

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

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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

Thunder Rose Enters., Inc. v. Kirk, No. 13-15-00431-CV, 2017 WL 2172468 (Tex. App.–Corpus Christi Apr. 20, 2017, no pet. h.)(mem. op.).

The court of appeals upheld a jury's verdict that an oral partnership existed between the parties.

Billy Kirk filed suit in September of 2011 alleging that he had formed a partnership with Michael Palmer and that Palmer had breached his duty of loyalty to Kirk. Later, Kirk added claims for breach of contract and requested a declaratory judgment that a partnership existed. Palmer disputed that there was a partnership, and alleged that if a partnership existed, Kirk breached his fiduciary duties owed to the partnership. Thus, a central issue at trial was whether Palmer and Kirk had formed a partnership.

Palmer invented a component part to be used in the oil and gas industry. In 2008, Palmer approached Kirk in an effort to obtain financing and market the valve. In 2009, Palmer and Kirk met with a manufacturer and contracted to have the manufacturer build a prototype of the product. As part of that transaction all parties other than Palmer signed a nondisclosure agreement. Kirk and a business associate had discussions about forming an entity, Excalibur Control Systems ("Excalibur"), to own the license to produce and market the valve. Kirk established a bank account in the name of Excalibur and advanced funds through Excalibur to pay for the prototype. Kirk and his business associate never signed the draft agreement prepared by Kirk regarding the formation of Excalibur, and Kirk and that business associate later severed their ties.

Palmer proposed that Excalibur be owned jointly by Kirk and Palmer and that Kirk contribute cash into Excalibur. Kirk did not have cash on hand and was unsuccessful in obtaining a bank loan. Despite the lack of financing or clear agreement regarding the structure, the parties continued with development. In 2010, the parties contracted with a different manufacturer to have a second prototype developed and, once completed, Palmer began making repairs on the second prototype. Palmer alleged that Kirk ordered additional valves and attempted to sell them without Palmer's knowledge or approval.

In 2011, Kirk's attorney sent to Palmer's attorney a draft agreement to form a Delaware LLC, which would own the patent, trademark, and distribution rights on the product. Under the proposed agreement Kirk would contribute \$750,000 and Palmer would contribute his rights to the product. That agreement was never executed. Palmer countered by offering Kirk a non-exclusive license to develop and market the product. After a few days, Palmer sent Kirk a cease and desist letter demanding that Kirk cease marketing the product. Kirk filed suit two weeks later.

At trial, the jury found there was an oral partnership agreement between the parties and that the agreement contained the following terms: (1) Kirk was to supply financing and funding for the development and production of the valve; (2) the parties were to split profits from the sale and marketing of the valve equally, with Kirk recouping his expenses from his 50% share; (3) the parties were to share losses and liability to third parties from the valve equally; and (4) Palmer was to assign Kirk an exclusive worldwide right or license to sell and market the valve. The jury found that Palmer breached each of these terms. The jury also found that Palmer breached the agreement by issuing the cease and desist letters and by preventing third parties from doing business with the partnership. The trial court rendered judgment on the verdict and ordered the parties to specifically perform under the partnership agreement. This appeal followed.

Palmer first challenged the sufficiency of the evidence to support the finding that there was an oral partnership agreement. The court cited the statutory description of a “partnership” as “‘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’ and regardless of what the association is called.” Tex. Bus. Orgs. Code §152.051(b). The following five statutory factors are considered in determining whether a partnership has been created: (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. Tex. Bus. Orgs. Code § 152.052(a). Whether a partnership exists must be determined by an examination of the totality of the circumstances.

The court first discussed testimony by Kirk and his lawyer about the agreement between Kirk and Palmer. Kirk testified that he and Palmer had a lengthy conversation in 2008 in which Palmer stated that Palmer wanted Kirk to be his partner, and in which they agreed on the terms of their partnership. These terms included the following: that Kirk would finance the operation and Palmer would provide the exclusive rights to manufacture, market, and distribute the valve; that profits and losses would be shared 50-50; and that they would share control equally. Additionally, Kirk’s attorney testified that Palmer and Kirk held each other out as partners, that they shared control equally, that they both made contributions to the partnership, and that they agreed to share profits and losses equally. The court agreed with Kirk that this testimony addressed the five statutory factors and was alone sufficient to allow the jury to conclude that a partnership agreement was reached.

In addition to the testimony regarding the agreement reached by Kirk and Palmer, the court pointed to evidence that they in fact shared control and each contributed thousands of dollars to the business. Furthermore, there was evidence that Palmer held Kirk out to be his partner with respect to the development and marketing of the valve, thus bolstering the evidence of intent to form a partnership reflected in the testimony of Kirk and Kirk’s lawyer.

In support of his argument that there was no partnership, Palmer pointed to the absence of profits generated from any sales of the valves and the absence of any mechanism to distribute profits, such as a line of credit or bank account, as well as the absence of accounting records, tax records, jointly titled property, or other financial records indicating the existence of a partnership. However, the court pointed out that there was evidence that Kirk set up a bank account in the name of Excalibur with Palmer, Kirk, and Kirk’s former business associate listed as signatories. The court stated that it must assume that the jury disbelieved evidence that supported the inference that there was not a partnership.

Palmer emphasized that the parties were never able to reach an agreement as to a patent license, but the court stated that the failure to enter into a written agreement as to a license did not preclude a finding that they separately agreed orally to be partners. Palmer pointed to statements in the nondisclosure agreement and draft LLC agreement that the parties did not intend to establish a partnership, but the court again stated the jury was entitled to reject this evidence. The jury could have instead believed Kirk’s explanation that the negotiations to create the LLC and to grant intellectual property licenses to that entity constituted an effort to convert the existing partnership into an LLC.

Considering the totality of the circumstances in light of the five statutory factors, the court concluded that the evidence could enable a reasonable juror to find that a partnership agreement existed, and the evidence was not so weak as to make the verdict clearly wrong or unjust.

Lopez v. Hernandez (In re Hernandez), 565 B.R. 367 (Bankr. W.D. Tex. 2017).

The court determined that the parties formed a “de facto” partnership and that one of the parties breached the fiduciary duty he owed to his fellow partner.

Hernandez and Quiroz-Pedrazzi formed a Texas LLC to purchase OrangeCup frozen yogurt stores in Texas and to purchase intellectual property rights and assets for the stores. Hernandez showed Lopez the business plan to open five OrangeCup stores and discussed the stores’ finances. In 2012, Lopez, Hernandez, and Quiroz-Pedrazzi signed a subscription agreement stating Lopez would pay \$400,000 for a 20% membership interest in the LLC if Hernandez gave Lopez financial documentation for the LLC and a related entity. Although Lopez did not receive the financial information, she paid \$200,000 and received a promissory note. Lopez continued to ask for the financial information and made numerous additional loans or contributions in 2012 and 2013. Lopez deferred taking a formal membership interest in the LLC while she awaited the requested financial information. Hernandez never

provided the financial information, and the OrangeCup stores, which were never profitable, closed in 2013. Lopez sued Hernandez, Quiroz-Pedrazzi, and the LLC. Shortly after Lopez sued Hernandez, he filed bankruptcy.

While Lopez never formally became a member of the LLC, the court found Lopez, Hernandez, and Quiroz-Pedrazzi formed a “de facto” partnership when they signed the subscription agreement. Under Tex. Bus. Orgs. Code § 152.051, “an association of two or more persons to carry on a business for profit as owners creates a partnership, regardless of whether the persons intend to create a partnership.” Under Tex. Bus. Orgs. Code § 152.052(a), there are five factors that are considered in determining whether parties have created a partnership: (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. No single factor is determinative, and Texas courts look at the totality of the circumstances when applying the factors to determine the existence of a partnership.

In this case, the court determined the parties created a partnership. First, Lopez’s testimony showed that she and Hernandez intended to share profits. Second, there were numerous expressions or indications of intent to be partners, including the manner in which Lopez and Hernandez referred to their relationship as “our partnership” and as the “three owners.” Third, Lopez participated in control of the OrangeCup stores by attending company meetings and discussing business decisions with Hernandez and Quiroz-Pedrazzi. Fourth, Lopez contributed to the business, and Hernandez continued to accept these contributions. Thus, the court found the evidence showed the parties formed a “de facto” partnership. The court stated that their de facto general partnership created a fiduciary relationship between Hernandez and Lopez, and the court found that Hernandez breached his fiduciary duty by failing to provide Lopez with the financial information she requested within a reasonable time. Because this failure breached Hernandez’s fiduciary duty, the court held the damages from this breach constituted a nondischargeable debt under Section 523(a)(4).

Tubb v. Aspect Int’l, Inc., No. 12-14-00323-CV, 2017 WL 192919 (Tex. App.—Tyler Jan. 18, 2017, pet. denied) (mem. op.).

The court of appeals held that the evidence conclusively established a partnership was created between the parties, and the plaintiff thus was not entitled to be compensated for the services it rendered for the partnership.

Superior Shooting Systems, Inc. (“Superior Shooting”), through its representative David Tubb, began a venture to manufacture high quality small arms ammunition with Aspect International, Inc. (“Aspect”), through its representative James Sterling. Under the verbal agreement, the two companies would split the profit equally and each would participate in control of the business. Superior Shooting provided the funds to purchase equipment and materials, allowed the venture to use Tubb’s name, and provided a distribution network. Aspect contributed Sterling’s information technology expertise, Sterling’s garage for a manufacturing facility, packaging for the ammunition, and management of the manufacturing operation. A little over a year into the venture, Sterling believed Tubb no longer wanted to continue with the venture. Sterling and Tubb discussed putting their agreement in writing, but Sterling still did not think Tubb intended to proceed with the venture. Sterling filed suit against Tubb and Superior Shooting for repudiating the verbal agreement and sought restitution damages.

While the trial court in a bench trial found the venture was not a partnership, the court of appeals examined the totality of the circumstances and found the evidence established that a partnership was created. Under Texas law, “an association of two or more persons to carry on a business for profit as owners creates a partnership, regardless of whether (1) the persons intend to create a partnership or (2) the association is called a ‘partnership,’ ‘joint venture,’ or other name.” Tex. Bus. Orgs. Code § 152.051(b). To determine whether a partnership has been created, courts consider five factors: (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. Tex. Bus. Orgs. Code § 152.052. When analyzing these factors, courts consider the totality of the circumstances and consider the aggregate weight of the factors along a “continuum” as referenced by the Texas Supreme Court in *Ingram v. Deere*, 288 S.W.3d 886 (Tex. 2009).

First, the court addressed the factors relating to profit sharing and loss sharing. The parties did not dispute that they agreed to share profits, and the court of appeals stated that an agreement to share profits weighs heavily in favor of a finding that the venture was a partnership. The court cited commentary to the Texas Revised

Partnership Act and Texas cases that have noted that sharing profits and sharing control have traditionally been, and will likely continue to be, the most important factors. The record supported the trial court's finding that there was no contemplated agreement regarding losses, but an agreement by the owners of a business to share losses is not necessary to create a partnership. The existence of an agreement to share losses would be indicative of a partnership, but the absence of such an agreement does not indicate that no partnership existed.

Next the court addressed the trial court's finding that the parties had no written agreement and did not express the type of entity their venture created. In a footnote, the court of appeals pointed out that the record indicated that both Tubb and Sterling referred to the entity as a "joint venture" on numerous occasions. The court further pointed out that the supreme court noted in *Ingram* that there is no "legal or logical reason for distinguishing a joint venture from a partnership on the question of formation of the entity." The court of appeals concluded that the lack of a tax return could reasonably be disregarded because the venture lasted just over a year and the parties reasonably doubted the venture's continuance. The court of appeals concluded that the parties' failure to agree on another form for the entity supported a conclusion that the entity was a partnership.

The court of appeals next concluded that the evidence did not show that Superior Shooting held all the rights to control the business as the trial court found. The trial court had found Tubb and Superior Shooting controlled the business because they controlled the "checkbook." The right to participate in control focuses on who has the right to make "executive decisions," and the venture in this case did not actually have a checkbook or any entity-owned property. Tubb and Superior Shooting made many decisions relating to equipment and materials because of Tubb's expertise and because they provided the capital to purchase these items. However, Sterling and Aspect made decisions regarding how to create the computer system for the equipment, prepared the manufacturing location, created the ammunition's branding, and purchased packaging. When Tubb suggested to Sterling that the manufacturing should be moved before manufacturing had commenced, Sterling strongly objected, and Tubb relented on the issue. Thus, the court of appeals concluded that the evidence showed both parties had the right to make executive decisions and control the business.

With regard to the factor relating to contribution of property to the venture, the trial court found that both Tubb and Sterling contributed property to the venture, and the evidence supported that finding. The evidence demonstrated that Tubb contributed approximately \$250,000 to procure the manufacturing machinery while Sterling contributed value in the form of IT invoices for work previously performed for Tubb and Superior Shooting in the amount of \$35,000. Although Tubb sought to maintain Superior Shooting's ownership of the machine, the court said that his permitting it to be used to manufacture ammunition for the venture nonetheless amounted to a contribution of value to the entity. The lending of Tubb's name, which was well known in the shooting community, to the venture was additional value. The court of appeals thus concluded that both parties' contributions of property to the venture supported the creation of a partnership.

Finally, the court of appeals concluded that the parties did not express an intent to create a partnership. Although both parties repeatedly referred to the project as a "joint venture," both parties provided contradictory and self-serving testimony as to whether they considered the project a partnership. The court of appeals concluded that the absence of expression of an intent to create a partnership should not weigh in favor of finding that no partnership existed.

In sum, the court of appeals concluded that the evidence in light of the factors and the continuum described by the Texas Supreme Court in *Ingram* conclusively established that a partnership was created, and the evidence was insufficient to support the trial court's finding that a partnership was not created. Under Tex. Bus. Orgs. Code § 152.203(c), a partner is not entitled to receive compensation for services performed for a partnership other than reasonable compensation for services rendered in the winding up of the business of the partnership. Because Aspect and Superior Shooting were partners, the court of appeals held that the trial court erred in awarding restitution damages for services performed for the partnership by Sterling on Aspect's behalf.

Nguyen v. Hoang, 507 S.W.3d 360 (Tex. App.—Houston [1st Dist.] 2016, no pet.).

The court of appeals determined a family chicken farm was a partnership and found that the managing partner and two other partners breached the partnership agreement and their statutory partner duties.

In 2006, a Vietnamese family decided to purchase and run a chicken farm. Andy Ngo and Phap Nguyen brought the family together to determine who would be interested in contributing money to purchase a chicken farm. At this meeting, appellants Nguyen and wife Dung Vu agreed to contribute \$80,000 for a 25% share of profits, appellee Manh Hoang and wife Diem Vu agreed to contribute \$80,000 for a 25% share of profits, appellee Dung

Le and boyfriend Tuan Ngo agreed to contribute \$50,000 for a 15.5% share of profits, and appellant Ngo contributed \$30,000 for a 12.5% share of profits. Other family members who were not parties in this case collectively contributed \$80,000 for a collective 24.5% profit share. The family purchased a chicken farm in Georgia, and they decided Ngo would manage the chicken farm because he had the best English skills. Two years later, the family sold the Georgia farm and bought a chicken farm in Texas. The family sold the first Texas chicken farm in 2010, and Ngo, Nguyen, and Vu made distributions to the family. Ngo, Nguyen, and Vu used their distributions to purchase a second Texas chicken farm but did not give the others an opportunity to participate in this chicken farm. Le and Hoang sued Ngo, Nguyen, and Vu for breach of partnership agreement and breach of duties.

The first issue raised on appeal was whether a partnership existed. The court of appeals set forth principles and guidance provided by the Texas Supreme Court in *Ingram v. Deere*, 288 S.W.3d 886 (Tex. 2009) with regard to a court's consideration of the five statutory factors involved in determining whether a partnership has been created. The five statutory factors 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 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. A court should consider the totality of the circumstances, and evidence of all five factors is not required. The evidence in support of the five factors is considered on a continuum. When there is conclusive evidence of all five statutory factors, a partnership exists as a matter of law, and a partnership does not exist as a matter of law when there is no evidence of any of the five factors. Conclusive evidence of only one factor is normally insufficient to establish a partnership. Commentary to the Texas Revised Partnership Act indicates that sharing profits and control over the business, which have traditionally been the most important factors, will probably continue to be the most important factors. The court of appeals then turned to examining the evidence in this case as to each of the five statutory factors.

All parties admitted on appeal that they agreed to share profits in proportion to their initial contributions. Thus, the "most important" factor was established as a matter of law.

The court of appeals next concluded there was some evidence that the parties expressed intent to be partners in the chicken farm. As the Texas Supreme Court explained in *Ingram v. Deere*, when determining whether parties have expressed intent to be partners, courts should only consider evidence that is not specifically probative of other factors and should consider the terminology used, the context in which the statements were made, and the identity of the speaker and listener. Hoang testified that all the parties were partners, but they agreed Ngo would "take care of everything" and "that if we make it, everybody will make it." Noang further testified that the parties were all owners even though Hoang and Le's names did not appear in the conveyance and loan documents and that the family "all agreed together" that they would be partners. Ngo testified he considered Hoang and Le to be investors, not owners or partners. Based on this evidence, the court of appeals concluded there was some evidence the parties expressed intent to be partners with Ngo as the managing partner.

The court of appeals next concluded that there was also evidence that Le and Hoang had the right to participate in control of the business. The Texas Supreme Court explained in *Ingram* that the right to control a business is the right to make executive decisions, such as exercising authority over the business's operations, writing checks on the business's checking account, accessing and maintaining the business's books, and receiving and managing the business's assets." All the parties in this case participated in family meetings where they discussed business decisions such as purchasing property for the chicken farm, when to sell property, terms of sale, and agreeing who would manage the farm and who would receive how much salary. Because all the parties discussed and agreed on major business decisions concerning the chicken farm, the court of appeals found that there was some evidence that they all participated in the control of the business.

Next the court of appeals concluded that there was evidence that the parties agreed to share in losses of the business and did in fact contribute proportionally to pay interest on the purchase money loan for the first Texas chicken farm. Although an agreement to share losses is not necessary to establish a partnership, the existence of such an agreement supports the contention that a partnership exists. The court explained that the inquiry in this regard is not whether there is evidence that the business ever lost money, but whether the parties share or agreed to share losses or liabilities. Ngo testified that he did not expect Hoang and Le to sustain any losses or contribute additional money if the business needed it. However, Ngo admitted that Le and Hoang had to pay their proportional shares of the interest on the \$400,000 loan that financed the purchase of the first Texas chicken farm, and Le testified that Nguyen and Vu told her she would have to help pay back the mortgage on the Georgia farm. Hoang

testified that he understood that if the business failed, everybody failed, and that the parties all agreed they would have to contribute if the business suffered a loss. Thus, the court of appeals concluded there was evidence that the parties agreed to share in business losses, supporting the existence of a partnership.

With regard to the fifth statutory factor, the evidence conclusively supported the conclusion that all parties contributed to the business in exchange for a share of future profits.

Because there was evidence supporting each of the five statutory factors, this case fell near the top of the continuum supporting the finding of a partnership,” and the court of appeals concluded that there was sufficient evidence to support the jury’s findings that the parties created a general partnership. The court of appeals proceeded to discuss the claims of Hoang and Le for breach of contract and breach of statutory partner duties, and the court held that there was sufficient evidence to support the jury’s award of damages in favor of Hoang and Le based on breach of the partnership agreement and breach of the statutory duties owed by Ngo, Nguyen, and Vu.

Derrick Petroleum Servs. v. PLS, Inc., 659 Fed. App’x 748 (5th Cir. 2016).

The Fifth Circuit Court of Appeals affirmed the district court’s decision in a bench trial that the parties did not create a partnership and that the property at issue belonged to its original owner.

Derrick Petroleum Services (“Derrick”) entered a Memorandum of Understanding with PLS, Incorporated (“PLS”) in which they agreed to work together to develop and market a jointly branded database. Derrick would develop and maintain a database on past and current deals in the oil and gas industry, and PLS would market the database and sell subscriptions to it. Prior to the relationship at issue, Derrick had created a database that formed the basis of the jointly branded database. The MOU stated the parties would form a limited liability company after reaching a specific revenue goal. The MOU did not expressly state who owned the Derrick/PLS Database or if it was jointly owned. The parties’ relationship deteriorated, and they did not create an LLC. Derrick sought a declaratory judgment that it owned the Derrick/PLS Database. In response, PLS argued that the parties formed a partnership and PLS had 50% ownership of the database.

The court of appeals held that the district court did not err in concluding that the parties did not create a partnership. Under Tex. Bus. Orgs. Code § 152.052(a), five factors are considered in determining the existence of a partnership: (1) receipt or a right to receive a share of profits of the business; (2) expression of an intent to be partners in the business; (3) participation or a 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. Proof of all factors is not required, and the existence of a partnership depends on the totality of the circumstances. The court of appeals found that the district court correctly applied Texas law and did not clearly err in finding that only two of the five factors—expression of an intent to form a partnership and contribution of property—were present to a limited extent. Because only two factors were somewhat present, the district court did not err in concluding that the parties did not create a partnership.

The court of appeals concluded that the district court did not err in finding that Derrick owned the jointly branded database because Derrick owned the database before entering into the agreement with PLS, and property purchased by a partner with the partner’s own funds is presumed to be the property of the partner even if it is used for partnership purposes. Tex. Bus. Orgs. Code § 152.102(c). Moreover, Derrick had ultimate control of the content of the database, and a person who is in possession and control of property is presumed to be the owner of the property. Furthermore, the MOU did not expressly state who owned the database, and the district court thus did not err in considering other evidence showing that the parties did not intend to convey ownership of the database.

Cooper Indus., Ltd. v. Nat’l Union Fire Ins. Co., No. 4:12-CV-01591, 2016 WL 3405295 (S.D. Tex. June 21, 2016).

The court determined that an investment scheme conducted by two entities constituted a joint venture, and the fraudulent acts of one member of the joint venture could be imputed to the other member.

Cooper Industries, Ltd. (“Cooper”) invested money with Westridge Capital Management, Inc. (“Westridge”) and its affiliates, WG Trading Company LP (“WGTC”) and WG Trading Investors, LP (“WGTI”), all of which was later discovered to be a Ponzi scheme. Cooper had a commercial crime insurance policy, which covered loss of its funds or other property due to fraudulent acts or thefts committed by an employee or fiduciary. After the Ponzi

scheme was discovered, Cooper filed a claim with the insurer that was later rejected. Cooper sued the insurer to recover under the policy.

Cooper argued, and the court agreed, that Westridge could be held liable for WGTC's fraud because the two entities had entered a joint venture. The court described a joint venture as "an undertaking by two or more persons jointly to carry out a common business enterprise for profit that falls short of an actual partnership." The court stated that a joint venture agreement, like a partnership agreement, need not be in writing. The members of the venture act as agents for each other in furthering a common objective. The court concluded that WGTC and Westridge entered a joint venture to invest funds. The entities shared fees and investment strategies. Because WGTC and Westridge were joint venturers, they were agents for each another, allowing WGTC's fraudulent acts to be imputed to Westridge.

B. Partnership by Estoppel

Rainier DSC 1, L.L.C. v. Rainier Capital Mgmt., L.P., 828 F.3d 356 (5th Cir. 2016) (per curiam).

The court determined that parties who were referred to as "partners" in a document provided to the plaintiffs were not liable as partners under a partnership-by-estoppel theory because the parties referred to as partners did not make the statements and there was no evidence that the parties were aware of or consented to the statements.

In a Private Placement Memorandum (PPM), Rainier DSC marketed tenant-in-common interests in property owned by Foundation Surgery Affiliate of Southwest Houston, LLC ("Southwest") to investors. The PPM identified Southwest as the seller and sole tenant of the property, Rainier Properties, LP as the property manager, and twenty-nine physician-members of Southwest as medical service providers using the property. Two years later, the investors who purchased interests sued Southwest, other Foundation Surgery Affiliate entities ("FSA"), Rainier entities, and the physicians. The investors' claims against FSA and the physicians were premised on statements in the PPM that described FSA and the physicians as "partners" of Southwest. The investors sought to hold FSA and the physicians liable for lease payments owed by Southwest, arguing that these statements created a partnership by estoppel. The district court granted summary judgment in favor of FSA and the physicians.

The court of appeals found there was no partnership by estoppel because the statements on which the investors relied were not made by the physicians or FSA, and there was no evidence that FSA or the physicians knew of the statements. According to the court, "[p]artnership by estoppel consists of two elements: (1) a representation that the one sought to be bound is a partner; and (2) the one to whom the representation is made must rely on the representation." Courts have found a party other than the alleged partner may make the representation when the alleged partner knowingly allows the representation to be made and does not correct it. However, "[e]ven assuming, *arguendo*, that the statements could be reasonably construed as a representation of partnership, which is highly doubtful, there is no evidence that the physicians and FSA were aware of or consented to these statements." Thus, the district court did not err in granting summary judgment for FSA and the physicians.

C. Partner's Personal Liability; Partner's Power to Bind Partnership

Gil v. De Laune Drilling Serv., Ltd., No. 2:16-CV-71, 2016 WL 5394261 (S.D. Tex. Sept. 27, 2016).

In a suit brought by employees of a limited partnership under the Fair Labor Standards Act (FLSA), the court determined that the vicarious statutory liability of the general partner under Texas partnership law was not alone enough to make the general partner a FLSA employer. As for the founder of the partnership who had turned over the business operations to his son, there was a fact issue as to whether the extent of the father's involvement during the time period in question would suffice to make the father a FLSA employer at the time.

The plaintiffs sued the following defendants under the Fair Labor Standards Act: De Laune Drilling Service, Ltd. ("DLDS Partnership"); De Laune Drilling Service Management Co., LLC ("DLDSM General Partner"); Bernie De Laune ("Bernie"); and Mark De Laune ("Mark"). The plaintiff sought summary judgment that DLDSM General Partner and Mark were FLSA employers as a matter of law, and Bernie sought summary judgment that he was not a FLSA employer. Under FLSA, an "[e]mployer includes any person acting directly or indirectly in the interest of an employer in relation to an employee." The Fifth Circuit uses the economic reality test to determine whether an individual or entity is an employer by considering whether the party: (1) possessed the power

to hire and fire employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.

