investment fund limited partnerships invested in a newly created Texas subsidiary that purchased a chain of Texas hospitals from a Texas company. The plaintiff, which was a Texas company that was in the market to purchase the hospitals, asserted that the defendants stole the opportunity to purchase the hospitals and that their tortious conduct subjected the defendants to Texas's jurisdiction with respect to claims arising out of that conduct. Other defendants included officers of the plaintiff who allegedly breached their duties to the plaintiff by secretly appropriating the opportunity to purchase the hospitals and joining forces with the private equity firm that then took the deal to the general partner of the funds. The limited partnerships and their nonresident general partner contested personal jurisdiction, but the supreme court concluded that they were subject to specific personal jurisdiction of Texas courts.

The three nonresident investment fund limited partnerships (the "Funds") and their nonresident general partner (collectively the "Fund Defendants") described their role in the underlying events as "limited to creating and funding a subsidiary that, in turn, indirectly invested in the Reliant hospital chain through further subsidiaries." The Fund Defendants cited settled law that the contacts of distinct legal entities, including parents and subsidiaries, must be assessed separately for jurisdictional purposes unless the corporate veil is pierced. They argued that, because the record showed that the entity that had direct contact with Texas was an indirect subsidiary of the Funds rather than the Funds themselves, and because the plaintiff never argued or proved that the subsidiary's contacts could be attributed to the Fund Defendants under a veil-piercing theory, jurisdiction over the Fund Defendants was lacking. The court agreed with the principle that "so long as a parent and subsidiary maintain separate and distinct corporate entities, the presence of one in a forum state may not be attributed to the other," and the court acknowledged that the plaintiff did not argue that the Funds and their subsidiaries failed to maintain their legal separateness or that the Texas contacts of any one of those entities could or should be attributed to any other. Thus, the subsidiary's Texas contacts (i.e., its ownership and operation of hospitals in Texas) could not in and of themselves subject the subsidiary's limited partnership parent companies and their general partner to Texas's jurisdiction. But the Funds' use of a subsidiary to purchase the hospitals did not end the inquiry. The court stated

that the plaintiff was not attempting to attribute the contacts established by the subsidiary as a going concern to the Funds or their general partner; the plaintiff was seeking to trace the purchase of Texas assets to the entities that spearheaded and directed the transaction and ultimately stood to profit from it. The court agreed with the plaintiff that “[k]eeping legal entities distinct does not mean they can escape jurisdiction by splitting an integrated transaction into little bits.” The court stated that the hospital purchase did not stem from a third party's unilateral activity; it was the result of a transaction stemming from the activity of the Fund Defendants themselves. The Funds, through the general partner, targeted Texas assets in which to invest and sought to profit from that investment.

Because the plaintiff alleged that the Fund Defendants' minimum contacts conferred on Texas specific, rather than general, jurisdiction, the court had to determine whether the plaintiff's causes of action arose from or related to the Fund Defendants' purposeful contacts with Texas—in other words, that there was a substantial connection between the contacts and the operative facts of the litigation. The plaintiff alleged that the Fund Defendants used the plaintiff's confidential information to divert the hospital purchase and that the transaction itself, which culminated in the subsidiary's purchase of the hospital assets, constituted tortious interference as well as aiding and abetting a usurpation of the opportunity to purchase the hospitals. The crux of the Fund Defendants' purposeful contact with Texas would be the focus of the claims against the Fund Defendants at trial. Thus, the court held that the claims arose out of the Fund Defendants' Texas contacts.

Having determined that the Fund Defendants had minimum contacts with Texas, the court turned to whether the exercise of personal jurisdiction comported with traditional notions of fair play and substantial justice. After considering the relevant factors in this analysis, the court concluded that exercising personal jurisdiction over the respondents did comport with traditional notions of fair play and substantial justice.

Hoskins v. Ricco Family Partners, No. 02-15-00249-CV, No. 02-15-00253-CV, 2016 WL 2772164 (Tex. App.—Fort Worth May 12, 2016, no pet. h.) (mem. op.).

In this suit to quiet title, the court held that the plaintiff had sufficiently alleged actions that supported the exercise of specific personal jurisdiction over individuals who were limited partners in a limited partnership that owned real property in Texas on which the plaintiff foreclosed. Although the court acknowledged that mere passive investment in a limited partnership will not amount to purposeful availment, the plaintiff alleged that the individuals' involvement went further than their mere status as limited partners of the former property owner. The plaintiff contended that the individuals were jointly and severally liable with the other defendants based on their role in a conspiracy to create a false perception of a second lien on the property. The plaintiff alleged that the individuals assisted in backdating documents that enabled another party to record documents in the real estate records that created a cloud on the property's title. The court held that these alleged actions were directed at the state of Texas rather than solely at the plaintiff and showed purposeful availment sufficient to support minimum contacts for purposes of specific jurisdiction.

Carruth v. Michot, No. A-15-CA-189-SS, 2015 WL 6506550 (W.D. Tex. Oct. 26, 2015).

A partner's own business activities in Texas could not be imputed to his co-partners in Louisiana for purposes of analyzing minimum contacts of the Louisiana partners in a dispute among the partners. A partner's actions may be imputed to the partnership for the purpose of establishing minimum contacts, but the partner's actions ordinarily may not be imputed to the other partners.

The plaintiff, a Texas resident, and the defendants, Louisiana residents, were members of a band that operated as a defacto partnership. After being ousted from the band, the plaintiff sued the defendants asserting various causes of action. The plaintiff asserted that the defendants had sufficient contacts to support general or specific jurisdiction and suggested that his activities in Texas on behalf of the band should be attributed to the defendants as members of the de facto partnership. The court refused to impute the plaintiff's activities to the defendants, stating that a partner's actions may be imputed to the partnership for the purpose of establishing minimum contacts, but ordinarily may not be imputed to the other partners. Ignoring the plaintiff's activities on behalf of the band, the defendants had not engaged in “continuous and systematic” activity in Texas so as to justify general jurisdiction. The court did find that the plaintiff satisfied his burden of establishing specific jurisdiction over the defendants, but the defendants established that venue should be transferred to the Western District of Louisiana as the more convenient forum in this case.

N. Attorney's Fees

Traxxas, L.P. v. DeWitt, No. 4:14CV733, 2015 WL 7777986 (E.D. Tex. Dec. 2, 2015).

The court dismissed the defendant's claim for attorney's fees against a limited partnership under Section 38.001 of the Texas Civil Practice and Remedies Code, relying on *Ganz v. Lyons P'ship, L.P.*, 173 F.R.D. 173, 176 (N.D. Tex. 1997), which held that the statute does not provide for recovery of attorney's fees against a limited partnership. The defendant argued that the Texas Supreme Court allowed recovery of attorney's fees against a partnership under Section 38.001 in *Bohatch v. Butler & Binion*, 977 S.W.2d 543, 547 (Tex. 1998), but the court pointed out that the case did not address the recoverability of attorney's fees from a defendant under Section 38.001 because the issue was not presented on appeal. The court agreed with the reasoning in *Ganz* that the legislature excluded "partnerships" from the statute by referencing "individuals" and "corporations" rather than the broader term "person," which is defined to include partnerships. Because the plaintiff was a limited partnership, the court thus dismissed the defendant's claim against it for attorney's fees.

Fleming v. Kirklin Law Firm, P.C., No. 14-14-00202-CV, 2015 WL 7258700 (Tex. App.–Houston [14th Dist.] Nov. 17, 2015, no pet. h.) (mem. op.).

The plaintiffs argued that the trial court erred when it refused to award them attorney's fees on their breach of contract claim against a law firm. The law firm was a limited liability partnership, and a previous opinion of this court of appeals held that Section 38.001 of the Civil Practices and Remedies Code does not authorize an award of attorney's fees against an LLP. See *Fleming & Assoc., L.L.P. v. Barton*, 425 S.W.3d 560, 576 (Tex. App.–Houston [14th Dist.] 2014, pet. denied). Because the law firm in this case was an LLP and the only basis on which the plaintiffs sought attorney's fees was Section 38.001 of the Civil Practice and Remedies Code, the court of appeals held that the trial court did not err when it refused to award attorney's fees against the firm.

O. Divorce

In the Interest of K.R.C., No. 05–13–01419–CV, 2015 WL 7731784 (Tex. App.–Dallas Dec. 1, 2015, no pet. h.) (mem. op.).

The court of appeals affirmed a monetary judgment against the husband in a divorce action, holding that the divorce court did not err in ordering the husband to pay an amount as reconstitution of amounts he fraudulently caused the couple's community property limited partnership to pay an employee with whom the husband was romantically involved.

Husband and wife were the sole limited partners of a medical services billing limited partnership and the sole owners of the general partner. Husband became romantically involved with an employee of the partnership, and the evidence showed that the employee was overpaid by the partnership over a period of several years. Husband's adultery and its role in the dissolution of the marriage were not in dispute, and the trial court specifically found that husband was at fault in the breakup of the marriage and guilty of adultery. Further, husband wasted community assets and engaged in fraud on the community estate, and husband was ordered to pay reconstitution of the community estate in the amount of \$195,000 based on the evidence of overpayment of the employee.

Husband argued that partnership funds are not community property, and that any reconstitution that included \$195,000 for compensation paid by the partnership was error because the funds used were not community property. Husband argued that he did not deprive wife of any interest in the partnership and that the partnership made payments to its employees in the course of doing business. Wife argued that husband did not have the unfettered right to deplete a community asset.

The court of appeals concluded the case relied on by husband, *Lifshutz v. Lifshutz*, 61 S.W.3d 511, 518 (Tex. App.–San Antonio 2001, pet. denied), was distinguishable. In *Lifshutz*, the husband's interests in certain companies were his separate property. During the divorce, the wife attempted to pierce the corporate veil of the husband's companies and reach company assets for distribution as part of the community estate. The court of appeals cited the Texas Revised Partnership Act for the proposition that a partner's spouse has no community property right in partnership property. A trial court may not award specific partnership assets to a non-partner spouse in the event of a divorce; the court may only award the spouse an interest in the partnership. If the husband's interest in a partnership is separate property, it cannot be awarded to the wife, and the wife cannot pierce the partnership and acquire partnership assets for distribution.

In this case, however, the partnership was owned one hundred percent by husband and wife, and wife did not seek to pierce the partnership and acquire partnership assets. She sought reconstitution of amounts fraudulently paid by the partnership in which she was a 50% owner. The court stated that husband in effect used the partnership to deprive wife of her interest in the partnership by fraudulently paying approximately \$195,000 to the employee. The evidence supported the money judgment against husband, and the trial court did not abuse its discretion in entering the judgment.

P. Securities Law

Securities and Exchange Commission v. Arcturus Corporation, 2016 WL 1109255, __ F.Supp.3d __ (N.D. Tex. 2016).

The court held that joint venture interests in oil and gas drilling projects were “investment contracts” within the definition of “securities” under the federal securities laws, and various entities and individuals who sold these securities violated federal law by selling unregistered securities, acting as unregistered brokers, and engaging in securities fraud.

Over a period of several years, Parvizian, an individual, and two entities formed and controlled by Parvizian, sold interests in six oil and gas well drilling projects that became the subject of an investigation by the Securities and Exchange Commission (“SEC”). One of the Parvizian entities served as managing venturer of each joint venture and was paid management fees by the project. The SEC contended that the investments in these drilling projects were securities, and the defendants attempted to avoid the application of the securities laws by referring to the oil and gas well drilling projects as “joint ventures” and the investors as “partners” or “venturers,” who “funded” rather than “invested” in the projects. The interests in the joint ventures were sold through entities that were not registered brokers. The SEC filed this civil enforcement action, alleging violations of the Securities Act of 1933 and the Securities Exchange Act of 1934, against Parvizian and the managing venturers (the “Parvizian defendants”) and other entities and related individuals who marketed the interests in the drilling ventures.

The court first discussed whether the interests in the drilling ventures were “securities” within the meaning of the Securities Act of 1933 and the Securities Exchange Act of 1934. The definition of a “security” under these statutes includes an “investment contract,” which is not a defined term in the statutes. The court relied on the definition of an investment contract set forth by the United States Supreme Court in the seminal case of *SEC v. W.J. Howey Co.* There are three prongs to the *Howey* test to determine whether a scheme is an “investment contract”: (1) an investment of money, (2) in a common enterprise, (3) with an expectation of profits to be derived solely from the efforts of individuals other than the investor. There was no dispute in this case that money was invested in the oil and gas well offerings for a common enterprise. The factor in dispute was the third *Howey* factor—whether the investors expected they would earn a profit solely through the efforts of others. In the Fifth Circuit, the requirement of an expectation of profits “solely” from the efforts of others is met if the efforts of others “are the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise.” A general partnership or joint venture interest usually does not meet this prong of the definition of “investment contract,” but the Fifth Circuit has stated that the third *Howey* factor can be established if the partnership or venture is one in which the partners are “so dependent on a particular manager that they cannot replace him or otherwise exercise ultimate control.” See *Williamson v. Tucker*, 645 F.2d 404 (5th Cir. 1981). In *Williamson*, the Fifth Circuit identified three non-exclusive tests for determining whether general partners or joint venturers are so dependent on another’s effort that the investment is actually an investment contract. If any of the three tests for dependence are met, the third prong of the *Howey* test will be met. The court in this case analyzed the oil and gas drilling ventures in light of the three *Williamson* tests, and the court concluded that the ventures met each of the three tests.

The first *Williamson* factor the court examined was whether the agreement left so little power in the hands of the partner or venturer that the arrangement in fact distributed power as would a limited partnership. The court found that the evidence submitted by the SEC established the venturers in this case had little to no power. Under the express language of the joint venture agreements, the venturers delegated all powers related to the day-to-day management as well as operations of the venture to the Parvizian entity that was the managing venturer. The only specific powers the Parvizian defendants referenced—the ability to call a meeting and voting powers to remove the managing venturer and to amend the joint venture agreement—required a specified percentage of joint venture interest. The SEC’s summary judgment evidence established the venturers had no information about each other and thus no way to contact each other to take any action that the agreement allowed them to take on a collective basis.

The Parvizian defendants withheld this information as “confidential” and threatened legal action when one of the investors in a venture tried to contact other investors using email addresses inadvertently disclosed by an employee of the managing venturer. Any right to vote or call a meeting that required a percentage of the venture interest was precluded by the inability of the venturers to contact each other. The court stated that “[t]hese venturers were given what are essentially sham or illusory powers; although listed on paper, these powers never actually existed because the Parvizian Defendants did not intend to allow the venturers to exercise them.” Thus, the court found that the third *Howey* prong was established under the first *Williamson* factor.

According to the court, even if the first *Williamson* factor was not satisfied, the second *Williamson* factor established complete dependence. Under this factor, the court considered whether the venturers were inexperienced and lacked expertise in the oil and gas well business. When analyzing this factor, courts look to the investor's experience and knowledge in the particular business of the venture, not the investor's general business experience. The SEC's summary judgment evidence established that the joint ventures were marketed through hundreds of unsolicited cold calls to thousands of potential venturers whose information came from a “leads list.” The uncontroverted summary judgment evidence also established that the joint venture offerings were not limited to potential venturers with experience in or knowledge of the oil and gas industry. The defendants argued that the investor group as a whole were sophisticated and experienced business people who could collectively run the joint venture, but the court stated that Fifth Circuit case law is clear that the investors' expertise and knowledge “must be considered in relation to the nature of the underlying venture.” The defendants failed to identify competent summary judgment evidence that any of the investors, collectively or individually, had expertise and experience in oil and gas well drilling. The evidence established that the venturers—although arguably professionals and business persons—lacked expertise or knowledge about the oil and gas well business and would have had to rely on information from the defendants to make any decision if they had possessed any powers to exercise. Because analysis of the second *Williamson* factor showed the venturers' dependence on the efforts of the defendants, the court found the third *Howey* prong was established.

Next the court turned to the third *Williamson* factor and concluded that, even if the first and second factors had not been satisfied, the third *Williamson* factor established that the venturers were completely dependent on the defendants' efforts. Under the third *Williamson* factor, even if the venturers possessed actual powers, the joint venture was still an investment contract if the venturers had no practical alternative to the manager or were incapable of competently exercising those powers. The summary judgment evidence showed that the investments in all the joint ventures were placed into one account controlled exclusively by Parvizian and commingled with non-joint venture money. This process was never disclosed to the venturers, who believed that each joint venture's funds were kept segregated in separate accounts. Even if the venturers were able to exercise their power to remove the managing venturer of their venture, they would not have had access to the investment funds and the venture would have been at risk for failing without access to its assets to fund the drilling. Lack of any control over their money created a complete dependency on the Parvizian defendants. In addition, the SEC presented evidence that the Parvizian defendants completely controlled and managed the ventures. Parvizian determined all the terms of the joint ventures, which were not negotiable, and the venturers were required to consent to all the terms as written if they wished to participate in the venture. The managing venturer of each venture controlled all the operations of the venture. The venturers had no access to information about each other, and even if they had, the Parvizian defendants controlled what information was disseminated to the venturers. The venturers had no personal or first-hand knowledge about any activities or decisions related to the joint venture and relied completely on information distributed by the Parvizian defendants. The court found that this summary judgment evidence established that the venturers completely depended on the Parvizian defendants as managers.

Having determined that the investments in the joint ventures were “investment contracts” and thus “securities,” the court turned to the SEC's four claims against the defendants. The court first determined that the defendants violated Section 5 of the Securities Act by offering and selling unregistered securities. The court next determined that Parvizian and several other defendants violated Section 15 of the Exchange Act by acting as unregistered brokers offering and selling securities. Finally, the court determined that the Parvizian defendants committed securities fraud in violation of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 by making a material omission in connection with the offer, sale, or purchase of securities.

Securities and Exchange Commission v. Helms, No. A-13-CV-01036 ML, 2015 WL 5010298 (W.D. Tex. Aug. 21, 2015).

The court granted the SEC's motion for summary judgment against four individuals in this securities fraud case in which the individuals were involved in selling limited partnership interests in oil and gas limited partnerships that were operated as a Ponzi scheme. The court noted that a limited partnership interest is a "security" within the meaning of the anti-fraud provisions in Section 17(a) of the Securities Act and Section 10(b) of the Securities Exchange Act and Rule 10b-5 promulgated thereunder. The court discussed the SEC's summary judgment evidence and concluded that the evidence established that two of the defendants violated those anti-fraud provisions by perpetuating a securities fraud scheme and making material misrepresentations of facts relating to the offer and sale of securities. The summary judgment evidence against the other two defendants established that they violated federal securities laws by acting as unregistered brokers. The court awarded injunctive relief, disgorgement, and civil money penalties against the defendants.

III. Recent Texas Cases Involving Limited Liability Companies

A. Nature of Limited Liability Company

Alta Mesa Holdings L.P. v. Ives, 2016 WL 1534007, __ S.W.3d __ (Tex. App.–Houston [14th Dist.] 2016, no pet. h.).

The court held that a limited liability company is not a corporation within the meaning of Section 38.001 of the Texas Civil Practice and Remedies Code, and Section 38.001 thus did not permit the plaintiff employees to recover their attorney's fees against their LLC employers in their suit for breach of their employment agreements.

The trial court in this case awarded attorney's fees to two employees on their claims for breach of an employment agreement on the basis of Section 38.001(8) of the Texas Civil Practice and Remedies Code, which provides that "[a] person may recover reasonable attorney's fees from an individual or corporation, in addition to the amount of a valid claim and costs, if the claim is for: ... (8) an oral or written contract." The LLC appellants argued that limited liability companies are excluded from the entities against which attorney's fees may be recovered under Section 38.001 because the statute only provides for recovery against individuals and corporations. The court of appeals agreed and reversed the award of attorney's fees.

The court of appeals relied on its opinion in *Fleming & Associates, L.L.P. v. Barton*, in which the court held that the plain language of Section 38.001 precluded a court from awarding a claimant attorney's fees against a partnership (in that case, a limited liability partnership). In that case, the court explained that neither "individual" nor "corporation" was defined in the Code Construction Act or Chapter 38; therefore, the ordinary meaning of those terms should be applied in construing Section 38.001. The court found no definition of "individual" or "corporation" that included any type of partnership, and the statutory interpretation doctrine of "expressio unius est exclusion alterius"—meaning the expression of one concept implies the exclusion of another—suggested to the court that the legislature did not intend Section 38.001 to apply to partnerships. The court stated that the question of whether an LLC is included within the term "corporation" is a closer call than the question of whether a partnership is included within "individual" or "corporation" because "company" and "corporation" are sometimes used synonymously. However, the court found it clear that, as used in Texas statutes, the legal entities identified by the terms "corporation" and "limited liability company" are distinct entities. Even though these entities share some common characteristics, the court noted that corporations and LLCs are governed by separate titles within the Texas Business Organizations Code. The court was not persuaded by the employees' argument that LLCs are treated the same as corporations for some purposes under Texas and Delaware law (the states of formation of the two LLCs in this case). In fact, the court stated that the examples given reinforced that corporations and LLCs are distinct entities because there would be no need to specifically state when they should be treated the same if they were not distinct entities.

The court also explained that the history of Section 38.001 and its predecessor statute further supported the conclusion that use of the term "corporation" does not encompass an LLC. The predecessor statute stated that "any person, corporation, partnership, or other legal entity having a valid claim against a person or corporation" could recover attorney's fees against the "persons or corporation." According to the court, the fact that "corporation" was first used in a list of entities that includes "partnerships" and "other legal entities" indicates that

the term was not intended to encompass those other types of entities, because to read the term otherwise would render use of these other terms meaningless.

The employees pointed out that numerous cases have affirmed attorney's fees awards against LLCs, but the court stated that the appealing parties in those other cases apparently did not argue that Section 38.001 did not permit an award of attorney's fees against an LLC. Thus, those cases do not stand for the proposition that Section 38.001 authorizes recovery of attorney's fees against LLCs. Because the employees did not seek attorney's fees on their breach of contract claim on any basis other than Section 38.001, the court reversed the award of attorney's fees against the LLCs.

Woods v. U.S. Bank, N.A., No. 4:15-cv-00536, 2016 WL 890676 (E.D. Tex. Mar. 8, 2016).

The court rejected the defendant's argument that limited liability companies are not included in the definition of "consumer" under the Deceptive Trade Practices Act (DTPA).