Mark conceded that he was a FLSA employer, and the court granted summary judgment in favor of the plaintiffs on the issue of Mark's status as a FLSA employer.

The plaintiffs argued that DLDSM General Partner was a FLSA employer as a matter of law based on Tex. Bus. Orgs. Code § 153.152(a)(2), which provides that a "general partner of a limited partnership: . . . has the liabilities of a partner in a partnership without limited partners *to the partnership and to the other partners*" (emphasis added by the court). The court pointed out that the general partner's liability to the limited partners or partnership was not helpful to the plaintiffs. Under Tex. Bus. Orgs. Code § 153.152(b), "a general partner of a limited partnership has the liabilities of a partner in a partnership without limited partners *to a person other than the partnership and the other partners*" (emphasis added by the court); therefore, a general partner of a limited partnership is always liable for the debts and obligations of the partnership. However, the court explained that "[h]aving the liabilities of the partnership is not equivalent to sharing the status of employer such that there are two employers against which to assess damages" under the FLSA. While the plaintiffs could join DLDSM General Partner as a defendant pursuant to its statutory vicarious liability, they were not entitled to summary judgment that it acted as a FLSA employer on the record before the court.

The court next turned to Bernie's motion for summary judgment that he was not a FLSA employer. Bernie once exercised complete operational control over DLDS Partnership, and the court said it could not assume that he had lost all influence in the course of turning the business over to his son, especially when he still held a financial interest at the time in question. Bernie routinely visited the business, and even though the evidence of his control was sparse, it involved important issues of employee workplace safety. In addition, the evidence of Bernie's relationship with the current owner—his son—permitted inferences that Bernie's influence over some aspects of the employer-employee relationship continued. Construing all doubts in favor of the plaintiffs, as required by the summary-judgment standard of review, the court held that there was a disputed issue of material fact as to whether Bernie was a FLSA employer during the relevant time period. Thus, Bernie's motion for summary judgment was denied.

Cooper Indus., Ltd. v. Nat'l Union Fire Ins. Co., No. 4:12-CV-01591, 2016 WL 3405295 (S.D. Tex. June 21, 2016).

The court determined that an investment scheme conducted by two entities constituted a joint venture, and the fraudulent acts of one member of the joint venture could be imputed to the other member.

Cooper Industries, Ltd. ("Cooper") invested money with Westridge Capital Management, Inc. ("Westridge") and its affiliates, WG Trading Company LP ("WGTC") and WG Trading Investors, LP ("WGTI"), all of which was later discovered to be a Ponzi scheme. Cooper had a commercial crime insurance policy, which covered loss of its funds or other property due to fraudulent acts or thefts committed by an employee or fiduciary. After the Ponzi scheme was discovered, Cooper filed a claim with the insurer that was later rejected. Cooper sued the insurer to recover under the policy.

Cooper argued, and the court agreed, that Westridge could be held liable for WGTC's fraud because the two entities had entered a joint venture. The court described a joint venture as "an undertaking by two or more persons jointly to carry out a common business enterprise for profit that falls short of an actual partnership." The court stated that a joint venture agreement, like a partnership agreement, need not be in writing. The members of the venture act as agents for each other in furthering a common objective. The court concluded that WGTC and Westridge entered a joint venture to invest funds. The entities shared fees and investment strategies. Because WGTC and Westridge were joint venturers, they were agents for each another, allowing WGTC's fraudulent acts to be imputed to Westridge.

D. Fiduciary Duties of Partners and Affiliates

CBIF Ltd. P'ship v. TGI Friday's Inc., No. 05-15-00157-CV, 2017 WL 1455407 (Tex. App.—Dallas Apr. 21, 2017, no pet. h.) (mem. op.).

The court of appeals held that the evidence supported the jury's findings that an entity that was a partner in a joint venture and a controlling limited partner in a limited partnership breached its fiduciary duties to the joint

venture, the limited partnership, and the other partners notwithstanding that the actions taken were within the contractual rights provided by the joint venture agreement and limited partnership agreement because “contractual rights must be exercised in a manner consistent with fiduciary duties” when the two overlap. The court also discussed the contours of a cause of action for knowing participation in a breach of fiduciary duty and concluded that the evidence supported the jury’s findings that an individual knowingly participated in breaches of fiduciary duty by entities he controlled.

In 1995, TGI Friday’s submitted a bid for a concession space at DFW Airport. The bid proposed a joint venture in which disadvantaged business enterprise (DBE) partners would have 35% ownership interest, as was required by government regulations. After DFW approved the proposal, Friday’s formed TGIF/DFW Restaurant Joint Venture (“TGIFJV”) with three other partners—two DBE partners and a corporation owned by Steve Flory, which ultimately assigned its interest to CBIF Limited Partnership (“CBIF”), another entity controlled by Flory. Each of the four partners was required to make a capital contribution of \$1.55 million in exchange for a 25% ownership interest in TGIFJV. Both of the original DBE partners had trouble making their required capital contributions. The interest of one of these DBE partners was acquired by a newly formed limited partnership, TSQF Limited Partnership (“TSQF”). TSQF’s limited partners were CBIF and three individuals (the “RSH Group”) who comprised the ownership group of the defaulting DBE partner whose interest TSQF acquired. The general partner of TSQF was Texas Star Quality Foods, LLC (“Texas Star”). Texas Star was managed by Columbia Airport LLC (“Columbia”), owned by Flory, and one of the members of the RSH Group. The RSH Group owned 51% of TSQF, but TSQF was structured so that the RSH Group could not cause TSQF to act without Flory’s consent. The interest of the other original DBE partner was acquired by Friday’s and CBIF. As a result, TSQF, with a 25% interest, became the only remaining DBE partner in TGIFJV, but the agreement between Friday’s and DFW Airport required DBE partners to own 35% of the joint venture. Flory refused to allow CBIF to sell 5% out of its 37.5% interest to help make up for the 10% difference. Therefore, Friday’s sold 10% out of its 37.5% interest to Domain Enterprises, Inc. (“Domain”), a DBE. Ultimately, TGIFJV had four partners—LBD Corporation, a subsidiary of Friday’s, with 27.5%; CBIF, controlled by Flory, with 37.5%; Domain with 10%; and TSQF Limited Partnership, owned by the RSH Group, CBIF, and Texas Star, with 25%.

In 1996, TGIFJV entered into a lease agreement with DFW Airport for an initial term of 10 years with two renewal options of 5 years. In 2004, DFW Airport accepted bidding for concession spaces with the requirement that a DBE own 35% interest. Flory failed to meet capital contributions on time and changed his mind multiple times as to whether he wanted to move forward with another lease. This flip-flopping left TSQF with only 25%, rather than the 40% the RSH Group wanted to acquire.

In 2009, DFW Airport began to renovate the airport and required restaurants to enter a new lease. Under new federal requirements, a DBE not only had to own a certain percentage of the venture but also maintain a degree of control at both the DBE partner level and the joint venture level. After a review, DFW Airport and the FAA found TGIFJV’s agreement failed to comply with these new control requirements. Friday’s and the RSH Group proposed amendments to the joint venture agreement that would give the DBE partners, Domain and TSQF, greater control, but Flory refused to agree to the changes. Ultimately, Friday’s and the RSH Group created a new joint venture and secured the lease. Friday’s and RSH Group entered a side agreement with Domain and CBIF to maintain their interests.

In 2011, Friday’s sued CBIF, Columbia, and Flory (the “CBIF parties”). The CBIF parties filed crossclaims against Friday’s and third-party claims against TSQF, the RSH Group, and others. TSQF and the RSH Group asserted claims against the CBIF parties. On appeal, the CBIF parties appealed a judgment in favor of the other parties on claims including judicial dissolution of TGIFJV and breach of fiduciary duty.

The court of appeals found that there was sufficient evidence to support the jury’s finding that CBIF breached its fiduciary duty to Friday’s by unreasonably withholding consent to a new lease with DFW Airport and acting in its own self-interest. CBIF argued it could not be held liable for breach of fiduciary duty because it was merely exercising its contractual right to vote against proposed changes to the venture’s governing documents. The court of appeals rejected this argument, stating that contracts “do not exist in a vacuum” and that “contractual rights, such as those claimed by CBIF, do not ‘operate to the exclusion of fiduciary duties.’” Where contractual rights and fiduciary duties “overlap, contractual rights must be exercised in a manner consistent with fiduciary duties.” The joint venture agreement of TGIFJV could not be amended or changed without unanimous consent of the partners, but the agreement had to comply with laws and regulations or TGIFJV risked losing its lease. By refusing to agree to the amendments giving the DBE partners the level of control required by federal law, CBIF put TGIFJV in

default and at risk of losing the entire venture. CBIF also demonstrated its pursuit of self-interest at the expense of TGIFJV and its partners when CBIF refused to waive its right of first refusal when Friday's sold a 10% interest to Domain to comply with the 35% DBE requirement, and CBIF only agreed to waive its right when Friday's paid CBIF \$109,000. Based on this evidence, the court of appeals concluded there was sufficient evidence to support the finding that CBIF breached its fiduciary duty to Friday's.

Next, the court of appeals concluded that there was sufficient evidence for the jury to find Flory individually liable for CBIF's breach of fiduciary duty because Flory knowingly participated in CBIF's breach. Under Texas law, a person is liable as a joint tortfeasor when the person "knowingly participates in a breach of fiduciary duty." To prevail on this claim, a plaintiff must prove a third party breached its fiduciary duty and that the defendant knew of the fiduciary relationship and was aware of his participation in the third party's breach of duty. Flory argued that he could not be held individually liable for CBIF's breach of fiduciary duty because he acted only in his capacity as manager of Columbia, the general partner of CBIF, and acted in good faith, believing that what he did was for the best interest of CBIF and Columbia. However, the case law relied on by Flory was a breach-of-contract and tortious-interference case, not a breach-of-fiduciary-duty case, and the court stated that Flory's reliance on it was misplaced. The court also rejected the argument that an agent cannot be held liable for aiding and abetting breach of a fiduciary duty by the principal. The court stated that the case on which Flory and Columbia relied for this proposition did not reach the question of whether an agent might be held liable for aiding and abetting a principal's breach of fiduciary duty.

When instructing the jury in this case on knowing participation in a breach of fiduciary duty, the court defined "knowingly" as "actual awareness, at the time of the conduct, that a fiduciary duty was owed and that the fiduciary was breaching that fiduciary duty." The court further instructed the jury that "[a]ctual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness." CBIF was a partner in TGIFJV, and the court of appeals characterized the relationship between partners as "fiduciary in character, and impos[ing] on all the participants the obligation of loyalty to the joint concern and of the utmost good faith, fairness, and honesty in their dealings with each other with respect to matters pertaining to the enterprise." Flory's testimony established that he knew of the fiduciary relationship between CBIF and its partners, but Flory argued that there was no evidence that he actually knew CBIF's actions were breaches of fiduciary duty owed to Friday's and that his testimony showed that he did not know CBIF was acting in breach of a fiduciary duty. According to the court, however, the jurors could have inferred Flory's actual awareness based on objective manifestations, such as Flory's management of CBIF, knowledge of the airport's DBE requirements, and actions preventing TGIFJV from complying with these requirements. In sum, Flory knew of CBIF's fiduciary relationship with the partners and it could be inferred that Flory had actual awareness of CBIF's breach of fiduciary duty, making Flory individually liable. The court also held that the trial court did not err in refusing to submit a jury question inquiring as to whether Columbia and Flory had a good-faith belief that they were entitled to take their actions based on the joint venture agreement. The court acknowledged that good faith is a defense to tortious interference but stated that it had found no authority extending this defense to a claim of knowing participation in a breach of fiduciary duty.

Flory and Columbia next challenged the sufficiency of the evidence supporting the jury's findings that they breached their fiduciary duties to TSQF. TSQF argued that CBIF and Columbia breached their fiduciary duties by using TSQF's money to fund a lawsuit against the RSH Group, by preventing TSQF from participating in a portion of CBIF's defaulted interest in one of the airport restaurants, by complicating TSQF's compliance with requirements of the DBE program, and by refusing to cooperate in adjusting TGIFJV to allow it to proceed at the airport for its purpose of operating Friday's restaurants. Columbia argued it could not be held liable for using TSQF funds to pay legal fees because the TSQF management services agreement authorized Columbia to obtain certain legal services and to pay for them with TSQF funds. However, the court pointed out that TSQF was managed by Texas Star as general partner, and Columbia's role in TSQF's management was very limited and administrative in nature. Despite this limited control, Columbia caused funds of TSQF to be used to pay legal fees incurred in a lawsuit Columbia and CBIF brought against the RSH Group. In doing so, Columbia "usurped Texas Star's general management role." CBIF was responsible for Columbia's actions because CBIF was a party to the lawsuit and acted through Columbia, its general partner. CBIF and Columbia also breached their fiduciary duties through Flory's lack of cooperation regarding TSQF's participation in a portion of CBIF's defaulted interest in one of the airport restaurants. CBIF and Columbia argued that they were not liable for breach of a fiduciary duty to TSQF because TSQF could not have participated in the new restaurant without a super-majority vote of its partners, which was not requested and would not have occurred because Columbia would not have voted in favor of the participation.

The court stated that the argument that Columbia could not breach a fiduciary duty by exercising a contractual right was an argument already rejected by the court earlier in its opinion. Columbia and Flory also argued that the trial court erred in refusing to instruct the jury that contractual rights supplant fiduciary duties. The court rejected this argument because “contractual rights do not ‘operate to the exclusion of fiduciary duties.’” Thus, the court of appeals concluded that the trial court did not err in refusing to submit the requested instruction that contractual rights supplant fiduciary duties, and there was sufficient evidence to support the jury’s finding that CBIF and Columbia breached their fiduciary duties to TSQF.

CBIF and Columbia also challenged the sufficiency of the evidence supporting the jury’s findings that they breached a fiduciary duty to the RSH Group. The RSH Group alleged CBIF and Columbia breached their fiduciary duties by refusing to agree to changes to the governing documents required to bring TSQF and TGIFJV into compliance with federal requirements regarding DBEs. Columbia argued it had no duty to agree to the proposed changes in the governing documents because the governing documents required unanimous consent to amend or modify them. Once again, the court stated that contractual rights do not operate to the exclusion of fiduciary duties and that contractual rights must be exercised in a manner consistent with fiduciary duties. The evidence showed that the airport required TGIFJV and TSQF to meet FAA guidelines for compliance or risk losing TGIFJV’s right to operate restaurants and café bars at the airport. The evidence also showed that CBIF and Columbia refused to amend the governing documents to give the DBEs the requisite levels of control over the venture and the partnership, which resulted in the airport condemning the lease as to one of the restaurants. Thus, the evidence was sufficient to support the jury’s findings of a breach of fiduciary duty to the RSH Group.

The court of appeals also rejected Flory’s challenge to the sufficiency of the evidence supporting the jury’s findings that he knowingly participated in CBIF’s and Columbia’s breach of fiduciary duty to TSQF and the RSH Group. CBIF was a limited partner in TSQF, and a limited partner owes a fiduciary duty to the partners and the partnership if the limited partner exercises control over the operation of the business. CBIF did not challenge findings by the jury that it exercised dominance and control over TSQF. Thus, CBIF owed TSQF and the RSH Group a fiduciary duty. Flory managed Columbia, and Columbia was the general partner of CBIF and a manager of TSQF. Thus, Columbia owed TSQF and the RSH Group a fiduciary duty. Flory knew of these fiduciary relationships, and the court concluded that the jury could have inferred Flory’s actual awareness of the breach based on Flory’s actions. Thus, the court held there was sufficient evidence to support the jury’s finding that Flory knowingly participated in CBIF’s and Columbia’s breach of fiduciary duties. Consistent with its earlier holding regarding Flory’s knowing participation in CBIF’s breach of fiduciary duty to Friday’s, the court held that the trial court did not err in refusing to submit an instruction on good-faith belief as a justification because justification is not a defense to knowing participation.

Thunder Rose Enters., Inc. v. Kirk, No. 13-15-00431-CV, 2017 WL 2172468 (Tex. App.—Corpus Christi Apr. 20, 2017, no pet. h.)(mem. op.).

The court of appeals upheld a jury’s finding that one of the partners in an oral partnership did not breach fiduciary duties to the other partner.

Michael Palmer invented a component part to be used in the oil and gas industry. Palmer approached Billy Kirk in an effort to obtain financing and market the valve. Over a period of several years, the parties pursued the development and marketing of the valve, but the parties never entered into a written agreement regarding their business venture. Eventually, Kirk filed suit alleging that he had formed a partnership with Palmer and that Palmer had breached his duty of loyalty to Kirk. Later, Kirk added claims for breach of contract and requested a declaratory judgment that a partnership existed. Palmer disputed that there was a partnership, and alleged that if a partnership existed, Kirk breached his fiduciary duties owed to the partnership.

At trial, the jury found there was an oral partnership agreement between the parties and that Palmer breached the agreement in numerous respects. The trial court rendered judgment on the verdict and ordered the parties to specifically perform under the partnership agreement.

On appeal, the court reviewed the evidence relating to the five statutory factors considered in determining whether a partnership has been created, and the court concluded that the evidence supported the jury’s finding that there was an oral partnership agreement. The court concluded that the evidence supported the jury’s finding that Palmer breached the partnership in some respects but not others.

The jury found that Kirk did not breach fiduciary duties to the partnership, and Palmer challenged that finding. The court characterized the relationship between partners as “fiduciary in character and ‘impos[ing] upon

all the participants the obligation of loyalty to the joint concern and of the utmost good faith, fairness, and honesty in their dealings with each other with respect to matters pertaining to the enterprise.” Though Palmer cited the record extensively, the court stated that he did not offer references to legal authority indicating the actions about which he complained were breaches of fiduciary duty even if supported by evidence. Among the actions that Palmer alleged were breaches of fiduciary duties by Kirk were field testing the product without proper modifications, issuing brochures with inaccurate statements about the product, and attempting to sell unmodified products. The court concluded that the evidence did not conclusively establish a breach of fiduciary duty and that the jury was entitled to believe contrary evidence presented by Kirk.

Bruce v. Cauthen, 515 S.W.3d 495 (Tex. App.—Houston [14th Dist.] 2017, pet. denied).

An individual limited partner (who also owned the general partner) wrongfully foreclosed on another limited partner’s partnership interest in violation of the UCC by purchasing the partnership interest at a private sale when the partnership agreement did not waive the UCC prohibition on purchase by the secured party at a private sale. The foreclosure also violated the partnership agreement and breached the individual’s duty of loyalty because the alleged debt was actually non-existent. The evidence supported the jury’s findings of damages in the amount of the value of the foreclosed partnership interest based on the market value of the real property owned by the partnership and without applying discounts for lack of control and lack of marketability of the interest since the other partner acquired the interest. Although the same facts formed the basis of the prevailing limited partner’s claims for breach of fiduciary duty and breach of contract, the prevailing limited partner was not entitled to recover statutory attorney’s fees for breach of the limited partnership agreement because she elected to recover in tort on her claim for breach of fiduciary duty.

David Bruce, founder of a medical staffing company, hired Misty Cauthen as a recruiter. Cauthen was promoted to vice-president and awarded 20% of the stock of the medical staffing company and then later was promoted to president and awarded an additional 20% of the stock. Bruce and Cauthen formed a limited partnership, with Bruce and Cauthen as limited partners and a limited liability company solely owned by Bruce as the general partner. Each partner’s interest in the partnership was similar to the amount of their ownership in the medical staffing company—Bruce owned 59.4%, Cauthen owned 39.6%, and Bruce’s LLC owned 1%. The partnership purchased a 4.57-acre property on which Bruce and Cauthen originally planned to build a new office building. After Bruce and Cauthen’s business relationship became strained, Cauthen resigned from the medical staffing company. There was a buy-sell agreement allowing Cauthen to sell her shares in the medical staffing company, but Cauthen remained a limited partner in the partnership. The partnership’s property was valued by one estimate at over \$1.6 million. Bruce refused to dissolve the partnership and refused to purchase Cauthen’s interest in the partnership for \$468,000. Cauthen failed to find a third party to purchase her interest in the partnership. During this time, Bruce began sending Cauthen invoices for her share of the mortgage payments on the partnership property and other partnership expenses. Cauthen did not pay the invoices, and the partnership declared her in default and sold her interest in a private foreclosure sale. Bruce, the only bidder, purchased Cauthen’s interest for the amount of her alleged debt, \$51,234. At trial, Bruce acknowledged that the invoices he had argued were cash calls were not cash calls under the terms of the partnership agreement and that Cauthen was thus never in default.

First, the court of appeals concluded that Bruce violated the UCC by selling Cauthen’s interest in the partnership in a private sale to himself. Bruce argued that the limited partnership agreement modified Section 9.610 of the UCC by allowing for private foreclosures to a restricted group of purchasers, including Bruce, who would buy the interest for investment and not for resale, but the court of appeals concluded that the partnership agreement did not modify Section 9.610 to allow the secured party to purchase a defaulting partner’s interest when it is sold at a foreclosure sale.

Next, the court of appeals concluded that the evidence supported the jury’s findings on the value of Cauthen’s interest in the partnership. The jury found that the damages caused by Bruce’s wrongful foreclosure were \$469,044, which was the undiscounted value of Cauthen’s interest according to Cauthen’s expert witness. The trial court separately asked the jury what discount should be applied for lack of marketability and lack of control, and the jury answered “zero” to both questions. Cauthen’s expert was a certified public accountant who, like Bruce’s expert, calculated the fair market value of Cauthen’s interest based on the value of the partnership’s land because it was the only asset the partnership possessed. Unlike Bruce’s expert, Cauthen’s expert did not discount the value of Cauthen’s interest for lack of control and lack of marketability. On appeal, Bruce argued that Cauthen’s fair market value, which the jury relied on, was incorrect because it failed to take into account lack of control and lack

of marketability. However, Cauthen's expert explained that he did not discount the interest because the person who purchased the interest—Bruce—already had control of the partnership. The court of appeals held that this was sufficient evidence to support Cauthen's calculations for fair market value and the jury's findings on the amount of damages for wrongful foreclosure. The jury also found damages in the amount of \$469,044 (the undiscounted value of Cauthen's interest according to Cauthen's expert witness) on Cauthen's claim for breach of contract, and the court of appeals concluded that the evidence was sufficient to support that finding for the same reasons set forth above.

The court of appeals did not consider Bruce's arguments on breach of loyalty due to inadequate briefing, but the court did discuss the arguments to some extent. Bruce argued that (1) the jury question on breach of the duty of loyalty misplaced the burden of proof on Bruce rather than Cauthen; and (2) the evidence did not support the jury's finding that Bruce violated this duty. The court said that Bruce prefaced these issues by reciting several provisions of Chapter 152 of the Business Organization Code concerning a partner's duty of loyalty to the partnership and other partners as well as pointing out that the Code provides that a partner's liability is limited to either a breach of the partnership agreement or a violation of partnership duties as provided under Chapter 152. Bruce argued that these statutes reflect that the duty of loyalty owed by the partners to the partnership and other partners is more limited than common-law fiduciary duties. Bruce also argued that the interest of the partnership and its partners "do not need to be exactly co-extensive" and that only transactions that are actually "adverse to the partnership" are barred by the duty of loyalty.

In arguing that the jury question on breach of the duty of loyalty erroneously placed the burden of proof on Bruce to prove that he complied with his duty of loyalty, rather than on Cauthen to prove that Bruce breached this duty, Bruce did not refer to the Business Organizations Code provisions he cited previously, nor provide any citations to relevant authorities or offer any discussion or meaningful analysis to support his premise. Because the court was not able to determine the legal or factual basis for his complaint, the court held that Bruce waived this issue due to inadequate briefing. To the extent that Bruce's appellate argument could be understood as a complaint that the burden of proof should be on Cauthen because a partner's duties as codified in Chapter 152 of the Business Organizations Code are not the equivalent of common-law fiduciary duties, the court concluded that Bruce failed to preserve the complaint for appellate review because he made a different objection in the trial court. At the charge conference, Bruce's attorney seemed to concede that Bruce owed Cauthen a fiduciary duty and that Cauthen had the initial burden of proof, but argued that Bruce presented evidence that shifted the burden back to Cauthen. The court of appeals thus overruled Bruce's complaint of charge error without reaching his arguments regarding the nature and extent of the duty of loyalty in the partnership context.

Next, Bruce contended that the evidence did not support the jury's finding that Bruce's conduct breached the statutory duty of loyalty. In conclusory statements, without providing meaningful discussion or citations to relevant authority or the record, Bruce asserted that he was free to further his own interest, even if it breached a contract, without incurring tort liability; that there was no evidence he was acting adversely to the partnership as a whole; and that he reasonably believed he was acting in the partnership's best interest. Again, the court of appeals did not consider Bruce's arguments due to inadequate briefing, but the court did state that there was "more than sufficient evidence" supporting the jury's finding that Bruce breached his duty of loyalty as it was explained in the charge. The court stated that he did not "merely 'further his own interest'"; he purposefully created a false debt in order to foreclose on Cauthen's partnership interest for the value of the nonexistent debt, which resulted in his acquiring her interest while paying her nothing for the interest through a private sale in violation of the UCC. The court explained that, contrary to his suggestion that a breach of contract does not necessarily result in tort liability, the foreclosure of the debt was "not an arm's-length transaction between strangers but an illegal acquisition of one partner's interest by another." The court also mentioned evidence that Bruce took advantage of Cauthen when she had financial difficulties after leaving their company and warned her that lawsuits were about "whoever could spend the most money and last the longest."

Bruce next challenged the sufficiency of the evidence to support the jury's finding of malice on his part and the amount of \$1.2 million in exemplary damages awarded by the jury. Once again, the court concluded that Bruce failed to adequately brief these issues and thus waived these challenges.

Finally, the court determined that Cauthen could not receive attorney's fees for breach of contract because she elected to recover on her breach-of-fiduciary-duty claim. Cauthen argued that she was entitled to recover statutory attorney's fees for breach of contract because her breach-of-fiduciary-duty claim was based on and "intertwined with" Bruce's breach of the limited partnership agreement. The court of appeals reviewed the

development of Texas law in cases of this nature and explained that Texas law no longer allows a party to recover attorney's fees under a tort claim even if the tort claim and a breach-of-contract claim are based on the same facts such that the claims are "intertwined to the point of being inseparable." Under the one-satisfaction rule, when a party prevails on more than one theory of liability for a single injury, the party must make an election, and the party may choose the claim that provides the greatest recovery. Cauthen could choose to recover on the claim that would provide the greatest recovery, which was actual and exemplary damages in tort under the breach-of-fiduciary-duty claim, but she was limited to that recovery and was not entitled to recover the statutory attorney's fees available if she elected to recover on her breach-of-contract claim.

Lopez v. Hernandez (In re Hernandez), 565 B.R. 367 (Bankr. W.D. Tex. 2017).

The court determined that the parties formed a "de facto" partnership and that one of the parties breached the fiduciary duty he owed to his fellow partner.

Hernandez and Quiroz-Pedrazzi formed a Texas LLC to purchase OrangeCup frozen yogurt stores in Texas and to purchase intellectual property rights and assets for the stores. Hernandez showed Lopez the business plan to open five OrangeCup stores and discussed the stores' finances. In 2012, Lopez, Hernandez, and Quiroz-Pedrazzi signed a subscription agreement stating Lopez would pay \$400,000 for a 20% membership interest in the LLC if Hernandez gave Lopez financial documentation for the LLC and a related entity. Although Lopez did not receive the financial information, she paid \$200,000 and received a promissory note. Lopez continued to ask for the financial information and made numerous additional loans or contributions in 2012 and 2013. Lopez deferred taking a formal membership interest in the LLC while she awaited the requested financial information. Hernandez never provided the financial information, and the OrangeCup stores, which were never profitable, closed in 2013. Lopez sued Hernandez, Quiroz-Pedrazzi, and the LLC. Shortly after Lopez sued Hernandez, he filed bankruptcy.

While Lopez never formally became a member of the LLC, the court found Lopez, Hernandez, and Quiroz-Pedrazzi formed a "de facto" partnership when they signed the subscription agreement. Although the court concluded that Hernandez did not induce Lopez to invest in the OrangeCup business venture through false pretenses, false representations, or actual fraud (stating that Lopez was "imprudent" but "an irresponsible business person does not necessarily make a fraudster"), the court stated that their de facto general partnership created a fiduciary relationship between Hernandez and Lopez that included a "duty of candor and full disclosure" related to their business. In Texas, a partner in a partnership owes duties of loyalty and care and must discharge those duties in good faith. Tex. Bus. Orgs. Code § 152.204. The partner's duty of loyalty includes a duty to account to the partnership for property and profits. Tex. Bus. Orgs. Code § 152.205. Further, the court relied on case law for the proposition that, in addition to the duties of "good faith and candor," partners owe one another a general duty of full disclosure with regard to matters affecting a partner's interests. Under the Bankruptcy Code, a debt for fraud or defalcation while acting in a fiduciary capacity is not dischargeable. The court found that Hernandez breached his fiduciary duty by failing to provide Lopez with the financial information she requested within a reasonable time. Because this failure breached Hernandez's fiduciary duty, the court held the damages from this breach constituted a nondischargeable debt under Section 523(a)(4).

Nguyen v. Hoang, 507 S.W.3d 360 (Tex. App.—Houston [1st Dist.] 2016, no pet.).

The court of appeals determined a family chicken farm was a partnership and found that the managing partner and two other partners breached the partnership agreement and their statutory partner duties.

In 2006, a Vietnamese family decided to purchase and run a chicken farm. Andy Ngo and Phap Nguyen brought the family together to determine who would be interested in contributing money to purchase a chicken farm. At this meeting, appellants Nguyen and wife Dung Vu agreed to contribute \$80,000 for a 25% share of profits, appellee Manh Hoang and wife Diem Vu agreed to contribute \$80,000 for a 25% share of profits, appellee Dung Le and boyfriend Tuan Ngo agreed to contribute \$50,000 for a 15.5% share of profits, and appellant Ngo contributed \$30,000 for a 12.5% share of profits. Other family members who were not parties in this case collectively contributed \$80,000 for a collective 24.5% profit share. The family purchased a chicken farm in Georgia, and they decided Ngo would manage the chicken farm because he had the best English skills. Two years later, the family sold the Georgia farm and bought a chicken farm in Texas. The family sold the first Texas chicken farm in 2010, and Ngo, Nguyen, and Vu made distributions to the family. Ngo, Nguyen, and Vu used their distributions to purchase a second Texas chicken farm but did not give the others an opportunity to participate in

this chicken farm. Le and Hoang sued Ngo, Nguyen, and Vu for breach of partnership agreement and breach of duties.

The first issue raised on appeal was whether a partnership existed. The court of appeals examined the evidence as to each of the five statutory factors and concluded that there was evidence supporting each of the factors. Thus, there was sufficient evidence to support the jury's findings that the parties created a general partnership.

The court of appeals next addressed whether the evidence supported the jury's finding that Ngo, Nguyen, and Vu breached the partnership agreement and that the breach caused Le and Hoang to suffer damages. The family did not enter a written partnership agreement but did agree to share the profits of the chicken farm. The family also agreed upon who would work at the chicken farm and what salary they would receive. Ngo and Nguyen withheld 20% of the profits from the sale of the first Texas chicken farm to compensate themselves for their labor without telling the other parties. Additionally, when Ngo made the final distributions, he gave Le only half of her share of the profits and gave the other half to her ex-boyfriend (Ngo's brother), even though Le paid her entire initial contribution herself. This evidence supported the jury's findings on breach of contract and damages for breach of the partnership agreement.

The court of appeals also concluded that the evidence supported the jury's findings that Ngo, Nguyen, and Vu breached their duties as partners. Under Tex. Bus. Orgs. Code § 152.204(a), a partner owes duties of loyalty and care to the partnership and the other partners. The jury was instructed on these duties as well as a "duty of utmost good faith and fair dealing" and a "duty of full disclosure." The court of appeals reviewed the statutory provisions of the Texas Business Organizations Code addressing partners' duties and held that there was evidence supporting the jury's award of damages for Hoang's and Le's breach of duties. Although the purchase of the first Texas chicken farm was structured as a tax-free like-kind exchange, Ngo withheld over \$500,000 from final distributions to the partners to cover capital gains taxes. Ngo also withheld 20% of the profits from the chicken farm to pay labor costs to himself and Nguyen without consent from the other partners. Ngo, Nguyen, and Vu used the money withheld to purchase the second Texas farm and did not give Le and Hoang the opportunity to participate in this chicken farm. This evidence supported the jury's award of damages against Ngo, Nguyen, and Vu for breach of their partner duties to Le and Hoang.

The court of appeals found that Vu, as a partner, was liable for the breaches of contract and duties discussed above. Vu argued the actions were those of Nguyen (her husband) and Ngo and that she could not be liable simply as Nguyen's wife. The Texas Supreme Court in *K & G Oil Tool Service Co. v. G & G Fishing Tool Service* stated, "A nonparticipating partner is ordinarily not personally liable for the wrongful, tortious or criminal acts of the acting partner unless such acts are within the scope of the partnership's business or were consented to, authorized, ratified or adopted by the non-participating partner." 314 S.W.2d 782, 793 (Tex. 1958). While Ngo made the distribution calculations on his own, he testified that he, Nguyen, and Vu decided together to sell the first Texas farm together, to make distributions, and then to buy the second Texas farm without Le and Hoang. Vu was a partner in the chicken farm, and Vu and her husband, Nguyen, benefited from Ngo's withholding of funds from the distribution because it made their share of the distribution larger and gave the three of them more funds to buy the second Texas farm. The court concluded that Vu consented to and ratified the action of Ngo by agreeing with Ngo and Nguyen to wind up the partnership and make distributions. Thus, the court found Vu's status as a partner that consented to and ratified Ngo's actions, not merely as Nguyen's wife, made her liable for Ngo's actions.

Finally, the court addressed the argument of Ngo, Hguyen, and Vu that the trial court violated the one-satisfaction rule by awarding damages for both breach of the partnership agreement and breach of statutory partner duties because both causes of action arose from the same events or facts. The court of appeals agreed that the jury's award allowed Hoang and Le to recover more than one award for the same injury. Both awards included amounts for labor performed by Ngo and Nguyen that were improperly withheld from the distributions after the sale of the first Texas chicken farm. The court reformed the judgment to reflect an election by Hoang and Le to recover based on the greater of the two recoveries, which was the breach-of-duties claim, and deleted the award for the breach-of-contract claim.

Hardwick v. Smith Energy Co., 500 S.W.3d 474 (Tex. App.—Amarillo 2016, pet. granted, judgment vacated w.r.m.).

The court of appeals held that the parties expressly disclaimed the formation of a partnership or fiduciary relationship in their written agreement and, without the breach-of-fiduciary-duty claim, the plaintiff could not receive equitable forfeiture damages.

Mark Hardwick and others developed a method of predicting the presence of oil and gas in certain locations. Hardwick took the method to Lester Smith, an investor in oil and gas businesses, and Smith agreed to pay all acquisition, seismic, and drilling costs in exchange for a 75% working interest. The parties entered into a series of agreements relating to a number of prospect areas, and each of the operating agreements disclaimed the creation of a partnership and fiduciary duties as follows:

It is not the intention of the parties to create, nor shall this agreement be construed as creating, a mining or other partnership, joint venture, agency relationship or association, or to render the parties liable as partners, co-venturers, or principals. In their relations with each other under this agreement, the parties shall not be considered fiduciaries or to have established a confidential relationship but rather shall be free to act on an arm's-length basis in accordance with their own respective self-interest, subject, however, to the obligation of the parties to act in good faith in their dealings with each other with respect to activities hereunder.

When the parties' relationship soured, Smith sued Hardwick for claims of fraud, theft, breach of contract, and breach of fiduciary duties. On appeal, Hardwick successfully argued that there was no evidence supporting the jury's finding that Hardwick breached his fiduciary duty.

Smith argued that their activities under their agreements established a joint venture between the parties and that Hardwick thus owed Smith fiduciary duties regardless of the disclaimers. The court of appeals did not refer to the statutory definition of a partnership or the five factors indicating the creation of a partnership under the Texas Business Organizations Code. Rather, the court relied on the old common-law definition of a joint venture, which must be based on an agreement, either express or implied, and have the following essential elements: (1) a community of interest in the venture, (2) an agreement to share profits, (3) an agreement to share losses, and (4) a mutual right of control or management of the enterprise. The court stated that it was mindful that the intention of the parties to a contract is a prime element in determining whether a partnership or joint venture exists.

Smith argued that the parties' arrangement was in fact a joint venture regardless of any disclaimers to the contrary, and that Hardwick thus owed fiduciary duties to Smith and the other participants. However, the court stated that, regardless of whether the disclaimers of joint venture were effective and without addressing whether the business arrangement constituted a joint venture, it was clear that the parties expressly disclaimed fiduciary duties. Citing Tex. Bus. Orgs. Code § 152.002(b)(2) and a limited partnership case, *Strebel v. Wimberly*, 371 S.W.3d 267, 284 (Tex.App.—Houston [1st Dist.] 2012, pet. denied), the court of appeals stated that “[c]ourts must honor the contractual terms that parties use to define the scope of their obligations and agreements, including limiting fiduciary duties that might otherwise exist.” Further relying on *Strebel*, the court stated that “[t]his is especially true when the contractual limitation arises from an arms-length business transaction between sophisticated businessmen,” and the court commented that “[t]his principle adheres to Texas’s public policy of freedom of contract.”

Because the court of appeals concluded that there was no breach of fiduciary duty, the court determined Hardwick could not be liable for equitable forfeiture damages. Under Texas law, equitable forfeiture is available as a potential remedy for a breach of fiduciary or when a fiduciary fraudulently induces a party to enter into a contract when the party is ignorant of the fraud. Because the court of appeals determined Hardwick did not owe Smith any fiduciary duties, and there was not sufficient evidence to support fraudulent inducement, Smith was not entitled to receive equitable forfeiture damages.

E. Partnership Property

Derrick Petroleum Servs. v. PLS, Inc., 659 Fed. App'x 748 (5th Cir. 2016).

The Fifth Circuit Court of Appeals affirmed the district court's decision in a bench trial that the parties did not create a partnership and that the property at issue belonged to its original owner.

Derrick Petroleum Services ("Derrick") entered a Memorandum of Understanding with PLS, Incorporated ("PLS") in which they agreed to work together to develop and market a jointly branded database. Derrick would develop and maintain a database on past and current deals in the oil and gas industry, and PLS would market the database and sell subscriptions to it. Prior to the relationship at issue, Derrick had created a database that formed the basis of the jointly branded database. The MOU stated the parties would form a limited liability company after reaching a specific revenue goal. The MOU did not expressly state who owned the Derrick/PLS Database or if it was jointly owned. The parties' relationship deteriorated, and they did not create an LLC. Derrick sought a declaratory judgment that it owned the Derrick/PLS Database. In response, PLS argued the parties formed a partnership and PLS had 50% ownership of the database.

The court of appeals held that the district court did not err in concluding that the parties did not create a partnership. Under Tex. Bus. Orgs. Code § 152.052(a), five factors are considered in determining the existence of a partnership, and the court of appeals found that the district court correctly applied Texas law and did not clearly err in finding that only two of the five factors—expression of an intent to form a partnership and contribution of property—were present to a limited extent. Because only two factors were somewhat present, the district court did not err in concluding that the parties did not create a partnership.

The court of appeals concluded that the district court did not err in finding that Derrick owned the jointly branded database because Derrick owned the database before entering into the agreement with PLS, and property purchased by a partner with the partner's own funds is presumed to be the property of the partner even if it is used for partnership purposes. Tex. Bus. Orgs. Code § 152.102(c). Moreover, Derrick had ultimate control of the content of the database, and a person who is in possession and control of property is presumed to be the owner of the property. Furthermore, the MOU did not expressly state who owned the database, and the district court thus did not err in considering other evidence showing that the parties did not intend to convey ownership of the database.

Cooper Indus., Ltd. v. Nat'l Union Fire Ins. Co., No. 4:12-CV-01591, 2016 WL 3405295 (S.D. Tex. June 21, 2016).

The court determined that fraudulent acts of one member of a joint venture could be imputed to the other member. The court also held that the plaintiff did not "own" the lost property within the terms of the insurance policy because a limited partner does not own a specific asset in a limited partnership.

Cooper Industries, Ltd. ("Cooper") invested money with Westridge Capital Management, Inc. ("Westridge") and its affiliates, WG Trading Company LP ("WGTC") and WG Trading Investors, LP ("WGTI"), all of which was later discovered to be a Ponzi scheme. Cooper had a commercial crime insurance policy, which covered loss of its funds or other property due to fraudulent acts or thefts committed by an employee or fiduciary. After the Ponzi scheme was discovered, Cooper filed a claim with the insurer that was later rejected. Cooper sued the insurer to recover under the policy.

Because Cooper was at most a limited partner in the entities in which its funds were invested, the court concluded that Cooper did not "own" the lost funds under the terms of the insurance policy. Another court, in a similar case involving the same Ponzi scheme, concluded that an insured who invested in WGTC as a limited partner could not recover under the policy because Delaware law is very clear that a limited partner has "no interest in specific limited partnership property." Because the investor only owned an interest in the partnership, not any specific partnership property, the court in that case held the investor did not "own" the property of the partnership within the meaning of the insurance policy. Here, Cooper did not even directly invest in WGTC, but loaned funds to WGTI, which WGTI then invested in WGTC. Thus, Cooper was even further removed from specific property within the WGTC partnership. Both WGTI and WGTC were Delaware limited partnerships. Even if this investment gave Cooper a limited partnership interest in WGTI/WGTC, Cooper would not own specific partnership property. Thus, the court concluded that Cooper did not "own" the lost funds under the terms of the insurance policy.

F. Interpretation and Enforcement of Partnership Agreement

1. Financial Rights

Thunder Rose Enters., Inc. v. Kirk, No. 13-15-00431-CV, 2017 WL 2172468 (Tex. App.–Corpus Christi Apr. 20, 2017, no pet. h.)(mem. op.).

The court upheld a jury’s verdict that an oral partnership existed between the parties and concluded that the evidence supported the jury’s findings that one of the partners breached the agreement in certain respects but not others.

Billy Kirk filed suit in September of 2011 alleging that he had formed a partnership with Michael Palmer and that Palmer had breached his duty of loyalty to Kirk. Later, Kirk added claims for breach of contract and requested a declaratory judgment that a partnership existed. Palmer disputed that there was a partnership, and alleged that if a partnership existed, Kirk breached his fiduciary duties owed to the partnership.

Palmer invented a component part to be used in the oil and gas industry. In 2008, Palmer approached Kirk in an effort to obtain financing and market the valve. In 2009, Palmer and Kirk met with a manufacturer and contracted to have the manufacturer build a prototype of the product. Kirk established a bank account in the name of Excalibur and advanced funds through Excalibur to pay for the prototype. Palmer proposed that Excalibur be owned jointly by Kirk and Palmer and that Kirk contribute cash to Excalibur. Kirk did not have cash on hand and was unsuccessful in obtaining a bank loan. Despite the lack of financing or clear agreement regarding the structure, the parties continued with development. In 2010, the parties contracted with a different manufacturer to have a second prototype developed and, once completed, Palmer began making repairs on the second prototype. Palmer alleged that Kirk ordered additional valves and attempted to sell them without Palmer’s knowledge or approval.

In 2011, Kirk’s attorney sent to Palmer’s attorney a draft agreement to form a Delaware LLC, which would own the patent, trademark, and distribution rights on the product. Under the proposed agreement Kirk would contribute \$750,000 and Palmer would contribute his rights to the product. That agreement was never executed. Palmer countered by offering Kirk a non-exclusive license to develop and market the product. After a few days, Palmer sent Kirk a cease and desist letter demanding that Kirk cease marketing the product. Kirk filed suit two weeks later.

At trial, the jury found there was an oral partnership agreement between the parties and that the agreement contained the following terms: (1) Kirk was to supply financing and funding for the development and production of the valve; (2) the parties were to split profits from the sale and marketing of the valve equally, with Kirk recouping his expenses from his 50% share; (3) the parties were to share losses and liability to third parties from the valve equally; and (4) Palmer was to assign Kirk an exclusive worldwide right or license to sell and market the valve. The jury found that Palmer breached each of these terms. The jury also found that Palmer breached the agreement by issuing the cease and desist letters and by preventing third parties from doing business with the partnership. The trial court rendered judgment on the verdict and ordered the parties to specifically perform under the partnership agreement.

On appeal, the court reviewed the evidence relating to the five statutory factors to be considered in determining whether a partnership has been created, and the court concluded that the evidence supported the jury’s finding of an oral partnership. The court also rejected Palmer’s arguments that the terms of the partnership fell within various Texas statute-of-frauds provisions. With the oral partnership agreement established, the court turned to the claims for breach of the partnership agreement. The court reversed the breach findings by the jury on the profit splitting terms, the loss splitting terms, and a term requiring Kirk to supply the financing for the product. Because there were no profits or losses to split, Palmer could not have breached those terms, and Palmer could not have breached Kirk’s responsibility to finance the partnership. With the exception of these claims, the court found that the elements of breach were supported by ample evidence. Specifically, the court referred to two communications supporting the claim for breach of the partnership agreement: one from Palmer’s attorney to Kirk’s attorney proposing to grant Kirk a non-exclusive license and one from Palmer to a manufacturer stating that Kirk was not his partner and not to sell any products to Kirk. Based on these documents, the court concluded that a reasonable juror could conclude Palmer breached the oral partnership agreement.

With regard to the remedy of specific performance sought by Kirk, Palmer alleged that Kirk was not ready, willing, and able to perform his obligations under the agreement. Palmer argued that Kirk was supposed to provide \$1 million in financing and \$3 million in a line of credit, but that Kirk could not obtain that financing. Kirk

countered by arguing a different agreement was proposed and the court concluded that the jury could believe Kirk's theory. Because Kirk's actions could reasonably constitute substantial performance by spending thousands of dollars in furtherance of the partnership, the court did not reverse the trial court's order of specific performance.

Bruce v. Cauthen, 515 S.W.3d 495 (Tex. App.—Houston [14th Dist.] 2017, pet. denied).

An individual limited partner (who also owned the general partner) wrongfully foreclosed on another limited partner's partnership interest in violation of the UCC by purchasing the partnership interest at a private sale when the partnership agreement did not waive the UCC prohibition on purchase by the secured party at a private sale. The foreclosure also violated the partnership agreement and breached the individual's duty of loyalty because the alleged debt was actually non-existent. The evidence supported the jury's findings of damages in the amount of the value of the foreclosed partnership interest based on the market value of the real property owned by the partnership and without applying discounts for lack of control and lack of marketability of the interest since the other partner acquired the interest. Although the same facts formed the basis of the prevailing limited partner's claims for breach of fiduciary duty and breach of contract, the prevailing limited partner was not entitled to recover statutory attorney's fees for breach of the limited partnership agreement because she elected to recover in tort on her claim for breach of fiduciary duty.

David Bruce, founder of a medical staffing company, hired Misty Cauthen as a recruiter. Cauthen was promoted to vice-president and awarded 20% of the stock of the medical staffing company and then later was promoted to president and awarded an additional 20% of the stock. Bruce and Cauthen formed a limited partnership, with Bruce and Cauthen as limited partners and a limited liability company solely owned by Bruce as the general partner. Each partner's interest in the partnership was similar to the amount of their ownership in the medical staffing company—Bruce owned 59.4%, Cauthen owned 39.6%, and Bruce's LLC owned 1%. The partnership purchased a 4.57-acre property on which Bruce and Cauthen originally planned to build a new office building. After Bruce and Cauthen's business relationship became strained, Cauthen resigned from the medical staffing company. There was a buy-sell agreement allowing Cauthen to sell her shares in the medical staffing company, but Cauthen remained a limited partner in the partnership. The partnership's property was valued by one estimate at over \$1.6 million. Bruce refused to dissolve the partnership and refused to purchase Cauthen's interest in the partnership for \$468,000. Cauthen failed to find a third party to purchase her interest in the partnership. During this time, Bruce began sending Cauthen invoices for her share of the mortgage payments on the partnership property and other partnership expenses. Cauthen did not pay the invoices, and the partnership declared her in default and sold her interest in a private foreclosure sale. Bruce, the only bidder, purchased Cauthen's interest for the amount of her alleged debt, \$51,234. At trial, Bruce acknowledged that the invoices he had argued were cash calls were not cash calls under the terms of the partnership agreement and that Cauthen was thus never in default.

The court of appeals concluded that Bruce violated the UCC by selling Cauthen's interest in the partnership in a private sale to himself. After a debtor's default, Section 9.610(b) of the UCC allows a secured party to dispose of the collateral in a commercially reasonable sale by either public or private proceedings. However, Section 9.610(c) does not allow the secured party to purchase the collateral at a private sale if the collateral is not "of a kind that is customarily sold on a recognized market or the subject of widely distributed standard price quotations." On appeal, Bruce did not dispute that Section 9.610(c) precluded him from purchasing Cauthen's interest at a private sale. Instead, Bruce argued that the limited partnership agreement modified Section 9.610 by allowing for private foreclosures to a restricted group of purchasers, including Bruce, who would buy the interest for investment and not for resale.

The court of appeals concluded that the partnership agreement did not modify Section 9.610 to allow the secured party to purchase a defaulting partner's interest when it is sold at a foreclosure sale. The paragraph on foreclosure in the partnership agreement stated:

(b) Foreclosure. Each Partner, by signing this Agreement, shall be deemed to have granted a lien to the Partnership and the non-Defaulter, in the event that such Partner becomes a Defaulter, securing the payment of all sums required to be paid and performance of all covenants required to be performed by the Defaulter, and securing the Partnership and the non-Defaulter against any loss, cost or expense resulting from the default of the Defaulter, and the Partnership or the non-Defaulter as secured parties may foreclose the lien in the manner provided under the Texas Business and Commerce Code (the "UCC"). If, upon an Event of Default the Defaulter's interest in the

Partnership is disposed of, 10 days' notice by the Partnership or by any Partner is reasonable notice under any provision of the UCC requiring notice. The Partners acknowledge that the Partnership or the non-Defaulter may be unable to effect a public sale of any or all of the Defaulter's interest in the Partnership by reason of certain prohibitions contained in the Securities Act of 1933, as amended, and applicable state securities laws, and may be compelled to resort to one or more private sales to a restricted group of purchasers who will be obligated to agree, among other things, to acquire the Defaulter's interest in the Partnership for their own respective accounts for investment and not with a view to distribution or resale. The Partners acknowledge that any private sale may result in prices or other terms less favorable to the seller than if the sale were a public sale. Notwithstanding those circumstances, each Partner agrees that a private sale is commercially reasonable and neither the Partnership nor the non-Defaulter is under any obligation to take any steps in order to permit the Defaulter's interest in the Partnership to be sold at a public sale....

While this provision recognizes that a partner may have to sell the interest in a private sale and acknowledges such a sale as commercially reasonable, the court pointed out that the agreement does not expressly state that it modifies Section 9.610(c) of the UCC. The agreement also does not state that the secured party may be the person acquiring the defaulting partner's interest in the private sale or that the potential purchaser may be the limited partner who is also a secured party. The court stated that the lack of any express language providing that the secured party may purchase the defaulting partner's partnership interest at a private sale in direct contravention of the UCC militated against Bruce's argument that the parties intended and agreed to modify Section 9.610(c) to permit such a transaction. Thus, the court concluded that nothing in the foreclosure provision of the limited partnership agreement modified Section 9.610(c) to permit Bruce to acquire Cauthen's interest at a private sale.