In opposing the plaintiff's motion for remand, the defendant argued that the plaintiff, an LLC, did not qualify as a "consumer" under the DTPA because the DTPA defines a "consumer" as "an individual, partnership, corporation, this state, or a subdivision or agency of this state." The DTPA was enacted in 1973, and legislation authorizing the creation of LLCs in Texas was not enacted until 1991. The defendant argued that the legislature's failure to amend the DTPA to encompass LLCs shows its intent to exclude them. The court rejected the defendant's comparison of the omission of an LLC from the DTPA's definition of consumer to the treatment of an LLC in Section 38.001 of the Texas Civil Practice and Remedies Code and the analysis of Section 38.001 in *Hoffman v. L & M Arts*, 2015 WL 1000838, at *10 (N.D. Tex. 2015). In *Hoffman*, the court concluded that attorney's fees are not recoverable from an LLC because Section 38.001 provides that attorney's fees are recoverable only from a corporation or an individual. The court stated that the DTPA does not contain definitional distinctions similar to those contained in Section 38.001. Because the DTPA predates the Texas LLC statute and a corporation is included within the DTPA's definition of consumer, the court in this case did not agree that the absence of LLC is indicative of a legislative intent to exclude an LLC from the definition of consumer. The court also relied on the proposition that courts must liberally construe and apply the DTPA to promote the underlying goals of protecting consumers against false, misleading, and deceptive business practices and unconscionable actions. Finally, to the extent that this issue presented an ambiguity in state law, the issue further supported the appropriateness of remand.

B. LLC Property and LLC Membership Interest

Abdullatif v. Erpile, 460 S.W.3d 685 (Tex. App.– Houston [14th Dist.] 2015, no pet.).

After the settlement of a lawsuit over the ownership and operation of an LLC, the parties got in a dispute over the settlement agreement, and a second lawsuit was filed. In this second lawsuit, the court of appeals analyzed whether the county court at law had subject matter jurisdiction over several claims based on the value or nature of the claims. The court concluded claims for declaratory relief for which no damages were sought did not fall within the "jurisdictional limits of the court," but a claim for a declaration regarding the ownership of a membership interest in the LLC did fall within the court's jurisdiction to "decide the issue of title to real or personal property" because a membership interest in an LLC is personal property. *See* Tex. Bus. Orgs. Code § 101.106(a). Otherwise, the trial court lacked jurisdiction over the claims because the suit did not fall within the court's subject matter jurisdiction to "hear a suit for the enforcement of a lien on real property" or to "decide the issue of title to real or personal property."

C. Assignment of Interest

Galaz v. Galaz (In re Galaz), Case No. 07–53287–RBK, Adv. No. 08–5043–RBK, 2015 WL 457850 (Bankr. W.D. Tex. Jan. 23, 2015).

The debtor sought to set aside a transfer from an LLC in which the debtor held an interest and recover damages based on the transfer. The debtor claimed that her ex-husband caused the LLC to improperly transfer valuable rights to an LLC solely owned by her ex-husband's father. The court concluded that the transfer was invalid and that the debtor should recover damages. In the course of the opinion, the court interpreted several provisions of the operating agreement of the LLC in which the debtor held an interest and determined the effect of several transactions that bore on the analysis of the validity of the transfer at issue.

Raul Galaz (“Raul”) and Julian Jackson (“Julian”) formed Artist Rights Foundation, LLC (“ARF”), a California LLC, and ARF acquired certain music royalty rights. The debtor, Lisa Galaz, acquired a 25% interest in ARF as a result of being awarded one-half of Raul’s 50% interest in ARF in their divorce. For purposes of certain issues in this case, it was important to determine whether Lisa was a member of ARF or was merely the assignee of an economic interest. Based on the operating agreement of ARF, the court found that Lisa held only an economic interest in ARF. The court relied on two provisions of ARF’s operating agreement. Section 6.1 of the operating agreement prohibited the transfer of membership interests without the prior approval of all members. Lisa argued that by signing the divorce agreement, Raul gave his approval for Lisa to become a full member. However, Lisa presented no evidence that Julian gave his prior approval to Raul’s transfer of a membership interest to Lisa. In addition, another provision stated that where a transfer of interest in ARF did not meet the requirements of section 6.1, the transferee would receive a share of the net profits and losses, but could not vote or participate in management of the company. Thus, because Raul transferred one-half of his interest in ARF without obtaining Julian’s consent, the court found that Lisa received solely an economic interest, with no management or voting rights, in ARF.

Because Lisa was only an assignee, the court concluded that Raul did not owe Lisa a fiduciary duty. As a manager of ARF, Raul owed a fiduciary duty to the LLC and its members under the California LLC statute because the California LLC statute provides that the fiduciary relationship between members of an LLC is the same as that between partners in a partnership. Because California courts have concluded that an assignment of a partnership interest does not bring the transferee into a fiduciary relationship with the remaining partners, and because Lisa was not a member of ARF and held only an economic interest, the court concluded that Raul did not owe Lisa a fiduciary duty.

D. Fiduciary Duties

Pilepro, LLC v. Chang, 2016 WL 270874, __ F.Supp.3d __ (W.D. Tex. 2016).

Applying the principle that the law of the state of incorporation governs a corporation’s internal affairs, the court applied Delaware law to claims that two individuals breached a fiduciary duty to a Delaware LLC with its principal place of business in Texas. The court concluded that Chang, a consultant who later became CFO of the LLC, did not breach a fiduciary duty to the LLC. The plaintiffs failed to prove that Chang engaged in some of the misdeeds alleged, and some of the claims alleged a breach of fiduciary duty on behalf of another party, which the LLC did not have standing to assert. Finally, Chang’s conduct after his termination as CFO of the LLC was not a breach of fiduciary duty where Chang was never a member and the plaintiffs did not expressly allege that Chang misappropriated trade secrets or revealed confidential information. The court also determined that the LLC’s patent attorney did not breach his fiduciary duty to the LLC.

Johnson v. King (In re King), 541 B.R. 404 (Bankr. N.D. Tex. 2015).

A judgment in favor of a member of an LLC against his co-member in a lawsuit in state court in which the judgment creditor sued for breach of fiduciary duty did not have preclusive effect for purposes of the judgment creditor’s objection to discharge of the debtor for a debt arising from fraud or defalcation in a fiduciary capacity where the state court made no findings of fact or conclusions of law. The bankruptcy court found it unnecessary to decide any issues of fraud or defalcation with respect to fiduciary duties owed by the debtor to the LLC since the LLC was not a plaintiff and the other member did not have standing to pursue the LLC’s claims. Assuming without deciding that the debtor owed his fellow member a fiduciary duty (which the debtor did not concede), there was insufficient evidence of moral turpitude, intentional wrongdoing, or willful blindness by the debtor with respect to the matters about which the other member complained to constitute fraud or defalcation.

Johnson and King formed Earl’s Deli, LLC, a Texas LLC, to operate a sandwich shop. The certificate of formation provided that the LLC was member-managed, and the company agreement likewise provided for management by the members, in proportion to the percentage interests of the members, which were 51% for Johnson and 49% for King. Notwithstanding the provision for management in proportion to their percentage interests, Johnson chose to be a passive owner, and King managed the LLC for the first year and a half until King informed Johnson that the LLC was out of money and would have to close. Johnson did not want to close the deli, so he took over the day-to-day operations. After doing so and reviewing the books, Johnson discovered alleged

improprieties on the part of King. Johnson managed the deli for the next 3 ½ years until the deli's landlord, a corporation owned by Johnson, changed the locks and evicted the LLC for failure to pay the rent for the previous four years.

Johnson sued King in state court and obtained a judgment after a non-jury trial in which the court made no findings of fact or conclusions of law. King then filed a Chapter 7 petition, and Johnson filed this adversary proceeding objecting to discharge of King's debt to him under Section 523(a)(4) (fraud or defalcation in a fiduciary capacity) and (a)(6) (willful and malicious injury to an entity or the property of an entity).

The bankruptcy court rejected the suggestion made by Johnson's counsel at trial that both Johnson and the LLC were plaintiffs in the adversary proceeding. Based on the filings made in the bankruptcy, the court concluded that only Johnson was a plaintiff in the adversary proceeding. Johnson, even though he owned 51% of the LLC, did not have standing to assert injuries to the LLC. Thus, the court did not have to decide any issues of fraud or defalcation in a fiduciary capacity owed to the LLC under Section 523(a)(4) or willful or malicious injury to the LLC or its property under Section 523(a)(6). The court noted that the LLC would not have prevailed even if it had been a plaintiff for the reasons set forth below.

Johnson first argued that the judgment he obtained in state court established a breach of fiduciary duty within the meaning of Section 523(a)(4), but the court pointed out that Section 523(a)(4) requires more than a breach of fiduciary duty. Section 523(a)(4) requires fraud or defalcation while acting in a fiduciary capacity. Because the state court made no findings of fact or conclusions of law, the bankruptcy court did not have a sufficient record from the state court to give preclusive effect to the judgment. Thus, the court proceeded to assess the evidence to determine whether to except King from discharge based on fraud or defalcation in a fiduciary capacity. The court stated in a footnote that King did not concede that he owed Johnson a fiduciary duty "as opposed to the unquestionable fiduciary duty he owed to the LLC." Assuming, without deciding, that King owed a fiduciary duty to Johnson, the court went on to conclude that Johnson did not prove fraud or defalcation.

The court found that the evidence did not show that King committed "fraud" while acting in a fiduciary capacity because there was insufficient evidence of moral turpitude or intentional wrong. The court stated that allegedly unauthorized gas purchases made on the LLC credit card as well as \$2,000 in distributions made to King during the time he managed the LLC were fully disclosed in the records of the LLC, to which Johnson always had access, and these transactions thus were not done "secretly" as alleged by Johnson. With respect to the gas purchases, it was necessary for the LLC to use the car of a member or employee since the LLC had no car. Although some of the gas purchases were for King's personal use, there was no evidence that the LLC helped King pay a portion of his car insurance or maintenance, or that the total transaction—King's providing a car and paying all maintenance and insurance in exchange for purchasing gas with the LLC's credit card—was unfair to the LLC. With respect to the \$2,000 in distributions, the company agreement provided that distributions of excess cash were to be made to the members in proportion to their percentage interests. While it was true that King made distributions only to himself and not to Johnson while King was managing and operating the deli, the court pointed out that Johnson chose not to share management responsibilities in proportion to their percentage interests as provided in their company agreement and that King's calculation of excess-cash determinations appeared to have been proper. Furthermore, Johnson allowed similar distributions to be made to King even after Johnson took control of the day-to-day management and operation of the deli. Given provisions in the company agreement that allowed a member to exercise remedies against a defaulting member who has committed fraud or theft or gross negligence, the court found disingenuous Johnson's claim that he did not want to "wrestle" with King over the distributions and did not know how to stop him. The court stated that the distributions did not suggest moral turpitude or intentional wrong by King, but instead both parties' recognition that King was entitled to some type of return for his sweat equity or that King needed the distributions for living expenses.

The evidence did not show that King committed a "defalcation" while acting in a fiduciary capacity because a defalcation requires a culpable state of mind involving knowledge of, or gross recklessness with respect to, the improper behavior. The court found that King did not have actual knowledge of any wrongdoing with respect to use of the LLC credit card or distributions because there was none, and he was not willfully blind to breaches of fiduciary duty because there were no such breaches. The evidence also did not show that King committed embezzlement or larceny within the meaning of Section 523(a)(4).

Galaz v. Galaz (In re Galaz), Case No. 07–53287–RBK, Adv. No. 08–5043–RBK, 2015 WL 457850 (Bankr. W.D. Tex. Jan. 23, 2015).

The debtor sought to set aside a transfer from an LLC in which the debtor held an interest and recover damages based on the transfer. The debtor claimed that her ex-husband caused the LLC to improperly transfer valuable rights to an LLC solely owned by her ex-husband’s father. The court concluded that the transfer was invalid and that the debtor should recover damages. In the course of the opinion, the court interpreted several provisions of the operating agreement of the LLC in which the debtor held an interest and determined the effect of several transactions that bore on the analysis of the validity of the transfer at issue.

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Because Lisa was only an assignee, the court concluded that Raul did not owe Lisa a fiduciary duty. As a manager of ARF, Raul owed a fiduciary duty to the LLC and its members under the California LLC statute because the California LLC statute provides that the fiduciary relationship between members of an LLC is the same as that between partners in a partnership. Because California courts have concluded that an assignment of a partnership interest does not bring the transferee into a fiduciary relationship with the remaining partners, and because Lisa was not a member of ARF and held only an economic interest, the court concluded that Raul did not owe Lisa a fiduciary duty.

Brickley v. Scattered Corporation (In re H & M Oil & Gas, LLC), 514 B.R. 790 (Bankr. N.D. Tex. 2014).

The bankruptcy court addressed the trustee’s claims for breach of fiduciary duty against the former manager of the debtor LLC, an oil and gas company. The court stated that “[a]s its Manager, Greenblatt owed fiduciary duties to H & M, including the duties of care and loyalty.” The court relied on case law in the corporate context in describing the standards of conduct required by these duties. Based on these precedents, the court analyzed whether Greenblatt breached the duties of loyalty and care owed to the debtor LLC as its manager by: (1) failing to timely pay drilling costs; (2) not requesting funds under the debtor-in-possession financing agreement (DIP agreement); and (3) not taking action against the LLC’s post-petition lender related to the lender’s breach of the DIP agreement. The court concluded that the manager did not breach his fiduciary duties to the LLC.

The trustee argued that Greenblatt’s repeated late payments of certain drilling costs and failures to request funds under the DIP agreement to prepay completion costs did not reflect the actions of a prudent manager in light of the attendant risks. The court disagreed. With respect to Greenblatt’s decision to late-pay drilling costs, the court found no injury to the LLC resulted and that those late payments, even assuming they were imprudent, could not support a finding of breach of fiduciary duty without resulting injury. With respect to Greenblatt’s decision not to prepay certain completion costs, the court concluded that Greenblatt correctly interpreted the consequences of prepaying versus not prepaying the costs at issue under the controlling joint operating agreement, and Greenblatt’s decision was protected by the business judgment rule. The evidence did not show that Greenblatt’s decision lacked a business purpose, was tainted by conflict of interest, or was the result of an obvious and prolonged failure to exercise oversight or supervision; therefore, the court concluded that Greenblatt’s decision not to prepay completion costs based on his interpretation of the joint operating agreement was the result of an informed business judgment and was not a breach of the fiduciary duty of care owed to the LLC.

As to the allegation that Greenblatt breached his fiduciary duty by failing to take action on the LLC’s behalf against the post-petition lender, the court concluded that the lender did not breach the DIP agreement, and thus

Greenblatt's alleged failure to take action against the lender for breach of the agreement could not constitute a breach of fiduciary duty.

Because the court found Greenblatt did not breach his fiduciary duty, the court rejected the trustee's claim that Greenblatt's wage claim should be equitably subordinated based on Greenblatt's alleged breaches of fiduciary duty. The court found no other conduct by Greenblatt that would warrant subordination, and the court stated that the record did not show any injury to the LLC or its creditors or any benefit to Greenblatt from any alleged improprieties even if Greenblatt participated in inequitable conduct.

Greenblatt prevailed on a claim for indemnification under the indemnification provision of the LLC's regulations (i.e., company agreement). The provision required the LLC to indemnify the manager "against loss, liability or expense, including attorneys' fees, actually and reasonably incurred, if he or it acted in good faith and in a manner reasonably believed to be in or not opposed to the best interests of the Company as specified in this section, except that no indemnification shall be made in respect of any claim, issue or matter as to which the [manager] shall have been adjudged to be liable for gross negligence, willful misconduct or breach of fiduciary obligation in the performance of his or its duty to the Company...." The trustee argued that Greenblatt did not meet the standard for indemnification, but the court stated that it could not find that Greenblatt's actions were grossly negligent or constituted willful misconduct in light of the court's finding that he acted within the scope of his fiduciary duties owed to the LLC and that his actions fell within the scope of the business judgment rule. Because the record showed that Greenblatt acted in good faith and in a manner not opposed to the LLC's best interests, Greenblatt was entitled to indemnification of his expenses incurred in defending the complaint. The court concluded that the indemnification claim under the LLC regulations should be allowed as a general unsecured claim in the LLC's Chapter 11 case. (The court also concluded that Greenblatt had a claim for indemnification under the DIP agreement and that the claim should be allowed as an administrative expense of the Chapter 11 case.)

E. Personal Liability of Member or Manager Under Agency or Other Law

Morello v. State, No. 03-15-00428-CV, 2016 WL 2742380 (Tex. App.-Austin May 6, 2016, no pet. h.) (mem. op.).

The court of appeals held that the State did not establish that the manager and operator of an LLC was personally liable for civil money penalties under the Texas Water Code arising from the LLC's violations of rules promulgated by the Texas Commission on Environmental Quality. The State relied on the principle that an officer or other agent of a corporation is personally liable when he knowingly participates in a tortious or fraudulent act even though the act was performed as an agent; however, the State did not allege that the manager in this case engaged in a tortious or fraudulent act. The State argued that this principle of personal liability covers "wrongful acts" and that an individual corporate officer may be held liable for his own violations when a statute provides for individual liability as does the Water Code. The court concluded that the conduct in this case did not precisely align with the kind of statutory violation likened to an "environmental tort" by a sister court of appeals in another case and that the other case was not binding on the court in any event. Thus, the court held that the trial court erred in granting the State summary judgment against the individual manager.

The State of Texas filed suit against Morello and White Lion Holdings, L.L.C. ("White Lion"), an LLC formed and managed by Morello, alleging violations of rules promulgated by the Texas Commission on Environmental Quality and seeking injunctive relief and civil penalties. White Lion purchased property out of a bankruptcy estate and was transferred a hazardous-waste permit and compliance plan associated with the property. A few years later, the State of Texas filed suit against White Lion alleging that it did not meet the requirements of the compliance plan, including requirements to continue corrective action to clean up contamination, monitor groundwater, file reports, and provide financial assurance for operation of corrective programs. Although the obligations that were imposed on the previous owner of the property were transferred to the LLC, the State amended its petition and named Morello in its suit, alleging that Morello was individually liable as well as the LLC. After the district court granted the State's motion for summary judgment against White Lion and severed the claims against Morello, the State moved for summary judgment against Morello. The district court granted the State's motion for summary judgment and ordered Morello to pay \$367,250 in civil penalties. Morello appealed, arguing that he could not be held individually liable because the State was not attempting to pierce the veil of the LLC and did not allege the type of conduct for which an agent of an LLC may be held individually liable for actions taken on behalf of the company.

The court of appeals first explained that both the Texas Limited Liability Company Act (TLLCA) (under which the LLC at issue in this case was formed) and the Texas Business Organizations Code (BOC) (which went into effect in 2006 and contains transition provisions for LLCs in effect at that time) provide that a member or manager of an LLC is not liable for the debts, liabilities, or obligations of the LLC except to the extent the LLC agreement provides otherwise. Further, both statutes provide that a member may only be named as a party in an action by or against the LLC if the suit is brought to enforce the member's right against or liability to the LLC. The court noted that neither the TLLCA nor the BOC at the time this suit was filed mentioned veil-piercing principles as an exception to the liability protection provided by an LLC or how such remedies might be applied in the LLC context. The court pointed out that it considered veil-piercing principles in the LLC context in *Shook v. Walden*, 368 S.W.3d 604 (Tex. App.—Austin 2012, pet. denied). In *Shook*, the court addressed the contours of LLC veil piercing assuming, without deciding, that veil-piercing concepts apply in the LLC context. In this case, the court stated that it was again not necessary to reach the question of whether veil-piercing concepts apply in the LLC context because the State did not assert that it was attempting to pierce White Lion's veil.

The State acknowledged that the structure of an LLC is intended to shield its members from the liabilities and obligations of the LLC but argued that the statutory shield does not deflect liability for the conduct at issue. Rather than relying on veil-piercing principles to hold Morello personally liable, the State relied on the common-law principle that a corporate officer may be held individually liable when the officer knowingly participates in tortious or fraudulent acts even though the officer is acting on behalf of the corporation. However, the State did not allege that Morello engaged in any fraudulent or tortious activity. The State acknowledged that this was not a tort action but was "a statutory enforcement action brought against Morello as operator and sole decision maker of White Lion." Instead of arguing that Morello engaged in fraudulent or tortious conduct, the State contended that this principle of law also covers "wrongful acts." The State asserted that Morello could be held individually liable for the failure to adhere to the terms of the compliance agreement that was transferred to White Lion and for the failure to provide financial assurance because of Sections 7.101 and 7.102 of the Water Code. Section 7.101 of the Water Code provides that "[a] person may not cause, suffer, allow, or permit a violation of a statute within the commission's jurisdiction or a rule adopted or an order or permit issued under such a statute," and Section 7.102 of the Water Code authorizes the assessment of a penalty on "[a] person who causes, suffers, allows, or permits a violation of a statute, rule, order, or permit." The State pointed to Morello's control over the operations and decisions of White Lion as sole manager and officer and argued that he could be held individually liable for the "wrongful acts" which he directed, participated in, knew of, or assented to. Relatedly, the State argued that since Morello was the sole member, owner, and decision maker of White Lion, he was a person that caused, allowed, and/or permitted White Lion to violate the compliance agreement and administrative rules.

As it began its discussion of whether the State established as a matter of law that Morello could be held individually liable, the court noted that all of the cases that the State cited in its summary judgment motion for the proposition that "wrongful acts" fall within the principle allowing for individual liability of corporate agents recite the longstanding rule that a corporate employee may be held liable for his "tortious" or his "fraudulent" acts when acting as an agent; the cases do not indicate that conduct falling outside of those types of misconduct may also serve as a basis for individual liability. Additionally, the court distinguished the cases relied on by the State as support for the proposition that the legislature intended to allow for individual liability to be imposed on an agent of an LLC even in the absence of fraudulent or tortious conduct through the passage of Sections 7.101 and 7.102 of the Water Code. In *Miller v. Keyser*, 90 S.W.3d 712 (Tex.2002), in which the supreme court determined that an agent of a corporation may be held liable under the Deceptive Trade Practices Act, the court equated the claims brought under the Deceptive Trade Practices Act to "torts." In the instant case, the court of appeals stated that there was no showing that the alleged failures to satisfy the terms of the compliance plan and failure to provide financial assurance were tortious or fraudulent conduct of Morello individually or that those failures to comply should be treated as if they were. Here, the State did not allege any fraudulent conduct and specifically stated that the violations at issue are not torts. The court of appeals was also unpersuaded by the decision of a sister court of appeals in *State v. Malone Service Co.*, 853 S.W.2d 82, 84–85 (Tex. App.—Houston [14th Dist.] 1993, writ denied). In *Malone*, the court of appeals concluded that the president of a company and the plant manager could be held individually liable under a former provision of the Water Code, which provided for civil money penalties to be imposed on a person who violated a provision of a permit. The court in *Malone* likened the conduct at issue in the case to "an environmental tort" for purposes of the rule that a corporate officer can be held individually liable for participating in or directing the commission of a tort. The court of appeals stated that the conduct at issue in *Malone*

was consistent with what the legislature had described as an environmental tort in a former provision of the Civil Practice and Remedies Code relating to proportionate responsibility. That provision addressed injury, damage, or death “caused by depositing, discharge, or release into the environment of any hazardous or harmful substances.” The court stated that the conduct alleged by the State in the instant case did not align as easily with the description of an environmental tort because there was no allegation that Morello deposited or discharged any hazardous substances. In any event, the analysis from *Malone* did not bind the Austin Court of Appeals. Thus, the court concluded that the State failed to establish as a matter of law that Morello could be held individually liable for the alleged violations and that the district court thus erred by granting the State's motion for summary judgment.

J&J Sports Productions, Inc. v. Bandera Cowboy Bar LLC, No. 5:15-CV-352-DAE, 2016 WL 2349123 (W.D. Tex. May 2, 2016).

The court held an individual managing member of an LLC personally liable for a violation of the Telecommunications Act based on the unauthorized broadcast of a pay-per-view fight at the LLC's bar because the statute has been interpreted to allow an aggrieved person to hold a person individually liable if he had the right and ability to supervise the unauthorized activities of the establishment and an obvious and direct financial interest in those activities.

McGroaty was the sole officer and managing member of a member-managed LLC that operated a bar at which an unauthorized broadcast of a pay-per-view fight took place. The court granted summary judgment in favor of the plaintiff against McGroaty because there was no genuine dispute as to the elements required to hold McGroaty vicariously liable under Section 605(a) of the Telecommunications Act for the bar's broadcast, i.e., that McGroaty had (1) the right and ability to supervise the activities of the bar, and (2) an obvious and direct financial interest in those activities.

Hovel v. Batzri, 2016 WL 802070, __ S.W.3d __ (Tex. App.–Houston [1st Dist.] 2016, no pet. h.).

Homeowners sued an LLC homebuilder for breach of contract and DTPA violations, and the LLC's privileges were forfeited due to failure pay franchise taxes. The forfeiture occurred after the suit was filed but before any determination of liability. The plaintiffs obtained a default judgment against the LLC and then sought to hold the sole manager of the LLC personally liable for the LLC's debt under Section 171.255 of the Texas Tax Code. The trial court granted the manager's motion for summary judgment, and the court of appeals affirmed because there was no dispute that the contract was executed pre-forfeiture, and the breach, tortious conduct, and injury occurred pre-forfeiture.

The Hovels contracted with a Texas LLC to build a custom home. The sole member and manager of the LLC was Gal Batzri. The Hovels became dissatisfied and sued the LLC for causes of action that included breach of contract, violation of the DTPA, and fraud. While the suit was pending, the LLC forfeited its charter and corporate privileges by failing to pay its franchise tax, and the Hovels obtained a default judgment against the LLC for more than \$2 million in actual damages. The judgment did not specify which of the Hovels' multiple legal theories was the basis of the damages awarded. A few months after the Hovels obtained their default judgment, the LLC revived its charter and corporate privileges.

After obtaining the default judgment against the LLC, the Hovels brought this lawsuit, in which they sought to hold Batzri personally liable for the judgment against the LLC under Section 151.255 of the Texas Tax Code. Section 171.255 imposes on a “director or officer” personal liability for “each debt of the corporation that is created or incurred” between the date that a company forfeits its corporate privileges and the date that it revives the privileges. This provision applies to LLCs as well as corporations, and the parties agreed that Batzri, the LLC's sole member and manager, was personally liable for any debt created or incurred during forfeiture of the LLC's corporate privileges and that the Hovels obtained a default judgment against the LLC while the LLC was forfeited. The point of dispute was whether the LLC's debt was created or incurred when the default judgment was entered or when the tortious or otherwise wrongful conduct occurred that ultimately led to the judgment against the LLC. The trial court granted summary judgment in favor of Batzri, apparently concluding that the debt was not “created or incurred” by the default judgment, which was the only event that occurred during the period of forfeiture. The Hovels appealed.

The Hovels argued that a debt does not come into existence until it is liquidated, relying in part on a narrow definition of “debt” adopted by the legislature in 1987. According to the Hovels, their damages remained unliquidated until they obtained the default judgment, and no debt was created or incurred until the default

judgment issued during the forfeiture. Conversely, Batzri argued that the 1987 narrow definition of “debt” is no longer significant because the legislation enacting it has been repealed. Batzri asserted a broad definition of “debt” that includes unliquidated obligations such that the LLC’s debt was created or incurred before the forfeiture, when the acts or omissions that gave rise to the Hovels' claim occurred, and the default judgment related back to that time.

Characterizing Section 171.255 as a penal statute such that any ambiguity must be “strictly construed” in favor of the party penalized by it, the court discussed numerous cases decided before the adoption of the definition of “debt” in 1987. The pre-1987 case law strictly construed the statute to treat debts as created or incurred at the time the relevant contractual obligations were incurred rather than at a later date when the obligations were breached or became due. Consistent with strict construction and this broad approach to “create or incur,” the pre-1987 case law applied a “relation-back” doctrine. That doctrine was first applied in *Curry Auto Leasing, Inc. v. Byrd*, 683 S.W.2d 109, 111 (Tex. App.–Dallas 1984, no writ), which involved a corporation that failed to make lease payments both before and after forfeiting its corporate privileges. The issue in *Curry* was whether the corporation's debt was created or incurred only after the amount of unpaid rent was capable of calculation, post-forfeiture, or earlier while still unliquidated. The court of appeals in *Curry* held that the obligation to pay the debt arose from the lease contract, even if the exact amount of the deficiency was unknown at that time (i.e., it was unliquidated), because there was no argument that a sum of money was due under “a new, different, separate, or independent agreement.” Thus, performance related back to and was authorized at the time of execution of the contract. The corporate officers in *Curry* were not personally liable because “the obligations, circumstances, conduct, or transactions that create[d] or incur[red] the debt in question pre-existed the forfeiture,” even though the debt was, at that point, still unliquidated. This “relation-back” doctrine allowed future liquidated debts to relate back to the execution of the agreement through which damages were owed. Many courts of appeals followed *Curry*, including a case involving tort claims that arose out of a contract. In *Rogers v. Adler*, 696 S.W.2d 674, 677 (Tex. App.–Dallas 1985, writ ref'd n.r.e.), a plaintiff obtained a judgment during an entity-defendant's period of forfeiture, and the plaintiff attempted to impose personal liability by arguing that the tort liability remained unliquidated until it was reduced to a judgment and thus was not a debt “created or incurred” until the judgment was entered during the period of forfeiture. The plaintiff's suit against the entity in *Rogers* alleged fraud in the inducement, breach of contract, breach of fiduciary duty, and violation of the DTPA, which the court considered to be claims based on the contract even if the claims were alleged as torts. Further, all the operative facts occurred pre-forfeiture, and the court concluded that the pre-forfeiture tort that led to a post-forfeiture judgment was like the contract entered into prior to forfeiture in *Curry*. Thus, the court of appeals in *Rogers* held that all the claims related back to the contract, whether the claims sounded in tort or contract, and were thus created or incurred pre-forfeiture.

Next the court of appeals discussed the legislature’s adoption and repeal of a narrow definition and the subsequent case law in which the “relation-back” doctrine was applied inconsistently. The definition of “debt” adopted in the Tax Code in 1987 was “any legally enforceable obligation measured in a certain amount of money which must be performed or paid within an ascertainable period of time or on demand.” This definition precluded corporations from deducting their contingent and unfixed losses from their taxable corporate surplus and thus increased revenue for the State. The definition also eliminated the ambiguity in “debt” and precluded courts from giving it a broad meaning. In 2008, the legislature repealed the definition of “debt” when it amended the Tax Code to adopt an entirely new method of calculating the franchise tax. After the repeal of the definition, the “relation-back” doctrine reemerged, and courts again concluded that a judgment debt is created or incurred when the conduct or contract occurs, even if the obligation is unliquidated at that time.

With the historical context above in mind, the court of appeals considered whether the trial court erred by concluding that the LLC’s debt in this case was not a debt created or incurred during forfeiture and, as a result, Batzri did not have individual liability under Section 171.255. The Hovels entered into a contract with the LLC to purchase a conforming home, and they sued under contract, statutory, and tort-based theories when the home did not meet the standards promised. The court said that all of the conduct underlying their claim, as well as the contract, occurred pre-forfeiture. The only post-forfeiture occurrence was entry of the judgment to liquidate the damages claim. The court concluded that the repealed statutory definition of “debt” was no longer binding and was immaterial to the court’s analysis of Section 171.255. Thus, the court examined the pre- and post-repeal cases to analyze when the LLC’s debt was created or incurred in this case, and the court noted that *Ballard v. Quinn*, No. 14–97–01057–CV, 1998 WL 787558 (Tex. App.–Houston [14th Dist.] Sept. 10, 1998, no pet.) (mem. op., not designated for publication) was factually similar to this case. In *Ballard*, all of the operative facts, including completion of the work performed under the agreement, occurred before the corporate charter was forfeited. The

court in *Ballard* held that the plaintiff's claims in the law suit "necessarily related back to and arose out of the contract," whether phrased as a breach-of-contract claim or a tort-based negligence claim, even though the liability did not become liquidated until after the forfeiture. Applying the rule of strict construction and relying on a pre-1987 Texas Supreme Court case defining the terms "created" and "incurred," the court of appeals in this case concluded that the debt evidenced by the default judgment obtained by the Hovels against the LLC was created or incurred pre-forfeiture at the time that the parties established their contractual and other obligations. Thus, the court held that Batzri was not individually liable for the LLC's debt.

Finally, the court stated that its interpretation did not run afoul of public policy considerations. The court identified three public-policy goals of Section 171.255: (1) to motivate corporate officers and directors to ensure that franchise taxes are paid; (2) to protect those dealing with the corporation; and (3) to hold liable directors and officers who have abused the corporate privilege by continuing to create and incur debts after non-payment of franchise tax and forfeiture of the corporate privilege. The court stated that the first purpose was satisfied because the LLC in this case cured its failure to pay its franchise taxes, and the third purpose was inapplicable because there was no evidence that the LLC had other outstanding bills that it incurred after forfeiture. The court stated that the second purpose was likewise inapplicable because the construction of the Hovels' home was completed before the forfeiture, and the Hovels were no longer in a contractual relationship with the LLC at the time it forfeited its corporate status. The court stated that this was not a situation in which individuals interacted with a corporation without realizing that it had forfeited its corporate privileges. The Hovels argued that Batzri's interpretation would provide an incentive for unscrupulous investors to undercapitalize their businesses and default on their franchise tax obligations if the business became potentially liable, but the court said there was no indication that the statute was intended to protect creditors from a defunct corporation's later failure to follow the procedures for winding down its affairs and filing a certificate of termination. The court pointed out that undercapitalization is a risk inherent in any contractual relationship with a limited-liability entity, and the Hovels presumably were aware of this risk before contracting with the LLC. If Batzri fraudulently transferred corporate assets that were available when the LLC ceased to do business, they could have continued with that claim. The court also listed other safeguards provided by Texas law against self-dealing, including piercing the corporate veil.

In a vigorous and lengthy dissenting opinion, Justice Keyes argued that "[t]he majority has chosen to ignore the reality of seventy unbroken years of the Texas Supreme Court's and appellate courts' consistent construction of section 171.255 and to substitute its own alternative meaning of the statute's terms under its own chosen rules of construction." Justice Keyes differed as to how the principle of "strict construction" affects the interpretation of Section 171.255 and as to how to interpret case law defining "debt" for purposes of the statute. Justice Keyes argued that the case law requires a court to distinguish among: (1) debts lawfully created or incurred as enforceable obligations by a corporation that subsequently forfeits its charter, as to which no personal liability may be imposed on corporate officers and directors after forfeiture; (2) new debts incurred or created after forfeiture by officers with knowledge of the post-forfeiture debts, for which the officers or directors may be held personally liable; and (3) judgment debts or penalties incurred by a corporation for wrongful acts of the corporation that occurred prior to forfeiture but were not reduced to a legally enforceable obligation until after forfeiture, for which officers and directors with knowledge of the acts can be held personally liable. Justice Keyes would have held Batzri personally liable in this case on the basis that the debt fell into the third category.

Key v. Richards, No. 03-14-00116-CV, 2016 WL 240773 (Tex. App.—Austin Jan. 13, 2016, no pet. h.) (mem. op.).

The court held that the trial court did not improperly apply veil-piercing principles to hold the owners of LLCs personally liable for a fraudulent transfer by one of the LLCs to the other and that the evidence showed that the individuals were directly liable (i.e., separate and apart from veil-piercing principles) for their own role in the fraudulent transfer.

After Adams was unable to collect on a judgment that she obtained against Centex Freight Lines, L.L.C. (Centex) in a previous lawsuit, she and the court-appointed receiver for Centex filed this lawsuit alleging a fraudulent transfer of Centex's assets to a commonly controlled company, PJC Properties, LLC ("PJC Properties") for the unlawful purpose of evading payment of the judgment. The owners of Centex and PJC Properties were Steve Key and Pat Curry. The challenged transaction was a foreclosure and sale of Centex's assets to PJC Properties after default on a loan purportedly secured by all of Centex's assets. The jury found that PJC Properties did not have an enforceable security interest in Centex's assets and that the transfer was thus a fraudulent transfer under the Texas

Uniform Fraudulent Transfer Act because Centex did not receive “reasonably equivalent value” in exchange for the assets. The jury also found that Key, Curry, and PJC Properties were “responsible” for the unfair conduct of Centex and PJC Properties and that holding only Centex responsible for liability on the Adams judgment would result in injustice. The trial court thus awarded Adams damages in the full amount of her prior judgment jointly and severally against Key, Curry, and PJC Properties, as well as attorney's fees, and awarded the receiver possession and title of all assets owned or held by Centex as of the date of the Adams judgment.

After finding that there was sufficient evidence to support the jury’s finding that the transfer of Centex’s assets was fraudulent due to the absence of an enforceable security interest, the court turned to the defendants’ challenges to the application of veil-piercing principles to hold Key and Curry individually liable. The court began by noting the longstanding common law of Texas regarding corporate veil piercing and pointing out several cases noting statutory developments and applying corporate veil-piercing principles to LLCs. The court also noted the well-established rule that an entity’s agent is personally liable for the agent’s own fraudulent or tortious acts without the necessity of piercing the entity’s veil.

The court rejected challenges to the jury questions and sufficiency of the evidence regarding the liability of Key and Curry based on veil piercing. The court stated that the court’s instructions were derived from applicable case law and were accurate statements of the law regarding veil piercing, but the court also stated that it was not necessary for the trial court to employ the equitable doctrine of veil piercing to impose individual liability on Key and Curry in light of the jury’s findings and the evidence because Key and Curry were individually liable for their own tortious conduct in participating and directing the fraudulent transfer.

In a concurring opinion, Justice Pemberton disagreed with the court that the issue of personal liability of Curry or Key for direct tort liability was properly before the court.

Chavez v. Aber, 122 F.Supp.3d 581 (W.D. Tex. 2015).

The court held that the plaintiff stated a claim for violation of the Federal Housing Act against the individual owner of an LLC that held title to a duplex that allegedly discriminated against a mentally disabled minor tenant based on allegations that the LLC’s owner personally made statements and took actions that constituted participation in the discriminatory conduct.

A mother and her mentally disabled minor sued for violation of the Federal Housing Act (FHA). The plaintiffs sued the LLC that owned the duplex where the plaintiffs lived and the individual who owned the LLC. The plaintiffs alleged that the defendants violated the FHA by refusing to accommodate the mental health disabilities of the minor by enforcing a “no pets” policy against the plaintiffs with respect to the emotional support animal recommended as treatment for the minor. The individual defendant, whom the plaintiff alleged was the “owner, director, and manager” of the LLC, argued that the plaintiffs failed to state a claim against him because all the acts alleged to have been taken by him were taken on behalf of the LLC and not in his individual capacity. The court stated that an action under the FHA is essentially an action in tort and that an agent who commits a tort is not relieved from liability by the fact that he acted on account of the principal. The court cited case law for the proposition that an agent who assists his principal in violating the FHA can be held liable for the violation. Here, the court said that the plaintiff’s allegations that the individual assisted the LLC in the allegedly discriminatory conduct at issue were sufficient to state a claim against the individual. The plaintiff alleged that the individual personally told the plaintiffs to get rid of the dog, delivered notice to vacate, threatened to have animal control remove the dog, and verbally denied the plaintiffs’ accommodation request.

Wright v. Minardi (In re Minardi), 536 B.R. 171 (Bankr. E.D. Tex. 2015).

The court concluded that liability for fraud could be imputed to an LLC based on the fraud of an agent acting within the scope of employment with the LLC, but the LLC’s liability for fraud could not be imputed to the debtor based on his role as manager of the LLC. Because the LLC was a Delaware LLC, the court applied Delaware law to the question of the LLC’s liability for the acts of its agents and the question of the manager’s liability for the debts and liabilities of the LLC. Delaware law provides that the debts, obligations, and liabilities of an LLC are solely the debts, obligations, and liabilities of the LLC, and no member or manager is obligated personally for any debt, obligation, or liability of the LLC solely by reason of being a member or acting as a manager of the LLC. The plaintiffs failed to prove that their alleged claim was obtained by false representations, false pretenses, or actual fraud by the debtor himself, and liability for fraud by the LLC could not be imputed to the debtor under Delaware law.

Future World Electronics, LLC v. Schnell (In re Schnell), No. 14–41478, Adv. No. 14–4081, 2015 WL 4537578 (Bankr. E.D. Tex. July 27, 2015).

In previous litigation, the debtor was found liable as a joint tortfeasor with his LLC for willful copyright infringement. The bankruptcy court found that this debt met the standard for a willful injury under Section 523(a)(6) of the Bankruptcy Code and was thus nondischargeable.

The plaintiff in this adversary proceeding obtained a judgment against the debtor’s LLC and the debtor individually for copyright infringement. In the previous lawsuit, the district court entered a default judgment against the LLC for willful copyright infringement. Subsequently, the district court examined whether the debtor should be held personally liable for the willful copyright infringement of the LLC and found that the debtor was the sole member, manager, and president of the LLC and that the debtor had knowledge of and control over the LLC’s creation, copying, distribution, and use of the infringing work. Thus, the district court entered a final judgment against the debtor holding him jointly and severally liable for statutory damages, attorney’s fees, costs, and interest, as a joint tortfeasor responsible for willful copyright infringement.

In this adversary proceeding, the plaintiff sought to have the debtor’s liability on the judgment for willful copyright infringement excepted from discharge as a debt for a “willful and malicious injury” under Section 523(a)(6) of the Bankruptcy Code. The debtor contended that “willfulness” in the context of a willful copyright infringement is not equivalent to the degree of willfulness required under Section 523(a)(6). The court acknowledged that it is possible for an individual to be held personally liable for willful copyright infringement when one recklessly disregards the possibility that his conduct might constitute infringement, but the court stated that the evidence presented to, and the conclusions made by, the district court in the plaintiff’s copyright infringement action revealed that the district court’s decision to award damages to the plaintiff against the debtor was based upon the deliberate action of the debtor. As the only person controlling the actions of the LLC, the district court determined that the debtor “knew of and controlled” his company’s illegal actions when it engaged in willful copyright infringement. The district court made no mention of recklessness in any of its orders or judgments. The judgment against the debtor clearly arose from his own willful participation by directing his solely owned company to violate repeatedly the copyright rights of the plaintiff. The debtor’s participation and cognitive assent to the deliberate infliction of the harmful conduct was buttressed by the debtor’s consistent refusal to resolve the dispute prior to litigation and by his failure to engage in an active defense of his allegedly reckless conduct. Contrary to the debtor’s contention, there was no summary judgment evidence that the district court utilized any type of recklessness standard in imposing joint and several liability upon the debtor for the damages resulting from the willful copyright infringement that he directed. The court discussed the controlling case law regarding the meaning of “willful and malicious” for purposes of Section 523(a)(6) and determined that the conclusions reached by the district court in entering the judgment against the debtor established a “willful and malicious injury” as a matter of law.

F. Authority of Member, Manager, or Officer

Galaz v. Galaz (In re Galaz), Case No. 07–53287–RBK, Adv. No. 08–5043–RBK, 2015 WL 457850 (Bankr. W.D. Tex. Jan. 23, 2015).

The debtor sought to set aside a transfer from an LLC in which the debtor held an interest and recover damages based on the transfer. The debtor claimed that her ex-husband caused the LLC to improperly transfer valuable rights to a company solely owned by her ex-husband’s father. The court concluded that the transfer was invalid and that the debtor should recover damages. In the course of the opinion, the court interpreted several provisions of the operating agreement of the LLC in which the debtor held an interest and determined the effect of several transactions that bore on the analysis of the validity of the transfer at issue.

Raul Galaz (“Raul”) and Julian Jackson (“Julian”) formed Artist Rights Foundation, LLC (“ARF”), a California LLC, and ARF acquired certain music royalty rights. The debtor, Lisa Galaz, acquired a 25% interest in ARF as a result of being awarded one-half of Raul’s 50% interest in ARF in their divorce. In her bankruptcy case, Lisa brought an adversarial proceeding for relief based on Raul’s transfer of ARF’s royalty rights to Raul’s father’s company for no consideration.

For purposes of certain issues in this proceeding, it was important to determine whether Lisa was a member of ARF or was merely the assignee of an economic interest. Based on the operating agreement of ARF, the court found that Lisa held only an economic interest in ARF. The court relied on two provisions of ARF’s operating

agreement. Section 6.1 of the operating agreement prohibited the transfer of membership interests without the prior approval of all members. Lisa argued that by signing the divorce agreement, Raul gave his approval for Lisa to become a full member. However, Lisa presented no evidence that Julian gave his prior approval to Raul's transfer of a membership interest to Lisa. In addition, another provision stated that where a transfer of interest in ARF did not meet the requirements of section 6.1, the transferee would receive a share of the net profits and losses, but could not vote or participate in management of the company. Thus, because Raul transferred one-half of his interest in ARF without obtaining Julian's consent, the court found that Lisa received solely an economic interest, with no management or voting rights, in ARF.

Julian's status as a member was also at issue because Raul claimed that Julian ceased to be a member as a result of his failure to respond to a capital call made by Raul. Raul sent a demand letter to Julian in which he demanded that Julian send money to cover expenses incurred by ARF. Raul sent the demand letter to the address specified for Julian in the operating agreement and contended that the letter constituted "written notice" under the terms of the operating agreement and that Julian had 10 days under the operating agreement to respond to the request for capital contributions. But Raul knew that the address to which he sent the demand letter was no longer valid, and Julian never received the demand letter. In addition, the demand letter did not particularly describe the charges for services or capital contributions Julian allegedly owed at that time and did not account for the capital contributions provided by Julian at the formation of the company. Thus, the court found that the demand letter was neither a legitimate demand for capital contributions nor an accounting of the company's expenses, but was merely a pretext in Raul's scheme to defraud ARF and its interest holders for his own benefit.