Next, the court of appeals concluded that the evidence supported the jury's findings on the value of Cauthen's interest in the partnership. The jury found that the damages caused by Bruce's wrongful foreclosure were \$469,044, which was the undiscounted value of Cauthen's interest according to Cauthen's expert witness. The trial court separately asked the jury what discount should be applied for lack of marketability and lack of control, and the jury answered "zero" to both questions. Cauthen's expert was a certified public accountant who, like Bruce's expert, calculated the fair market value of Cauthen's interest based on the value of the partnership's land because it was the only asset the partnership possessed. Unlike Bruce's expert, Cauthen's expert did not discount the value of Cauthen's interest for lack of control and lack of marketability. On appeal, Bruce argued that Cauthen's fair market value, which the jury relied on, was incorrect because it failed to take into account lack of control and lack of marketability. However, Cauthen's expert explained that he did not discount the interest because the person who purchased the interest—Bruce—already had control of the partnership. The court of appeals held this was sufficient evidence to support Cauthen's calculations for fair market value and the jury's findings on the amount of damages for wrongful foreclosure. The jury also found damages in the amount of \$469,044 (the undiscounted value of Cauthen's interest according to Cauthen's expert witness) on Cauthen's claim for breach of contract, and the court of appeals concluded that the evidence was sufficient to support that finding for the same reasons set forth above.

The court of appeals did not consider Bruce's arguments on breach of loyalty due to inadequate briefing, but the court did discuss the arguments to some extent. In the course of its discussion, the court stated that there was "more than sufficient evidence" supporting the jury's finding that Bruce breached his duty of loyalty as it was explained in the charge. The court stated that he did not "merely 'further his own interest'"; he purposefully created a false debt in order to foreclose on Cauthen's partnership interest for the value of the nonexistent debt, which resulted in his acquiring her interest while paying her nothing for the interest through a private sale in violation of the UCC. The court explained that, contrary to his suggestion that a breach of contract does not necessarily result in tort liability, the foreclosure of the debt was "not an arm's-length transaction between strangers but an illegal acquisition of one partner's interest by another." The court also mentioned evidence that Bruce took advantage of Cauthen when she had financial difficulties after leaving their company and warned her that lawsuits were about "whoever could spend the most money and last the longest."

The court determined that Cauthen could not receive attorney's fees for breach of contract because she elected to recover on her breach-of-fiduciary-duty claim. Cauthen argued that she was entitled to recover statutory attorney's fees for breach of contract because her breach-of-fiduciary-duty claim was based on and "intertwined with" Bruce's breach of the limited partnership agreement. The court of appeals reviewed the development of Texas law in cases of this nature and explained that Texas law no longer allows a party to recover attorney's fees under

a tort claim even if the tort claim and a breach-of-contract claim are based on the same facts such that the claims are “intertwined to the point of being inseparable.” Under the one-satisfaction rule, when a party prevails on more than one theory of liability for a single injury, the party must make an election, and the party may choose the claim that provides the greatest recovery. Cauthen could choose to recover on the claim that would provide the greatest recovery, which was actual and exemplary damages in tort under the breach-of-fiduciary-duty claim, but she was limited to that recovery and was not entitled to recover the statutory attorney’s fees available if she elected to recover on her breach-of-contract claim.

Nguyen v. Hoang, 507 S.W.3d 360 (Tex. App.—Houston [1st Dist.] 2016, no pet.).

The court of appeals determined a family chicken farm was a partnership and found that the managing partner and two other partners breached the partnership agreement and their statutory partner duties.

In 2006, a Vietnamese family decided to purchase and run a chicken farm. Andy Ngo and Phap Nguyen brought the family together to determine who would be interested in contributing money to purchase a chicken farm. At this meeting, appellants Nguyen and wife Dung Vu agreed to contribute \$80,000 for a 25% share of profits, appellee Manh Hoang and wife Diem Vu agreed to contribute \$80,000 for a 25% share of profits, appellee Dung Le and boyfriend Tuan Ngo agreed to contribute \$50,000 for a 15.5% share of profits, and appellant Ngo contributed \$30,000 for a 12.5% share of profits. Other family members who were not parties in this case collectively contributed \$80,000 for a collective 24.5% profit share. The family purchased a chicken farm in Georgia, and they decided Ngo would manage the chicken farm because he had the best English skills. Two years later, the family sold the Georgia farm and bought a chicken farm in Texas. The family sold the first Texas chicken farm in 2010, and Ngo, Nguyen, and Vu made distributions to the family. Ngo, Nguyen, and Vu used their distributions to purchase a second Texas chicken farm but did not give the others an opportunity to participate in this chicken farm. Le and Hoang sued Ngo, Nguyen, and Vu for breach of partnership agreement and breach of duties.

The first issue raised on appeal was whether a partnership existed. The court of appeals examined the evidence as to each of the five statutory factors and concluded that there was evidence supporting each of the factors. Thus, there was sufficient evidence to support the jury’s findings that the parties created a general partnership.

The court of appeals next addressed whether the evidence supported the jury’s finding that Ngo, Nguyen, and Vu breached the partnership agreement and that the breach caused Le and Hoang to suffer damages. The family did not enter a written partnership agreement but did agree to share the profits of the chicken farm. The family also agreed upon who would work at the chicken farm and what salary they would receive. Ngo and Nguyen withheld 20% of the profits from the sale of the first Texas chicken farm to compensate themselves for their labor without telling the other parties. Additionally, when Ngo made the final distributions, he gave Le only half of her share of the profits and gave the other half to her ex-boyfriend (Ngo’s brother), even though Le paid her entire initial contribution herself. This evidence supported the jury’s findings on breach of contract and damages for breach of the partnership agreement.

The court of appeals found that Vu, as a partner, was liable for the breaches of contract and duties found by the jury. Vu argued the actions were those of Nguyen (her husband) and Ngo and that she could not be liable simply as Nguyen’s wife. The Texas Supreme Court in *K & G Oil Tool Service Co. v. G & G Fishing Tool Service* stated, “A nonparticipating partner is ordinarily not personally liable for the wrongful, tortious or criminal acts of the acting partner unless such acts are within the scope of the partnership’s business or were consented to, authorized, ratified or adopted by the non-participating partner.” 314 S.W.2d 782, 793 (Tex. 1958). While Ngo made the distribution calculations on his own, he testified that he, Nguyen, and Vu decided together to sell the first Texas farm together, to make distributions, and then to buy the second Texas farm without Le and Hoang. Vu was a partner in the chicken farm, and Vu and her husband, Nguyen, benefited from Ngo’s withholding of funds from the distribution because it made their share of the distribution larger and gave the three of them more funds to buy the second Texas farm. The court concluded that Vu consented to and ratified the action of Ngo by agreeing with Ngo and Nguyen to wind up the partnership and make distributions. Thus, the court found Vu’s status as a partner that consented to and ratified Ngo’s actions, not merely as Nguyen’s wife, made her liable for Ngo’s actions.

Finally, the court addressed the argument of Ngo, Hguyen, and Vu that the trial court violated the one-satisfaction rule by awarding damages for both breach of the partnership agreement and breach of statutory partner duties because both causes of action arose from the same events or facts. The court of appeals agreed that the jury’s

award allowed Hoang and Le to recover more than one award for the same injury. Both awards included amounts for labor performed by Ngo and Nguyen that were improperly withheld from the distributions after the sale of the first Texas chicken farm. The court reformed the judgment to reflect an election by Hoang and Le to recover based on the greater of the two recoveries, which was the breach of duties claim, and deleted the award for the breach of contract claim.

2. Statute of Frauds

Thunder Rose Enters., Inc. v. Kirk, No. 13-15-00431-CV, 2017 WL 2172468 (Tex. App.—Corpus Christi Apr. 20, 2017, no pet. h.)(mem. op.).

The court upheld a jury’s verdict that an oral partnership existed between the parties and rejected arguments that the terms of the agreement were required to be in writing under various statute-of-frauds provisions.

Billy Kirk filed suit in September of 2011 alleging that he had formed a partnership with Michael Palmer and that Palmer had breached his duty of loyalty to Kirk. Later, Kirk added claims for breach of contract and requested a declaratory judgment that a partnership existed. Palmer disputed that there was a partnership, and alleged that if a partnership existed, Kirk breached his fiduciary duties owed to the partnership. Thus, a central issue at trial was whether Palmer and Kirk had formed a partnership.

Palmer invented a component part to be used in the oil and gas industry. In 2008, Palmer approached Kirk in an effort to obtain financing and market the valve. In 2009, Palmer and Kirk met with a manufacturer and contracted to have the manufacturer build a prototype of the product. Palmer proposed that their business be owned jointly by the parties and that Kirk contribute cash into the entity. Kirk did not have cash on hand and was unsuccessful in obtaining a bank loan. Despite the lack of financing or clear agreement regarding the structure, the parties continued with development. In 2010, the parties contracted with a different manufacturer to have a second prototype developed and, once completed, Palmer began making repairs on the second prototype. Palmer alleged that Kirk ordered additional valves and attempted to sell them without Palmer’s knowledge or approval. In 2011, Kirk’s attorney sent to Palmer’s attorney a draft agreement to form a Delaware LLC, which would own the patent, trademark, and distribution rights on the product. Under the proposed agreement Kirk would contribute \$750,000 and Palmer would contribute his rights to the product. That agreement was never executed. Palmer countered by offering Kirk a non-exclusive license to develop and market the product. After a few days, Palmer sent Kirk a cease and desist letter demanding that Kirk cease marketing the product. Kirk filed suit two weeks later.

At trial, the jury found there was an oral partnership agreement between the parties and that Palmer breached the agreement in numerous respects. The trial court rendered judgment on the verdict and ordered the parties to specifically perform under the partnership agreement.

On appeal, the court reviewed the evidence relating to five statutory factors that are considered in determining whether a partnership has been created and concluded that the evidence supported the jury’s finding of an oral partnership agreement. Palmer argued that there were several bases on which the oral agreement was unenforceable under the statute of frauds. First, Palmer argued that assignment of patents or trademarks must be made in writing, but the court concluded that those statutes did not apply in this case because the agreement was to enter into a partnership and not to assign a patent or trademark. Further, the court found that only a license of the patent was contemplated and patent licenses are not subject to the statute of frauds. Palmer also argued that a promise to make a contribution to an LLC requires a writing, but the court concluded that this provision was not applicable because the partnership agreement did not contemplate or contain a promise to make a contribution to a LLC. The court similarly rejected Palmer’s last statute of frauds argument that the agreement could not be completed in one year. The court concluded that Palmer had not directed the court to evidence in the record indicating that the partnership or patent license would last for longer than one year.

Bakke Dev. Corp. v. Albin, No. 04-15-00008-CV, 2016 WL 6088980 (Tex. App.—San Antonio Oct. 19, 2016, no pet.)(mem. op.).

The court of appeals held that the statute of frauds required a writing to enforce a promise to contribute real property to a partnership. Because the partnership agreement between the parties was oral, the plaintiff could not prevail on its claim for breach of the partnership agreement to contribute real property.

Bakke Development Corporation (“Bakke”) and Albin entered into an oral partnership agreement that required each party to contribute real property. Bakke claimed a formal contract was unnecessary and alleged that it began work on developing the real property. Subsequently, Albin disclaimed the partnership and refused to let the partnership use the property that he was to contribute. Bakke filed suit asserting claims for breach of the partnership agreement and breach of fiduciary duty and requested that a constructive trust be imposed on Albin’s property. Albin raised the statute of frauds (Tex. Bus. & Com. Code § 26.01) as his chief defense. The trial court agreed with Albin that the statute of frauds prohibited judicial enforcement of the partnership agreement and entered summary judgment for Albin on all claims. Bakke appealed.

The court of appeals first considered whether the partnership agreement involved the sale of real estate. Bakke claimed the property did not need to be contributed for the parties to develop it and that the property could be used without being conveyed. The court pointed out that Bakke’s owner testified in his deposition that he believed the real property of both parties would be contributed to the partnership. Specifically, Bakke testified in response to questions about his obligations under the alleged partnership agreement that he was ready, willing, and able to convey the property to the partnership but had not yet done so. The court treated this statement as evidence that mere use of the property was not what the parties envisioned when making the oral agreement. Thus, because the properties in question were expected to be transferred, the agreement fell within the statute of frauds. Because the agreement was not in writing, it was not enforceable absent an exception.

Bakke made an additional argument that the court should apply the partial performance exception to the statute of frauds. The court rejected this argument because Bakke failed to show that Albin would reap an unearned benefit. Albin did not receive any plans, drawings, or other consideration from Bakke. The court concluded that Bakke failed to raise a fact issue on the partial performance claim.

G. Dissolution/Winding Up

CBIF Ltd. P’ship v. TGI Friday’s Inc., No. 05–15–00157–CV, 2017 WL 1455407 (Tex. App.—Dallas Apr. 21, 2017, no pet. h.) (mem. op.).

The court of appeals affirmed the trial court’s judicial dissolution of a joint venture under Section 11.314 of the Texas Business Organizations Code on the basis that the economic purpose of the joint venture had been unreasonably frustrated and was likely to be frustrated in the future. The court also held that appointment of a wind-up representative was not governed by the liquidating receivership provisions of Section 11.405 of the Texas Business Organizations Code and stated that appointment of the wind-up representative avoided certain fiduciary-duty concerns that would be present in the winding up process if the partners were conducting the winding up.

In 1995, TGI Friday’s submitted a bid for a concession space at DFW Airport. The bid proposed a joint venture in which disadvantaged business enterprise (DBE) partners would have 35% ownership interest, as was required by government regulations. After DFW approved the proposal, Friday’s formed TGIF/DFW Restaurant Joint Venture (“TGIFJV”) with three other partners—two DBE partners and a corporation owned by Steve Flory, which ultimately assigned its interest to CBIF Limited Partnership (“CBIF”), another entity controlled by Flory. Each of the four partners was required to make a capital contribution of \$1.55 million in exchange for a 25% ownership interest in TGIFJV. Both of the original DBE partners had trouble making their required capital contributions. The interest of one of these DBE partners was acquired by a newly formed limited partnership, TSQF Limited Partnership (“TSQF”). TSQF’s limited partners were CBIF and three individuals (the “RSH Group”) who comprised the ownership group of the defaulting DBE partner whose interest TSQF acquired. The general partner of TSQF was Texas Star Quality Foods, LLC (“Texas Star”). Texas Star was managed by Columbia Airport LLC (“Columbia”), owned by Flory, and one of the members of the RSH Group. The RSH Group owned 51% of TSQF, but the structure of TSQF under its partnership agreement prevented the RSH Group from acting without Flory’s consent. The interest of the other original DBE partner was acquired by Friday’s and CBIF. As a result, TSQF, with a 25% interest, became the only remaining DBE partner in TGIFJV, but the agreement between Friday’s and DFW Airport required DBE partners to own 35% of the joint venture. Flory refused to allow CBIF to sell 5% out of its 37.5% interest to help make up for the 10% difference. Therefore, Friday’s sold 10% out of its 37.5% interest to Domain Enterprises, Inc. (“Domain”), a DBE. Ultimately, TGIFJV had four partners—LBD Corporation, a subsidiary of Friday’s, with 27.5%; CBIF, controlled by Flory, with 37.5%; Domain with 10%; and TSQF Limited Partnership, owned by the RSH Group, CBIF, and Texas Star, with 25%.

In 1996, TGIFJV entered into a lease agreement with DFW Airport for an initial term of 10 years with two renewal options of 5 years. In 2004, DFW Airport accepted bidding for concession spaces with the requirement that a DBE own 35% interest. Flory failed to meet capital contributions on time and changed his mind multiple times as to whether he wanted to move forward with another lease. This flip-flopping left TSQF with only 25%, rather than the 40% the RSH Group wanted to acquire.

In 2009, DFW Airport began to renovate the airport and required restaurants to enter a new lease. Under new federal requirements, a DBE not only had to own a certain percentage of the venture but also maintain a degree of control at both the DBE partner level and the joint venture level. After a review, DFW Airport and the FAA found TGIFJV's agreement failed to comply with these new control requirements. Friday's and the RSH Group proposed amendments to the joint venture agreement that would give the DBE partners, Domain and TSQF, greater control, but Flory refused to agree to the changes. Ultimately, Friday's and the RSH Group created a new joint venture and secured the lease. Friday's and RSH Group entered a side agreement with Domain and CBIF to maintain their interests.

In 2011, Friday's sued CBIF, Columbia, and Flory (the "CBIF parties"). The CBIF parties filed crossclaims against Friday's and third-party claims against TSQF, the RSH Group, and others. TSQF and the RSH Group asserted claims against the CBIF parties. On appeal, the CBIF parties appealed a judgment in favor of the other parties on claims including judicial dissolution of TGIFJV and breach-of-fiduciary-duty.

CBIF argued that there was no evidence to support the jury's findings that: (1) the economic purpose of TGIFJV had been unreasonably frustrated and likely would be frustrated in the future; (2) CBIF engaged in conduct that made it not reasonably practicable to carry on the business of TGIFJV in partnership with CBIF; and (3) it was not reasonably practicable for the joint venture to carry on its business in conformity with its governing documents. Each of these is grounds for a judicially ordered winding up of a partnership under Section 11.314 of the Texas Business Organizations Code, and the trial court entered an order of judicial dissolution of TGIFJV and appointed a third party to conduct the winding up. CBIF argued that the economic purpose of TGIFJV had never been unreasonably frustrated and was not likely to be frustrated in the future because the venture had been very profitable from 1995 through 2013. The court of appeals began its discussion of this issue by pointing out that the joint venture agreement of TGIFJV provided that the purpose of TGIFJV was "to construct, outfit and operate for profit" Friday's restaurants and café bars at DFW Airport and that leases entered into by TGIFJV with the airport required TGIFJV to consent to amendments and modifications of the lease agreement if required by the FAA and to comply with all laws and regulations. If TGIFJV failed to comply with these laws, the airport could terminate the lease agreement, which would cause the restaurants and café bars to close and clearly frustrate the economic purpose of the venture. The airport was required to have and enforce federal requirements regarding DBE programs in order to receive federal grants and was required to follow FAA and USDOT guidelines for administering the programs. When the FAA required the airport to review and bring existing joint ventures into compliance, it was determined that neither TGIFJV nor TSQF were compliant. Flory did not trust the RSH Group and refused to enter into agreements that would allow the group to exercise the level of control required to meet the FAA guidelines. As a result, the airport condemned TGIFJV's restaurant space in one terminal. The evidence showed that Flory did not intend to change his position concerning control of TSQF and TGIFJV, making condemnation of the other restaurant and café bar spaces inevitable. TGIFJV then would not be able to construct and operate Friday's restaurants and café bars at the airport. Thus, there was evidence to support the jury's finding that the economic purpose of TGIFJV had been unreasonably frustrated and was likely to be unreasonably frustrated in the future. Because any of the three grounds sufficed for a judicial dissolution, it was unnecessary for the court to examine the evidence relating to the other grounds found by the jury.

CBIF also complained about the winding up process, arguing that the trial court's order authorizing the wind-up representative to systematically liquidate all the assets of TGIFJV, including the master lease with the airport, violated Section 152.701 of the Texas Business Organizations Code and the common law. CBIF argued that the duty to wind up generally includes the duty to complete all executory contracts. Section 152.701 provides that the partnership continues after an event requiring winding up until the winding up of its business is completed, at which time the partnership is terminated. The statute does not require continuation of a partnership until all executory contracts are fulfilled, but CBIF relied on *Bader v. Cox*, 701 S.W.2d 677 (Tex. App.—Dallas 1985, writ ref'd n.r.e.) for the proposition that the duty to wind up generally includes the duty to complete all executory contracts. The court acknowledged this general rule but stated that executory contracts need not always be concluded as part of the winding-up process, but rather may be given a present value. The court of appeals stated

that this was the intent reflected in the trial court's order in this case that the wind-up representative obtain appraisals of the leases, taking into account various factors such as the likelihood of condemnation and constraints on assignability. CBIF also argued that allowing the wind-up representative to terminate the lease before the end of its term exposed CBIF to potential liability to the airport, but the trial court addressed this concern by authorizing the wind-up representative, subject to court approval, to terminate existing contracts or leases between TGIFJV and any third party during the wind-up period in a manner calculated to minimize the risk of liability of TGIFJV and/or maximize the value of TGIFJV property. Because the trial court's order allowed the wind-up representative to sell or assign the leasehold interest applicable to each restaurant to a new entity owned or controlled by Friday's, CBIF also claimed that the order ran afoul of the *Bader* court's pronouncement that partners owe a fiduciary duty to wind up and cannot take actions for purely personal gain. However, the court distinguished the instant case from *Bader*, where the remaining partners who were winding up the partnership business "clearly owed fiduciary duties" and refused to give credit to the deceased partner's estate for the value of certain partnership assets. Here, the partners were not winding up the venture's business, but rather a third party was appointed as the wind-up representative. The court said there was no evidence suggesting that the wind-up representative had any connection to or interest in Friday's or was likely to personally gain from the wind-up process. Thus, the concern presented in *Bader* did not exist here. The court also rejected CBIF's argument that the wind-up representative order was a liquidating-receiver order under Section 11.405 of the Texas Business Organizations Code requiring a judicial determination under Section 11.401 that all other available legal and equitable remedies are inadequate. The court stated that Section 11.405 did not apply to the circumstances of this case.

In re Spiritas, No. 05-16-00791-CV, 2017 WL 1281394 (Tex. App.—Dallas Apr. 6, 2017, no pet. h.)(mem. op.).

The court held that a trial court could not issue an order authorizing a representative to implement winding up of a partnership by selling the partnership's property after a partial summary judgment in which the court ordered winding up because the order was not final and appealable and the lawsuit in which judicial winding was sought was still pending between the partners.

The underlying dispute concerned two equal partners, Spiritas and Davidoff. Spiritas and Davidoff were equal partners in Spiritas Ranch Enterprises, LLP ("SRE") and J. Spiritas Land & Cattle Company ("JSLC"). JSLC used the property held by SRE to operate a cattle business. Spiritas and Davidoff disagreed over the future of SRE. As a result of the disagreement, the parties filed competing lawsuits that were consolidated into the underlying proceeding. Spiritas asserted claims for breach of contract, breach of fiduciary duty, and declaratory judgment. Davidoff filed suit against Spiritas for breach of fiduciary duty and requested that SRE be wound up. The parties each filed a summary judgment motion. In January 2014, the trial court appointed a receiver, denying Davidoff's motion as moot and not reaching Spiritas's motion.

Spíritas appealed the interlocutory order appointing a receiver. On appeal, the court held that Sections 11.054, 101.551, and 152.702(a)(3) of the Texas Business Organizations Code did not authorize or provide for the appointment of a receiver. Thus, the court remanded the case to the trial court. (This opinion was summarized in the materials provided for the case law update presentation at this conference in 2015.)

On remand, the parties each amended their pleadings, and the trial court heard the previously filed motions for summary judgment. The court granted Davidoff's motion for partial summary judgment on whether SRE should be wound up and declared that an event requiring a winding up of the partnership had occurred. After the summary judgment motion was granted, Davidoff filed an application to have the court appoint a representative to wind up SRE and sell the real property it owned. The court signed an order granting that motion and authorizing the representative to begin winding up within thirty days and to take all necessary steps to complete the process, including selling the real property. Spiritas sought severance of this issue so he could promptly appeal, but the trial court denied that motion. Spiritas thus brought this mandamus action, seeking to have the court direct the trial court to vacate its winding-up order.

The court stated that a trial court abuses its discretion by allowing the execution of a non-final order. The court concluded that neither the summary judgment order nor the winding-up order was a final, appealable judgment because the orders did not dispose of all parties and all claims. The court reviewed the winding-up order granted by the trial court and concluded that the order permitted execution of a non-final order because it put into immediate effect the summary judgment order declaring that an event requiring winding up of the partnership had occurred. The court concluded that the trial court abused its discretion by issuing the winding-up order because that

order constituted an execution order prior to final judgment that is improper as a matter of law. Lastly, the court found that Spiritas did not have an adequate remedy by appeal because the partnership could be wound up and its property sold before a final, appealable judgment is reached in the underlying case. Thus, the court conditionally granted Spiritas's writ.

H. Forfeiture and Involuntary Termination

Mandarino v. Sherwood Lane Invs., LLC, NO. 01-15-00192-CV, 2016 WL 4034568 (Tex. App.–Houston [1st Dist.] July 26, 2016, no pet.)(mem. op.).

The court held that, under the Texas Revised Limited Partnership Act, a limited partnership whose certificate of limited partnership had been cancelled by the Secretary of State due to the partnership's failure to file a periodic report could enter into a valid contract.

Sherwood Pines, Ltd. failed to file a required periodic report under the Texas Revised Limited Partnership Act (TRLPA), and the Secretary of State canceled the partnership's certificate of limited partnership. The partnership then sold its interest in real property to the defendants. The defendants signed a promissory note payable to the partnership. The partnership then endorsed the note to a third party and that third party later endorsed the note to Sherwood Lane Investments, LLC. During that time, the defendants defaulted on the promissory note and eventually the current holder of the note filed suit to collect the unpaid balance.

At trial, the defendants attacked the note on various grounds, including that the partnership was not a valid legal entity at the time of the creation of the note. All of the defendants' arguments were rejected by the trial court, and the trial court granted summary judgment in favor of the current holder of the note.

On appeal, the defendants again argued that the partnership did not exist and could not have entered into a new contract because it had lost the right to transact business. The court reviewed the provisions of the TRLPA addressing forfeiture of the right to transact business and cancellation of the certificate of limited partnership. Under these provisions, the failure to file the report when due led to the partnership's forfeiture of the right to transact business, but the court pointed out that the statute provided that forfeiture did not impair the validity of a contract or act of the limited partnership. The right to transact business could have been restored if the partnership filed the required report and paid the required fee. Upon cancellation of the limited partnership's certificate, the status of the limited partnership was changed to inactive in the records of the secretary of state. Active status could have been revived by filing the report and associated fees. The defendants argued that the loss of the right to transact business prevented the partnership from entering into a new contract, but the court characterized this argument as contrary to the plain language of the statute, which stated that the forfeiture of the right to transact business did not impair the validity of a contract or act of the limited partnership. The court stated that the terms of the statute only prevented the partnership from maintaining an action, suit, or proceeding in the courts and "did not prevent the partnership from forming new, valid contracts." Accordingly, the court concluded that the partnership was a legal entity at the time of the note's creation, and the contract was not invalidated due to the invalidation of the partnership's certificate of limited partnership. The court resolved all other issues in favor of the holder of the note and affirmed the trial court's summary judgment.