The court examined the provisions of the operating agreement addressing management of ARF to determine whether Raul had authority to transfer valuable royalty rights owned by ARF to Segundo Suenos, LLC ("Segundo Suenos"), an LLC solely owned by Raul's father. The California LLC statute provides that a California LLC may be managed by its members or managers. ARF's articles of organization stated that its members would manage the LLC, and the operating agreement stated:

[T]he intent of each Member is to actively engage in the management of the Company. Accordingly, unless otherwise limited by the Articles or this Agreement, each Member shall have full, complete and exclusive authority, power, and discretion to manage and control the business, property and affairs of the Company, to make all decisions regarding those matters and to perform any and all other acts or activities customary or incident to the management of the Company's business, property and affairs.

The next section of the operating agreement constrained the authority of members as follows:

[N]o member shall have authority to cause the Company to engage in the following transactions without first obtaining the approval of Members holding a majority of the Membership interests:
(i) The sale, exchange or other disposition of all, or substantially all, of the Company's assets occurring as part of a single transaction or plan

The royalty rights constituted substantially all of the assets of ARF; therefore, the approval of members holding a majority of the membership interests was required to authorize their transfer. Raul claimed that he was the sole full member of ARF remaining at the time of the transfer and did not need consent of either Lisa or Julian to transfer ARF's assets. The court agreed that Raul did not need the consent of Lisa because she was only the holder of an economic interest and not a voting member, but (for the reasons set forth above) the court rejected Raul's argument that Julian's failure to respond to Raul's capital call stripped Julian of his status as a full member. Since Julian was a full member of ARF, with voting and management rights, at the time of the transfer to Segundo Suenos, Raul needed Julian's approval to transfer ARF's royalty rights. Because Raul did not obtain the requisite consent, the court concluded that the transfer was void and unenforceable.

The court found that Raul wrongfully dissolved ARF by filing a certificate of cancellation with the California Secretary of State after transferring ARF's assets to Segundo Suenos. Raul's dissolution was wrongful because ARF's articles of organization and operating agreement provided that dissolution of the company would occur under specific conditions, and none of those conditions were met when Raul dissolved ARF. Also, because Raul wrongfully dissolved ARF without notice to Julian, there was no winding up of its affairs as contemplated

by the operating agreement. The court stated that ARF's wrongful dissolution caused it to cease its active existence as an LLC, and its assets devolved to the individual owners of the company.

Fitzerman v. Classic Americana LLC, No. 05–15–00528–CV, 2016 WL 1450165 (Tex. App.–Dallas Apr. 13, 2016, no pet. h.) (mem. op.).

The court rejected the argument that the sole manager and officer of an LLC, as an agent of the LLC, cannot defraud the LLC because any misrepresentations by the manager were made to himself.

After improprieties on the part of the sole manager/president/secretary/treasurer of an LLC were discovered by the members of the LLC, the members sued the manager (Todd Fitzerman or “Todd”) and his wife (Linda Fitzerman or “Linda”). Among the improprieties discovered were payments by the LLC of large sums of money directly to Linda or for payment of personal expenses. The trial court granted summary judgment in favor of the LLC against Linda and Todd as to liability for fraud and conspiracy. Todd filed a bankruptcy petition, and the claims against Linda were severed and tried to a jury on the issue of damages. The trial court entered a judgment against Linda for actual and exemplary damages on the fraud claim based on the jury's verdict.

On appeal, Linda attacked the legal sufficiency of the grounds presented by the LLC for its summary judgment. Linda made two arguments: (1) that because Todd was the sole manager and president of the LLC, any misrepresentations were merely made by Todd to himself, and Todd would have defrauded only himself; and (2) that as a matter of law, there can be no conspiracy between a husband and wife. Linda relied on Section 101.254 of the Texas Business Organizations Code (BOC) for the first proposition, but the court concluded that this section did not support the notion that a manager of an LLC cannot defraud the LLC because he is an agent of the LLC. Section 101.254 addresses who may be an agent of the LLC and how an agent may bind the LLC for his acts, but the court pointed out that the following section of the BOC, Section 101.255, addresses when the LLC or its members may have a cause of action against a governing person or officer for breach of duty in making, authorizing, or performing a contract or transaction between the governing person or officer and the LLC. With respect to the argument that there can be no conspiracy between a husband and wife, Linda relied on Section 3.201 of the Texas Family Code, which addresses agency in the spousal relationship. The court stated that this provision did not support Linda's position. The LLC did not allege that Linda was liable because she was Todd's spouse or agent; her liability was based on her own actions in participating in a conspiracy to defraud the LLC. Thus, the court of appeals rejected Linda's challenge to the legal sufficiency of the grounds for her liability.

G. Transfer Restrictions and Buyout Provisions

White v. Pottorff, 479 S.W.3d 409 (Tex. App.–Dallas 2015, pet. filed).

A Delaware LLC, White Energy Partners, LLC (“WEP”), agreed to repurchase the Class B units of the Class B member, White Ventures Energy, LLC (“White Ventures”). Members of the Class A member, We Investors Group, LLC (“WEIG”), brought a derivative suit against Trey White, who was the manager of WEIG as well as the manager of White Ventures and a member of the board of managers of WEP, asserting breach-of-fiduciary and other claims against White related to WEP's repurchase of White Venture's Class B units. The plaintiffs also sued White Ventures for breach of contract, alleging that White Ventures violated a provision of the WEP operating agreement allowing WEIG to “tag along” with White Venture's sale of its Class B units to WEP. The trial court concluded that the tag-along provision applied to the repurchase, but the court of appeals analyzed the tag-along provision and concluded that the provision did not entitle a Class A member to participate in a Class B member's sale of Class B units. Even assuming the tag-along provision generally entitled a Class A member to participate in a Class B member's sale of Class B units, the court concluded that the provision did not apply in this case because the Delaware LLC statute provided that the units repurchased by WEP were canceled on their repurchase, and the operating agreement contemplated that the purchaser in a transaction described in the tag-along provision would be capable of becoming a substituted member who would have the right to vote the units and receive distributions and allocations of profits and losses with respect to the units.

After White Ventures executed an agreement in which it agreed to transfer its Class B units to WEP, White Ventures sent WEIG a written notice of the proposed sale pursuant to a right-of-first-refusal provision in the WEP operating agreement. The right-of-first-refusal provision was one of two provisions contained in Section 10.4 of the WEP operating agreement. Section 10.4 was entitled “Sale by a Class A Member or Class B Member.” Section 10.4.1 was entitled “Right of First Refusal,” and Section 10.4.2 was entitled “Tag Along.” White decided not to

have WEIG purchase any of the Class B units under the right-of-first-refusal provision. The trial court concluded that WEIG was entitled to the rights provided under the tag-along provision of the operating agreement in addition to the right-of-first-refusal provision and entered a judgment for relief based on the breach of the tag-along provision by White Ventures and related breaches of fiduciary duty by White. White and White Ventures appealed.

The court of appeals agreed with the appellants' argument that the tag-along privileges applied only to members holding the same class of units as the class that was the subject of the third-party offer. Under the tag-along provision, a member that elected to participate in a sale of units was entitled to sell in such proposed sale, at the same price and on the same terms, "*a number of Units included in [such sale of Class B Units]*" determined by a formula set forth in the provision. The court stated that the emphasized language limited the type of units that could tag along to the class of units included in the purchase. Moreover, even assuming the agreement could be read to apply to both classes of units, the number of units that WEIG would be entitled to sell would be zero under the formula in the agreement because the pro rata portion was determined by dividing the number of WEIG's Class B units, which was zero, into the total number of Class B units.

The court of appeals explained that there was another reason in this case that the language of the tag-along provision precluded WEIG from having tag-along rights in the transaction at issue. The provision described the field of buyers whose purchases could trigger tag-along rights as a "Person" who could become a substituted WEP member. Although "Person" was defined to include an LLC, WEP could not become a member of itself, and its repurchase of White Ventures' units thus did not trigger tag-along rights. Section 10.1 stated that it applied to an offer to purchase Class A or B units from any Person, but the provision later stated that a Person who purchased a member's interest did not become a substituted member unless the terms and conditions of another provision of the operating agreement were satisfied. A substituted member under the operating agreement was entitled to all of the rights and benefits under the agreement of the transferor of the interest. These rights would include voting and economic rights. Because the Delaware LLC statute provides that an interest in an LLC that is acquired by the LLC is deemed canceled unless otherwise provided in the LLC agreement, and the WEP agreement did not override this provision, the court concluded that White Venture's units were canceled when repurchased by WEP, and WEP was not a Person whose offer triggered the provisions of Section 10.1.

H. Access to Books and Records

Davis v. Highland Coryell Ranch, LLC, No. 07–15–00269–CV, 2016 WL 1238175 (Tex. App.–Amarillo Mar. 28, 2016, pet. filed) (mem. op.).

The court reversed a summary judgment in favor of an LLC on a former member's claim to inspect the books and records created by the LLC during the former member's time as a member because the absence of the governing documents in the summary judgment record precluded the LLC from establishing as a matter of law that the former member was not entitled to view the records.

Davis was a former member of an LLC who relinquished his membership and later sought to inspect the books and records created or developed by the LLC during his time as a member. Because the LLC refused his request for access to the books and records, Davis sued the LLC and requested a declaration entitling him to inspect the desired documents. The trial court granted summary judgment in favor of the LLC, and Davis appealed, arguing that the trial court misconstrued the applicable statutes.

The court identified the relevant provisions in the Texas Business Organizations Code (BOC) as Sections 3.153 and 101.502. Section 3.153 states that "[e]ach owner or member of a filing entity may examine the books and records of the filing entity maintained under Section 3.151 and other books and records of the filing entity to the extent provided by the governing documents of the entity and the title of this code governing the filing entity." Section 101.502(a)(1)-(2) provides:

A member of a limited liability company or an assignee of a membership interest in a limited liability company, or a representative of the member or assignee, on written request and for a proper purpose, may examine and copy at any reasonable time and at the member's or assignee's expense:

- (1) records required under Sections 3.151 and 101.501; and
- (2) other information regarding the business, affairs, and financial condition of the company that is reasonable for the person to examine and copy.

The dispute between Davis and the LLC related to the words “member” and “owner.” Davis argued that these words encompass both present and former members and owners of the entity. The LLC apparently convinced the trial court that they referred to only current members and owners.

The court found it odd that neither party cited the statutory definitions to the trial court or in their respective appellate briefs. Nevertheless, the court stated that the definitions controlled the outcome. According to Section 1.002(53) of the BOC, a “member” of an LLC is “a person who *is* a member or *has been admitted as a member in the limited liability company under its governing documents.*” Tex. Bus. Orgs. Code § 1.002(53)(A)(emphasis added). In a different paragraph of that same section, “owner” of an LLC is defined as “a member.” *Id.* § 1.002(63). Thus, the definitions of “owner” and “member” contain at least two components, one of which depends on the verbiage of the LLC’s “governing documents,” but the summary judgment record did not contain the governing documents of the LLC. Without them, the court of appeals said that the trial court could not find that the LLC established, as a matter of law, that Davis was not entitled to view the LLC’s records. In other words, the trial court could not hold, as a matter of law, that Davis was not a member without knowing whether Davis “ha[d] been admitted as a member” under the LLC’s governing documents.

The court of appeals next addressed two other grounds asserted by the LLC: limitations and release. The LLC relied on the residual four-year statute of limitations. Based on Davis’s requests for documents, the LLC argued that Davis was required to sue no later than April of 2012, and he did not file until July of 2012. But the court of appeals concluded that the LLC’s analysis was flawed. Section 101.502(a) of the BOC provides that a member may review and copy records “on written request and for a proper purpose.” The court stated that this language led to the logical conclusion that any duty to disclose would not arise until such a written request was made and then refused. The summary judgment record revealed several written requests from Davis, the earliest being dated April 25, 2008, and sent by an attorney named Matheson. An affidavit attached to the motion for summary judgment stated that documents were sent to Mr. Matheson in response to that request and that copies of those documents had previously been provided to Davis. The court stated that the act of sending documents could hardly be interpreted as a refusal to comply with Section 101.502(a) in April of 2008, or, at the very least, a fact issue existed in that regard. The next written request appearing in the record was sent on behalf of Davis in February of 2012. Apparently, the LLC complied with that request in part. Assuming the partial failure to comply constituted a breach of the statutory duty in question, Davis filed suit for a declaration of his rights on July 25, 2012, less than four years from February 2012. Thus, the LLC failed to prove, as a matter of law, its entitlement to summary judgment on the affirmative defense of limitations.

As for its defense of release, the LLC argued that Davis executed an agreement releasing his causes of action against the LLC. The document relied upon by the LLC referred to a release and discharge of all claims by “the parties” and their “agents, employees and representatives,” but the document did not define the term “parties.” The document opened by stating that the agreement was by and between Davis and Byron Cook, but the LLC was not mentioned in that passage or in the paragraph referencing the release and discharge of claims. Also significant was the absence of conditioning language from the signatures of both Davis and Cook indicating that they intended to act individually and/or as a representative of the LLC. Although the record indicated that Cook was the sole remaining member of the LLC once Davis left, the LLC did not argue that it and Cook were one and the same. Because someone unnamed in a release (or otherwise omitted from the category of people released) is not released, the summary judgment record failed to provide the trial court a basis to hold that the LLC was entitled to judgment as a matter of law on the affirmative defense of release.

I. Indemnification Provisions

Brickley v. Scattered Corporation (In re H & M Oil & Gas, LLC), 514 B.R. 790 (Bankr. N.D. Tex. 2014).

The bankruptcy court addressed the trustee’s claims for breach of fiduciary duty against the former manager of the debtor LLC, an oil and gas company. The court stated that “[a]s its Manager, Greenblatt owed fiduciary duties to H & M, including the duties of care and loyalty.” The court relied on case law in the corporate context in describing the standards of conduct required by these duties. Based on these precedents, the court analyzed whether Greenblatt breached the duties of loyalty and care owed to the debtor LLC as its manager by: (1) failing to timely pay drilling costs; (2) not requesting funds under the debtor-in-possession financing agreement (DIP agreement); and (3) not taking action against the LLC’s post-petition lender related to the lender’s breach of the

DIP agreement. The court concluded that the manager did not breach his fiduciary duties to the LLC and then analyzed the manager's claim for indemnification.

Greenblatt prevailed on a claim for indemnification under the indemnification provision of the LLC's regulations (i.e., company agreement). The provision required the LLC to indemnify the manager "against loss, liability or expense, including attorneys' fees, actually and reasonably incurred, if he or it acted in good faith and in a manner reasonably believed to be in or not opposed to the best interests of the Company as specified in this section, except that no indemnification shall be made in respect of any claim, issue or matter as to which the [manager] shall have been adjudged to be liable for gross negligence, willful misconduct or breach of fiduciary obligation in the performance of his or its duty to the Company...." The trustee argued that Greenblatt did not meet the standard for indemnification, but the court stated that it could not find that Greenblatt's actions were grossly negligent or constituted willful misconduct in light of the court's finding that he acted within the scope of his fiduciary duties owed to the LLC and that his actions fell within the scope of the business judgment rule. Because the record showed that Greenblatt acted in good faith and in a manner not opposed to the LLC's best interests, Greenblatt was entitled to indemnification of his expenses incurred in defending the complaint. The court concluded that the indemnification claim under the LLC regulations should be allowed as a general unsecured claim in the LLC's Chapter 11 case. (The court also concluded that Greenblatt had a claim for indemnification under the DIP agreement and that the claim should be allowed as an administrative expense of the Chapter 11 case.)

J. Capital Contribution Provisions

Galaz v. Galaz (In re Galaz), Case No. 07-53287-RBK, Adv. No. 08-5043-RBK, 2015 WL 457850 (Bankr. W.D. Tex. Jan. 23, 2015).

The debtor sought to set aside a transfer from an LLC in which the debtor held an interest and recover damages based on the transfer. The debtor claimed that her ex-husband caused the LLC to improperly transfer valuable rights to a company solely owned by her ex-husband's father. The court concluded that the transfer was invalid and that the debtor should recover damages. In the course of the opinion, the court interpreted several provisions of the operating agreement of the LLC in which the debtor held an interest and determined the effect of several transactions that bore on the analysis of the validity of the transfer at issue. One of the issues examined by the court was whether a member's failure to respond to a capital call stripped the member of his membership. The court held that the capital call was not properly made, and the member's failure to respond did not strip the member of his membership.

Raul Galaz ("Raul") and Julian Jackson ("Julian") formed Artist Rights Foundation, LLC ("ARF"), a California LLC, and ARF acquired certain music royalty rights. The debtor, Lisa Galaz, acquired a 25% interest in ARF as a result of being awarded one-half of Raul's 50% interest in ARF in their divorce. In her bankruptcy case, Lisa brought an adversarial proceeding for relief based on Raul's transfer of ARF's royalty rights to Raul's father's company for no consideration.

For purposes of certain issues in this proceeding, it was important to determine whether Lisa was a member of ARF or was merely the assignee of an economic interest. Based on the operating agreement of ARF, the court found that Lisa held only an economic interest in ARF.

Julian's status as a member was also at issue because Raul claimed that Julian ceased to be a member as a result of his failure to respond to a capital call made by Raul. Raul sent a demand letter to Julian in which he demanded that Julian send money to cover expenses incurred by ARF. Raul sent the demand letter to the address specified for Julian in the operating agreement and contended that the letter constituted "written notice" under the terms of the operating agreement and that Julian had 10 days under the operating agreement to respond to the request for capital contributions. But Raul knew that the address to which he sent the demand letter was no longer valid, and Julian never received the demand letter. In addition, the demand letter did not particularly describe the charges for services or capital contributions Julian allegedly owed at that time and did not account for the capital contributions provided by Julian at the formation of the company. Thus, the court found that the demand letter was neither a legitimate demand for capital contributions nor an accounting of the company's expenses, but was merely a pretext in Raul's scheme to defraud ARF and its interest holders for his own benefit. Thus, Julian's failure to respond to Raul's capital call did not strip Julian of his status as a full member.

K. Distribution Provisions

Johnson v. King (In re King), 541 B.R. 404 (Bankr. N.D. Tex. 2015).

The debtor's co-member in an LLC brought this adversary proceeding objecting to discharge of the debtor for a debt arising from fraud or defalcation in a fiduciary capacity. The bankruptcy court found it unnecessary to decide any issues of fraud or defalcation with respect to fiduciary duties owed by the debtor to the LLC since the LLC was not a plaintiff and the other member did not have standing to pursue the LLC's claims. Assuming without deciding that the debtor owed his fellow member a fiduciary duty (which the debtor did not concede), there was insufficient evidence of moral turpitude, intentional wrongdoing, or willful blindness by the debtor with respect to the matters about which the other member complained (which included disproportionate distributions to the debtor from the LLC) to constitute fraud or defalcation.

Johnson and King formed Earl's Deli, LLC, a Texas LLC, to operate a sandwich shop. The certificate of formation provided that the LLC was member-managed, and the company agreement likewise provided for management by the members, in proportion to the percentage interests of the members, which were 51% for Johnson and 49% for King. Notwithstanding the provision for management in proportion to their percentage interests, Johnson chose to be a passive owner, and King managed the LLC for the first year and a half until King informed Johnson that the LLC was out of money and would have to close. Johnson did not want to close the deli, so he took over the day-to-day operations. After doing so and reviewing the books, Johnson discovered alleged improprieties on the part of King. Johnson managed the deli for the next 3 ½ years until the deli's landlord, a corporation owned by Johnson, changed the locks and evicted the LLC for failure to pay the rent for the previous four years.

Johnson sued King in state court and obtained a judgment after a non-jury trial in which the court made no findings of fact or conclusions of law. King then filed a Chapter 7 petition, and Johnson filed this adversary proceeding objecting to discharge of King's debt to him under Section 523(a)(4) (fraud or defalcation in a fiduciary capacity) and (a)(6) (willful and malicious injury to an entity or the property of an entity).

The court found that the evidence did not show that King committed "fraud" while acting in a fiduciary capacity because there was insufficient evidence of moral turpitude or intentional wrong. The court stated that allegedly unauthorized gas purchases made on the LLC credit card as well as \$2,000 in distributions made to King during the time he managed the LLC were fully disclosed in the records of the LLC, to which Johnson always had access, and these transactions thus were not done "secretly" as alleged by Johnson. With respect to the gas purchases, it was necessary for the LLC to use the car of a member or employee since the LLC had no car. Although some of the gas purchases were for King's personal use, there was no evidence that the LLC helped King pay a portion of his car insurance or maintenance, or that the total transaction—King's providing a car and paying all maintenance and insurance in exchange for purchasing gas with the LLC's credit card—was unfair to the LLC. (The company agreement permitted a member to transact business with the LLC if the transaction was fair to the LLC.) With respect to the \$2,000 in distributions, the company agreement provided that distributions of excess cash were to be made to the members in proportion to their percentage interests. While it was true that King made distributions only to himself and not to Johnson while King was managing and operating the deli, the court pointed out that Johnson chose not to share management responsibilities in proportion to their percentage interests as provided in their company agreement and that King's calculation of excess-cash determinations appeared to have been proper. Furthermore, Johnson allowed similar distributions to be made to King even after Johnson took control of the day-to-day management and operation of the deli. Given provisions in the company agreement that allowed a member to exercise remedies against a defaulting member who has committed fraud or theft or gross negligence, the court found disingenuous Johnson's claim that he did not want to "wrestle" with King over the distributions and did not know how to stop him. The court stated that the distributions did not suggest moral turpitude or intentional wrong by King, but instead both parties' recognition that King was entitled to some type of return for his sweat equity or that King needed the distributions for living expenses.

The evidence did not show that King committed a "defalcation" while acting in a fiduciary capacity because a defalcation requires a culpable state of mind involving knowledge of, or gross recklessness with respect to, the improper behavior. The court found that King did not have actual knowledge of any wrongdoing with respect to use of the LLC credit card or distributions because there was none, and he was not willfully blind to breaches of fiduciary duty because there were no such breaches. The evidence also did not show that King committed embezzlement or larceny within the meaning of Section 523(a)(4).

L. Dissolution/Winding Up

Galaz v. Galaz (In re Galaz), Case No. 07–53287–RBK, Adv. No. 08–5043–RBK, 2015 WL 457850 (Bankr. W.D. Tex. Jan. 23, 2015).

The debtor sought to set aside a transfer from an LLC in which the debtor held an interest and recover damages based on the transfer. The debtor claimed that her ex-husband caused the LLC to improperly transfer valuable rights to a company solely owned by her ex-husband’s father. The court concluded that the transfer was invalid and that the debtor should recover damages. In the course of the opinion, the court interpreted several provisions of the operating agreement of the LLC in which the debtor held an interest and determined the effect of several transactions that bore on the analysis of the validity of the transfer at issue.

Raul Galaz (“Raul”) and Julian Jackson (“Julian”) formed Artist Rights Foundation, LLC (“ARF”), a California LLC, and ARF acquired certain music royalty rights. The debtor, Lisa Galaz, acquired a 25% interest in ARF as a result of being awarded one-half of Raul’s 50% interest in ARF in their divorce. In her bankruptcy case, Lisa brought an adversarial proceeding for relief based on Raul’s transfer of ARF’s royalty rights to Raul’s father’s company for no consideration.

For purposes of certain issues in this proceeding, it was important to determine whether Lisa was a member of ARF or was merely the assignee of an economic interest. Based on the operating agreement of ARF, the court found that Lisa held only an economic interest in ARF.

Julian’s status as a member was also at issue because Raul claimed that Julian ceased to be a member as a result of his failure to respond to a capital call made by Raul. The court found that the demand letter was neither a legitimate demand for capital contributions nor an accounting of the company’s expenses, but was merely a pretext in Raul’s scheme to defraud ARF and its interest holders for his own benefit.

The court examined the provisions of the operating agreement addressing management of ARF to determine whether Raul had authority to transfer valuable royalty rights owned by ARF to Segundo Suenos, LLC (“Segundo Suenos”), an LLC solely owned by Raul’s father. The royalty rights constituted substantially all of the assets of ARF, and the operating agreement required approval of members holding a majority of the membership interests to authorize their transfer. Raul claimed that he was the sole full member of ARF remaining at the time of the transfer and did not need consent of either Lisa or Julian to transfer ARF’s assets. The court agreed that Raul did not need the consent of Lisa because she was only the holder of an economic interest and not a voting member, but Julian was a full member of ARF, with voting and management rights, at the time of the transfer to Segundo Suenos. Raul needed Julian’s approval to transfer ARF’s royalty rights. Because Raul did not obtain the requisite consent, the court concluded that the transfer was void and unenforceable.

The court found that Raul wrongfully dissolved ARF by filing a certificate of cancellation with the California Secretary of State after transferring ARF’s assets to Segundo Suenos. Raul’s dissolution was wrongful because ARF’s articles of organization and operating agreement provided that dissolution of the company would occur under specific conditions, and none of those conditions were met when Raul dissolved ARF. Also, because Raul wrongfully dissolved ARF without notice to Julian, there was no winding up of its affairs as contemplated by the operating agreement. The court stated that ARF’s wrongful dissolution caused it to cease its active existence as an LLC, and its assets devolved to the individual owners of the company.

M. Forfeiture and Involuntary Termination

Hovel v. Batzri, 2016 WL 802070, __ S.W.3d __ (Tex. App.–Houston [1st Dist.] 2016, no pet. h.).

Homeowners sued an LLC homebuilder for breach of contract and DTPA violations, and the LLC’s privileges were forfeited due to failure pay franchise taxes. The forfeiture occurred after the suit was filed but before any determination of liability. The plaintiffs obtained a default judgment against the LLC and then sought to hold the sole manager of the LLC personally liable for the LLC’s debt under Section 171.255 of the Texas Tax Code. The trial court granted the manager’s motion for summary judgment, and the court of appeals affirmed because there was no dispute that the contract was executed pre-forfeiture, and the breach, tortious conduct, and injury occurred pre-forfeiture.

The Hovels contracted with a Texas LLC to build a custom home. The sole member and manager of the LLC was Gal Batzri. The Hovels became dissatisfied and sued the LLC for causes of action that included breach of contract, violation of the DTPA, and fraud. While the suit was pending, the LLC forfeited its charter and

corporate privileges by failing to pay its franchise tax, and the Hovels obtained a default judgment against the LLC for more than \$2 million in actual damages. The judgment did not specify which of the Hovels' multiple legal theories was the basis of the damages awarded. A few months after the Hovels obtained their default judgment, the LLC revived its charter and corporate privileges.

After obtaining the default judgment against the LLC, the Hovels brought this lawsuit, in which they sought to hold Batzri personally liable for the judgment against the LLC under Section 151.255 of the Texas Tax Code. Section 171.255 imposes on a “director or officer” personal liability for “each debt of the corporation that is created or incurred” between the date that a company forfeits its corporate privileges and the date that it revives the privileges. This provision applies to LLCs as well as corporations, and the parties agreed that Batzri, the LLC’s sole member and manager, was personally liable for any debt created or incurred during forfeiture of the LLC’s corporate privileges and that the Hovels obtained a default judgment against the LLC while the LLC was forfeited. The point of dispute was whether the LLC’s debt was created or incurred when the default judgment was entered or when the tortious or otherwise wrongful conduct occurred that ultimately led to the judgment against the LLC. The trial court granted summary judgment in favor of Batzri, apparently concluding that the debt was not “created or incurred” by the default judgment, which was the only event that occurred during the period of forfeiture. The Hovels appealed.

The Hovels argued that a debt does not come into existence until it is liquidated, relying in part on a narrow definition of “debt” adopted by the legislature in 1987. According to the Hovels, their damages remained unliquidated until they obtained the default judgment, and no debt was created or incurred until the default judgment issued during the forfeiture. Conversely, Batzri argued that the 1987 narrow definition of “debt” is no longer significant because the legislation enacting it has been repealed. Batzri asserted a broad definition of “debt” that includes unliquidated obligations such that the LLC’s debt was created or incurred before the forfeiture, when the acts or omissions that gave rise to the Hovels' claim occurred, and the default judgment related back to that time.

Characterizing Section 171.255 as a penal statute such that any ambiguity must be “strictly construed” in favor of the party penalized by it, the court discussed numerous cases decided before the adoption of the definition of “debt” in 1987. The pre-1987 case law strictly construed the statute to treat debts as created or incurred at the time the relevant contractual obligations were incurred rather than at a later date when the obligations were breached or became due. Consistent with strict construction and this broad approach to “create or incur,” the pre-1987 case law applied a “relation-back” doctrine. That doctrine was first applied in *Curry Auto Leasing, Inc. v. Byrd*, 683 S.W.2d 109, 111 (Tex. App.–Dallas 1984, no writ), which involved a corporation that failed to make lease payments both before and after forfeiting its corporate privileges. The issue in *Curry* was whether the corporation's debt was created or incurred only after the amount of unpaid rent was capable of calculation, post-forfeiture, or earlier while still unliquidated. The court of appeals in *Curry* held that the obligation to pay the debt arose from the lease contract, even if the exact amount of the deficiency was unknown at that time (i.e., it was unliquidated), because there was no argument that a sum of money was due under “a new, different, separate, or independent agreement.” Thus, performance related back to and was authorized at the time of execution of the contract. The corporate officers in *Curry* were not personally liable because “the obligations, circumstances, conduct, or transactions that create[d] or incur[red] the debt in question pre-existed the forfeiture,” even though the debt was, at that point, still unliquidated. This “relation-back” doctrine allowed future liquidated debts to relate back to the execution of the agreement through which damages were owed. Many courts of appeals followed *Curry*, including a case involving tort claims that arose out of a contract. In *Rogers v. Adler*, 696 S.W.2d 674, 677 (Tex. App.–Dallas 1985, writ ref'd n.r.e.), a plaintiff obtained a judgment during an entity-defendant's period of forfeiture, and the plaintiff attempted to impose personal liability by arguing that the tort liability remained unliquidated until it was reduced to a judgment and thus was not a debt “created or incurred” until the judgment was entered during the period of forfeiture. The plaintiff's suit against the entity in *Rogers* alleged fraud in the inducement, breach of contract, breach of fiduciary duty, and violation of the DTPA, which the court considered to be claims based on the contract even if the claims were alleged as torts. Further, all the operative facts occurred pre-forfeiture, and the court concluded that the pre-forfeiture tort that led to a post-forfeiture judgment was like the contract entered into prior to forfeiture in *Curry*. Thus, the court of appeals in *Rogers* held that all the claims related back to the contract, whether the claims sounded in tort or contract, and were thus created or incurred pre-forfeiture.

Next the court of appeals discussed the legislature’s adoption and repeal of a narrow definition and the subsequent case law in which the “relation-back” doctrine was applied inconsistently. The definition of “debt” adopted in the Tax Code in 1987 was “any legally enforceable obligation measured in a certain amount of money

which must be performed or paid within an ascertainable period of time or on demand.” This definition precluded corporations from deducting their contingent and unfixed losses from their taxable corporate surplus and thus increased revenue for the State. The definition also eliminated the ambiguity in “debt” and precluded courts from giving it a broad meaning. In 2008, the legislature repealed the definition of “debt” when it amended the Tax Code to adopt an entirely new method of calculating the franchise tax. After the repeal of the definition, the “relation-back” doctrine reemerged, and courts again concluded that a judgment debt is created or incurred when the conduct or contract occurs, even if the obligation is unliquidated at that time.

With the historical context above in mind, the court of appeals considered whether the trial court erred by concluding that the LLC’s debt in this case was not a debt created or incurred during forfeiture and, as a result, Batzri did not have individual liability under Section 171.255. The Hovels entered into a contract with the LLC to purchase a conforming home, and they sued under contract, statutory, and tort-based theories when the home did not meet the standards promised. The court said that all of the conduct underlying their claim, as well as the contract, occurred pre-forfeiture. The only post-forfeiture occurrence was entry of the judgment to liquidate the damages claim. The court concluded that the repealed statutory definition of “debt” was no longer binding and was immaterial to the court’s analysis of Section 171.255. Thus, the court examined the pre- and post-repeal cases to analyze when the LLC’s debt was created or incurred in this case, and the court noted that *Ballard v. Quinn*, No. 14-97-01057-CV, 1998 WL 787558 (Tex. App.–Houston [14th Dist.] Sept. 10, 1998, no pet.) (mem. op., not designated for publication) was factually similar to this case. In *Ballard*, all of the operative facts, including completion of the work performed under the agreement, occurred before the corporate charter was forfeited. The court in *Ballard* held that the plaintiff’s claims in the law suit “necessarily related back to and arose out of the contract,” whether phrased as a breach-of-contract claim or a tort-based negligence claim, even though the liability did not become liquidated until after the forfeiture. Applying the rule of strict construction and relying on a pre-1987 Texas Supreme Court case defining the terms “created” and “incurred,” the court of appeals in this case concluded that the debt evidenced by the default judgment obtained by the Hovels against the LLC was created or incurred pre-forfeiture at the time that the parties established their contractual and other obligations. Thus, the court held that Batzri was not individually liable for the LLC’s debt.

Finally, the court stated that its interpretation did not run afoul of public policy considerations. The court identified three public-policy goals of Section 171.255: (1) to motivate corporate officers and directors to ensure that franchise taxes are paid; (2) to protect those dealing with the corporation; and (3) to hold liable directors and officers who have abused the corporate privilege by continuing to create and incur debts after non-payment of franchise tax and forfeiture of the corporate privilege. The court stated that the first purpose was satisfied because the LLC in this case cured its failure to pay its franchise taxes, and the third purpose was inapplicable because there was no evidence that the LLC had other outstanding bills that it incurred after forfeiture. The court stated that the second purpose was likewise inapplicable because the construction of the Hovels’ home was completed before the forfeiture, and the Hovels were no longer in a contractual relationship with the LLC at the time it forfeited its corporate status. The court stated that this was not a situation in which individuals interacted with a corporation without realizing that it had forfeited its corporate privileges. The Hovels argued that Batzri’s interpretation would provide an incentive for unscrupulous investors to undercapitalize their businesses and default on their franchise tax obligations if the business became potentially liable, but the court said there was no indication that the statute was intended to protect creditors from a defunct corporation’s later failure to follow the procedures for winding down its affairs and filing a certificate of termination. The court pointed out that undercapitalization is a risk inherent in any contractual relationship with a limited-liability entity, and the Hovels presumably were aware of this risk before contracting with the LLC. If Batzri fraudulently transferred corporate assets that were available when the LLC ceased to do business, they could have continued with that claim. The court also listed other safeguards provided by Texas law against self-dealing, including piercing the corporate veil.

In a vigorous and lengthy dissenting opinion, Justice Keyes argued that “[t]he majority has chosen to ignore the reality of seventy unbroken years of the Texas Supreme Court’s and appellate courts’ consistent construction of section 171.255 and to substitute its own alternative meaning of the statute’s terms under its own chosen rules of construction.” Justice Keyes differed as to how the principle of “strict construction” affects the interpretation of Section 171.255 and as to how to interpret case law defining “debt” for purposes of the statute. Justice Keyes argued that the case law requires a court to distinguish among: (1) debts lawfully created or incurred as enforceable obligations by a corporation that subsequently forfeits its charter, as to which no personal liability may be imposed on corporate officers and directors after forfeiture; (2) new debts incurred or created after forfeiture by officers with

knowledge of the post-forfeiture debts, for which the officers or directors may be held personally liable; and (3) judgment debts or penalties incurred by a corporation for wrongful acts of the corporation that occurred prior to forfeiture but were not reduced to a legally enforceable obligation until after forfeiture, for which officers and directors with knowledge of the acts can be held personally liable. Justice Keyes would have held Batzri personally liable in this case on the basis that the debt fell into the third category.

Marshall Feature Recognition, LLC v. Pepsi-Cola Company, No. 6:12-cv-00956-JRG-RSP, 2015 WL 5912672 (E.D. Tex. Sept. 28, 2015).

The court held that an LLC had capacity to file this suit, even though its charter had been forfeited for failure to pay its franchise taxes before it filed suit, because the LLC's charter was reinstated after the suit was filed, and such reinstatement related back as if the disability had never existed.

The plaintiff was an LLC whose charter was forfeited prior to filing suit due to nonpayment of its franchise taxes. The LLC's capacity to file suit was governed by Federal Rule 17(b)(3), which provides that capacity of a non-corporate entity to sue in federal court is determined by the law of the state where the court is located. Under the Texas Tax Code, the right of a corporation or LLC to operate in Texas may be forfeited due to failure to pay its franchise tax. The Tax Code provides that a forfeited corporation or LLC may not sue or defend in a Texas court. The court held that the plaintiff had capacity to bring this suit because its charter was reinstated after the suit was filed. The court relied on Texas case law holding that a corporation's payment of its delinquent taxes removes the disability and that the reinstatement of a corporation's charter relates back and revives whatever rights the corporation had when the suit was filed. The court said that the rule regarding the effect of reinstatement applies to LLCs as well as corporations; therefore, the defendant's motion to dismiss was denied.

N. Veil Piercing

Cornerstone Healthcare Group Holding, Inc. v. Nautic Management VI, L.P., 2016 WL 3382159, ___ S.W.3d ___ (Tex. 2016).

Three nonresident investment fund limited partnerships invested in a newly created Texas LLC subsidiary that purchased a chain of Texas hospitals from a Texas company. The plaintiff, which was a Texas company that was in the market to purchase the hospitals, asserted that the defendants stole the opportunity to purchase the hospitals and that their tortious conduct subjected the defendants to Texas's jurisdiction with respect to claims arising out of that conduct. Other defendants included officers of the plaintiff who allegedly breached their duties to the plaintiff by secretly appropriating the opportunity to purchase the hospitals and joining forces with the private equity firm that then took the deal to the general partner of the funds. The limited partnerships and their nonresident general partner contested personal jurisdiction, but the supreme court concluded that they were subject to specific personal jurisdiction of Texas courts.

The three nonresident investment fund limited partnerships (the "Funds") and their nonresident general partner (collectively the "Fund Defendants") described their role in the underlying events as "limited to creating and funding a subsidiary that, in turn, indirectly invested in the Reliant hospital chain through further subsidiaries." The Fund Defendants cited settled law that the contacts of distinct legal entities, including parents and subsidiaries, must be assessed separately for jurisdictional purposes unless the corporate veil is pierced. They argued that, because the record showed that the entity that had direct contacts with Texas was an indirect subsidiary of the Funds rather than the Funds themselves, and because the plaintiff never argued or proved that the subsidiary's contacts could be attributed to the Fund Defendants under a veil-piercing theory, jurisdiction over the Fund Defendants was lacking. The court agreed with the principle that "so long as a parent and subsidiary maintain separate and distinct corporate entities, the presence of one in a forum state may not be attributed to the other," and the court acknowledged that the plaintiff did not argue that the Funds and their subsidiaries failed to maintain their legal separateness or that the Texas contacts of any one of those entities could or should be attributed to any other. Thus, the LLC subsidiary's Texas contacts (i.e., its ownership and operation of hospitals in Texas) could not in and of themselves subject the LLC's limited partnership parent companies and their general partner to Texas's jurisdiction. But the Funds' use of a subsidiary to purchase the hospitals did not end the inquiry. The court stated that the plaintiff was not attempting to attribute the contacts established by the subsidiary as a going concern to the Funds or their general partner; the plaintiff was seeking to trace the purchase of Texas assets to the entities that spearheaded and directed the transaction and ultimately stood to profit from it. The court agreed with the plaintiff

that “[k]eeping legal entities distinct does not mean they can escape jurisdiction by splitting an integrated transaction into little bits.” The court stated that the hospital purchase did not stem from a third party's unilateral activity; it was the result of a transaction stemming from the activity of the Fund Defendants themselves. The Funds, through the general partner, targeted Texas assets in which to invest and sought to profit from that investment.

In re Divine Ripe, L.L.C., 538 B.R. 300 (Bankr. S.D. Tex. 2016).

The debtor LLC sought to extend the automatic stay to the LLC's member with respect to a lawsuit brought against the LLC and the member before the bankruptcy filing. The court concluded that extension of the stay was not justified. The record provided no basis to conclude that a judgment against the member would in effect be a judgment against the LLC other than the fact that the claims against the LLC and the member were the same and the potential application of collateral estoppel.

Prior to the commencement of this bankruptcy case, the LLC debtor and its member were sued for violations of the Perishable Agricultural Commodities Act, breach of contract, and breach of fiduciary duty. The LLC sought extension of the automatic stay by the bankruptcy court in order to prevent “adverse, and likely irreconcilable, economic effect” on the LLC's estate.

The bankruptcy court explained that the automatic stay is not generally extended beyond the debtor. In *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 999 (4th Cir.1986), the Fourth Circuit recognized an exception to this general rule, and the Fifth Circuit has recognized and applied that exception in a narrow fashion. Under *A.H. Robins Co.*, an exception to the debtor-only application of the automatic stay exists in the circumstances where a non-debtor and debtor are co-defendants and “there is such identity between the debtor and the third-party defendant that the debtor may be said to be the real party defendant and that a judgment against the third-party defendant will in effect be a judgment or finding against the debtor.” In order to find an identity of interest between bankrupts and nonbankrupts, there must be both “unusual circumstances” and “something more than the mere fact that one of the parties to the lawsuit has filed [for bankruptcy]”

The court discussed other Fifth Circuit case law as well as a factually similar case in which another bankruptcy court in Texas declined to extend the automatic stay to the managing member of an LLC debtor. The court then examined the relationship between the LLC debtor in this case and its member. The court noted that the evidence revealed disarray in the accounting records and financial condition of the LLC such that the court “could hardly distinguish the efforts of [the member] on his own accord from those on behalf of the Debtor.” The court stated that the “circumstances presented could hardly be a more ripe ground to pierce the corporate veil of the Debtor to [the member], but not the inverse, as the operations of the Debtor appear to have been unhampered by the lack of activity by [the member] in recent years, contrary to the Debtor's argument of [the member]'s necessitude to the Debtor to remain a going concern.” The court did not believe the facts present in this case constituted the “unusual circumstances” consistent with the Fifth Circuit's treatment of the standard to warrant extension of the automatic stay.

The debtor further argued that the stay should be extended because the debtor was responsible for the acts of its operating member under the principle of respondeat superior, but the court stated that there was no basis for it to consider this argument because the debtor offered no evidence as to how the member had bound the LLC under the principle of respondeat superior. The Fifth Circuit has stated that the automatic stay should extend to non-bankrupt co-defendants only when there is a formal or contractual relationship between the debtor and non-debtors such that a judgment against one would in effect be a judgment against the other. Thus, the court concluded that the presence of identical allegations against the LLC debtor and its member was an insufficient ground to extend the stay to the non-debtor member in the absence of evidence of actual identity of interests such that a judgment against the member would in fact be a judgment against the debtor LLC.

Key v. Richards, No. 03–14–00116–CV, 2016 WL 240773 (Tex. App.–Austin Jan. 13, 2016, no pet. h.) (mem. op.).

The court held that the evidence was sufficient to support a finding that a judgment-debtor LLC fraudulently transferred assets to another LLC to evade payment of a judgment against the judgment-debtor LLC and that the trial court did not improperly apply veil piercing principles to hold the owners of the LLCs personally liable for the judgment and to award the property to the receiver of the judgment-debtor LLC.

After Adams was unable to collect on a judgment that she obtained against Centex Freight Lines, L.L.C. (Centex) in a previous lawsuit, she and the court-appointed receiver for Centex filed this lawsuit alleging a fraudulent transfer of Centex's assets to a commonly controlled company, PJC Properties, LLC ("PJC Properties") for the unlawful purpose of evading payment of the judgment. The owners of Centex and PJC Properties were Steve Key and Pat Curry. The challenged transaction was a foreclosure and sale of Centex's assets to PJC Properties after default on a loan purportedly secured by all of Centex's assets. The jury found that PJC Properties did not have an enforceable security interest in Centex's assets and that the transfer was thus a fraudulent transfer under the Texas Uniform Fraudulent Transfer Act because Centex did not receive "reasonably equivalent value" in exchange for the assets. The jury also found that Key, Curry, and PJC Properties were "responsible" for the unfair conduct of Centex and PJC Properties and that holding only Centex responsible for liability on the Adams judgment would result in injustice. The trial court thus awarded Adams damages in the full amount of her prior judgment jointly and severally against Key, Curry, and PJC Properties, as well as attorney's fees, and awarded the receiver possession and title of all assets owned or held by Centex as of the date of the Adams judgment.

After finding that there was sufficient evidence to support the jury's finding that the transfer of Centex's assets was fraudulent due to the absence of an enforceable security interest, the court turned to the defendants' challenges to the application of veil-piercing principles to hold Key and Curry individually liable. The court began by noting the longstanding common law of Texas regarding corporate veil piercing and pointing out several cases noting statutory developments and applying corporate veil-piercing principles to LLCs. The court also noted the well-established rule that an entity's agent is personally liable for the agent's own fraudulent or tortious acts without the necessity of piercing the entity's veil.

The court rejected challenges to the jury questions and sufficiency of the evidence regarding the liability of Key and Curry based on veil piercing. The defendants complained that the jury question inquiring whether Key and Curry were "responsible" for the conduct of their LLCs took a "kitchen sink" approach to the listing of veil-piercing theories by listing the following: use of the entity as a sham to perpetrate a fraud, and holding only the entity responsible would result in injustice; use of the entity as a means of evading an existing legal obligation, and holding only the entity responsible would result in injustice; use of the entity as a means of circumventing a statute, and holding only the entity responsible would result in injustice; use of the entity to protect a crime or to justify a wrong, and holding only the entity responsible would result in injustice; or transfer of the assets of Centex Freight Lines, LLC to PJC Central Texas Freight Lines, LLC to avoid a judgment or debt and holding only Centex Freight Lines, LLC, PJC Properties, LLC or PJC Central Texas Freight Lines, LLC responsible would result in injustice. The court stated that the court's instructions were derived from applicable case law and were accurate statements of the law. In a footnote, the court acknowledged that the legislature has broadly insulated LLC members from liability for the obligations of the LLC by virtue of Section 101.114, but the court stated: "Without clear direction from the Supreme Court holding that the legislature has thereby abrogated longstanding common law recognizing that corporate agents are liable for their own tortious conduct and may even be liable for an entity's liabilities based on the equitable principles of veil piercing, we refuse to hold that section 101.114 shields Key and Curry from their tortious fraudulent transfer under the circumstances in this case." In addition, the court concluded that the findings of the jury were sufficient to impose liability on Key and Curry for their own tortious conduct without relying on veil piercing. The court also concluded that the evidence was sufficient to support imposing liability on Key and Curry for the fraudulent transfer.