I. Sufficiency of Pleadings or Service of Process

Hammer v. Univ. Fed. Credit Union, No. 03-16-00262-CV, No. 03-16-00264-CV 2017 WL 1228871 (Tex. App.–Austin Mar. 30, 2017, no pet. h.) (mem. op.).

The court of appeals determined that summary judgment in favor of a limited partnership disposed of any vicarious claim against the general partner who was not named as a party or separately served.

The plaintiff sued several parties including a limited partnership. The limited partnership obtained a summary judgment, and the court severed the claims against the other defendants, who subsequently obtained a summary judgment in a "final order" signed by the court. A few months later, the general partner of the limited partnership, who was identified in the petition as the general partner of the limited partnership, but was not named as a party or separately served (having been served as agent of the partnership), moved for and obtained a "final judgment" awarding the general partner sanctions and dismissing the plaintiff's claims against the general partner. In the course of determining which "final" judgment operated as a final judgment for purposes of the deadline to appeal, the court discussed the effect of the summary judgment in favor of the partnership. The court noted that a

petition must state the names of the parties and that, to be a party in a lawsuit, a person must generally be named in the pleadings and either be served, waive service, or appear. The court cited Tex. Bus. Orgs. Code § 153.306 (which provides that a judgment against a partnership is not itself a judgment against a partner, that a judgment may be entered against a partner who has been served, and that a creditor may proceed against property of a partner to satisfy a judgment based on claims against the partnership when a judgment is obtained against both the partnership and the partner), and the court stated that, to the extent the plaintiff sought a judgment against the general partner on the basis of his status as general partner, any claim for vicarious liability was necessarily disposed of when the partnership obtained summary judgment. Thus, because the second summary judgment disposed of the claims against all remaining parties at the time, it operated as a final judgment.

Patrick O'Connor & Assocs., L.P. v. Hall, NO. 01-15-00661-CV, 2016 WL 4440665 (Tex. App.–Houston [1st Dist.] Aug. 23, 2016, pet. denied)(mem. op.).

A citation naming the plaintiff as “Patrick OConnor Associates” instead of “Patrick O’Connor & Associates, L.P.” misidentified the entity that was the named plaintiff, and the citation was invalid as a matter of law. This error in the citation rendered service on the defendant ineffective in the context of a no-answer default judgment, and the trial court did not err in granting summary judgment in favor of the defendant on the defendant’s bill of review.

J. Standing or Capacity to Sue

See *Guerrero-McDonald v. Nassour*, 516 S.W.3d 198 (Tex. App.–Eastland 2017, no pet.), summarized below under “Direct and Derivative Claims.”

K. Direct and Derivative Claims

Guerrero-McDonald v. Nassour, 516 S.W.3d 198 (Tex. App.–Eastland 2017, no pet.).

The court discussed the difference between direct and derivative claims and held that a limited partner lacked standing to sue on a number of claims for breach of contract and breach of fiduciary duty involving misuse of funds and mismanagement of the limited partnership, but she had standing to assert claims under a consulting agreement and loan agreement with the limited partnership that conferred on her unique rights that were not conferred on other limited partners.

Guerrero-McDonald was a limited partner in a limited partnership formed to develop a condominium project in Austin. The limited partnership failed when it could not find financing to complete the project. Guerrero-McDonald sued the general partner and an individual who was a limited partner and a manager of the general partner. The court trial court granted the defendants’ motion for summary judgment on numerous claims and the remaining claim were tried to a jury, which found in favor of the defendants. Guerrero-McDonald appealed the judgment.

The appeals court summarized the case law regarding standing of a stakeholder of a legal entity. The court began by reviewing Texas case law in the corporate context and explained that this case law has been applied in other contexts, including where a limited partner attempts to bring a claim individually. The general rule established in the corporate context is that a shareholder cannot recover damages personally for a wrong done solely to the corporation, even though the shareholder may be injured by that wrong. The Texas Supreme Court later defined scenarios where a limited partner would have standing under the “personally aggrieved” test in *In re Fisher*, 433 S.W.3d 523 (Tex. 2014). In *Fisher*, the plaintiff had made a loan to the partnership that other partners did not make. Based on this unique injury to the partner, the court determined that he had standing to pursue his claims. After summarizing other cases interpreting this standing distinction, the court turned to the facts of the case.

The court of appeals concluded that Guerrero-McDonald asserted some claims for damages that were unique to her and some claims that were derivative of losses sustained by the partnership generally. Guerrero-McDonald alleged numerous instances of misuse or mismanagement of the limited partnership’s funds, and the court held that the claims for breach of contract and breach of fiduciary duty that were based on the alleged misuse or mismanagement of the limited partnership’s funds were claims of the limited partnership that Guerrero-McDonald did not have standing to assert individually. Guerrero-McDonald also alleged claims for breach of

contract and breach of fiduciary duty based on the defendants' failure to either make additional capital contributions themselves or request additional capital contributions from others. Guerrero-McDonald asserted that these claims involved a unique injury suffered by Guerrero-McDonald because she was the only limited partner whose ownership interest was protected from dilution if additional capital contributions were made to the project. However, the essence of these claims was the loss of her investment in the project because the project failed, and the court reasoned that such claims were not exclusive to her because the other limited partners also lost their investment in the project when the project failed.

Although the court of appeals agreed with the trial court that Guerrero-McDonald lacked standing to assert many of her claims for breach of contract and breach of fiduciary duty as discussed above, the court of appeals held that she had standing to assert certain claims based on unique injury suffered by her as a result of the consulting and loan agreements she had with the partnership. Guerrero-McDonald alleged that the defendants breached the partnership agreement and their fiduciary duties by failing to pay her under the consulting agreement or loan her the money under a non-recourse note she executed. Relying on *Fisher*, the court concluded that these claims were unique to Guerrero-McDonald because she was the only limited partner that had a consulting agreement or loan agreement with the partnership. According to the court, these claims involved matters that diminished the value of Guerrero-McDonald's interest in the limited partnership exclusively, rather than the value of the limited partnership generally.

L. Creditor's Remedies: Charging Order, Turnover Order, etc.

Pajoooh v. Royal W. Inv. LLC, Series E, 2017 WL 1173892, ___ S.W.3d___ (Tex. App.–Houston [1st Dist.] 2017, no pet. h.).

The court of appeals analyzed the exclusivity provisions of Sections 101.112 and 153.256 of the Texas Business Organizations Code and concluded that the trial court erred in permitting a receiver to assume control of assets of a limited partnership, but the court upheld the trial court's turnover and receivership order against the LLC general partner pursuant to Section 31.002 of the Texas Civil Practice and Remedies Code, as well as its order of receivership over the LLC and the individual who owned 99% of the LLC and the limited partnership under Section 64.001, concluding that these orders were appropriate measures to effectuate the charging orders issued with respect to the ownership interests in those entities.

A judgment creditor sought to enforce a judgment against two judgment debtors, Pajoooh and U.S. Capital Investments, LLC ("US Capital"). Pajoooh was the 99% limited partner of County Investment, LP ("County Investment"), and Pajoooh also owned 99% of U.S. Capital, the 1% general partner of County Investment. County Investment held assets valued at approximately \$4 million, including commercial real estate, the Lexus SUV driven by Pajoooh, antique cars, antique rugs, oil paintings and other investments. The judgment creditor obtained a charging order against Pajoooh's membership interest in U.S. Capital and a charging order against the partnership interests of Pajoooh and U.S. Capital in County Investment. The trial court also entered a turnover order and appointed a receiver under Sections 31.002 and 64.001 of the Texas Civil Practice and Remedies Code. Although the trial court originally entered a receivership order that expressly excepted the partnership and membership interests of the judgment debtors from the receiver's powers over the judgment debtors' assets, the trial court entered an amended order that appointed a receiver over all nonexempt assets of Pajoooh and U.S. Capital, "including (but not limited to) their interest in County Investment L.P." A portion of the receivership order authorized the receiver to take control of assets of County Investment. On appeal, Pajoooh and U.S. Capital argued that the trial court erred in appointing a receiver.

The court of appeals analyzed the exclusivity provisions of Sections 101.112 and 153.256 of the Texas Business Organizations Code and concluded that the trial court erred in permitting the receiver to assume control of assets of County Investment. Sections 101.112 and 153.256 provide that a charging order is the exclusive remedy by which a creditor of a partner, member, or other owner of an interest in a partnership or LLC may satisfy a judgment out of the judgment debtor's interest in the partnership or LLC. In the course of its discussion, the court distinguished and refused to follow opinions in other jurisdictions in which courts did not confine relief to a charging order in the context of single-member LLCs. The court also rejected the argument that the plain text of the statute vitiated fraudulent transfer laws, stating that "to the extent that a debtor is shown to have fraudulently transferred an asset to a partnership in which the debtor has a partnership interest, the creditor's remedies are not limited to the debtor's partnership interest. Instead, the creditor is authorized to obtain an avoidance of the

fraudulent transfer to the extent necessary to satisfy the creditor's claim, as well as other remedies under the Uniform Fraudulent Transfer Act." The court commented that there was no apparent conflict in this case between fraudulent transfer laws and the exclusivity provision since the judgment creditor did not allege any fraudulent transfer. Based on the plain statutory text of the exclusivity provision, the court of appeals held that the trial court erred by imposing a receivership and turnover order as to County Investment and as to Pajoooh's U.S. Capital membership interest.

The court of appeals upheld the trial court's turnover and receivership order against U.S. Capital pursuant to Section 31.002 of the Texas Civil Practice and Remedies Code, as well as its order of receivership over U.S. Capital and Pajoooh under Section 64.001, concluding that these orders were appropriate measures to effectuate the charging orders. While acknowledging that the charging order is the exclusive remedy by which a judgment creditor of a partner may satisfy a judgment from the judgment debtor's partnership interest, the court stated that a judgment creditor is not deprived of procedures to put the charging order into effect. A turnover order and receivership may be used to reach both present and future rights to nonexempt property that cannot be readily attached or levied on by ordinary legal process, and the court thus concluded that a Chapter 31 turnover and receivership order may be used to monitor distributions and effectuate a charging order. Here the court viewed the turnover and receivership order against U. S. Capital as an appropriate measure to monitor distributions from County Investment and effectuate the existing charging order in favor of the judgment creditor. Likewise, the court of appeals concluded that receivership over U.S. Capital and Pajoooh under Section 64.001(a)(6), pursuant to which a court may appoint a receiver in any case in which a receiver may be appointed under the rules of equity, was appropriate based on a threat of serious injury to the judgment creditor. The parties disputed whether money Pajoooh had been receiving from County Investment was salary or a distribution subject to the charging order, and the court stated that Pajoooh's de facto domination of County Investment could obstruct the enforcement of the charging orders. The court noted that the judgment creditor may never collect on the judgment because it could not compel a distribution by County Investment, but the court of appeals recognized that the trial court could have found a threat that County Investment's assets could dissipate into the hands of the judgment debtors without the judgment creditor's knowledge or a meaningful opportunity to seek to have distributions remitted to the judgment creditor.

Goodman v. Compass Bank, No. 05-15-00812-CV, 2016 WL 4142243 (Tex. App.–Dallas Aug. 3, 2016, no pet.)(mem. op.).

The court concluded that a judgment creditor is not precluded from obtaining a turnover order requiring proceeds of a distribution from a partnership or LLC to be turned over after the judgment debtor has received the proceeds, and an LLC or partnership need not be named as a party in an action by a judgment creditor of a partner or member to have a charging order issued against interests in the LLC or partnership.

Compass Bank sued Goodman, a guarantor of a promissory note, to collect on a deficiency owed after foreclosure on real property securing the indebtedness. The court granted a turnover order, injunctive relief, and charging orders to enforce the judgment against Goodman. An amended turnover order was subsequently entered providing for turnover of nonexempt property including proceeds from all limited partnerships and LLCs in which Goodman was a member. Goodman appealed, asserting numerous points of error.

Goodman argued that the charging order was the exclusive remedy with respect to his interests in limited partnerships and LLCs and that the court's order of the turnover of future proceeds from all limited partnerships and LLCs was thus improper. The court discussed the background of the charging order under Texas law and reviewed the language of the Texas Business Organizations Code. The court concluded that the plain language of Sections 101.112 and 153.256 does not preclude a judgment creditor from seeking the turnover of proceeds from an LLC or limited partnership distribution after the distribution has been made and the proceeds are in the judgment debtor's possession. This holding is consistent with other Texas case law permitting a judgment creditor to collect the proceeds of a partnership or LLC distribution after the debtor has received those proceeds.

Goodman next argued that a trial court may not enter a charging order against a partnership or LLC that is not a party to the suit. Goodman reasoned that the judgment affected the entity, much like a writ of garnishment, and that the entity must therefore be a party to the suit. The court relied on the Texas Business Organizations Code for its response to Goodman's argument. Specifically, the court found that the charging order provisions only require an application by a judgment creditor of a partner or an LLC member. Further, because the charging order does not affect the entity until the distribution is authorized to be made, the charged entity has no obligation under

the charging order. Based on this reasoning, the court declined to read into the statutory provisions a limitation not expressly imposed by the legislature.

M. Attorney's Fees

CBIF Ltd. P'ship v. TGI Friday's Inc., No. 05–15–00157–CV, 2017 WL 1455407 (Tex. App.—Dallas Apr. 21, 2017, no pet. h.) (mem. op.).

The court of appeals overturned the attorney's fees awarded to the plaintiff on its breach-of-contract claim because Tex. Civ. Prac. & Rem. Code § 38.001 only covers "claims brought by a 'person' against 'an individual or corporation.'" The court applied the plain language of the statute and concluded that a party cannot recover attorney's fees under the statute from a limited liability company or a limited partnership. The defendants were neither individuals nor corporations—one was a limited partnership and the other an LLC—and the lower court thus erred in awarding the plaintiff attorney's fees on its breach-of-contract claim.

Bruce v. Cauthen, 515 S.W.3d 495 (Tex. App.—Houston [14th Dist.] 2017, pet. denied).

An individual limited partner (who also owned the general partner) wrongfully foreclosed on another limited partner's partnership interest in violation of the UCC by purchasing the partnership interest at a private sale when the partnership agreement did not waive the UCC prohibition on purchase by the secured party at a private sale. The foreclosure also violated the partnership agreement and breached the individual's duty of loyalty because the alleged debt was actually non-existent. The evidence supported the jury's findings of damages in the amount of the value of the foreclosed partnership interest based on the market value of the real property owned by the partnership and without applying discounts for lack of control and lack of marketability of the interest since the other partner acquired the interest. Although the same facts formed the basis of the prevailing limited partner's claims for breach of fiduciary duty and breach of contract, the prevailing limited partner was not entitled to recover statutory attorney's fees for breach of the limited partnership agreement because she elected to recover in tort on her claim for breach of fiduciary duty.

David Bruce, founder of a medical staffing company, hired Misty Cauthen as a recruiter. Cauthen was promoted to vice-president and awarded 20% of the stock of the medical staffing company and then later was promoted to president and awarded an additional 20% of the stock. Bruce and Cauthen formed a limited partnership, with Bruce and Cauthen as limited partners and a limited liability company solely owned by Bruce as the general partner. Each partner's interest in the partnership was similar to the amount of their ownership in the medical staffing company—Bruce owned 59.4%, Cauthen owned 39.6%, and Bruce's LLC owned 1%. The partnership purchased a 4.57-acre property on which Bruce and Cauthen originally planned to build a new office building. After Bruce and Cauthen's business relationship became strained, Cauthen resigned from the medical staffing company. There was a buy-sell agreement allowing Cauthen to sell her shares in the medical staffing company, but Cauthen remained a limited partner in the partnership. The partnership's property was valued by one estimate at over \$1.6 million. Bruce refused to dissolve the partnership and refused to purchase Cauthen's interest in the partnership for \$468,000. Cauthen failed to find a third party to purchase her interest in the partnership. During this time, Bruce began sending Cauthen invoices for her share of the mortgage payments on the partnership property and other partnership expenses. Cauthen did not pay the invoices, and the partnership declared her in default and sold her interest in a private foreclosure sale. Bruce, the only bidder, purchased Cauthen's interest for the amount of her alleged debt, \$51,234. At trial, Bruce acknowledged that the invoices he had argued were cash calls were not cash calls under the terms of the partnership agreement and that Cauthen was thus never in default.

The court of appeals first concluded that Bruce violated the UCC by selling Cauthen's interest in the partnership in a private sale to himself. Bruce argued that the limited partnership agreement allowed private foreclosure sales to a restricted group of purchasers, including Bruce, who would buy the interest for investment and not for resale, but the court of appeals concluded that the partnership agreement did not modify the UCC to allow the secured party to purchase a defaulting partner's interest when it is sold at a foreclosure sale.

Next, the court of appeals concluded that the evidence supported the jury's findings on the value of Cauthen's interest in the partnership. The jury found that the damages caused by Bruce's wrongful foreclosure were \$469,044, which was the undiscounted value of Cauthen's interest according to Cauthen's expert witness. The jury also found damages in the amount of \$469,044 on Cauthen's claim for breach of contract.

The court of appeals did not consider Bruce's arguments on breach of loyalty due to inadequate briefing, but the court did discuss the arguments to some extent. In the course of this discussion, the court stated that there was "more than sufficient evidence" supporting the jury's finding that Bruce breached his duty of loyalty as it was explained in the charge. The court stated that he did not "merely 'further his own interest'"; he purposefully created a false debt in order to foreclose on Cauthen's partnership interest for the value of the nonexistent debt, which resulted in his acquiring her interest while paying her nothing for the interest through a private sale in violation of the UCC. The court explained that, contrary to his suggestion that a breach of contract does not necessarily result in tort liability, the foreclosure of the debt was "not an arm's-length transaction between strangers but an illegal acquisition of one partner's interest by another."

Bruce next challenged the sufficiency of the evidence to support the jury's finding of malice on his part and the amount of \$1.2 million in exemplary damages awarded by the jury, but the court concluded that Bruce failed to adequately brief these issues and thus waived these challenges.

Finally, the court determined that Cauthen could not receive attorney's fees for breach of contract because she elected to recover on her breach-of-fiduciary-duty claim. Cauthen argued that she was entitled to recover statutory attorney's fees for breach of contract because her breach-of-fiduciary-duty claim was based on and "intertwined with" Bruce's breach of the limited partnership agreement. The court of appeals reviewed the development of Texas law in cases of this nature and explained that Texas law no longer allows a party to recover attorney's fees under a tort claim even if the tort claim and a breach-of-contract claim are based on the same facts such that the claims are "intertwined to the point of being inseparable." Under the one-satisfaction rule, when a party prevails on more than one theory of liability for a single injury, the party must make an election, and the party may choose the claim that provides the greatest recovery. Cauthen could choose to recover on the claim that would provide the greatest recovery, which was actual and exemplary damages in tort under the breach-of-fiduciary-duty claim, but she was limited to that recovery and was not entitled to recover the statutory attorney's fees available if she elected to recover on her breach-of-contract claim.

Varel Int'l Indus., LP v. PetroDrillbits Int'l, Inc., No. 05-14-01556-CV, 2016 WL 4535779 (Tex. App.—Dallas Aug. 30, 2016, pet. denied).

The court of appeals upheld an award of attorney's fees when the trial record was unclear as to whether the defendant was a limited partnership or a corporation.

Texas Civil Practice and Remedies Code § 38.001 allows a prevailing party to receive attorney's fees for certain claims against "an individual or corporation." Texas courts have held the statute does not provide for recovery of fees from limited liability companies or limited partnerships based on the plain language of the statute. In this case, there was conflicting evidence as to whether the defendant was a limited partnership or a corporation. The plaintiff's fourth amended original petition, the style of the case, the jury charge, and signature blocks on emails admitted into evidence all included an "L.P." designation, indicating the defendant was a limited partnership. However, a witness for the defendant stated he was the "president and CEO" of the defendant, that "its 'corporate headquarters' [was] in Carrollton, Texas," and that "he owned 8% of the shares" in the defendant company. One of the sale agreements in the record used the "Inc." designation to refer to the entity. Because the court found conflicting evidence regarding entity form, the court held there was legally sufficient evidence that the defendant was a corporation and, therefore, fell within the statute providing for recovery of attorney's fees.

EXCO Operating Co. v. McGee, No. 12-15-00087-CV, 2016 WL 4379484 (Tex. App.—Tyler Aug. 17, 2016, no pet.)(mem. op.).

The defendant appealed an award of attorney's fees against it in a case involving breach of a mineral lease, arguing that there was legally insufficient evidence for the trial court to award attorney's fees because the defendant was a limited partnership. The court concluded that the defendant could raise the issue for the first time on appeal because the general rule about complaining to the trial court regarding sufficiency of the evidence does not apply in a bench trial. Since it was undisputed that the defendant was a limited partnership, the court held that the plaintiff was not entitled to recover attorney's fees under Section 38.001(8) of the Texas Civil Practice and Remedies Code, which only allows recovery of attorney's fees against "an individual or corporation." Thus, the court reversed the award of attorney's fees.

N. Securities Laws

SEC v. Mieka Energy Corp., No. 4:15-CV-00300, 2017 WL 1739767 (E.D. Tex. May 4, 2017).

The court held that the joint venture interests sold by the defendants were investment contract securities. The defendants acted as brokers and violated Section 15(a) of the Securities and Exchange Act by not being registered.

Romo and Myers were salesman for Mieka Energy Corp. (“Mieka”), a company owned and controlled by Blankenship. They followed a procedure specified by Blankenship that began by cold-calling potential investors and developing a relationship with the investors. After a period of time the salesmen would then offer joint venture interests in gas wells. Mieka raised \$4.4 million from 66 investors for the joint venture in question. Mieka misused approximately 80% of the funds, drawing the attention of the SEC.

This opinion and order was based on the SEC’s summary judgment motion against Romo and Myers for violations of Section 15(a) of the Securities and Exchange Act, which prohibits someone from acting as a broker without registering with the SEC. The only contested issue in the motion was whether the interests sold by Romo and Myers were securities. The Securities and Exchange Act defines securities to include “investment contracts.” An investment contract exists where: (1) individuals are led to invest money; (2) in a common enterprise; (3) with the expectation that they would earn a profit solely through the efforts of the promoter or of someone other than themselves. *SEC v. W.J. Howey Co.*, 328 U.S. 293, 298–99 (1946). The third element was the only disputed element in this case.

The court relied on the Fifth Circuit’s opinion in *Williamson v. Tucker*, 645 F.2d 404 (5th Cir. 1981) to guide its analysis of whether the joint venture interests were investment contracts. Under *Williamson*, an investment contract exists if any one of the following is met: (1) an agreement among the parties leaves so little power in the hands of the partner or venture that the arrangement in fact distributes power as would a limited partnership; (2) the partner or venturer is so inexperienced and unknowledgeable in business affairs that he is incapable of intelligently exercising his partnership or venture powers; or (3) the partner or venturer is so dependent on some unique entrepreneurial or managerial ability of the promoter or manager that he cannot replace the manager of the enterprise or otherwise exercise meaningful partnership or venture powers.

The court began by acknowledging that the investment was labeled a joint venture, but labels are not conclusive. According to the court, even a cursory review revealed that Blankenship wholly dominated the investment, while the investors, some of whom had no experience with oil and gas, had no real power, were prevented from exercising any of the scant rights afforded to them, and depended entirely on Mieka’s managing of the business.

The court summarized some of the significant factors leading to a finding that the investment was a security. From the beginning, management power was delegated to Mieka, and Mieka had control over all of the actions of the joint venture, including the drilling of the wells. Further, any managerial powers of the investors were illusory because Blankenship did not provide any information about the identity of other investors or provide meaningful access to books and records of the joint venture. Without this information, it was not possible for investors to reach the 10% threshold needed to call a meeting. Additionally, the court concluded that the investors had little or no experience in the oil and gas industry, and thus the investors did not have the knowledge to intelligently exercise their rights even if they were given enough information about the identity of investors to call meetings or exercise voting rights. Based on this reasoning, the court concluded that the first test of *Williamson* was satisfied and that Romo and Myers were thus selling securities. Because they violated Section 15(a) of the Exchange Act by acting as unregistered brokers, the court granted summary judgment against them.

SEC v. Sethi Petroleum, LLC, No. 4:15-CV-00338, 2017 WL 192666 (E.D. Tex. Jan. 17, 2017).

The court held that interests in an oil and gas joint venture were investment contract securities under federal securities law and that an individual was liable for violations of antifraud provisions of the federal securities laws.

Sethi Petroleum, LLC (“Sethi Petroleum”) marketed interests in an oil and gas joint venture through a sales staff that used cold calls, pitch scripts, and purchased lists of leads. Once salespeople learned that an investor was interested in the venture investment, the potential investor would be sent a private placement memorandum (PPM) and executive summary. Sethi Petroleum raised over \$4 million from 90 investors in 28 states for the joint venture. After Sameer Sethi moved \$3.15 million of investor funds to Sethi Petroleum’s general account, the SEC requested and received an emergency TRO and other injunctive relief against Sethi Petroleum and Sameer Sethi. In this

opinion and order, the court concluded that the joint venture interests were securities and that Sameer Sethi was liable for violations of antifraud provisions of the federal securities laws.

A “security” is defined under the federal securities laws to include an “investment contract.” The United States Supreme Court has held that an investment contract exists where: (1) individuals are led to invest money; (2) in a common enterprise; (3) with the expectation that they would earn a profit solely through the efforts of the promoter or of someone other than themselves. *SEC v. W.J. Howey Co.*, 328 U.S. 293, 298–99 (1946). The first two elements of the Howey test were not seriously disputed in this case. Thus, the issue for the court was whether the investors in the joint venture had an expectation that they would earn a profit solely through the efforts of others. When determining whether profits are expected to come “solely” from the efforts of others, the Fifth Circuit has defined the critical question as “whether the efforts made by those other than the investor are the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise.” The Fifth Circuit has stated that there is “a strong presumption” that an interest in a general partnership or joint venture is not a security. Nevertheless, under *Williamson v. Tucker*, 645 F.2d 404 (5th Cir. 1981), the third element of the *Howey* test is met if any one of the following is met: (1) an agreement among the parties leaves so little power in the hands of the partner or venturer that the arrangement in fact distributes power as would a limited partnership; or (2) the partner or venturer is so inexperienced and unknowledgeable in business affairs that he is incapable of intelligently exercising his partnership or venture powers; or (3) the partner or venturer is so dependent on some unique entrepreneurial or managerial ability of the promoter or manager that he cannot replace the manager of the enterprise or otherwise exercise meaningful partnership or venture powers. The court examined each of the *Williamson* factors to determine if the SEC met its “heavy burden” to establish that the joint venture interests in this case were securities, and the court concluded that the SEC had done so.

First, the court concluded that the agreement among the parties in this case left so little power in the hands of the venturers that power was in fact distributed similarly to a limited partnership. The defendants argued that the venturers had real power in the joint venture because the venturers could remove the managing venturer, propose and pass amendments to the joint venture agreement, call meetings, develop rules and procedures for meetings, and vote on other matters submitted for decision by the venturers. However, the summary judgment evidence established that the investors could not exercise any of these powers because they did not know the names or addresses of other investors. Furthermore, even if the investors had been able to contact each other or otherwise force a vote, Sethi Petroleum’s misrepresentations and control of information stymied the exercise of any meaningful management powers of the investors. Because the first *Williamson* test was met, the third factor in the *Howey* analysis was met, and the joint venture interests in this case were securities.

The court next concluded that, even if the first *Williamson* test had not been met, the venturers were inexperienced and lacked expertise in the oil and gas business, and the second *Williamson* test for establishing dependence was thus met. The evidence established that the joint venture was marketed through hundreds of unsolicited cold calls from a list of thousands of potential investors. The summary judgment evidence established that the joint venture sought out and obtained investors who had no experience in the oil and gas industry.

Finally, even if the first and second *Williamson* tests had not been met, the court concluded that the investors were completely dependent on Sethi Petroleum, the managing venturer. Sales people touted Sethi Petroleum’s experience, its established relationships in the oil and gas industry, and its access to an exclusive market in the Bakken Shale. Further, by commingling investments in an account exclusively controlled by Sethi Petroleum, the venturers were deprived of any control over or access to their funds.

Having concluded that the joint venture interests met the third element of the *Howey* test for an investment contract and were thus securities, the court next analyzed whether the summary judgment evidence showed that Sameer Sethi was liable for federal securities fraud. The court found that Sameer Sethi violated Section 17(a) of the Securities Act of 1933 and that Sethi Petroleum violated Section 10(b) (by violating Rule 10b-5) of the Securities and Exchange Act of 1934. The court further found that Sameer Sethi was liable for Sethi Petroleum’s violation of the Exchange Act as a “control person” of Sethi Petroleum under Section 20(a) of the Exchange Act.

SEC v. Sethi Petroleum, LLC, No. 4:15-CV-00338, 2016 WL 4196667 (E.D. Tex. Aug. 9, 2016).

The court held that interests in an oil and gas joint venture were securities under the federal securities laws because the investments left the venturers with little power, the venturers were inexperienced and lacked knowledge of the oil and gas industry, and the venturers were completely dependent on the efforts of the manager of the

venture. Therefore, the defendants were in violation of an injunction issued by the court that prohibited the offer or sale of securities by the defendants.

The SEC sought to hold the defendants in contempt for violating the court's order prohibiting the defendants from offering or selling securities. The defendants were offering for sale interests in joint ventures to operate oil and gas leases, and they argued that the joint venture interests were not securities within the meaning of the federal securities laws.

Under the Securities Act of 1933 and the Securities and Exchange Act of 1934, a "security" is defined to include an "investment contract." The United States Supreme Court has held that an investment contract exists where: (1) individuals are led to invest money; (2) in a common enterprise; (3) with the expectation that they would earn a profit solely through the efforts of the promoter or of someone other than themselves. *SEC v. W.J. Howey Co.*, 328 U.S. 293, 298–99 (1946). When determining whether profits are expected to come "solely" from the efforts of others, the Fifth Circuit has defined the critical question as "whether the efforts made by those other than the investor are the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise." The Fifth Circuit has stated that there is "a strong presumption" that an interest in a general partnership or joint venture is not a security. Nevertheless, under *Williamson v. Tucker*, 645 F.2d 404 (5th Cir. 1981), the third element of the *Howey* test is met if any one of the following is met: (1) an agreement among the parties leaves so little power in the hands of the partner or venturer that the arrangement in fact distributes power as would a limited partnership; or (2) the partner or venturer is so inexperienced and unknowledgeable in business affairs that he is incapable of intelligently exercising his partnership or venture powers; or (3) the partner or venturer is so dependent on some unique entrepreneurial or managerial ability of the promoter or manager that he cannot replace the manager of the enterprise or otherwise exercise meaningful partnership or venture powers. The court examined each of the *Williamson* factors to determine if the SEC met its "heavy burden" to establish that the joint venture interests in this case were securities, and the court concluded that the SEC had done so.

First, the court concluded that the agreement among the parties in this case left so little power in the hands of the venturers that power was in fact distributed similarly to a limited partnership. The defendants argued that the venturers had real power in the joint venture because the venturers had rights of control to remove the managers, to vote on what projects to invest in, to participate in telephone conferences, to review the books and records, and to decide not to allow their investment to be used on a project they did not approve. The court found these rights to be illusory, however, because the venturers did not have access to essential information that would have allowed them to meaningfully exercise any managerial powers that they were given. Specifically, the court found there were significant barriers to investors' ability to exercise the powers they were allegedly given because certain percentages of venturers were required to trigger the managerial rights and the defendants would not share the investor list with the venturers after the list was requested. Because the first *Williamson* test was met, the third factor in the *Howey* analysis was met, and the joint venture interests in this case were securities.

The court next concluded that, even if the first *Williamson* test had not been met, the venturers were inexperienced and lacked expertise in the oil and gas business, and the second *Williamson* test for establishing dependence was thus met. The evidence established that the joint venture was marketed through hundreds of unsolicited cold calls from a list of thousands of potential investors. The offers were not limited to potential venturers with experience in or knowledge of the oil and gas industry. The fact that the list was made up of accredited investors did not distinguish the instant case from other cases relied on by the court because an accredited investor is not necessarily knowledgeable about the oil and gas industry.

Finally, even if the first and second *Williamson* tests had not been met, the court concluded that the investors were completely dependent on the managing venturer. Sales people touted the managing venturer's successful track record, its strategic partnerships and market niches with industry leaders, and its staff of experts and geologists, among other things. Further, by commingling investments in an account exclusively controlled by the managing venturer, the managing venturer exclusively controlled the funds and deprived venturers of access to their funds.

In sum, because all three *Williamson* tests were met (though only one was necessary), the dependence of the venturers on the efforts of the managing venturer was established, and the investments were securities. Thus, the defendants had violated the court's injunction by offering or selling securities, and the court entered a contempt order against each of the defendants.

III. Recent Texas Cases Involving Limited Liability Companies

A. Nature of Limited Liability Company

B Choice Ltd. v. Epicentre Dev. Ass'n LLC, No. H-14-2096, 2017 WL 1227313 (S.D. Tex. Mar. 3, 2017), adopted, 2017 WL 1160512 (S.D. Tex. Mar. 29, 2017).

The court held that purchase of an interest in an LLC fell within the scope of Section 27.01 of the Texas Business and Commerce Code, which provides a cause of action for statutory fraud in real estate and stock transactions.

The plaintiff, an investor in a Texas LLC formed to build a residential and commercial development project on the old AstroWorld site, sued multiple defendants for fraud, breach of fiduciary duty, and breach of contract. The plaintiff invested millions of dollars in EpiCentre Development Associates, LLC (“EDA”). Over a period of six years, the venture misspent \$25 million obtained through loans and investments made by the plaintiff. EDA only acquired a small portion of the property formerly known as AstroWorld, which it transferred to a newly created LLC, EpiCentre Development Associates II, LLC (“EDA II”), in which the plaintiff had no interest and about which the plaintiff knew nothing. The plaintiff sued the defendants after learning that EDA misspent all of the plaintiff’s investment and still had no ownership interest in the AstroWorld property.

Among the plaintiff’s claims was a claim under Section 27.01 of the Texas Business and Commerce Code, which provides a cause of action for statutory fraud in real estate and stock transactions. The defendants argued that the statute did not apply in this case because no real estate transaction occurred and EDA was a limited liability company, not a corporation, and did not issue stock. While there was no real estate conveyance between the plaintiff and EDA in this case, the court agreed with the plaintiff that its 10% subscription in EDA was a “stock transaction,” citing *Energy Maintenance Services Group I, LLC v. Sandt*, 401 S.W.3d 204 (Tex. App.—Houston [14th Dist.] 2012, pet. denied), which upheld a statutory fraud claim against an LLC, its director, and its member. Based on evidence supporting the plaintiff’s allegations that certain individual defendants received kickbacks for getting investors and the plaintiff’s purchase of its 10% ownership interest in the LLC, the court refused to dismiss the statutory fraud claim.

Perez v. Le Prive Enters., L.L.C., No. 14-15-00291-CV, 2016 WL 3634298 (Tex. App.—Houston [14th Dist.] July 7, 2016, no pet.) (mem. op.).

Two brothers relied on a “Partnership Dissolution Agreement” that recited their interests in an LLC to establish their ownership in the LLC. The LLC had no written operating agreement and its certificate of formation identified another individual as the only member. Although the individual identified as the LLC’s member in the certificate of formation was a party to the Partnership Dissolution Agreement along with the two brothers, the court stated that the agreement was not a company record reflecting admission of the two brothers to the LLC and the agreement was irrelevant to their status as members of the LLC.

Two brothers and their cousin agreed to open a nightclub together. One of the brothers filed a certificate of formation for an LLC. The certificate of formation identified the cousin as the organizer, managing member, and registered agent of the LLC. The brothers were not named in the certificate of formation. Later, the certificate of formation was amended to identify another individual who had become involved in the management of the nightclub as the sole manager of the LLC. The brothers claimed that they had entered into a partnership with their cousin regarding the nightclub and that they were all owners of the LLC in the same percentages as their ownership in the partnership. The trial court found that the cousin was the sole owner of the LLC, and the brothers challenged this finding on appeal.

The court of appeals stated that the brothers appeared to confuse the nature of partnerships and LLCs, which are distinct entities. The brothers asserted that they each had “ownership interests [as] partner[s] in the company” and argued that the “totality of the circumstances point[s] to the existence of a partnership” with their cousin under which one brother was entitled to a 35% share of the profits and the other brother was entitled to a 30% share of the profits. The brothers admitted that they had no written agreement regarding this profit-sharing and ownership-interest scheme prior to the start of their business venture; however, the brothers argued that the court should hold that there was a partnership under which the brothers each owned a portion of the LLC. The court stated that the brothers “relied on a set of unrelated statements of the law governing business organizations and

contracts.” The brothers argued that their arrangement was valid despite the absence of written documentation because: (1) the Texas Business Organizations Code permits oral operating agreements among members of an LLC; (2) the Texas Business Organizations Code permits people to become members of an LLC after the LLC’s certificate of formation is filed; (3) a partnership that is indefinite in duration falls outside of the statute of frauds; and (4) partial performance takes a partnership agreement outside the statute of frauds. Based on the procedural posture of the case and the applicable standard of review, the brothers had to conclusively establish that they were co-owners of the LLC to prevail.

The court stated that the brothers had to establish that they were members in order to conclusively establish that they were co-owners of the LLC. A “member” of an LLC is defined in the Texas statute as “a person who has been admitted as a member in the limited liability company under its governing documents.” The court stated that the brothers did not argue that they became members of the LLC by admission under the LLC’s governing documents; instead the brothers relied on the statute to argue that there was no statutory requirement that the membership be recorded in writing to be effective.

Assuming the Texas Business Organizations Code requires a writing, the brothers argued that their Partnership Dissolution Agreement with their cousin satisfied any writing requirement. The brothers argued that “[t]he December 4, 2013 contract makes clear that the Perez brothers are members, and the document can reasonably be read to mean that the Perez brothers joined the limited liability company on the day the contract was signed. In fact, the four corners of the document make clear that the parties had a partnership before the corporation was formed and that said partnership is incorporated as Le Prive Enterprises, LLC.”

The Partnership Dissolution Agreement provided:

This document is an agreement between partners Manuel Arellano, Erick [sic] E. Perez, and Edmundo Perez (said partnership is incorporated as Le Prive Enterprises, LLC, and is doing business as Mekano Live). Manuel Arellano owns 35% of Le Prive Enterprises, LLC doing business as Mekano Live, Erick E. Perez owns 35% of Le Prive Enterprises, LLC doing business as Mekano Live, and Edmundo Perez owns 30% of Le Prive Enterprises, LLC doing business as Mekano Live. There are no other persons who own an interest in said partnership. The partners agree to dissolve the partnership as follows:

Erick E. Perez and Edmundo Perez hereby transfer all of their interest in the partnership known as Le Prive Enterprises, LLC doing business as Mekano Live to Manuel Arellano. Erick E. Perez and Edmundo Perez agree to return all the property that was removed from the business premises of Mekano Live to Manuel Arellano. Each partner agrees to release each partner from any and all civil liability concerning the partnership. Manuel Arellano does not want Erick E. Perez or Edmundo Perez prosecuted criminally.

The court stated that the brothers’ argument “conflate[d] three distinct business organizational forms—partnership, limited liability company, and corporation.” The court also said that the Partnership Dissolution Agreement was irrelevant to the issue of whether the defendants were members because it was not a company record reflecting the brothers’ admission to the LLC. Because this document was the only specific evidence the brothers offered of their membership in the LLC, the court concluded that the brothers failed to conclusively establish that they were members, and their challenge to the trial court’s finding that they had no ownership in the LLC failed.

See also *CBIF Ltd. P’ship v. TGI Friday’s Inc.*, No. 05–15–00157–CV, 2017 WL 1455407 (Tex. App.—Dallas Apr. 21, 2017, no pet. h.) (mem. op.); *Siwell, Inc. v. Leverage Fin., LLC*, No. 5:12-CV-185-D, 2017 WL 1397818 (N.D. Tex. Apr. 18, 2016); *J.D. Fields & Co. v. N. Am. Fabricators, LLC*, No. H–15–317, 2017 WL 7912455 (S.D. Tex. Nov. 7, 2016); *Solid Sys. CAD Servs. v. Total Rise Tech., Ltd.*, No. 4:12-CV-03176, 2016 WL 5942935 (S.D. Tex. Oct. 13, 2016) summarized below under “Attorney’s Fees.”

B. LLC Property and LLC Membership Interest

Julka v. U.S. Bank Nat'l Ass'n, 2017 WL 405814, __ S.W.3d __ (Tex. App.–Houston [1st Dist.] no pet. h.).

The court held that a guarantor's contributions to an LLC which were then used to make payments on the LLC's note did not constitute payment on the guaranty by the guarantor.

Julka was the sole member and president of an Ohio LLC that was the sole member of a Delaware LLC of which Julka was also president. A real estate loan was made to the Delaware LLC, and Julka signed a guaranty agreement under which he agreed to pay up to \$250,000 in damages in the event of a default on the loan. The LLC defaulted on the note, and a deficiency of approximately \$3.5 million was owed after foreclosure on the collateral. The bank that held the loan documents sued Julka on the guaranty. Julka asserted the affirmative defenses of payment and estoppel on the basis that he had made contributions to the LLC in the amount of \$1.6 million that allowed the LLC to continue making payments on the note. Both the bank and Julka moved for summary judgment, and the court granted summary judgment in favor of the bank and denied Julka's motion.

On appeal, Julka directed the court to evidence documenting his contributions of funds to the LLC. He argued that these contributions discharged his obligations on the guaranty because his contributions were used by the LLC to make payments on the note. The court rejected Julka's argument on the basis that the guaranty agreement required personal payment to the bank, not payment from the LLC on the note secured by the guaranty. Although Julka transferred personal funds to the LLC to enable the LLC to make the payments on the note, the LLC acted on its own behalf in paying the note, and its payments were attributable solely to the LLC and not to Julka. The court pointed out that Julka formed the borrower and its sole member as LLCs (mistakenly referring to them as "limited liability corporations") in order "to take advantage of the protections afforded by the corporate form, including those that protect him from personal liability on the note beyond the individual obligations that he undertook as guarantor," citing Del Code tit. 6, § 18–303 and Tex. Bus. Orgs. Code § 101.002(a). The court stated that this liability shield stems from the presumption of legal separateness that exists between a limited liability company and its members. As a result of that separate existence, members of an LLC are not individually liable for the debts or other liabilities of the LLC absent an agreement by a member in the member's individual capacity. Furthermore, contributions made to the LLC become the LLC's property and are no longer the property of the members. The court acknowledged that a court may disregard the corporate form and hold its agent subject to individual liability, or vice versa, in rare circumstances. No such circumstances were alleged to exist in this case. Because of the presumptive separateness of the LLC, Julka's subjective intent that the LLC's loan payments count toward either satisfying his personal guaranty obligation or showing that the bank knew that Julka had provided the LLC with money so that it could make payments due on its note did not raise a fact issue on either of Julka's affirmative defenses. The court distinguished a case in which a guarantor made payments on the underlying note directly. The appeals court there held that the payments offset the guarantor's liability because they originated from the guarantor and the lender accepted them. In Julka's case, the LLC made the payments, and the trial court thus properly granted summary judgment in favor of the bank.

C. Assignment of Interest

Rocklon, LLC v. Paris, No. 09-16-00070-CV, 2016 WL 6110911 (Tex. App.–Beaumont Oct. 20, 2016, no pet.) (mem. op.).

In the course of analyzing the ownership of an LLC for purposes of determining whether there was evidence of an alter-ego relationship between the LLC and its alleged member, the court of appeals discussed the validity of the sole initial member's purported assignment of his membership interest to his son. The court of appeals concluded that the trial court could have reasonably determined that the assignment was void due to its failure to meet the requirements of the company agreement for a valid assignment.

The surviving spouse and estate of Kristin Paris (collectively, "the plaintiff") brought a wrongful death suit against Rocklon, L.L.C. ("Rocklon"), Rockal, Inc. ("Rockal"), and Rockline George Kennedy, among others, after Kristin Paris died in a car accident with Kennedy. A key point of dispute in the lawsuit was Kennedy's relationship to his co-defendant entities. The plaintiff alleged that the two entities were the alter egos of Kennedy, while Kennedy alleged that he had no ownership interest in the entities.

According to the plaintiff's pleadings, Kennedy had been drinking at the bar and strip club that was operated by Rockal on real property owned by Rocklon. Kennedy then left the club in his vehicle, crossed the median of a highway and struck Kristin Paris's vehicle head on. Kennedy was arrested shortly after the incident and released a few days later. Upon his release Kennedy accompanied his son to Rocklon's bank and transferred full control of Rocklon's account to the son. Eight days after Kennedy filed his answer in the suit, Rocklon sold its primary asset, the real estate where the club was located, for approximately one million dollars. Based on evidence that Rocklon was the alter ego of Kennedy and that Kennedy fraudulently transferred Rocklon's bank account to his son, the trial court entered a temporary injunction preventing the proceeds of the real estate sale from being accessed by Rocklon. Rocklon filed a notice of interlocutory appeal challenging the temporary injunction.

On appeal, Rocklon argued that there was no evidence that Rocklon was liable to the plaintiff on the underlying claims because the evidence did not establish that Rocklon was the alter ego of Kennedy and there was no evidence of a fraudulent transfer. Rocklon did not challenge the plaintiff's contention that corporate veil-piercing theories, including reverse veil piercing, are applicable to LLCs, but rather argued that the plaintiff failed to present evidence to support the plaintiff's reverse-piercing theory. Whether an alter-ego relationship exists depends on the total dealings between the corporation and individual, including the amount of financial interest, ownership, and control the individual maintains over the corporation. In that regard, Rocklon argued that it was merely a real estate business that leased property to Rockal, the company that owned and operated the club, and that Rocklon was owned solely by Kennedy's son and not Kennedy. The court reviewed basic statutory concepts relating to an LLC, such as the certificate of formation, company agreement, members, membership interests, and assignees. Rocklon's certificate of formation filed with the Secretary of State on February 1, 2006 indicated that it was a member-managed LLC whose registered agent and only member was Kennedy. Two nearly identical company agreements were produced by Rocklon's bank. One version, which was unexecuted, indicated that Kennedy was the sole and initial member. The other, which was executed, indicated that Kennedy's son was the sole and initial member. Both company agreements were dated the same date, February 1, 2006. The record also contained an assignment of membership interest in Rocklon from Kennedy to Kennedy's son dated February 1, 2006, but the court of appeals concluded that the trial court could have reasonably determined that the assignment was void due to its failure to meet the requirements of the company agreements for a valid assignment.

Both of the company agreements contained in the record for Rocklon defined an assignee as "a person who receives a Transfer of all or a portion of the Membership Interest of a Member, but who has not been admitted to the Company as a Member." Another provision of the company agreement stated that "[a]ny attempted Transfer by a person of an interest or right, or any part thereof, in or in respect of the Company other than as specifically provided by this Agreement shall be, and is hereby declared, null and void ab initio." The company agreements also stated that an assignee did not have any voting right or right to participate in the operations or management of the company until admitted as a substituted member. Further, an assignee was admitted as a substituted member only when the member making the transfer granted the assignee the right to be admitted and the instrument assigning the membership interest contained an agreement by the assignee that the assignee agreed to be bound by all of the terms and provisions of the company agreement. The assignment purporting to transfer Kennedy's interest in Rocklon to his son was only signed by Kennedy and did not contain any agreement by the son as an assignee. Thus, the court concluded that the trial court could reasonably have determined the assignment failed and was void based on the provisions of Rocklon's company agreement. Further, the record contained an apparent transmittal letter from an attorney to Kennedy dated June 5, 2006, in which the attorney instructed Kennedy to execute the assignment of interest to his son and have his son execute the company agreement. When questioned in the trial, Kennedy's son stated that he was not sure when the assignment was executed and refused to confirm or deny that it was executed on February 1, 2006. Based on the conflicting documents, the court held that the trial court could properly have found that neither the assignment nor the executed version of the company agreement were reliable to show the true membership or ownership of Rocklon.

D. Fiduciary Duties

Pham v. Carrier, No. 07-15-00031-CV, 2017 WL 1291660 (Tex. App.—Amarillo Apr. 3, 2017, no pet. h.) (mem. op.).

The court of appeals affirmed summary judgment against a 40% LLC member on his claims against the other two members for breach of contract, fraud, and conversion arising out of the sale of the LLC's assets and

termination of the LLC, but the court of appeals reversed the trial court's summary judgment against the member on his derivative claims for fraud and unjust enrichment and his direct and derivative claims for revocation of termination of the LLC.

Three individuals, Pham, Carrier, and Womack, formed an LLC that owned and operated a bar in Austin. Pham owned 40% of the LLC, and Carrier and Womack together owned 60%. The bar began operating in 2002, and Pham received some cash distributions from the LLC in 2002 and 2003. He left Austin in 2004 and moved to Houston. Pham's summary judgment evidence showed he told Carrier and Womack to retain his share of profits in the company. Pham had no communication with Carrier or Womack from the time he left Austin until he had lunch with Carrier in early 2011. In 2013, Pham sued Carrier, Womack, and other parties after he learned that Carrier and Womack caused the LLC to convey the bar in late 2005 to another entity that was formed by Carrier and Womack and did not include Pham. Pham asserted claims for fraud, breach of fiduciary duty, and other causes of action. He sought monetary and exemplary damages, a 40% interest in the existing bar and interests in "spinoff" bars, an accounting, and attorney's fees. The defendants filed special exceptions to some of Pham's claims and made the court aware that a certificate of termination had been filed for the LLC in 2010. The defendants also filed a motion for summary judgment, asserting no-evidence and traditional grounds, including limitations.

The trial court sustained special exceptions to, and dismissed with prejudice, Pham's causes of action for majority oppression of a minority member, conversion of his membership interest, and breach of fiduciary duty owed to him individually. The day before a scheduled later hearing on the defendants' motion for summary judgment, Pham filed an amended petition in which he asserted derivative claims for fraud and unjust enrichment on behalf of the terminated LLC. In this petition Pham also sought, both individually and derivatively, revocation of the LLC's termination under Section 11.153 of the Texas Business Organizations Code. The trial court granted a take-nothing summary judgment against Pham on all his claims. On appeal, Pham argued that the defendants' motion for summary judgment did not address all the causes of action on which summary judgment was granted. Pham also raised issues addressing the defendants' statute-of-limitations grounds and no-evidence grounds challenging the merits of some causes of action.

The court of appeals first addressed Pham's request for revocation of the LLC's termination under Section 11.153 of the Texas Business Organizations Code. Section 11.153 provides that a court may revoke the termination of an entity's existence where the termination resulted from actual or constructive fraud. The court noted that neither the defendants' motion for summary judgment nor their reply to Pham's response made any mention of Section 11.153. The defendants' motion for summary judgment anticipated that Pham would amend his pleadings to assert derivative claims, and the motion contended that any cause of action asserted on behalf of the LLC survived for only three years after the effective date of its termination under Section 11.356 of the Texas Business Organizations Code. The motion did not address any impact that revocation of an entity's termination under Section 11.153 might have on the operation of Section 11.356. The court stated that the defendants failed to show the grounds they raised with the trial court precluded Pham's revocation-of-termination claim under Section 11.153 as a matter of law.

The court of appeals likewise concluded that the defendants' summary judgment motion did not challenge the assertion that Womack and Carrier owed fiduciary duties to the LLC and did not address the impact fiduciary duties may have on the application of statutes of limitations. Thus, the court of appeals held that the limitations grounds asserted by the defendants in their motion did not conclusively preclude the derivative claims for fraud and unjust enrichment. The defendants did not demonstrate that the trial court's grant of summary judgment on the unaddressed derivative claims was harmless error.

Next the court of appeals addressed the defendants' entitlement to summary judgment on Pham's direct claims. Pham's brief identified two injuries: (1) the undisclosed sale of the bar to a company Carrier and Womack owned and controlled, for less than fair market value; and (2) Carrier's and Womack's distribution of Pham's share of profit to themselves. Pham acknowledged that the relevant chronology was essentially undisputed and that, had Pham known about his claims, they would be barred by limitations. The parties disagreed as to what dates were relevant in determining when imitations began to run.