The court held that the defendants did not preserve their complaint that the judgment was improper in awarding double recovery by awarding Adams damages in the amount of her prior judgment while also granting the receiver equitable relief in the form of possession and title to all of Centex's assets as of the date of the Adams judgment. The court also held that the defendants waived other arguments related to damages.

In a concurring opinion, Justice Pemberton disagreed with the court that the issue of personal liability of Curry or Key for direct tort liability was properly before the court. In agreeing with the majority that their liability could be affirmed on the basis of veil piercing, Justice Pemberton emphasized that the defendants did not preserve, and the court thus was not called upon to address, the argument that Texas law simply does not allow the piercing of an LLC's veil in the same manner as a business corporation. Neither was the question addressed by the court in *Shook v. Walden* because the defendant in that case conceded the general proposition that the veil of a Texas LLC can be pierced in some circumstances. According to Justice Pemberton, "[t]his is potentially a more vexing question than one might assume initially because of the curious phrasing of section 101.002 of the Business Organizations Code, which applies to LLCs the statutory provisions governing veil-piercing of business corporations, but with

the preceding qualifier, ‘Subject to Section 101.114,’ a reference to the general statutory limitations on the liability of LLC members.”

Fisher v. Blue Cross and Blue Shield of Texas, Inc., No. 3:10–cv–2652–L, 2015 WL 5603711 (N.D. Tex. Sept. 23, 2015).

The court held that a genuine dispute of material fact precluded summary judgment as to veil-piercing and alter-ego theories of liability asserted against a physician and several LLCs owned by the physician.

Blue Cross and Blue Shield of Texas, Inc. (“BCBSTX”) asserted a counterclaim for money had and received against Dr. Neil Fisher and the following entities owned by Dr. Fisher: Paragon Office Services, LLC, Paragon Ambulatory Health Resources, LLC, Paragon Ambulatory Physician Services, LLC, and Office Surgery Support Services, LLC (collectively, the “Paragon Entities”). BCBSTX sought to pierce the corporate veil between Dr. Fisher and the Paragon Entities, and asserted other theories of liability, including that Dr. Fisher and the Paragon Entities were mere alter egos or a single business enterprise. Dr. Fisher and the Paragon Entities sought summary judgment as to the single-business enterprise, veil-piercing, and alter-ego theories of liability.

Because the Texas Supreme Court rejected the single-business enterprise theory in *SSP Partners v. Gladstrong Investments (USA) Corp.*, the court granted summary judgment as to the single-business enterprise theory of liability.

The court quoted from Fifth Circuit case law in which the Fifth Circuit pointed out that veil piercing is a remedial measure used to impose liability on an owner of a corporation or LLC and that veil-piercing and alter-ego principles apply equally to corporations and LLCs. The court further quoted the Fifth Circuit in stating that “[s]eparate corporate structures may be ignored when ‘the corporate form has been used as part of a basically unfair device to achieve an inequitable result.’” Because BCBSTX’s claim of money had and received was quasi-contractual in nature, the court agreed with Dr. Fisher and the Paragon Entities that BCBSTX was required by Section 21.223(b) of the Texas Business Organizations Code to establish that Dr. Fisher “caused the corporation to be used for the purpose of perpetrating and did perpetrate an actual fraud on the obligee primarily for the direct personal benefit of the holder, beneficial owner, subscriber, or affiliate” to establish alter-ego liability. The court pointed out that Section 21.223(b) applies to LLCs, members, owners, and managers under Section 101.002.

Viewing the evidence in the light most favorable to BCBSTX, the court determined that there was a genuine dispute of material fact as to whether Dr. Fisher established the Paragon Entities as mere instrumentalities to facilitate a fraudulent billing scheme, and whether Dr. Fisher blurred the lines between him and the Paragon Entities such that these entities were nothing more than the alter ego of Dr. Fisher and one another. The court also concluded that BCBSTX produced summary judgment evidence sufficient to create a genuine dispute of material fact that the alleged fraud was perpetrated primarily for the direct personal benefit of Dr. Fisher or the other Paragon Entities as required by Section 21.223(b) of the Texas Business Organizations Code. Thus, the court denied the motion of Dr. Fisher and the Paragon Entities for summary judgment on the veil-piercing and alter-ego theories of liability.

Paragon Office Services, LLC v. Aetna Inc., No. 3:11–CV–1898–L, 2015 WL 4602943 (N.D. Tex. July 30, 2015).

The court held that a genuine dispute of material fact precluded summary judgment on claims that (1) the veil should be pierced between and among a physician, a professional association, and several LLCs and (2) the physician and the entities should be treated as alter egos of one another.

Aetna Healthcare, Inc. (“AHI”) asserted counterclaims against the plaintiffs, Paragon Office Services, LLC, Office Surgery Support Services, LLC, Paragon Ambulatory Physician Services, P.A., and Ambulatory Health Systems, LLC (collectively, the “Paragon Entities”) and a third-party complaint against Dr. Neal Fisher and another professional association. AHI alleged that the veil should be pierced between and among Dr. Fisher and the Paragon Entities or, alternatively, that Dr. Fisher and the Paragon Entities were alter egos of each other. AHI alleged that Dr. Fisher created and used the LLCs and PAs in order to perpetrate a fraud by submitting duplicate and improper claims for reimbursement. AHI further alleged that discovery of the scheme was avoided or delayed by submitting claims under new entities or TINs even though they were providing the same services as previous Paragon Entities whose claims had been denied. Alternatively, AHI alleged that Dr. Fisher and the Paragon Entities were alter egos of one another. Dr. Fisher and the Paragon Entities sought summary judgment on these claims.

The court quoted from Fifth Circuit case law in which the Fifth Circuit pointed out that veil piercing is a remedial measure used to impose liability on an owner of a corporation or LLC and that veil-piercing and alter-ego principles apply equally to corporations and LLCs. The court further quoted the Fifth Circuit in stating that “[s]eparate corporate structures may be ignored when ‘the corporate form has been used as part of a basically unfair device to achieve an inequitable result.’” Viewing the evidence in the light most favorable to AHI, the court determined that there was a genuine dispute of material fact as to whether Dr. Fisher established the Paragon Entities for the purpose of deceiving AHI through the use of changing TINs and varied billing schemes and whether Dr. Fisher blurred the lines between himself and the Paragon Entities such that the entities were nothing more than the alter ego of Dr. Fisher and one another. Thus, the court denied the motion for summary judgment.

O. Creditor’s Remedies: Charging Order, Turnover Order, etc.

Henderson v. Chrisman, No. 05–14–01507–CV, 2016 WL 1702221 (Tex. App.–Dallas Apr. 27, 2016, no pet. h.) (mem. op.).

The trial court granted judgment creditors a turnover order directed at all monies, distributions, or assets received by the judgment debtor from an LLC in which the judgment debtor owned an interest and injunctive relief prohibiting the judgment debtor from disposing of her interest in the LLC. The court of appeals upheld the turnover order and injunctive relief.

Henderson and her husband entered into an agreed judgment to settle a lawsuit brought against them by the Chrismans, and Henderson’s husband later agreed to pay the judgment when they divorced. Henderson’s ex-husband defaulted in payment of the judgment, and the Chrismans sought post-judgment relief in aid of enforcement of the judgment against Henderson. The Chrismans alleged that Henderson owned an interest in an LLC and had received distributions from the LLC in the amount of \$155,000. The trial court granted the Chrismans a turnover order that ordered Henderson to turn over “all monies, distributions, or assets” she received from the LLC and an injunction that enjoined Henderson from “assigning, selling, giving away, pledging or encumbering” Henderson’s interest in the LLC until the judgment was paid in full. Henderson appealed.

Henderson argued the trial court abused its discretion by ordering turnover because a charging order is the exclusive method by which the Chrismans could recover any distribution from the LLC. Henderson asked the court to revisit its holding in *Stanley v. Reef Securities, Inc.*, 314 S.W.3d 659 (Tex. App.–Dallas 2010, no pet.), which she contended was wrongly decided to the extent it would permit issuance of a turnover order with respect to distributions from an LLC. The court declined to overrule *Stanley* and concluded that a charging order was not the exclusive remedy available in this case. In *Stanley*, the court analyzed Section 153.256(d) of the Texas Business Organizations Code (BOC) and concluded a charging order was not the exclusive remedy for reaching partnership distributions. In *Stanley*, the court determined that Section 153.256 (which applies to limited partnerships) did not preclude a judgment creditor from seeking the turnover of proceeds from a partnership distribution after a distribution has been made and is in the debtor's possession. Section 101.112 of the BOC, which applies to an LLC, states: “The entry of a charging order is the exclusive remedy by which a judgment creditor of a member or of any other owner of a membership interest may satisfy a judgment out of the judgment debtor's membership interest.” This language is essentially the same as the language of Section 153.256, and Henderson did not cite any authority indicating that *Stanley* was wrongly decided or that Section 101.112 required a different analysis and conclusion than Section 153.256.

The court noted that Henderson’s lawyer agreed during the turnover hearing that Henderson was not a member of the LLC and stipulated she inherited her interest. Her lawyer also agreed during the hearing that a charging order would not apply to the facts in this case. Henderson became an assignee of her father's interest with a right to distributions. Tex. Bus. Orgs. Code. § 101.1115(a)(2) (upon the death of a member, the successor becomes an assignee of the membership interest). Applying the same reasoning as *Stanley*, the court found nothing in the plain language of Section 101.112 that precludes a judgment creditor from seeking the turnover of proceeds from a membership distribution if and when such a distribution is made and in the judgment debtor's possession. Thus, the court concluded that a charging order was not the exclusive remedy in this case.

The court next considered Henderson’s argument that the evidence was insufficient to support the required elements to justify a turnover order. A turnover order is proper if the conditions of Section 31.002 of the Texas Civil Practice and Remedies Code are met. These requirements include a showing that the debtor owns the property, including present or future rights to property, that cannot be readily attached or levied on by ordinary legal process.

Henderson argued that the trial court had no evidence establishing what interest, if any, that she owned in the LLC, but her counsel stipulated to her interest at the hearing, and the documents attached to the Chrismans' motion showed she owned an interest. Henderson testified in her deposition that she inherited an interest in the LLC from her father, and she admitted in an interrogatory that she owned a sixteen percent interest in the LLC. The Chrismans also provided a Schedule K-1 that listed Henderson's interest in the LLC. This was some evidence satisfying the required showing of ownership.

Henderson argued that the turnover order was overly broad because it required her to turn over "all monies, distributions, assets [she] receives from Henderson Properties," which encompassed potential future property that may be exempt. The court was not persuaded by her argument. The trial court's order only required the turnover of property distributions from her interest in the LLC and not generally owned property. Further, Section 31.002(a) allows a judgment creditor to recover "present and future rights to property." Thus, the turnover order was not overbroad.

After concluding Henderson owned property that was not exempt, the court turned to the question of whether the property could not be readily attached by ordinary legal process. The court noted that courts may look to a judgment debtor's noncompliance and lack of cooperation in determining whether or not property is readily attached. The court pointed to evidence that Henderson had lent money to her boyfriend as a showing of unwillingness and lack of cooperation in paying the judgment, which provided some evidence to support the trial court's conclusion that payments from the LLC to Henderson could not be readily attached or levied on by ordinary legal process. The court also stated that Henderson's interest entitling her to future distributions from the LLC was "a nontangible property interest that cannot be readily attached and levied on by ordinary legal process." Although Henderson argued that there was nothing extraordinary about the property in question that would make it difficult to attach by ordinary legal process, the court could not conclude that the trial court abused its discretion by ordering turnover when it had before it some evidence of the necessary conditions for a turnover order.

With respect to the injunctive relief granted by the trial court, Henderson argued that there was no evidence to support that relief and that the turnover statute did not authorize the trial court to enjoin Henderson from "pledging, giving away, encumbering, or selling" her interests. The turnover statute states that a judgment creditor is entitled to aid from the court through injunction in order to reach property to obtain satisfaction of the judgment, and the court said that Henderson's argument that there was no evidence to support injunctive relief was without merit because there was evidence supporting the underlying turnover order. According to the court of appeals, enjoining Henderson from encumbering, pledging, assigning, selling, or giving away her interest in the LLC—the only non-exempt property the Chrismans were trying to collect—supported the Chrismans' attempts to satisfy the judgment and thus carried out the purpose of the turnover statute. The court stated that the injunctive relief maintained the status quo, and the trial court did not err in granting it.

Khan v. Chaudhry, No. 09-15-00007-CV, 2016 WL 1600444 (Tex. App.—Beaumont Apr. 21, 2016, no pet. h.) (mem. op.).

A judgment debtor failed to preserve his right to complain that he was required to turn over his interest in a professional limited liability company directly to the judgment creditor rather than a sheriff or constable or receiver.

Khan appealed a turnover order entered in a post-judgment proceeding filed by Chaudhry against Khan. Khan argued that the trial court abused its discretion by ordering Khan to turn over the equity interest in a professional LLC directly to Chaudhry rather than a sheriff or constable. (The court noted in a footnote that Khan argued at the hearing that Chaudhry's sole remedy was a charging order, but Khan did not assert this argument on appeal. The court further noted that an interest in an LLC can be assigned). The court of appeals explained that the turnover statute allows a trial court to order a judgment debtor to turn over nonexempt property to a designated sheriff or constable for execution, or to a receiver for sale, but a turnover order may not order that the property be turned over directly to the judgment creditor. Khan failed to preserve this issue for review, however, because he did not complain to the trial court that the order required him to turn over the executed documents directly to Chaudhry, as opposed to a sheriff or constable.

Spates v. Office of the Attorney General, 485 S.W.3d 546 (Tex. App.—Houston [14th Dist.] 2016, no pet.).

The Child Support Division of the Office of the Attorney General (OAG), intervened in a lawsuit brought by a limited liability company against another company. The OAG sought to collect on three child support liens

against the sole member of the LLC, who was not a party to the lawsuit. The trial court granted a charging order in favor of the OAG against the member's membership interest in the LLC. The charging order required the LLC to pay the amounts of the unsatisfied child support judgments against the member out of any distribution to which the member would otherwise be entitled by virtue of his membership interest in the LLC. On appeal, the member and the LLC argued that the trial court lacked jurisdiction to issue the charging order because the child support judgments were issued against the member in other trial courts. The court of appeals held that the trial court had jurisdiction to issue the charging order and affirmed the trial court's judgment.

Prodigy Services, LLC ("Prodigy") sued Eni U.S. Operating Company ("Eni") for breach of contract. The OAG had obtained three judgments against Spates, the sole member of Prodigy, for unpaid child support, and the OAG intervened in Prodigy's lawsuit against Eni. Prodigy and Eni entered into a mediated settlement agreement, and Eni paid the proceeds of the settlement into the registry of the court. The OAG filed a request for a charging order, attaching notices of child support liens based on judgments naming Spates as the obligor. The OAG requested an order: (1) charging Spates's membership interest in Prodigy in the total amount owed on the three judgments; (2) requiring Prodigy to distribute all cash and assets due Spates directly to the registry of the court until the unsatisfied child support liens had been satisfied; and (3) requiring the court clerk to disburse funds directly from the court registry to satisfy the child support liens. The trial court denied Prodigy's motion to disburse the funds, and Prodigy filed a petition for writ of mandamus. Among other things, Prodigy requested the court of appeals to order the trial court to disburse the settlement funds to Prodigy. The court of appeals granted that portion of Prodigy's petition for writ of mandamus, holding that the trial court abused its discretion by not granting Prodigy's motion to disburse the settlement funds to Prodigy. The trial court then signed an order disbursing the settlement funds to Prodigy. A few days later, the OAG filed an application for entry of the previously requested charging order. The trial court signed a charging order against Prodigy. The charging order recited the following action on the part of the court:

1. GRANTS the ORDER charging the membership interest of CHRISTOPHER SPATES in PRODIGY SERVICES, LLC, in the amount of \$94,376.54 for payment of child support judgment/liens attached as Exhibit A, Exhibit B, and Exhibit C.
2. ORDERS PRODIGY SERVICES, LLC upon distribution of funds due CHRISTOPHER SPATES [to pay such funds] to the TEXAS STATE DISBURSEMENT UNIT until the unsatisfied child support judgments attached as Exhibit A, Exhibit B, and Exhibit C, have been fully paid and satisfied.

The order also set forth the address to which the funds were to be sent and identified the amounts to be issued to each of the three mothers to whom Spates owed unpaid child support. In this appeal, Spates and Prodigy challenged the trial court's personal jurisdiction over Spates and its subject matter jurisdiction to enter the charging order.

As an initial matter, the court of appeals addressed whether it had jurisdiction over the appeal. The court dismissed Spates's appeal because Spates was not a party to the lawsuit and did not argue that he had standing to appeal the charging order on any basis. Because a limited liability company is considered a separate legal entity from its members, Spates did not have standing merely because he is a member of Prodigy. Further, the Texas Business Organizations Code (BOC) provides that a member of an LLC does not have an interest in any specific property of the company. *See* Tex. Bus. Orgs. Code § 101.106(b). Further, the OAG's requested relief did not involve litigating the amount of any child support arrearages Spates may have owed, since those amounts had already been determined and reduced to money judgments in other courts. The charging order merely ordered Prodigy, upon the event of a distribution, to send a specified amount of funds from Spates's membership interest directly to the Texas State Distribution Unit.

The court next addressed whether Prodigy could attack the charging order in a direct appeal. The court explained that most post-judgment orders made for the purpose of enforcing or effectuating an already-entered judgment are not subject to an appeal, but some post-judgment orders may be appealable if an appeal is statutorily authorized or if the order resolves property rights and imposes obligations on the judgment creditor or interested third parties. In this case, the charging order did not dispose of all claims and parties (even though Prodigy and Eni reached a settlement and Eni distributed the settlement funds into the registry of the court) because Eni had not been dismissed from the case, there had been no severance of Prodigy's claims against Eni, and the charging order did

not recite that it was final and appealable. Furthermore, there is no statute authorizing an appeal from a charging order. The court concluded, however, that it had jurisdiction over this appeal because the charging order resolved property rights and imposes obligations on Prodigy, an interested third party.

The court quoted Section 101.112 of the BOC, which allows a judgment creditor to obtain a charging order as a method to collect a judgment against a person who owns a membership interest in an LLC. The court further noted that a membership interest in an LLC is personal property and that an LLC member or assignee of a member does not have an interest in any specific property of the company. Tex. Bus. Orgs. Code § 101.106. The court discussed the two cases that have expressly considered whether an order that relates solely to a charging order is final for purpose of appeal, both of which held that the orders at issue were not appealable. The court distinguished the other two cases on the basis that the charging order in this case, unlike the orders in the other cases, resolved the property rights of the parties and imposed obligations on the LLC. Thus, the court held that the charging order at issue in this case was appealable.

Next the court of appeals addressed Prodigy's argument that the family court has continuing, exclusive jurisdiction over the parties and subject matter of a suit affecting the parent-child relationship and retains that jurisdiction until an event occurs that terminates the trial court's jurisdiction. Prodigy relied on provisions of the Family Code and also cited rules of civil procedure for the propositions that a court shall cause its judgments and decrees to be carried into execution, and that child support violations will be investigated and enforced pursuant to the Texas Family Code. Based on these authorities, Prodigy argued that only the courts in which the OAG obtained its judgments for unpaid child support had jurisdiction to grant the OAG's request for a charging order. Prodigy also argued that the liens were against Spates, who was not a party to this lawsuit and did not have an interest in any specific property of Prodigy as an organizer and member of the LLC. The court of appeals rejected these arguments.

Under the Family Code, the OAG is expressly authorized to enforce a child support obligation by filing a statutorily prescribed lien to collect all amounts of child support due and owing. The OAG became a judgment creditor, standing in the shoes of the three mothers, once Spates's child support obligations were reduced to judgment. The Family Code provides that a child support lien notice may be filed with or delivered to the clerk of the court in which "a claim, counterclaim, or suit by, or on behalf of, the obligor, including a claim or potential right to proceeds from an estate as an heir, beneficiary, or creditor, is pending, provided that a copy of the lien is mailed to the attorney of record for the obligor, if any." Tex. Fam. Code § 157.314(b). Thus, to the extent Prodigy contended that notices of liens may be filed only in the court of continuing jurisdiction, the Family Code provides otherwise. Once Spates's child support arrearages were reduced to judgments in the respective family courts, they became enforceable as any other money judgment. Under the BOC, "a court having jurisdiction" may charge the membership interest of a judgment debtor who owns a membership interest to satisfy the judgment." Tex. Bus. Orgs. Code § 101.112(a). Chapter 101 of the BOC does not specify any jurisdictional requirements for filing an application for a charging order. The court stated that a judgment creditor in the usual case would seek a charging order in the same court in which the underlying judgment was obtained, either during the original suit or in a subsequent ancillary proceeding. The court found it conceivable, however, that the judgment creditor in some circumstances might find it expedient or necessary to file the application for a charging order in another court that has jurisdiction over the LLC of which the judgment debtor is a member, especially if the judgment debtor lacks other assets or has taken affirmative actions to avoid the creditor's collection efforts. In this case, once the OAG learned of Prodigy's lawsuit, it filed its application for a charging order as a means of enforcing the child support judgments against Spates. The charging order recited that the OAG had made a diligent search and had not been able to discover any assets of Spates subject to execution and that the OAG was entitled pursuant to statute to a charging order against Spates's interest in Prodigy. The court stated that neither Prodigy nor Spates challenged this recital. On these facts, the court held that the trial court had subject matter jurisdiction to hear the OAG's request for a charging order.

Further, the court held that it was not necessary that Spates be made a party for the trial court to have jurisdiction to enter the charging order. The BOC does not require that the judgment debtor be made a party to an action in which a judgment creditor files an application for a charging order against the debtor's membership interest in the LLC. Additionally, the charging order was not directed to Spates and imposed no obligations on him. Likewise, the charging order did not entitle the OAG to reach the proceeds of Prodigy's settlement with Eni or Prodigy's property to satisfy the OAG's three money judgments against Spates. The court explained that the statutory scheme creating the charging order as the exclusive remedy for a judgment creditor seeking satisfaction

from a debtor's membership interest in an LLC strictly constrained the OAG's ability to collect on its judgments. The OAG is not permitted to: (1) foreclose on the lien created by the charging order; (2) compel Prodigy to make a distribution to Spates; (3) take possession of Spates's membership interest; or (4) exercise any other legal or equitable remedies with respect to company property. The distributed funds would only become Spates's nonexempt personal property when and if Prodigy distributes the funds. The charging order merely required Prodigy to send distributed funds directly to the OAG rather than to Spates up to the amount owed by Spates.

In sum, because the Family Code authorizes the OAG to enforce and collect child-support judgments and expressly permits the OAG, as a judgment creditor, to enforce a money judgment in a court of competent jurisdiction in the same manner as any judgment creditor, the court of appeals held that the trial court had jurisdiction to enter the charging order against Spates's membership interest and thus did not abuse its discretion by entering the order.

Sargeant v. AlSaleh, 2016 WL 362772, __ S.W.3d __ (Tex. App.—Corpus Christi-Edinburgh 2016, mand. denied).

In a proceeding by a judgment creditor against the judgment debtor and his wholly owned LLC, the court of appeals held that the trial court did not abuse its discretion in issuing a temporary injunction prohibiting the LLC from transferring its assets pending trial. The judgment creditor asserted that assets had been fraudulently transferred to and by the LLC, and the Texas Uniform Fraudulent Transfer Act (TUFTA) provides for injunctive relief. The LLC argued that the court could not enjoin it under TUFTA because the plaintiff did not have a judgment against the LLC. The court held that the judgment creditor was a “creditor” of the LLC under TUFTA because he had a “claim,” which can be equitable and need not be matured or reduced to judgment. The court said the judgment creditor’s claim need not be against the debtor only, but may also be against the transferee or person for whose benefit the transfer was made.

Al Saleh obtained a \$28 million judgment against Sargeant in Florida. BTB Refining LLC (“BTB”) was a Florida LLC wholly owned by Sargeant that was converted to a Texas LLC two days before entry of the judgment against Sargeant in Florida. In the Florida collection proceeding, Al Saleh asserted: (1) a claim for constructive trust over BTB’s primary asset, a \$29 million note purchased with the proceeds of fuel contracts that were the subject of Al Saleh’s lawsuit against Sargeant in Florida; (2) a claim that BTB was the alter ego of Sargeant; and (3) a claim that BTB was fraudulently re-domiciled to Texas just before entry of the verdict and should be re-domiciled to Florida to allow foreclosure of Sargeant's interest under Florida law. Al Saleh's collection efforts in Florida were fruitless, and he domesticated the Florida judgment in Texas.

In the Texas collection proceeding, Al Saleh filed an agreed motion and obtained an agreed order charging Sargeant's member interest in BTB with the judgment debt. Al Saleh then filed an amended petition in which he stated that a sales transaction involving BTB was about to close in which Sargeant, as BTB’s alter ego, would ultimately receive approximately \$52 million. Al Saleh requested the court’s assistance in ensuring that a portion of these funds was distributed to Al Saleh to satisfy the judgment against Sargeant. Al Saleh’s causes of action included claims relating to turnover, fraudulent transfer under TUFTA, and fraud, and Al Saleh also alleged theories of vicarious liability and disregard of the corporate form. The claims for disregard of the corporate form included allegations that BTB and a Bahamas corporation, Sargeant Marine, Ltd. (“Sargeant Marine”), were mere alter egos of Sargeant.

In support of his claims, Al Saleh alleged and provided evidence that Sargeant had settled litigation in which he released valuable claims but received no consideration under the settlement agreement. Instead, the settlement proceeds were paid solely to Sargeant’s entities, including over \$52,000,000 to BTB. Al Saleh also alleged that BTB had entered into a “Zero Coupon Promissory Note” with Sargeant Marine obligating BTB to pay Sargeant Marine more than \$55,000,000. In seeking the temporary injunction at issue in this appeal, Al Saleh urged that injunctive relief was necessary to prevent Sargeant, Sargeant Marine, and BTB from transferring or moving the settlement proceeds “beyond reach.” The trial court granted a temporary injunction ordering that “Sargeant, BTB, and the officers, agents, servants, employees, attorneys, principals, members, manager and other persons in active concert or participation with them, be and hereby are, commanded forthwith to desist and refrain from using or transferring to any person or entity \$21,828,446.65 or transferring such amount out of the jurisdiction of this Court, from the date of this Order until further Order of this Court.”

The fundamental question on appeal was whether the trial court abused its discretion in entering an injunction freezing millions of dollars of assets of BTB until trial. BTB framed its argument as follows: Al Saleh,

with no judgment against BTB, brought this lawsuit to attempt to hold BTB liable for Al Saleh's money judgment against Sargeant under theories of alter ego and fraudulent conveyance, and the district court abused its discretion in ruling that a temporary injunction was available to preserve BTB's cash as security for a potential money judgment against BTB in Al Saleh's favor.

Because Al Saleh alleged a fraudulent conveyance in violation of TUFTA, which provides for injunctive relief, the court analyzed the validity of the temporary injunction in this case under TUFTA. BTB argued that TUFTA requires the plaintiff to establish that he is a creditor of the transferor—here BTB. BTB reasoned that Al Saleh was not a creditor of BTB because Al Saleh did not have a judgment against that entity. The court distinguished cases relied on by BTB and concluded that Al Saleh was a “creditor” under the express terms of TUFTA because he “has a claim,” which can be equitable and need not be matured or reduced to judgment. Further, the court said that a creditor’s claim need not be against the debtor only, but can also be against the transferee of an asset or the person for whose benefit the transfer was made. TUFTA expressly provides for an injunction under the circumstances and facts alleged, and the trial court exercised its discretion to grant that injunction. The court rejected BTB’s argument that the trial court lacked discretion to issue a temporary injunction based on cases that have disapproved of temporary injunctions freezing assets unrelated to the subject matter of the suit. But the court concluded that these cases did not control the analysis in this case because: (1) Al Saleh brought claims under TUFTA, which expressly provides that a plaintiff may obtain an injunction against further disposition of “the asset transferred or of other property”; and (2) Al Saleh presented evidence from which the trial court could have concluded that BTB's assets were related to the subject of the suit, i.e., Al Saleh's affidavit linking BTB's assets, including the promissory note with Sargeant Marine, to the funds at issue in the Florida dispute and the subject of the already-obtained Florida judgment. Thus, the court of appeals affirmed the temporary injunction.

P. Attorney’s Fees

Alta Mesa Holdings L.P. v. Ives, 2016 WL 1534007, __ S.W.3d __ (Tex. App.–Houston [14th Dist.] 2016, no pet. h.).

The court held that a limited liability company is not a corporation within the meaning of Section 38.001 of the Texas Civil Practice and Remedies Code, and Section 38.001 thus did not permit the plaintiff employees to recover their attorney’s fees against their LLC employers in their suit for breach of their employment agreements.

The trial court in this case awarded attorney’s fees to two employees on their claims for breach of an employment agreement on the basis of Section 38.001(8) of the Texas Civil Practice and Remedies Code, which provides that “[a] person may recover reasonable attorney's fees from an individual or corporation, in addition to the amount of a valid claim and costs, if the claim is for: ... (8) an oral or written contract.” The LLC appellants argued that limited liability companies are excluded from the entities against which attorney's fees may be recovered under Section 38.001 because the statute only provides for recovery against individuals and corporations. The court of appeals agreed and reversed the award of attorney’s fees.

The court of appeals relied on its opinion in *Fleming & Associates, L.L.P. v. Barton*, in which the court held that the plain language of Section 38.001 precluded a court from awarding a claimant attorney’s fees against a partnership (in that case, a limited liability partnership). In that case, the court explained that neither “individual” nor “corporation” was defined in the Code Construction Act or Chapter 38; therefore, the ordinary meaning of those terms should be applied in construing Section 38.001. The court found no definition of “individual” or “corporation” that included any type of partnership, and the statutory interpretation doctrine of “expressio unius est exclusion alterius”—meaning the expression of one concept implies the exclusion of another—suggested to the court that the legislature did not intend Section 38.001 to apply to partnerships. The court stated that the question of whether an LLC is included within the term “corporation” is a closer call than the question of whether a partnership is included within “individual” or “corporation” because “company” and “corporation” are sometimes used synonymously. However, the court found it clear that, as used in Texas statutes, the legal entities identified by the terms “corporation” and “limited liability company” are distinct entities. Even though these entities share some common characteristics, the court noted that corporations and LLCs are governed by separate titles within the Texas Business Organizations Code. The court was not persuaded by the employees’ argument that LLCs are treated the same as corporations for some purposes under Texas and Delaware law (the states of formation of the two LLCs in this case). In fact, the court stated that the examples given reinforced that corporations and LLCs are

distinct entities because there would be no need to specifically state when they should be treated the same if they were not distinct entities.

The court also explained that the history of Section 38.001 and its predecessor statute further supported the conclusion that use of the term “corporation” does not encompass an LLC. The predecessor statute stated that “any person, corporation, partnership, or other legal entity having a valid claim against a person or corporation” could recover attorney's fees against the “persons or corporation.” According to the court, the fact that “corporation” was first used in a list of entities that includes “partnerships” and “other legal entities” indicates that the term was not intended to encompass those other types of entities, because to read the term otherwise would render use of these other terms meaningless.

The employees pointed out that numerous cases have affirmed attorney's fees awards against LLCs, but the court stated that the appealing parties in those other cases apparently did not argue that Section 38.001 did not permit an award of attorney's fees against an LLC. Thus, those cases do not stand for the proposition that Section 38.001 authorizes recovery of attorney's fees against LLCs. Because the employees did not seek attorney's fees on their breach of contract claim on any basis other than Section 38.001, the court reversed the award of attorney's fees against the LLCs.

Q. Standing or Capacity to Sue

Sherman v. Boston, 486 S.W.3d 88 (Tex. App.–Houston [14th Dist.] no pet. h.).

The court of appeals held that the sole member of an LLC did not have standing to bring a conversion claim based on checks owned by and payable to the LLC. The LLC was a separate legal entity from its sole member, and a member of an LLC lacks standing to assert claims individually where the cause of action belongs to the company. The evidence introduced during trial established that the checks allegedly converted belonged to the LLC and were payable to the LLC. The member thus did not have standing to bring a common-law conversion action based on those checks, and the court of appeals dismissed the conversion cause of action for lack of standing.

Hope Therapy v. St. Anthony's Hospital, No. 01–14–01011–CV, 2015 WL 7263968 (Tex. App.–Houston [1st Dist.] Nov. 17, 2015, pet. denied) (mem. op.).

The court affirmed a summary judgment against the plaintiff based on the lack of legal capacity to sue where the defendants proffered evidence that a search of the Secretary of State's website indicated no entity or assumed name matching the name of the plaintiff.

Hope Therapy filed suit for breach of contract and various tort claims. The petition referenced two contracts signed by Lily Wildu on behalf of “Hope P.C., a Texas limited liability company,” and one contract signed by Lily Wildu on behalf of “Hope Therapy, LLC, a Texas limited liability company.” The defendants sought summary judgment and provided search results from the Secretary of State website indicating that there was no Hope Therapy registered with the Secretary of State as an entity or as an assumed name for an entity. The plaintiff's pleadings referenced the plaintiff as “she” or “her,” but Hope Therapy did not amend its pleadings to add Lily Wildu or explain its capacity to sue. The court explained that failure of an entity to comply with the assumed name filing requirements prevents it from maintaining an action in a Texas court arising out of a contract in which the assumed name is used until an assumed name certificate is filed. The court held that the trial court did not err by concluding Hope Therapy lacked capacity to maintain its suit for damages.

Johnson v. King (In re King), 541 B.R. 404 (Bankr. N.D. Tex. 2015).

In this adversary proceeding brought by a member of an LLC to determine whether the debtor should be denied a discharge for a debt arising from fraud or defalcation in a fiduciary capacity or for injury to an entity or its property, the bankruptcy court found it unnecessary to decide any issues of fraud or defalcation with respect to fiduciary duties owed by the debtor to the LLC since the LLC was not a plaintiff and the other member did not have standing to pursue the LLC's claims. Likewise, the court did not need to decide whether the debtor injured the LLC.

Johnson and King formed Earl's Deli, LLC, a Texas LLC, to operate a sandwich shop. The certificate of formation provided that the LLC was member-managed, and the company agreement likewise provided for management by the members, in proportion to the percentage interests of the members, which were 51% for Johnson and 49% for King. Notwithstanding the provision for management in proportion to their percentage interests, Johnson chose to be a passive owner, and King managed the LLC for the first year and a half until King

informed Johnson that the LLC was out of money and would have to close. Johnson did not want to close the deli, so he took over the day-to-day operations. After doing so and reviewing the books, Johnson discovered alleged improprieties on the part of King. Johnson managed the deli for the next 3 ½ years until the deli's landlord, a corporation owned by Johnson, changed the locks and evicted the LLC for failure to pay the rent for the previous four years.

The bankruptcy court rejected the suggestion made by Johnson's counsel at trial that both Johnson and the LLC were plaintiffs in the adversary proceeding. Based on the filings made in the bankruptcy, the court concluded that only Johnson was a plaintiff in the adversary proceeding. Johnson, even though he owned 51% of the LLC, did not have standing to assert injuries to the LLC. Thus, the court did not have to decide any issues of fraud or defalcation in a fiduciary capacity owed to the LLC under Section 523(a)(4) or willful or malicious injury to the LLC or its property under Section 523(a)(6). The court noted that the LLC would not have prevailed even it had been a plaintiff

Saulsberry v. Ross, 485 S.W.3d 35 (Tex. App.–Houston [14th Dist.] 2015, pet. denied).

An LLC's member was not entitled to recover damages incurred by the LLC in a malpractice lawsuit brought by the member and the LLC against an attorney that represented the member before the LLC was formed. Although the trial court found that the LLC was not the defendant attorney's client and rendered a take-nothing judgment on the LLC's claims against him, the court still awarded the individual member attorney's fees incurred by the LLC as well as other expenses of the LLC. The court of appeals pointed out that a member or manager of an LLC is legally distinct from the company. Absent an agreement otherwise, a member or manager of an LLC is not liable for the company's obligations. Thus, the fees incurred for legal work on claims by or against the LLC and other business expenses of the LLC were obligations for which the member had no individual liability unless she chose to incur them. If the member was obligated to pay the company's fees or expenses, it was not because the defendant attorney proximately caused her to incur them, but rather because she agreed to assume personal responsibility for these obligations. Given the unchallenged finding that the defendant attorney was not liable to the LLC, there was no basis to support the member's recovery of attorney's fees for work performed on the LLC's claims and defenses or other business expenses of the LLC.

Marshall Feature Recognition, LLC v. Pepsi-Cola Company, No. 6:12-cv-00956-JRG-RSP, 2015 WL 5912672 (E.D. Tex. Sept. 28, 2015).

The court held that an LLC had capacity to file this suit, even though its charter had been forfeited for failure to pay its franchise taxes before it filed suit, because the LLC's charter was reinstated after the suit was filed, and such reinstatement related back as if the disability had never existed.

The plaintiff was an LLC whose charter was forfeited prior to filing suit due to nonpayment of its franchise taxes. The LLC's capacity to file suit was governed by Federal Rule 17(b)(3), which provides that capacity of a non-corporate entity to sue in federal court is determined by the law of the state where the court is located. Under the Texas Tax Code, the right of a corporation or LLC to operate in Texas may be forfeited due to failure to pay its franchise tax. The Tax Code provides that a forfeited corporation or LLC may not sue or defend in a Texas court. The court held that the plaintiff had capacity to bring this suit because its charter was reinstated after the suit was filed. The court relied on Texas case law holding that a corporation's payment of its delinquent taxes removes the disability and that the reinstatement of a corporation's charter relates back and revives whatever rights the corporation had when the suit was filed. The court said that the rule regarding the effect of reinstatement applies to LLCs as well as corporations; therefore, the defendant's motion to dismiss was denied.

R. Fraudulent Transfer

Sargeant v. AlSaleh, 2016 WL 362772, ___ S.W.3d ___ (Tex. App.–Corpus Christi-Edinburgh 2016, mand. denied).

In a proceeding by a judgment creditor against the judgment debtor and his wholly owned LLC, the court of appeals held that the trial court did not abuse its discretion in issuing a temporary injunction prohibiting the LLC from transferring its assets pending trial. The judgment creditor asserted that assets had been fraudulently transferred to and by the LLC, and the Texas Uniform Fraudulent Transfer Act (TUFTA) provides for injunctive relief. The LLC argued that the court could not enjoin it under TUFTA because the plaintiff did not have a

judgment against the LLC. The court held that the judgment creditor was a “creditor” of the LLC under TUFTA because he had a “claim,” which can be equitable and need not be matured or reduced to judgment. The court said the judgment creditor’s claim need not be against the debtor only, but may also be against the transferee or person for whose benefit the transfer was made.

Al Saleh obtained a \$28 million judgment against Sargeant in Florida. BTB Refining LLC (“BTB”) was a Florida LLC wholly owned by Sargeant that was converted to a Texas LLC two days before entry of the judgment against Sargeant in Florida. In the Florida collection proceeding, Al Saleh asserted: (1) a claim for constructive trust over BTB’s primary asset, a \$29 million note purchased with the proceeds of fuel contracts that were the subject of Al Saleh’s lawsuit against Sargeant in Florida; (2) a claim that BTB was the alter ego of Sargeant; and (3) a claim that BTB was fraudulently re-domiciled to Texas just before entry of the verdict and should be re-domiciled to Florida to allow foreclosure of Sargeant’s interest under Florida law. Al Saleh’s collection efforts in Florida were fruitless, and he domesticated the Florida judgment in Texas.

In the Texas collection proceeding, Al Saleh filed an agreed motion and obtained an agreed order charging Sargeant’s member interest in BTB with the judgment debt. Al Saleh then filed an amended petition in which he stated that a sales transaction involving BTB was about to close in which Sargeant, as BTB’s alter ego, would ultimately receive approximately \$52 million. Al Saleh requested the court’s assistance in ensuring that a portion of these funds was distributed to Al Saleh to satisfy the judgment against Sargeant. Al Saleh’s causes of action included claims relating to turnover, fraudulent transfer under TUFTA, and fraud, and Al Saleh also alleged theories of vicarious liability and disregard of the corporate form. The claims for disregard of the corporate form included allegations that BTB and a Bahamas corporation, Sargeant Marine, Ltd. (“Sargeant Marine”), were mere alter egos of Sargeant.

In support of his claims, Al Saleh alleged and provided evidence that Sargeant had settled litigation in which he released valuable claims but received no consideration under the settlement agreement. Instead, the settlement proceeds were paid solely to Sargeant’s entities, including over \$52,000,000 to BTB. Al Saleh also alleged that BTB had entered into a “Zero Coupon Promissory Note” with Sargeant Marine obligating BTB to pay Sargeant Marine more than \$55,000,000. In seeking the temporary injunction at issue in this appeal, Al Saleh urged that injunctive relief was necessary to prevent Sargeant, Sargeant Marine, and BTB from transferring or moving the settlement proceeds “beyond reach.” The trial court granted a temporary injunction ordering that “Sargeant, BTB, and the officers, agents, servants, employees, attorneys, principals, members, manager and other persons in active concert or participation with them, be and hereby are, commanded forthwith to desist and refrain from using or transferring to any person or entity \$21,828,446.65 or transferring such amount out of the jurisdiction of this Court, from the date of this Order until further Order of this Court.”

The fundamental question on appeal was whether the trial court abused its discretion in entering an injunction freezing millions of dollars of assets of BTB until trial. BTB framed its argument as follows: Al Saleh, with no judgment against BTB, brought this lawsuit to attempt to hold BTB liable for Al Saleh’s money judgment against Sargeant under theories of alter ego and fraudulent conveyance, and the district court abused its discretion in ruling that a temporary injunction was available to preserve BTB’s cash as security for a potential money judgment against BTB in Al Saleh’s favor.

Because Al Saleh alleged a fraudulent conveyance in violation of TUFTA, which provides for injunctive relief, the court analyzed the validity of the temporary injunction in this case under TUFTA. BTB argued that TUFTA requires the plaintiff to establish that he is a creditor of the transferor—here BTB. BTB reasoned that Al Saleh was not a creditor of BTB because Al Saleh did not have a judgment against that entity. The court distinguished cases relied on by BTB and concluded that Al Saleh was a “creditor” under the express terms of TUFTA because he “has a claim,” which can be equitable and need not be matured or reduced to judgment. Further, the court said that a creditor’s claim need not be against the debtor only, but can also be against the transferee of an asset or the person for whose benefit the transfer was made. TUFTA expressly provides for an injunction under the circumstances and facts alleged, and the trial court exercised its discretion to grant that injunction. The court rejected BTB’s argument that the trial court lacked discretion to issue a temporary injunction based on cases that have disapproved of temporary injunctions freezing assets unrelated to the subject matter of the suit. But the court concluded that these cases did not control the analysis in this case because: (1) Al Saleh brought claims under TUFTA, which expressly provides that a plaintiff may obtain an injunction against further disposition of “the asset transferred or of other property”; and (2) Al Saleh presented evidence from which the trial court could have concluded that BTB’s assets were related to the subject of the suit, i.e., Al Saleh’s affidavit linking BTB’s assets,

including the promissory note with Sargeant Marine, to the funds at issue in the Florida dispute and the subject of the already-obtained Florida judgment. Thus, the court of appeals affirmed the temporary injunction.

Key v. Richards, No. 03–14–00116–CV, 2016 WL 240773 (Tex. App.–Austin Jan. 13, 2016, no pet. h.) (mem. op.).

The court held that the evidence was sufficient to support a finding that a judgment-debtor LLC fraudulently transferred assets to another LLC to evade payment of a judgment against the judgment-debtor LLC and that the trial court did not improperly apply veil-piercing principles to hold the owners of the LLCs personally liable for the judgment and to award the property to the receiver of the judgment-debtor LLC.

After Adams was unable to collect on a judgment that she obtained against Centex Freight Lines, L.L.C. (Centex) in a previous lawsuit, she and the court-appointed receiver for Centex filed this lawsuit alleging a fraudulent transfer of Centex's assets to a commonly controlled company, PJC Properties, LLC (“PJC Properties”) for the unlawful purpose of evading payment of the judgment. The owners of Centex and PJC Properties were Steve Key and Pat Curry. The challenged transaction was a foreclosure and sale of Centex's assets to PJC Properties after default on a loan purportedly secured by all of Centex's assets. The jury found that PJC Properties did not have an enforceable security interest in Centex's assets and that the transfer was thus a fraudulent transfer under the Texas Uniform Fraudulent Transfer Act because Centex did not receive “reasonably equivalent value” in exchange for the assets. The jury also found that Key, Curry, and PJC Properties were “responsible” for the unfair conduct of Centex and PJC Properties and that holding only Centex responsible for liability on the Adams judgment would result in injustice. The trial court thus awarded Adams damages in the full amount of her prior judgment jointly and severally against Key, Curry, and PJC Properties, as well as attorney's fees, and awarded the receiver possession and title of all assets owned or held by Centex as of the date of the Adams judgment.