The court of appeals first addressed Pham's argument that the sale of the bar gave rise to a continuing tort claim. Pham challenged the validity of the sale of the bar on several grounds: that the individual who signed the sale documents was no longer a manager or member in 2005; that the entity that purchased the bar on December 31, 2005, was not formed until January 10, 2006; and that Carrier and Womack did not disclose the conflict-of-interest transaction as provided by Section 101.255 of the Texas Business Organizations Code. Based on these

defects in the sale process, Pham argued that the sale was invalid and was a continuing tort. The court of appeals distinguished a continuing injury from a continuing tort, and stated that the transfer that caused the injury was completed in January 2006. Thus, the continuing tort doctrine was not applicable to Pham's individual claims.

The court next addressed Pham's argument that the summary judgment record raised genuine issues of material fact concerning the application of the discovery rule and the doctrine of fraudulent concealment to his direct claims. Pham acknowledged that the trial court had already ruled that the defendants did not owe Pham fiduciary duties individually, and he did not challenge that ruling on appeal. The court thus analyzed the discovery/fraudulent concealment argument under the law applicable to parties who are not fiduciaries.

The court of appeals stated that contracting parties generally are not fiduciaries and thus must use due diligence to protect their own interests. Failing to ask for information is not the exercise of due diligence. Pham contended that the sale of the bar to another entity that did not include him was an inherently undiscoverable injury. Even assuming, as Pham asserted, that there was no publicly available evidence of the sale, that he was not involved in its operations, and that the bar continued to operate under the same name at the same location, the court was "unwilling to hold that the injury suffered by one of three Texas LLC members from the sale of all the assets of its operating retail business is inherently undiscoverable." The court held that the summary judgment record demonstrated the discovery rule had no application to Pham's individual breach-of-contract and conversion claims.

The court of appeals next addressed Pham's individual fraud claim. The court acknowledged that limitations does not begin to run on a fraud claim until the fraud is discovered or in the exercise of reasonable diligence would be discovered, but the court agreed with the defendants' contention that the exercise of reasonable diligence would have led Pham to discover that the LLC was no longer operating the bar after January 2006. The court stated that reasonable diligence requires property owners to be aware of relevant information available in the public record, and the court pointed out that the LLC's Texas franchise tax reports showed that Pham had been removed as a manager of the LLC. In addition, the Texas Business Organizations Code provides an LLC member rights of access to information about the LLC, including tax returns. Tex. Bus. Orgs. Code §§ 101.501, 101.502. Furthermore, courts have found that a party to a contract that has utterly failed to inquire of the other contracting party about contractual performance is not exercising reasonable diligence. The court considered that concept particularly applicable to an absentee 40% business owner like Pham. As a matter of law, outside the context of fiduciary duties, Pham would have been able to discover any fraud involved in the LLC's sale of the bar within the limitations period if he had exercised reasonable diligence. Even assuming, as Pham alleged, that Carrier and Womack owed Pham a duty to make him aware of the sale and that they knowingly failed to do so, the court concluded that the fraudulent concealment doctrine could not save the breach of contract and conversion claims, for the same reason that his fraud claim failed. The court stated that a party to a contract may not fail to inquire for years on end and then sue for contractual breaches that could have been discovered within the limitations period through the exercise of reasonable diligence.

B Choice Ltd. v. Epicentre Dev. Ass'n LLC, No. H-14-2096, 2017 WL 1227313 (S.D. Tex. Mar. 3, 2017), adopted, 2017 WL 1160512 (S.D. Tex. Mar. 29, 2017).

In a case brought by an investor in a Texas LLC formed to build a residential and commercial development project on the old AstroWorld site, the magistrate judge recommended denial of the defendants' motion for summary judgment on the plaintiff's breach-of-fiduciary-duty claims against the officers and manager of the LLC and an individual who allegedly exercised control over the plaintiff. The district court adopted the memorandum and recommendation of the magistrate court.

B Choice Limited (incorporated under the laws of England and Wales) brought claims against multiple defendants for fraud, breach of fiduciary duty, and breach of contract arising out of an investment project structured as a Texas LLC. Defendants Botero, Delaney, and Iragorri sought investors for a residential and commercial project that would be built on the old AstroWorld site. They contacted defendant Guiduzzi, who was B Choice Limited's director and the director of defendant F&G Consultancy ("F&G"). Defendant Andrea Frattini was Guiduzzi's partner in F&G and made several representations about the project. Based on these defendants' representations, the plaintiff decided to invest \$11 million in EpiCentre Development Associates, LLC ("EDA"). EDA was a Texas LLC managed by Delaney, Botero, and Iragorri. Over the course of six years, the venture misspent \$25 million obtained through loans and investments made by the plaintiff. EDA only acquired a small portion of the property formerly known as AstroWorld, which it transferred to a newly created LLC, EpiCentre Development Associates II, LLC ("EDA II"), in which the plaintiff had no interest and about which the plaintiff knew nothing. The plaintiff

sued the defendants after learning that EDA misspent all of the plaintiff's investment and still had no ownership interest in the AstroWorld property.

The court refused to dismiss the breach-of-fiduciary-duty claim against Frattini based on evidence of Frattini's prior relationship with the plaintiff and alleged control of the plaintiff. For an informal fiduciary duty to exist, there must be a relationship of trust and confidence that existed prior to and separate from the transaction that is the basis of the suit. Frattini argued that the project and agreement resulted from an arms' length transaction and that Frattini owed no formal fiduciary duty to the plaintiff. The plaintiff argued that Frattini had control over the plaintiff because Frattini asked Guiduzzi to be the director of the plaintiff and had control over Guiduzzi's actions. Frattini and Guiduzzi's relationship began prior to and separate from the project underlying this case when they were in a partnership together. Based on Frattini's control of the plaintiff via its director, the court found that a fact question existed as to whether Frattini owed an informal fiduciary duty to the plaintiff.

The court also concluded that a fact issue existed as to whether the officers and manager of EDA owed a fiduciary duty to the plaintiff. The court recognized that no Texas court has held that fiduciary duties exist between members of an LLC as a matter of law but stated that the recognition of a fiduciary duty in the LLC context is typically a question of fact. The court relied on *Allen v. Devon Energy Holdings, LLC*, 367 S.W.3d 355, 392 (Tex. App.–Houston [1st Dist] 2012, judgm't vacated, w.r.m.), in which the court of appeals discussed the similarities between an LLC and a partnership and stated that "courts in many jurisdictions have recognized a fiduciary duty between members of an LLC on that basis." The court in *Allen* found that the manager-owner of the LLC owed a fiduciary duty to the passive minority owner, characterizing their relationship as similar to that of a general and limited partner in a limited partnership. Here, the manager of EDA was empowered by the operating agreement with "full and exclusive right, power, and authority to manage the affairs of the Company." The court found this structure and the plaintiff's minority membership created a situation similar to a limited partnership. Thus, the court refused to grant summary judgment on the breach-of-fiduciary-duty claim against EDA's officers and manager.

Angel v. Tauch (In re Chiron Equities, LLC), 552 B.R. 674 (Bankr. S.D. Tex. 2016).

After an LLC's bankruptcy trustee sold claims belonging to the LLC to a creditor of the LLC, a dispute arose over who owned the right to sue the LLC's original manager for claims of breach of fiduciary duty, fraud, and breach of contract. The court concluded that the manager/minority member owed the LLC, but not the other member, fiduciary duties. The court held that the claims at issue were derivative, and the court enjoined litigation in state court in which the majority member was asserting the claims.

The debtor LLC was owned by two members, minority member Jay Krasoff (also the original manager of the LLC) and majority member K Realty Development, LLC ("KRD"), which was solely owned by another individual. Following the LLC's bankruptcy, the bankruptcy court approved an order under which a creditor of the LLC (a trust of which Krasoff's wife was trustee) bought the debtor LLC's claims, which included "any and all causes of action against pre-petition officers, directors, and or managers of" the LLC. KRD sued Krasoff in state court for fraud and for breaching fiduciary and contractual duties Krasoff owed to the LLC and to KRD. The purchaser of the LLC's claims (the plaintiff in this action) asked the bankruptcy court to grant a temporary injunction staying KRD's state court action on the basis that the plaintiff, not KRD, owned the right to file suit on these claims based on its purchase of the LLC's claims.

The bankruptcy court analyzed each of KRD's claims to determine if the claims were derivative claims belonging to the LLC prior to the bankruptcy or direct claims belonging to KRD prior to the bankruptcy. Relying on Texas case law relating to corporations, the court explained the difference between derivative and direct claims. The court stated that Texas law is clear that a cause of action for injury to the corporation's property or destruction of its business belongs to the corporation rather than a shareholder. The court relied on *Wingate v. Hajdik*, 795 S.W.2d 717, 719 (Tex. 1990), superseded by statute on other grounds as stated in *Sneed v. Webre*, 465 S.W.3d 169 (Tex. 2015), for the proposition that a shareholder cannot personally recover for an injury solely to the corporation even though the shareholder may have been injured as well. If a shareholder's claim would require a demonstration of harm to the corporation in order to recover, the claim is a derivative claim. A direct claim requires the plaintiff to demonstrate personal harm suffered by the plaintiff.

KRD argued that its claim against Krasoff for breach of fiduciary duty was a direct claim because Krasoff "violated the fiduciary duties he owed directly to [KRD] as a fellow member of the [Debtor] and as a holder of a super majority of the membership interests of the [Debtor]." KRD asserted that it "justifiably expected Krasoff to act in the best interest of the [Debtor]." Relying on case law from the corporate context, the bankruptcy court

disagreed with KRD for three reasons. First, the court pointed to Texas cases holding that a co-shareholder in a closely held corporation does not as a matter of law owe a co-shareholder a fiduciary duty. The court stated that these cases appeared to preclude the argument that a fiduciary duty existed between Krasoff and KRD. Second, the court pointed to Fifth Circuit case law that makes clear that an action for breach of fiduciary duty by an officer or director belongs to the corporation and not to individual shareholders under Texas law. *Gearhart Indus., Inc. v. Smith Int'l, Inc.*, 741 F.2d 707, 721-22 (Tex. 1984). Finally, the court relied on *Schautteet v. Chester State Bank*, 707 F. Supp. 885, 888 (E.D. Tex. 1988), in which the district court relied on *Gearhart* and held that officers and directors owe fiduciary duties only to the corporation. The court noted that the district court in *Schautteet* stated that a minority shareholder might have a direct claim against the majority shareholder in certain circumstances, but those circumstances were not present in this case. The court stated that Krasoff, as an officer of the LLC, definitely owed a fiduciary duty to the LLC. Thus, if Krasoff violated this fiduciary duty, the claim belonged to the LLC. Any looting of the LLC's funds by Krasoff was a violation of Krasoff's fiduciary duty to the LLC, and the claim was a derivative claim even though Krasoff's embezzlement of the LLC funds may have harmed KRD by damaging the value of his interest in the LLC. Because the claim for breach of fiduciary duty was a derivative claim, it was sold to the plaintiff by the trustee and KRD had not standing to prosecute the claim in state court.

The court also concluded that the fraud and breach-of-contract claims were derivative claims, and the court awarded the plaintiff injunctive relief staying the state-court action.

Siddiqui v. Fancy Bites, LLC, 504 S.W.3d 349 (Tex. App.—Houston [14th Dist.] 2016, pet. filed).

The court found that there was no informal fiduciary relationship among the co-equal managers/members of the LLCs in this case.

Brothers Najeeb and Ajaz Siddiqui owned several entities that purchased property, built subdivisions, flipped properties, and built shopping centers. The Siddiquis owned Suncoast Environmental and Construction, Inc. ("Suncoast"), Fancy Bites, LLC ("Fancy Bites"), and Quick Eats, LLC ("Quick Eats"). Fancy Bites was the general partner for Blueline Real Estate, Limited Partnership ("Blueline"), and Quick Eats was the limited partner in Blueline. Ajaz was also the sole owner of Sunnyland Development, Inc., which owned the Bammel property on which the Siddiquis built a retail building.

The Siddiquis wanted to put a chicken restaurant in the empty building on the Bammel property. Najeeb spoke with two of his contacts about getting a Hartz Chicken franchise in the building. The two contacts, Farhan Qureshi and Syed Ali, decided to go into business with the Siddiquis on the project. Believing that Blueline owned the Bammel property, Qureshi and Ali each purchased a 25% membership interest in Quick Eats and Fancy Bites (the two LLCs that owned Blueline). As the members and managers of the LLCs, the Siddiquis, Qureshi, and Ali had equal voting power and ownership. The four executed a Restated Limited Partnership Agreement for Blueline and Restated Company Agreements for the two LLCs. Blueline's partnership agreement included a provision allowing Blueline to contract with partners and affiliates, and the company agreements likewise allowed the two LLCs to contract with members, managers, and their affiliates.

After the Hartz restaurant opened on the Bammel property, Qureshi contracted with Suncoast to build a retail center on property Qureshi owned. Suncoast constructed a pad site on the property. The Siddiquis, Qureshi, and Ali then decided to open a second Hartz restaurant on the pad site, so Blueline bought the pad site from Qureshi. Blueline got two loans for the second restaurant, both guaranteed by Fancy Bites and the Siddiquis, Qureshi, and Ali.

The Hartz restaurants were not profitable enough to make the franchise payments and loan payments. Qureshi and Ali made payments on Blueline's debts in an attempt to keep up with Blueline's obligations. Five years after the four men began the first Hartz restaurant project, Blueline filed for Chapter 11 bankruptcy.

The Siddiquis and Suncoast sued Qureshi and Ali for their pro-rata shares of payments the Siddiquis made to the bank for Blueline's loans. Qureshi and Ali brought counterclaims against the Siddiquis and Suncoast for fraud, breach of fiduciary duty, and unjust enrichment. The trial court found for Qureshi and Ali on their breach-of-fiduciary-duty and fraud claims and awarded them exemplary damages from Ajaz Siddiqui. Among the issues addressed on appeal were arguments by the Siddiquis that Qureshi and Ali lacked standing to assert claims that belonged to Blueline and that there was no evidence of a fiduciary relationship between the Siddiquis and Qureshi and Ali.

In their first issue on fiduciary duty, the appellants contended in a sub-issue that Qureshi and Ali lacked standing to assert construction-related claims belonging to Blueline. The appellate court determined Qureshi and

Ali did not have standing to assert claims for construction-related damages sustained by either Blueline or the LLCs because those claims belonged to the legal entity, not an individual stakeholder.

Next the court of appeals concluded that there was no evidence of an informal fiduciary relationship between the Siddiquis and Qureshi and Ali. For a breach-of-fiduciary-duty claim to stand, a fiduciary duty must exist between the parties. An informal fiduciary duty may arise out of a moral, social, domestic, or personal relationship of trust and confidence that existed prior to and separate from the agreement that is the basis of the suit. Qureshi and Ali admitted that no pre-existing relationship of trust and confidence existed with the Siddiquis. Instead, Qureshi and Ali argued that the informal fiduciary duty arose from the Siddiquis' complete control and management of Blueline. Qureshi and Ali relied on *Guevara v. Lackner* for "the proposition that 'Texas courts have...recognized that an informal fiduciary duty *may* exist between the shareholders in a closely held corporation, depending on the circumstances.'" 447 S.W.3d 566, 580–81 (Tex. App.—Corpus Christi 2014, no pet.). Although the court of appeals here acknowledged that some appellate courts have held that an informal fiduciary duty may arise between shareholders in a closely held corporation under certain circumstances in the absence of a pre-transaction relationship, the court stated that it had not adopted such an expansive view and "has consistently determined that informal fiduciary duties do not arise in business transactions...unless the special relationship of trust and confidence existed before the transaction at issue." Moreover, the Siddiquis, Qureshi, and Ali were each co-equal managers and owners of the LLCs with equal rights of control and access to books and records. Any control exercised by the Siddiquis resulted because Qureshi and Ali chose not to participate fully in the LLC's affairs. In the course of discussing whether informal fiduciary duties arose among the parties, the court commented that evidence that Suncoast overcharged non-party Blueline for its construction services was not, without more, enough to overcome the contractual business arrangements among the entities and impose fiduciary duties on the Siddiquis. Neither Qureshi nor Ali testified that they had any relationship other than a business relationship with the Siddiquis, and they did not testify that they trusted or relied on the Siddiquis in any particular respect to manage the venture for them. Thus, the court of appeals held that the trial court erred in rendering judgment for Qureshi and Ali based on breach of fiduciary duties.

Finally, the court concluded that there was no evidence that the Siddiquis or Suncoast made fraudulent misrepresentations or nondisclosures to Qureshi and Ali concerning the cost of the build-out of the Bammel restaurant or the guarantees; however, the Siddiquis' representation that Blueline, Fancy Bites, or Quick Eats owned the Bammel property to induce Qureshi and Ali to invest in the Hartz Chicken franchise venture was a misrepresentation or partial disclosure of ownership that triggered the duty to disclose that the property was actually titled in the name of a separate company wholly owned by Ajaz Siddiqui.

B Choice Ltd v. Epicentre Dev. Ass'n LLC, No. H-14-2096, 2016 WL 3911123 (S.D. Tex. May 12, 2016), adopted, 2016 WL 3763268 (S.D. Tex. July 14, 2016).

A magistrate judge recommended denial of the defendants' motion to dismiss claims for breach of fiduciary duty and breach of contract brought by an investor in a Texas LLC formed to build a residential and commercial development project on the old AstroWorld site. The district court adopted the memorandum and recommendation of the magistrate court and declined to dismiss the claims.

B Choice Limited (incorporated under the laws of England and Wales) brought claims against multiple defendants for fraud, breach of fiduciary duty, and breach of contract arising out of an investment project structured as a Texas LLC. Defendants Botero, Delaney, and Iragorri sought investors for a residential and commercial project that would be built on the old AstroWorld site. They contacted defendant Guiduzzi, who was B Choice Limited's director and the director of defendant PLG Consulting and defendant F&G Consultancy ("F&G"). Defendant Andrea Frattini was Guiduzzi's partner in F&G and made several representations about the project. Based on these defendants' representations, the plaintiff decided to invest \$11 million in EpiCentre Development Associates, LLC ("EDA"). EDA was a Texas LLC managed by Delaney, Botero, and Iragorri. Over the course of six years, the venture misspent \$25 million obtained through loans and investments made by the plaintiff. EDA only acquired a small portion of the property formerly known as AstroWorld, which it transferred to a newly created LLC, EpiCentre Development Associates II, LLC ("EDA II"), in which the plaintiff had no interest and about which the plaintiff knew nothing. The plaintiff sued the defendants after learning that EDA misspent all of the plaintiff's investment and still had no ownership interest in the AstroWorld property.

The court denied EDA's motion to dismiss the plaintiff's breach-of-fiduciary-duty claim against EDA's "officers and directors." The plaintiff argued that a fiduciary duty existed because the plaintiff was a "shareholder"

of EDA and as such was owed a fiduciary duty by EDA's "officers and directors." The court recognized that an LLC has the flexibility to organize in a manner similar to a limited partnership and to expand or restrict fiduciary duties. The court stated that "a limited partner may owe a fiduciary duty if a plaintiff can show that the limited partner exercised management or control over the LLC." While the court recognized that the Texas Supreme Court in *Ritchie v. Rupe* reaffirmed the rule that directors of a closely held corporation owe a fiduciary duty to the corporation, the court did "not read *Ritchie* to preclude, as a matter of law, a breach of fiduciary duty claim against the officers and directors of EDA, who were alleged to have acted for their own self-interests." Thus, the court concluded that the breach-of-fiduciary-duty claim should survive dismissal.

The court also denied the motion to dismiss the breach-of-fiduciary-duty claim against Frattini. The plaintiff argued that a service agreement between the plaintiff and F&G created a contractual relationship with Frattini, a partner in F&G, and that a special relationship with Frattini existed, giving rise to an informal fiduciary duty. Texas recognizes that an informal fiduciary duty can arise from a moral, social, or purely personal relationship of trust and confidence that existed prior to and apart from the agreement underlying the suit. Without elaborating, the court characterized the relationship between the plaintiff and Frattini as "complicated" and apparently involving "trust and confidence." Thus, the court recommended that Frattini's motion to dismiss the breach-of-fiduciary-duty claim be denied.

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

B Choice Ltd. v. Epicentre Dev. Ass'n LLC, No. H-14-2096, 2017 WL 1227313 (S.D. Tex. Mar. 3, 2017), adopted, 2017 WL 1160512 (S.D. Tex. Mar. 29, 2017).

In a case brought by an investor in a Texas LLC formed to build a residential and commercial development project on the old AstroWorld site, the magistrate judge recommended summary judgment in favor of the officers and directors of the LLC on the plaintiff's claim to hold them liable under the Texas Tax Code with respect to a partial summary judgment entered against the LLC after forfeiture of the LLC's privileges because the promissory note on which the summary judgment was based was signed before the forfeiture and thus was not a debt created or incurred during the period under which officers and directors incur personal liability under the Texas Tax Code. The district court adopted the memorandum and recommendation of the magistrate court.

B Choice Limited (incorporated under the laws of England and Wales) brought claims against multiple defendants for fraud, breach of fiduciary duty, and breach of contract arising out of an investment project structured as a Texas LLC. The plaintiff invested millions of dollars in EpiCentre Development Associates, LLC ("EDA"), which was formed to develop a residential and commercial project that would be built on the old AstroWorld site. Over the course of six years, the venture misspent \$25 million obtained through loans and investments made by the plaintiff. EDA only acquired a small portion of the property formerly known as AstroWorld, which it transferred to a newly created LLC, EpiCentre Development Associates II, LLC ("EDA II"), in which the plaintiff had no interest and about which the plaintiff knew nothing. The plaintiff sued the defendants after learning that EDA misspent all of the plaintiff's investment and still had no ownership interest in the AstroWorld property.

The court granted summary judgment on the plaintiff's claim that EDA's directors and officers were personally liable for the debt on a promissory note under the Texas Tax Code because EDA's corporate privileges had been forfeited. Under Texas Tax Code § 171.255, the officers and directors of a corporation whose corporate privileges are forfeited have personal liability for "each debt of the corporation that is created or incurred in this state after the date on which the report, tax, or penalty is due and before the corporate privileges are revived." Relying on *Hovel v. Batzri*, 490 S.W.3d 132, 136 (Tex. App.—Houston [1st Dist.], 2016, pet. filed), the court explained that the date a debt is "created or incurred" is determined under the "relation-back" doctrine, which links post-forfeiture judgments to pre-forfeiture conduct and agreements. The plaintiff argued that the debt was created or incurred when EDA agreed to the partial summary judgment on the promissory note after EDA lost its corporate privileges. However, the court concluded that the debt was not incurred at the time of the partial summary judgment but at the time EDA signed the promissory note, which was prior to EDA's forfeiture of corporate privileges.

Julka v. U.S. Bank Nat'l Ass'n, 2017 WL 405814, ___ S.W.3d ___ (Tex. App.—Houston [1st Dist.] 2017, no pet. h.).

The court held that a guarantor's contributions to an LLC which were then used to make payments on the LLC's note did not constitute payment on the guaranty by the guarantor.

Julka was the sole member and president of an Ohio LLC that was the sole member of a Delaware LLC of which Julka was also president. A real estate loan was made to the Delaware LLC, and Julka signed a guaranty agreement under which he agreed to pay up to \$250,000 in damages in the event of a default on the loan. The LLC defaulted on the note, and a deficiency of approximately \$3.5 million was owed after foreclosure on the collateral. The bank that held the loan documents sued Julka on the guaranty. Julka asserted the affirmative defenses of payment and estoppel on the basis that he had made contributions to the LLC in the amount of \$1.6 million that allowed the LLC to continue making payments on the note. Both the bank and Julka moved for summary judgment, and the court granted summary judgment in favor of the bank and denied Julka's motion.

On appeal, Julka directed the court to evidence documenting his contributions of funds to the LLC. He argued that these contributions discharged his obligations on the guaranty because his contributions were used by the LLC to make payments on the note. The court rejected Julka's argument on the basis that the guaranty agreement required personal payment to the bank, not payment from the LLC on the note secured by the guaranty. Although Julka transferred personal funds to the LLC to enable the LLC to make the payments on the note, the LLC acted on its own behalf in paying the note, and its payments were attributable solely to the LLC and not to Julka. The court pointed out that Julka formed the borrower and its sole member as LLCs (mistakenly referring to them as "limited liability corporations") in order "to take advantage of the protections afforded by the corporate form, including those that protect him from personal liability on the note beyond the individual obligations that he undertook as guarantor," citing Del Code tit. 6, § 18-303 and Tex. Bus. Orgs. Code § 101.002(a). The court stated that this liability shield stems from the presumption of legal separateness that exists between a limited liability company and its members. As a result of that separate existence, members of an LLC are not individually liable for the debts or other liabilities of the LLC absent an agreement by a member in the member's individual capacity. Furthermore, contributions made to the LLC become the LLC's property and are no longer the property of the members. The court acknowledged that a court may disregard the corporate form and hold its agent subject to individual liability, or vice versa, in rare circumstances. No such circumstances were alleged to exist in this case. Because of the presumptive separateness of the LLC, Julka's subjective intent that the LLC's loan payments count toward either satisfying his personal guaranty obligation or showing that the bank knew that Julka had provided the LLC with money so that it could make payments due on its note did not raise a fact issue on either of Julka's affirmative defenses. The court distinguished a case in which a guarantor made payments on the underlying note directly. The appeals court there held that the payments offset the guarantor's liability because they originated from the guarantor and the lender accepted them. In Julka's case, the LLC made the payments, and the trial court thus properly granted summary judgment in favor of the bank.

Chico Auto Parts & Serv., Inc. v. Crockett, 512 S.W.3d 560 (Tex. App.—El Paso 2017, pet. denied).

The court held that summary judgment in favor of an LLC's managing member was properly granted in a case where the plaintiff attempted to hold the managing member liable in connection with a contract for remediation services performed by the plaintiff. The plaintiff sought to hold the managing member liable based on: (1) the managing member's part ownership of the well where the remediation services were performed, (2) veil piercing of the LLC, and (3) the managing member's alleged fraudulent misrepresentations. The court held that: (1) the managing member's part ownership of the well did not make the managing member liable to the plaintiff under the Texas Natural Resources Code, (2) the plaintiff did not allege facts supporting a veil-piercing claim, and (3) the plaintiff did not allege facts supporting a fraud claim.