Galaz v. Galaz (In re Galaz), Case No. 07–53287–RBK, Adv. No. 08–5043–RBK, 2015 WL 457850 (Bankr. W.D. Tex. Jan. 23, 2015).

The debtor sought to set aside a transfer from an LLC in which the debtor held an interest and recover damages based on the transfer. The debtor claimed that her ex-husband caused the LLC to improperly transfer valuable rights to a company solely owned by her ex-husband's father. The court concluded that the transfer was invalid and that the debtor should recover damages. In the course of the opinion, the court interpreted several provisions of the operating agreement of the LLC in which the debtor held an interest and determined the effect of several transactions that bore on the analysis of the validity of the transfer at issue.

Raul Galaz (“Raul”) and Julian Jackson (“Julian”) formed Artist Rights Foundation, LLC (“ARF”), a California LLC, and ARF acquired certain music royalty rights. The debtor, Lisa Galaz, acquired a 25% interest in ARF as a result of being awarded one-half of Raul's 50% interest in ARF in their divorce. In her bankruptcy case, Lisa brought an adversarial proceeding for relief based on Raul's transfer of ARF's royalty rights to Raul's father's company, Segundo Suenos, LLC (“Segundo Suenos”) for no consideration.

The court agreed with Lisa's arguments that the transfer of royalty rights from ARF to Segundo Suenos was invalid for three reasons: (1) Raul lacked authority to unilaterally make the transfer because he did not obtain the consent of the other member, which was required under the operating agreement; (2) the doctrine of collateral estoppel compelled the court to recognize the transfer as invalid because a court of competent jurisdiction previously determined the transfer was invalid; and (3) the transfer of rights was a fraudulent transfer.

The court concluded that the transfer of royalties from ARF to Segundo Suenos was a fraudulent transfer under the Texas Uniform Fraudulent Transfer Act (TUFTA), and should be set aside. The court stated that a number of the statutory “badges of fraud” were present at the time of the transfer and supplied the basis for strong inferences of fraud. The court found that Lisa was entitled to actual and exemplary damages.

The court stated that TUFTA authorizes both equitable relief, through the avoidance of a fraudulent transfer, and money damages up to the value of the property transferred, and Lisa was thus entitled to relief in the amount of the value taken by Raul, his father, and his father's company, to restore Lisa's position as if the fraudulent transfer had never occurred. Because Lisa lost the benefit of her ownership interest in ARF during the time period between the date of the transfer and the date when the transfer was set aside, the court said she was entitled to her proportionate share of the gross income generated by the royalties during that period of time. The court refused to deduct any expenses incurred by Segundo Suenos because it was a separate entity from ARF formed for the purpose of defrauding Lisa. There was no basis to impose liability on ARF for the expenses of

Segundo Suenos, and the court also found the expenses reported by Segundo Suenos to be suspect and unreliable. The court stated that Lisa should be responsible for her proportionate share of reasonable and necessary expenses that were incurred by ARF prior to the date of the transfer. After subtracting Lisa's share of ARF's franchise tax liability prior to the transfer, the court concluded that Lisa was entitled to actual damages of \$241,309. The court also found that exemplary damages in the amount of \$250,000 were appropriate based on the fraud, malice, and gross negligence of the defendants.

S. Bankruptcy

In re Divine Ripe, L.L.C., 538 B.R. 300 (Bankr. S.D. Tex. 2016).

The debtor LLC sought to extend the automatic stay to the LLC's member with respect to a lawsuit brought against the LLC and the member before the bankruptcy filing. The court concluded that extension of the stay was not justified. The record provided no basis to conclude that a judgment against the member would in effect be a judgment against the LLC other than the fact that the claims against the LLC and the member were the same and the potential application of collateral estoppel.

Prior to the commencement of this bankruptcy case, the LLC debtor and its member were sued for violations of the Perishable Agricultural Commodities Act, breach of contract, and breach of fiduciary duty. The LLC sought extension of the automatic stay by the bankruptcy court in order to prevent "adverse, and likely irreconcilable, economic effect" on the LLC's estate.

The bankruptcy court explained that the automatic stay is not generally extended beyond the debtor. In *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 999 (4th Cir.1986), the Fourth Circuit recognized an exception to this general rule, and the Fifth Circuit has recognized and applied that exception in a narrow fashion. Under *A.H. Robins Co.*, an exception to the debtor-only application of the automatic stay exists in the circumstances where a non-debtor and debtor are co-defendants and "there is such identity between the debtor and the third-party defendant that the debtor may be said to be the real party defendant and that a judgment against the third-party defendant will in effect be a judgment or finding against the debtor." In order to find an identity of interest between bankrupts and nonbankrupts, there must be both "unusual circumstances" and "something more than the mere fact that one of the parties to the lawsuit has filed [for bankruptcy]"

The court discussed other Fifth Circuit case law as well as a factually similar case in which another bankruptcy court in Texas declined to extend the automatic stay to the managing member of an LLC debtor. The court then examined the relationship between the LLC debtor in this case and its member. The court noted that the evidence revealed disarray in the accounting records and financial condition of the LLC such that the court "could hardly distinguish the efforts of [the member] on his own accord from those on behalf of the Debtor." The court stated that the "circumstances presented could hardly be a more ripe ground to pierce the corporate veil of the Debtor to [the member], but not the inverse, as the operations of the Debtor appear to have been unhampered by the lack of activity by [the member] in recent years, contrary to the Debtor's argument of [the member]'s necessity to the Debtor to remain a going concern." The court did not believe the facts present in this case constituted the "unusual circumstances" consistent with the Fifth Circuit's treatment of the standard to warrant extension of the automatic stay.

The debtor further argued that the stay should be extended because the debtor was responsible for the acts of its operating member under the principle of respondeat superior, but the court stated that there was no basis for it to consider this argument because the debtor offered no evidence as to how the member had bound the LLC under the principle of respondeat superior. The Fifth Circuit has stated that the automatic stay should extend to non-bankrupt co-defendants only when there is a formal or contractual relationship between the debtor and non-debtors such that a judgment against one would in effect be a judgment against the other. Thus, the court concluded that the presence of identical allegations against the LLC debtor and its member was an insufficient ground to extend the stay to the non-debtor member in the absence of evidence of actual identity of interests such that a judgment against the member would in fact be a judgment against the debtor LLC.

Johnson v. King (In re King), 541 B.R. 404 (Bankr. N.D. Tex. 2015).

A judgment in favor of a member of an LLC against his co-member in a lawsuit in state court in which the judgment creditor sued for breach of fiduciary duty did not have preclusive effect for purposes of the judgment creditor's objection to discharge of the debtor for a debt arising from fraud or defalcation in a fiduciary capacity

where the state court made no findings of fact or conclusions of law. The bankruptcy court found it unnecessary to decide any issues of fraud or defalcation with respect to fiduciary duties owed by the debtor to the LLC since the LLC was not a plaintiff and the other member did not have standing to pursue the LLC's claims. Assuming without deciding that the debtor owed his fellow member a fiduciary duty (which the debtor did not concede), there was insufficient evidence of moral turpitude, intentional wrongdoing, or willful blindness by the debtor with respect to the matters about which the other member complained to constitute fraud or defalcation.

Johnson and King formed Earl's Deli, LLC, a Texas LLC, to operate a sandwich shop. The certificate of formation provided that the LLC was member-managed, and the company agreement likewise provided for management by the members, in proportion to the percentage interests of the members, which were 51% for Johnson and 49% for King. Notwithstanding the provision for management in proportion to their percentage interests, Johnson chose to be a passive owner, and King managed the LLC for the first year and a half until King informed Johnson that the LLC was out of money and would have to close. Johnson did not want to close the deli, so he took over the day-to-day operations. After doing so and reviewing the books, Johnson discovered alleged improprieties on the part of King. Johnson managed the deli for the next 3 ½ years until the deli's landlord, a corporation owned by Johnson, changed the locks and evicted the LLC for failure to pay the rent for the previous four years.

Johnson sued King in state court and obtained a judgment after a non-jury trial in which the court made no findings of fact or conclusions of law. King then filed a Chapter 7 petition, and Johnson filed this adversary proceeding objecting to discharge of King's debt to him under Section 523(a)(4) (fraud or defalcation in a fiduciary capacity) and (a)(6) (willful and malicious injury to an entity or the property of an entity).

The bankruptcy court rejected the suggestion made by Johnson's counsel at trial that both Johnson and the LLC were plaintiffs in the adversary proceeding. Based on the filings made in the bankruptcy, the court concluded that only Johnson was a plaintiff in the adversary proceeding. Johnson, even though he owned 51% of the LLC, did not have standing to assert injuries to the LLC. Thus, the court did not have to decide any issues of fraud or defalcation in a fiduciary capacity owed to the LLC under Section 523(a)(4) or willful or malicious injury to the LLC or its property under Section 523(a)(6). The court noted that the LLC would not have prevailed even it had been a plaintiff for the reasons set forth below.

Johnson first argued that the judgment he obtained in state court established a breach of fiduciary duty within the meaning of Section 523(a)(4), but the court pointed out that Section 523(a)(4) requires more than a breach of fiduciary duty. Section 523(a)(4) requires fraud or defalcation while acting in a fiduciary capacity. Because the state court made no findings of fact or conclusions of law, the bankruptcy court did not have a sufficient record from the state court to give preclusive effect to the judgment. Thus, the court proceeded to assess the evidence to determine whether to except King from discharge based on fraud or defalcation in a fiduciary capacity. The court stated in a footnote that King did not concede that he owed Johnson a fiduciary duty "as opposed to the unquestionable fiduciary duty he owed to the LLC." Assuming, without deciding, that King owed a fiduciary duty to Johnson, the court went on to conclude that Johnson did not prove fraud or defalcation.

The court found that the evidence did not show that King committed "fraud" while acting in a fiduciary capacity because there was insufficient evidence of moral turpitude or intentional wrong. The court stated that allegedly unauthorized gas purchases made on the LLC credit card as well as \$2,000 in distributions made to King during the time he managed the LLC were fully disclosed in the records of the LLC, to which Johnson always had access, and these transactions thus were not done "secretly" as alleged by Johnson. With respect to the gas purchases, it was necessary for the LLC to use the car of a member or employee since the LLC had no car. Although some of the gas purchases were for King's personal use, there was no evidence that the LLC helped King pay a portion of his car insurance or maintenance, or that the total transaction—King's providing a car and paying all maintenance and insurance in exchange for purchasing gas with the LLC's credit card—was unfair to the LLC. With respect to the \$2,000 in distributions, the company agreement provided that distributions of excess cash were to be made to the members in proportion to their percentage interests. While it was true that King made distributions only to himself and not to Johnson while King was managing and operating the deli, the court pointed out that Johnson chose not to share management responsibilities in proportion to their percentage interests as provided in their company agreement and that King's calculation of excess-cash determinations appeared to have been proper. Furthermore, Johnson allowed similar distributions to be made to King even after Johnson took control of the day-to-day management and operation of the deli. Given provisions in the company agreement that allowed a member to exercise remedies against a defaulting member who has committed fraud or theft or gross negligence,

the court found disingenuous Johnson's claim that he did not want to "wrestle" with King over the distributions and did not know how to stop him. The court stated that the distributions did not suggest moral turpitude or intentional wrong by King, but instead both parties' recognition that King was entitled to some type of return for his sweat equity or that King needed the distributions for living expenses.

The evidence did not show that King committed a "defalcation" while acting in a fiduciary capacity because a defalcation requires a culpable state of mind involving knowledge of, or gross recklessness with respect to, the improper behavior. The court found that King did not have actual knowledge of any wrongdoing with respect to use of the LLC credit card or distributions because there was none, and he was not willfully blind to breaches of fiduciary duty because there were no such breaches. The evidence also did not show that King committed embezzlement or larceny within the meaning of Section 523(a)(4).

T. Diversity Jurisdiction

[In *Carden v. Arkoma Associates*, 494 U.S. 185 (1990), the United States Supreme Court held that a limited partnership's citizenship is determined by the citizenship of each of its partners. The Fifth Circuit, in *Harvey v. Grey Wolf Drilling Co.*, 542 F.3d 1077, 1079–80 (5th Cir.2008), as well as every other circuit to address the issue, has held that the rule applied in *Carden v. Arkoma Associates* applies to limited liability companies. There are many district court decisions within and outside the Fifth Circuit following this approach. The district court decisions in Texas on this issue are too numerous to include in this paper. During the last year, the Fifth Circuit reiterated the principle that the citizenship of an LLC is determined by the citizenship of all of its members in the following cases:]

Bank of America, N.A. v. Fulcrum Enterprises, LLC, 2016 WL 1084225, __ Fed. App'x __ (5th Cir. 2016).

The plaintiff asserted jurisdiction based on diversity of citizenship, which was not challenged, but the Fifth Circuit Court of Appeals raised the question of subject matter jurisdiction on appeal sua sponte because the jurisdictional allegations were deficient in that they did not mention the members of the LLC defendant, let alone their respective states of citizenship. On appeal, the defendant alleged that its members were citizens of various states, including North Carolina. Because the plaintiff was also a North Carolina citizen, this allegation, if true, would preclude diversity of jurisdiction. The court of appeals thus remanded the case for further proceedings in the district court to resolve the question of whether diversity jurisdiction was present.

Alphonse v. Arch Bay Holdings, L.L.C., 618 Fed. App'x 765 (5th Cir. 2015).

The court rejected the contention that the citizenship of a passive investor who was a member of a member of a member of the defendant LLC could be disregarded for purposes of the LLC's citizenship. The plaintiff argued that the standard established in *Harvey* would be stretched to an illogical absurdity in this case because the member whose citizenship would destroy diversity was in fact a member of a member of one of the plaintiff's members and was a limited partner who had no managerial responsibilities and was difficult to locate. The court found these arguments unpersuasive because the Supreme Court has explicitly rejected the contention that a court may consult the citizenship of less than all of an unincorporated entity's members to determine citizenship for diversity purposes. Additionally, there is no case law suggesting that an exception may be made when one of the LLC's members is an artificial entity whose members are also entities. To the contrary, the Fifth Circuit has observed that testing citizenship involves tracing the citizenship of entities through the various organizations and layers when necessary. Accordingly, the court rejected the plaintiff's contention that the court could consider less than all of the defendant LLC's members when determining its citizenship.

U. Personal Jurisdiction

Cornerstone Healthcare Group Holding, Inc. v. Nautic Management VI, L.P., 2016 WL 3382159, __ S.W.3d __ (Tex. 2016).

Three nonresident investment fund limited partnerships invested in a newly created Texas LLC subsidiary that purchased a chain of Texas hospitals from a Texas company. The plaintiff, which was a Texas company that was in the market to purchase the hospitals, asserted that the defendants stole the opportunity to purchase the

hospitals and that their tortious conduct subjected the defendants to Texas's jurisdiction with respect to claims arising out of that conduct. Other defendants included officers of the plaintiff who allegedly breached their duties to the plaintiff by secretly appropriating the opportunity to purchase the hospitals and joining forces with the private equity firm that then took the deal to the general partner of the funds. The limited partnerships and their nonresident general partner contested personal jurisdiction, but the supreme court concluded that they were subject to specific personal jurisdiction of Texas courts.

The three nonresident investment limited partnerships (the “Funds”) and their nonresident general partner (collectively the “Fund Defendants”) described their role in the underlying events as “limited to creating and funding a subsidiary that, in turn, indirectly invested in the Reliant hospital chain through further subsidiaries.” The Fund Defendants cited settled law that the contacts of distinct legal entities, including parents and subsidiaries, must be assessed separately for jurisdictional purposes unless the corporate veil is pierced. They argued that, because the record showed that the entity that had direct contacts with Texas was an indirect subsidiary of the Funds rather than the Funds themselves, and because the plaintiff never argued or proved that the subsidiary’s contacts could be attributed to the Fund Defendants under a veil-piercing theory, jurisdiction over the Fund Defendants was lacking. The court agreed with the principle that “so long as a parent and subsidiary maintain separate and distinct corporate entities, the presence of one in a forum state may not be attributed to the other,” and the court acknowledged that the plaintiff did not argue that the Funds and their subsidiaries failed to maintain their legal separateness or that the Texas contacts of any one of those entities could or should be attributed to any other. Thus, the LLC subsidiary’s Texas contacts (i.e., its ownership and operation of hospitals in Texas) could not in and of themselves subject the LLC’s limited partnership parent companies and their general partner to Texas's jurisdiction. But the Funds' use of a subsidiary to purchase the hospitals did not end the inquiry. The court stated that the plaintiff was not attempting to attribute the contacts established by the subsidiary as a going concern to the Funds or their general partner; the plaintiff was seeking to trace the purchase of Texas assets to the entities that spearheaded and directed the transaction and ultimately stood to profit from it. The court agreed with the plaintiff that “[k]eeping legal entities distinct does not mean they can escape jurisdiction by splitting an integrated transaction into little bits.” The court stated that the hospital purchase did not stem from a third party's unilateral activity; it was the result of a transaction stemming from the activity of the Fund Defendants themselves. The Funds, through the general partner, targeted Texas assets in which to invest and sought to profit from that investment.

Carruth v. Michot, No. A–15–CA–189–SS, 2015 WL 6506550 (W.D. Tex. Oct. 26, 2015).

The court concluded that it did not have personal jurisdiction over two Louisiana LLCs, differentiating the analysis required for determining citizenship of an LLC for diversity jurisdiction purposes from the analysis required to determine the exercise of personal jurisdiction over an LLC.

Carruth, a Texas resident, sued Louis Michot and Andre Michot, Louisiana residents, and two Louisiana LLCs formed to manage a band in which Carruth and the Michots played. Carruth and the Michots were the members of Lost Bayou Ramblers, LLC (“LBR”), and LBR was the sole member of OTUT, LLC (“OTUT”).

In support of his argument that the court could exercise personal jurisdiction over the LLCs, Carruth first pointed to the fact that he was a member of LBR, which was in turn the sole member of OTUT. Carruth suggested that his residency in Texas meant both LLCs must also be present in Texas for purposes of determining general personal jurisdiction. Carruth based this argument on case law in which the Fifth Circuit held LLCs are considered citizens of the states of their members for purposes of determining diversity jurisdiction. The court rejected this argument because it blurred principles of diversity jurisdiction and minimum contacts and ignored the United States Supreme Court's prohibition on talismanic formulas for determining jurisdiction. Analysis of personal jurisdiction must be founded on an evaluation of whether each defendant purposefully availed itself of the benefits and protections of the forum state. Disregarding a defendant's corporate form and looking directly to the citizenship of an LLC’s members ignored that directive.

Second, Carruth contended that the LLCs conducted sufficient business activity within Texas to warrant jurisdiction. This argument also failed. It was undisputed that the LLCs were both organized under and governed by the laws of the state of Louisiana. The LLCs' operating agreements were entered into in Louisiana, and their registered agents were located in Louisiana. The LLCs never sought authority to do business in Texas, never held a bank account in Texas, and had no offices or employees in Texas. Other than one publishing agreement, Carruth did not present evidence of any contracts, agreements, communications or other materials evidencing any

connection between the LLCs and Texas. Thus, Carruth failed to make a prima facie showing of continuous and systematic affiliations with Texas so as to render them essentially at home in Texas.

Carruth argued his own activities managing the band in Texas on behalf of LBR and publicizing and promoting the band's catalog on behalf of OTUT were sufficient contacts to subject the LLCs to general personal jurisdiction in Texas. The LLCs argued Carruth's activities were conducted on his own behalf rather than on behalf of the LLCs, and the court agreed that there was insufficient evidence establishing that Carruth's management or promotional efforts were conducted in his capacity as a representative or agent of LBR or OTUT as opposed to in his capacity as a representative of the band or in his individual capacity. Absent such evidence, Carruth's contacts with Texas could not qualify as contacts of the LLCs. Furthermore, the court stated that Carruth's contacts would not suffice to make the LLCs at home in Texas even if his contacts were attributed to the LLCs in view of the LLCs' considerably more substantial connection to Louisiana.

V. Pro Se Representation

Sherman v. Boston, 486 S.W.3d 88 (Tex. App.–Houston [14th Dist.] 2016, no pet. h.).

The court reversed a judgment in favor of an LLC because the LLC was not represented by licensed counsel. Legal entities such as LLCs may appear in district or county court only through a licensed attorney, and any attempt to appear through a non-attorney representative has no legal effect. Thus, the court held that the presentation of evidence by an LLC's sole member, who was not a licensed attorney, had no legal effect, and the evidence was legally insufficient to support the judgment for conversion in favor of the LLC.

A dissenting justice acknowledged the rule that a legal entity cannot represent itself outside of justice court, but would have held that the other party's failure to raise the issue and preserve the error precluded reversal on this basis. Even if error preservation was not required, the dissenting justice did not believe the trial evidence was legally insufficient to support the judgment because the dissenting justice would have considered the evidence presented by the other party.

W. Governing Law

Pilepro, LLC v. Chang, 2016 WL 270874, __ F.Supp.3d __ (W.D. Tex. 2016).

Applying the principle that the law of the state of incorporation governs a corporation's internal affairs, the court applied Delaware law to claims that two individuals breached a fiduciary duty to a Delaware LLC with its principal place of business in Texas. The court concluded that Chang, a consultant who later became CFO of the LLC, did not breach a fiduciary duty to the LLC. The plaintiffs failed to prove that Chang engaged in some of the misdeeds alleged, and some of the claims alleged a breach of fiduciary duty on behalf of another party, which the LLC did not have standing to assert. Finally, Chang's conduct after his termination as CFO of the LLC was not a breach of fiduciary duty where Chang was never a member and the plaintiffs did not expressly allege that Chang misappropriated trade secrets or revealed confidential information. The court also determined that the LLC's patent attorney did not breach his fiduciary duty to the LLC.

Wright v. Minardi (In re Minardi), 536 B.R. 171 (Bankr. E.D. Tex. 2015).

The court concluded that liability for fraud could be imputed to an LLC based on the fraud of an agent acting within the scope of employment with the LLC, but the LLC's liability for fraud could not be imputed to the debtor based on his role as manager of the LLC. Because the LLC was a Delaware LLC, the court applied Delaware law to the question of the LLC's liability for the acts of its agents and the question of the manager's liability for the debts and liabilities of the LLC. Delaware law provides that the debts, obligations, and liabilities of an LLC are solely the debts, obligations, and liabilities of the LLC, and no member or manager is obligated personally for any debt, obligation, or liability of the LLC solely by reason of being a member or acting as a manager of the LLC. The plaintiffs failed to prove that their alleged claim was obtained by false representations, false pretenses, or actual fraud by the debtor himself, and liability for fraud by the LLC could not be imputed to the debtor under Delaware law.