The plaintiff remediated a water leak at an oil well. It was undisputed that the plaintiff completed the remediation, but there was uncertainty regarding who contracted for the plaintiff's services. The plaintiff billed a corporation that was a part owner of the well, and the plaintiff sued the corporation and obtained an agreed judgment. The corporation did not pay the judgment and filed for bankruptcy. The plaintiff then filed this lawsuit against the fee simple land owner, the LLC operator of the well, and the LLC's managing member. The LLC and its managing member were also part owners of the oil well. The plaintiff asserted claims for breach of contract and quantum meruit, alleging each of the parties were jointly and severally liable for the remediation expenses. The

plaintiff also alleged that the LLC and its managing member misrepresented the identity of the parties and their relation to the well. The trial court dismissed all of the plaintiff's claims but subsequently allowed the plaintiff to pursue its quantum meruit claim against the LLC and granted the managing member's motion to sever. Thus, the only issues being heard on appeal were those relating to the managing member. The court of appeals reviewed two theories to hold the managing member personally liable: (1) as a co-owner of the well based on the Texas Natural Resources Code, and (2) in his capacity as managing member or president of the LLC.

First, the plaintiff argued that the managing member could be held personally liable for breach of contract based on his status as a part owner of the well and a provision of the Texas Natural Resources Code that imposes individual liability on "officers, owners, and operators" for environmental cleanup of wells. Even assuming the managing member was a responsible person against whom the Railroad Commission could proceed, that fact did not establish that the managing member was in privity with and liable to the plaintiff.

The court next turned to the plaintiff's arguments that the managing member was personally liable through the LLC. The court cited Texas case law in the corporate context for the proposition that a corporation is a separate legal entity that generally shields its owners, directors, and officers from liability absent use of the corporation "as part of a basically unfair device to achieve an inequitable result." The court noted that "the most frequent basis for disregarding the corporate shield at common law was the use of the 'alter ego' theory, in which a corporate obligee was required to demonstrate that the corporate officer had essentially used the corporation for its own 'personal purposes,' without any regard for corporate formalities." The court pointed out that, at the time the plaintiff performed its services in July of 2011, two statutes "severely limited the circumstances under which a member of an LLC could be held personally liable for an LLC's contractual obligations." Tex. Bus. Orgs. Code §§ 101.113, 101.114. Section 101.002, which made the actual-fraud requirement in Section 21.223 applicable to LLCs, did not become effective until September 1, 2011. The court further pointed out, however, that Texas courts did not view the statutory liability protection provided to a managing member as absolute, but uniformly applied the same common-law principles for "piercing the corporate veil" as were previously applied to corporations prior to the adoption of the actual-fraud requirement in the Business Organizations Code in determining whether an LLC's member could be held liable for the LLC's contractual obligations. When a plaintiff at common law sought to hold a corporate affiliate personally liable for a contractual obligation of a corporation under any of the veil-piercing theories, the plaintiff had the burden to plead and prove the basis on which the plaintiff sought to pierce the veil. In both his answer and his motion for summary judgment, the managing member asserted that he was shielded from liability based on his status as a managing member of an LLC, and the plaintiff failed to come forward with any pleadings, argument, or evidence to establish that the managing member could be held liable on any veil-piercing theory. The plaintiff tried to salvage its veil-piercing claim by relying on its fraud claim against the managing member, but the court rejected this argument after reviewing the record and finding the only allegations of fraud related to alleged misrepresentations after the contract was entered into regarding whom to invoice for the work. The plaintiff never alleged that the managing member committed any fraud in the formation of the contract, or that he used the LLC to fraudulently induce the plaintiff into entering into the alleged contract or otherwise used the LLC to perpetrate any fraud on the plaintiff.

Next, instead of piercing, the plaintiff relied on a fraudulent misrepresentation theory to hold the managing member liable. The court agreed with the plaintiff that a party may sue a corporation's affiliate for his torts, including fraud, without the need to pierce the corporate veil. The court concluded, however, that the plaintiff failed to allege how the alleged misrepresentations would be material. The plaintiff alleged that the managing member misrepresented ownership of the well, but the court said that the plaintiff's allegations as to the true ownership were immaterial to the real issue of who were the parties to the contract with the plaintiff. The court further concluded that the plaintiff could not have justifiably relied on any misrepresentation because a party in an arm's length transaction is charged with knowledge of all the facts that would have been discoverable. Here, the well's true ownership, who operated the well, and who the plaintiff was contracting with were all facts that the plaintiff could have discovered before any remediation and certainly before the first suit. Without a material representation and justifiable reliance the court concluded that the trial court properly granted summary judgment on the fraud claim.

Lost Creek Ventures, LLC d/b/a Happy Bulldog Mgmt. v. Pilgrim, No. 01-15-00375-CV, 2016 WL 3569756 (Tex. App.—Houston [1st Dist.] June 30, 2016, no pet.) (mem. op.).

In this appeal of a landlord-tenant dispute, the court of appeals affirmed the joint and several liability of two individuals who owned a duplex and their LLC that managed the duplex. However, the court of appeals held

that the individual owners could not be held liable on the breach-of-contract claim because only the LLC signed the lease with the tenant.

Marilyn and Stephan Epstein owned a duplex and owned the LLC property manager that executed the lease agreement with Alan Pilgrim. After complaining of multiple problems with the property, Pilgrim terminated the lease, vacated the duplex, and sued the Epsteins individually and the LLC for breaching the contract, wrongfully withholding his security deposit, and failing to make repairs that affected Pilgrim's health and safety. The court of appeals concluded that the evidence supported the trial court's findings that the lease agreement was breached and that landlord-tenant statutes were violated. Under Chapter 92 of the Texas Property Code, "landlord" is defined as "owner, lessor, or sublessor of a dwelling." As owners of the duplex, the court held that the Epsteins were thus jointly and severally liable with their LLC property manager for violations of Chapter 92. However, the court of appeals modified the joint and several liability of the Epsteins regarding the breach-of-contract claim. The court determined that the Epsteins did not have joint and several liability for the breach of contract claim because the Epsteins were not signatories on the lease agreement. Only the LLC and Pilgrim signed the lease. Thus, only the LLC was liable on the breach of contact claim.

F. Admission of Members

Perez v. Le Prive Enters., L.L.C., No. 14-15-00291-CV, 2016 WL 3634298 (Tex. App.–Houston [14th Dist.] July 7, 2016, no pet.) (mem. op.).

Two brothers relied on a "Partnership Dissolution Agreement" that recited their interests in an LLC to establish their ownership in the LLC. The LLC had no written operating agreement and its certificate of formation identified another individual as the only member. Although the individual identified as the LLC's member in the certificate of formation was a party to the Partnership Dissolution Agreement along with the two brothers, the court stated that the agreement was not a company record reflecting admission of the two brothers to the LLC and the agreement was irrelevant to their status as members of the LLC.

Two brothers and their cousin agreed to open a nightclub together. One of the brothers filed a certificate of formation for an LLC. The certificate of formation identified the cousin as the organizer, managing member, and registered agent of the LLC. The brothers were not named in the certificate of formation. Later, the certificate of formation was amended to identify another individual who had become involved in the management of the nightclub as the sole manager of the LLC. The brothers claimed that they had entered into a partnership with their cousin regarding the nightclub and that they were all owners of the LLC in the same percentages as their ownership in the partnership. The trial court found that the cousin was the sole owner of the LLC, and the brothers challenged this finding on appeal.

The court of appeals stated that the brothers appeared to confuse the nature of partnerships and LLCs, which are distinct entities. The brothers asserted that they each had "ownership interests [as] partner[s] in the company" and argued that the "totality of the circumstances point[s] to the existence of a partnership" with their cousin under which one brother was entitled to a 35% share of the profits and the other brother was entitled to a 30% share of the profits. The brothers admitted that they had no written agreement regarding this profit-sharing and ownership-interest scheme prior to the start of their business venture; however, the brothers argued that the court should hold that there was a partnership under which the brothers each owned a portion of the LLC. The court stated that the brothers "relied on a set of unrelated statements of the law governing business organizations and contracts." The brothers argued that their arrangement was valid despite the absence of written documentation because: (1) the Texas Business Organizations Code permits oral operating agreements among members of an LLC; (2) the Texas Business Organizations Code permits people to become members of an LLC after the LLC's certificate of formation is filed; (3) a partnership that is indefinite in duration falls outside of the statute of frauds; and (4) partial performance takes a partnership agreement outside the statute of frauds. Based on the procedural posture of the case and the applicable standard of review, the brothers had to conclusively establish that they were co-owners of the LLC to prevail.

The court stated that the brothers had to establish that they were members in order to conclusively establish that they were co-owners of the LLC. A "member" of an LLC is defined in the Texas statute as "a person who has been admitted as a member in the limited liability company under its governing documents." The court stated that the brothers did not argue that they became members of the LLC by admission under the LLC's governing

documents; instead the brothers relied on the statute to argue that there was no statutory requirement that the membership be recorded in writing to be effective.

Assuming the Texas Business Organizations Code requires a writing, the brothers argued that their Partnership Dissolution Agreement with their cousin satisfied any writing requirement. The brothers argued that “[t]he December 4, 2013 contract makes clear that the Perez brothers are members, and the document can reasonably be read to mean that the Perez brothers joined the limited liability company on the day the contract was signed. In fact, the four corners of the document make clear that the parties had a partnership before the corporation was formed and that said partnership is incorporated as Le Prive Enterprises, LLC.”

The Partnership Dissolution Agreement provided:

This document is an agreement between partners Manuel Arellano, Erick [sic] E. Perez, and Edmundo Perez (said partnership is incorporated as Le Prive Enterprises, LLC, and is doing business as Mekano Live). Manuel Arellano owns 35% of Le Prive Enterprises, LLC doing business as Mekano Live, Erick E. Perez owns 35% of Le Prive Enterprises, LLC doing business as Mekano Live, and Edmundo Perez owns 30% of Le Prive Enterprises, LLC doing business as Mekano Live. There are no other persons who own an interest in said partnership. The partners agree to dissolve the partnership as follows:

Erick E. Perez and Edmundo Perez hereby transfer all of their interest in the partnership known as Le Prive Enterprises, LLC doing business as Mekano Live to Manuel Arellano. Erick E. Perez and Edmundo Perez agree to return all the property that was removed from the business premises of Mekano Live to Manuel Arellano. Each partner agrees to release each partner from any and all civil liability concerning the partnership. Manuel Arellano does not want Erick E. Perez or Edmundo Perez prosecuted criminally.

The court stated that the brothers’ argument “conflate[d] three distinct business organizational forms—partnership, limited liability company, and corporation.” The court also said that the Partnership Dissolution Agreement was irrelevant to the issue of whether the defendants were members because it was not a company record reflecting the brothers’ admission to the LLC. Because this document was the only specific evidence the brothers offered of their membership in the LLC, the court concluded that the brothers failed to conclusively establish that they were members, and their challenge to the trial court’s finding that they had no ownership in the LLC failed.

G. Authority of Member, Manager, or Officer

Badmand Holdings, LLC v. Jimin Xie, No. 05-15-01379-CV, 2016 WL 6835722 (Tex. App.—Dallas Nov. 4 2016, no pet.) (mem. op.).

The court held that a member of an LLC was a governing person who had the power to bind the LLC as its agent even if he had no actual authority since the persons with whom the agent was dealing did not have knowledge of the agent’s lack of authority.

Xie and Li sued Badmand Holdings, LLC for breach of contract after the LLC did not perform on a contract to sell a condominium in Dallas. Badmand Holdings, LLC had two members: Pejman Bady and Roger Farahmand. Bady listed a condominium owned by the LLC for sale through a broker and subsequently entered into a contract with Xie and Li. Prior to closing and after the option period had expired, the listing agent notified Xie and Li’s agent that “we can’t sell this property.” After the LLC did not perform the contract at the closing date, Xie and Li sued and sought specific performance.

Farahmand, on behalf of the LLC, testified at the bench trial that Bady did not have actual authority to sell the property. Xie and Li testified that neither had investigated the selling party, only knowing that Badmand Holdings, LLC was the seller and that they had been dealing with Bady. The trial court rendered judgment in favor of Xie and Li and ordered specific performance.

On appeal, the LLC argued that there was insufficient evidence to show that Bady had authority to sell the condo and that the contract was therefore not enforceable. Xie and Li argued on appeal that they had no duty to

inquire about Bady's authority to execute the contract and cited Tex. Bus. Orgs. Code § 101.254, which provides that each governing person is an agent of the LLC with authority to bind the LLC for the purpose of apparently carrying out the ordinary course of business of the LLC unless the agent lacks authority and the person with whom the agent is dealing knows that the agent lacks authority.

The court stated that it was undisputed that Bady was a member of the LLC and one of its two decision makers. The court relied on Tex. Bus. Orgs. Code § 101.251 to conclude that Bady was a governing person although the court did not indicate whether the LLC's certificate of formation provided for the LLC to be member-managed or manager-managed. As a governing person, Bady had the power to bind the LLC absent knowledge of his lack of authority by Xie and Li. The LLC presented no evidence at trial concerning Xie and Li's knowledge. Xie and Li put on evidence that they did not know the reason the LLC backed out of the contract until after the lawsuit. Therefore, the court found the evidence legally and factually significant to support the trial court's decision.

H. Fraud or Fraudulent Inducement to Invest in LLC

Siddiqui v. Fancy Bites, LLC, 504 S.W.3d 349 (Tex. App.—Houston [14th Dist.] 2016, pet. filed).

Brothers Najeeb and Ajaz Siddiqui owned several entities that purchased property, built subdivisions, flipped properties, and built shopping centers. The Siddiquis owned Suncoast Environmental and Construction, Inc. ("Suncoast"), Fancy Bites, LLC ("Fancy Bites"), and Quick Eats, LLC ("Quick Eats"). Fancy Bites was the general partner for Blueline Real Estate, Limited Partnership ("Blueline"), and Quick Eats was the limited partner in Blueline. Ajaz was also the sole owner of Sunnyland Development, Inc., which owned the Bammel property on which the Siddiquis built a retail building.

The Siddiquis wanted to put a chicken restaurant in the empty building on the Bammel property. Najeeb spoke with two of his contacts about getting a Hartz Chicken franchise in the building. The two contacts, Farhan Qureshi and Syed Ali, decided to go into business with the Siddiquis on the project. Believing that Blueline owned the Bammel property, Qureshi and Ali each purchased a 25% membership interest in Quick Eats and Fancy Bites (the two LLCs that owned Blueline). As the members and managers of the LLCs, the Siddiquis, Qureshi, and Ali had equal voting power and ownership. The four executed a Restated Limited Partnership Agreement for Blueline and Restated Company Agreements for the two LLCs. Blueline's partnership agreement included a provision allowing Blueline to contract with partners and affiliates, and the company agreements likewise allowed the two LLCs to contract with members, managers, and their affiliates.

After the Hartz restaurant opened on the Bammel property, Qureshi contracted with Suncoast to build a retail center on property Qureshi owned. Suncoast constructed a pad site on the property. The Siddiquis, Qureshi, and Ali then decided to open a second Hartz restaurant on the pad site, so Blueline bought the pad site from Qureshi. Blueline got two loans for the second restaurant, both guaranteed by Fancy Bites and the Siddiquis, Qureshi, and Ali.

The Hartz restaurants were not profitable enough to make the franchise payments and loan payments. Qureshi and Ali made payments on Blueline's debts in an attempt to keep up with Blueline's obligations. Five years after the four men began the first Hartz restaurant project, Blueline filed for Chapter 11 bankruptcy.

The Siddiquis and Suncoast sued Qureshi and Ali for their pro-rata shares of payments the Siddiquis made to the bank for Blueline's loans. Qureshi and Ali brought counterclaims against the Siddiquis and Suncoast for fraud, breach of fiduciary duty, and unjust enrichment. The trial court found for Qureshi and Ali on their breach-of-fiduciary-duty and fraud claims and awarded them exemplary damages from Ajaz Siddiqui. On appeal, the court of appeals concluded that Qureshi and Ali did not have standing to assert claims for construction-related damages sustained by either Blueline or the LLCs because those claims belong to the legal entity, not an individual stakeholder. The court also concluded that there was no evidence of an informal fiduciary relationship between the Siddiquis and Qureshi and Ali.

With respect to the fraud claims, the court of appeals concluded that there was no evidence that the Siddiquis or Suncoast made fraudulent misrepresentations or nondisclosures to Qureshi and Ali concerning the cost of the build-out of the Bammel restaurant or the guarantees; however, the Siddiquis' representation that Blueline, Fancy Bites, or Quick Eats owned the Bammel property to induce Qureshi and Ali to invest in the Hartz Chicken franchise venture was a misrepresentation or partial disclosure of ownership that triggered the duty to disclose that the property was actually titled in the name of a separate company wholly owned by Ajaz Siddiqui. In other words, the court found that the Siddiquis fraudulently induced Qureshi and Ali to purchase their 25% membership interests

in the LLCs by making a false representation about Blueline’s asset—the Bammel property. The Siddiquis represented that Blueline, Fancy Bites, or Quick Eats owned the Bammel property at the time Qureshi and Ali purchased their membership interest. However, Ajaz’s solely owned corporation, Sunnyland Development, had title to the Bammel property. After Qureshi and Ali purchased the membership interest, Ajaz transferred the Bammel property to Blueline at no cost. Generally, there is no duty to disclose information. However, there is a duty to disclose information when a partial disclosure conveys a false impression or when a party voluntarily provides some information, giving rise to the duty to disclose the whole truth. Here, the Siddiquis stated that they owned the Bammel property, implying Blueline or one of the LLCs owned it, when Sunnyland owned it.

Qureshi and Ali argued that they would not have purchased their 25% membership interests had they known Sunnyland owned the Bammel property. The Siddiquis argued that their statement that they “owned” the Bammel property could refer to equitable ownership or legal ownership. According to the Siddiquis, the LLCs had equitable ownership of the Bammel property because Sunnydale was solely owned by Ajaz, who was an owner and manager of the LLCs, making the LLCs equitable owners of the Bammel tract. The court of appeals rejected the Siddiquis’ argument because the Siddiquis did not explain how Ajaz’s ownership and management of Fancy Bites and Quick Eats created in the LLCs an equitable or beneficial ownership interest in a different company’s property. Thus, the court held that the Siddiquis falsely represented that Blueline or one of the LLCs owned the Bammel property. The court also found that Qureshi and Ali were injured even though the property was later transferred to Blueline at no cost because Qureshi and Ali testified they would not have purchased their membership interests had they known the property was not an asset of Blueline or the LLCs.

I. Dissolution/Winding Up

Pham v. Carrier, No. 07-15-00031-CV, 2017 WL 1291660 (Tex. App.–Amarillo Apr. 3, 2017, no pet. h.) (mem. op.).

The court of appeals affirmed summary judgment against a 40% LLC member on his claims against the other two members for breach of contract, fraud, and conversion arising out of the sale of the LLC’s assets and termination of the LLC, but the court of appeals reversed the trial court’s summary judgment against the member on his derivative claims for fraud and unjust enrichment and his direct and derivative claims for revocation of termination of the LLC.

Three individuals, Pham, Carrier, and Womack, formed an LLC that owned and operated a bar in Austin. Pham owned 40% of the LLC, and Carrier and Womack together owned 60%. The bar began operating in 2002, and Pham received some cash distributions from the LLC in 2002 and 2003. He left Austin in 2004 and moved to Houston. Pham’s summary judgment evidence showed he told Carrier and Womack to retain his share of profits in the company. Pham had no communication with Carrier or Womack from the time he left Austin until he had lunch with Carrier in early 2011. In 2013, Pham sued Carrier, Womack, and other parties after he learned that Carrier and Womack caused the LLC to convey the bar in late 2005 to another entity that was formed by Carrier and Womack and did not include Pham. Pham asserted claims for fraud, breach of fiduciary duty, and other causes of action. He sought monetary and exemplary damages, a 40% interest in the existing bar and interests in “spinoff” bars, an accounting, and attorney’s fees. The defendants filed special exceptions to some of Pham’s claims and made the court aware that a certificate of termination had been filed for the LLC in 2010. The defendants also filed a motion for summary judgment, asserting no-evidence and traditional grounds, including limitations.

The trial court sustained special exceptions to, and dismissed with prejudice, Pham’s causes of action for majority oppression of a minority member, conversion of his membership interest, and breach of fiduciary duty owed to him individually. The day before a scheduled later hearing on the defendants’ motion for summary judgment, Pham filed an amended petition in which he asserted derivative claims for fraud and unjust enrichment on behalf of the terminated LLC. In this petition Pham also sought, both individually and derivatively, revocation of the LLC’s termination under Section 11.153 of the Texas Business Organizations Code. The trial court granted a take-nothing summary judgment against Pham on all his claims. On appeal, Pham argued that the defendants’ motion for summary judgment did not address all the causes of action on which summary judgment was granted. Pham also raised issues addressing the defendants’ statute-of-limitations grounds and no-evidence grounds challenging the merits of some causes of action.

The court of appeals first addressed Pham’s request for revocation of the LLC’s termination under Section 11.153 of the Texas Business Organizations Code. Section 11.153 provides that a court may revoke the termination

of an entity's existence where the termination resulted from actual or constructive fraud. The defendants argued on appeal that Pham's request for revocation of the LLC's termination was a request for a remedy, not the assertion of a cause of action. The court noted that neither the defendants' motion for summary judgment nor their reply to Pham's response made any mention of Section 11.153. The defendants' motion for summary judgment anticipated that Pham would amend his pleadings to assert derivative claims, and the motion contended that any cause of action asserted on behalf of the LLC survived for only three years after the effective date of its termination under Section 11.356 of the Texas Business Organizations Code. The motion did not address any impact that revocation of an entity's termination under Section 11.153 might have on the operation of Section 11.356. The court stated that the defendants failed to show the grounds they raised with the trial court precluded Pham's revocation-of-termination claim under Section 11.153 as a matter of law. The defendants' contention that Section 11.153 establishes only a remedy and not a cause of action was not argued to the trial court, and the court of appeals expressed no opinion on that question. According to the court of appeals, it sufficed that the defendants' reasoning was not enough to show that the trial court's grant of summary judgment on the Section 11.153 request was harmless error.

The court affirmed the trial court's summary judgment against Pham on his direct claims for breach of contact, conversion, and fraud (all of which were based on the sale of the bar and retention of his share of the profits without his knowledge), because the summary judgment record established that he could have discovered these claims in the exercise of reasonable diligence.

J. Forfeiture and Involuntary Termination

B Choice Ltd. v. Epicentre Dev. Ass'n LLC, No. H-14-2096, 2017 WL 1227313 (S.D. Tex. Mar. 3, 2017), adopted, 2017 WL 1160512 (S.D. Tex. Mar. 29, 2017).

In a case brought by an investor in a Texas LLC formed to build a residential and commercial development project on the old AstroWorld site, the magistrate judge recommended summary judgment in favor of the officers and directors of the LLC on the plaintiff's claim to hold them liable under the Texas Tax Code with respect to a partial summary judgment entered against the LLC after forfeiture of the LLC's privileges because the promissory note on which the summary judgment was based was signed before the forfeiture and thus was not a debt created or incurred during the period under which officers and directors incur personal liability under the Texas Tax Code. The district court adopted the memorandum and recommendation of the magistrate court.

B Choice Limited (incorporated under the laws of England and Wales) brought claims against multiple defendants for fraud, breach of fiduciary duty, and breach of contract arising out of an investment project structured as a Texas LLC. The plaintiff invested millions of dollars in EpiCentre Development Associates, LLC ("EDA"), which was formed to develop a residential and commercial project that would be built on the old AstroWorld site. Over the course of six years, the venture misspent \$25 million obtained through loans and investments made by the plaintiff. EDA only acquired a small portion of the property formerly known as AstroWorld, which it transferred to a newly created LLC, EpiCentre Development Associates II, LLC ("EDA II"), in which the plaintiff had no interest and about which the plaintiff knew nothing. The plaintiff sued the defendants after learning that EDA misspent all of the plaintiff's investment and still had no ownership interest in the AstroWorld property.

The court granted summary judgment on the plaintiff's claim that EDA's directors and officers were personally liable for the debt on a promissory note under the Texas Tax Code because EDA's corporate privileges had been forfeited. Under Texas Tax Code § 171.255, the officers and directors of a corporation whose corporate privileges are forfeited have personal liability for "each debt of the corporation that is created or incurred in this state after the date on which the report, tax, or penalty is due and before the corporate privileges are revived." Relying on *Hovel v. Batzri*, 490 S.W.3d 132, 136 (Tex. App.—Houston [1st Dist.] 2016, pet. filed), the court explained that the date a debt is "created or incurred" is determined under the "relation-back" doctrine, which links post-forfeiture judgments to pre-forfeiture conduct and agreements. The plaintiff argued that the debt was created or incurred when EDA agreed to the partial summary judgment on the promissory note after EDA lost its corporate privileges. However, the court concluded that the debt was not incurred at the time of the partial summary judgment but at the time EDA signed the promissory note, which was prior to EDA's forfeiture of corporate privileges.

K. Veil Piercing

B Choice Ltd. v. Epicentre Dev. Ass'n LLC, No. H-14-2096, 2017 WL 1227313 (S.D. Tex. Mar. 3, 2017), adopted, 2017 WL 1160512 (S.D. Tex. Mar. 29, 2017).

In a case brought by an investor in a Texas LLC formed to build a residential and commercial development project on the old AstroWorld site, the magistrate judge recommended denial of the defendants' motion for summary judgment on a claim for breach of contract (based on veil piercing). The district court adopted the memorandum and recommendation of the magistrate court.

B Choice Limited (incorporated under the laws of England and Wales) brought claims against multiple defendants for fraud, breach of fiduciary duty, and breach of contract arising out of an investment project structured as a Texas LLC. Defendants Botero, Delaney, and Iragorri sought investors for a residential and commercial project that would be built on the old AstroWorld site. They contacted defendant Guiduzzi, who was B Choice Limited's director and the director of defendant F&G Consultancy ("F&G"). Defendant Andrea Frattini was Guiduzzi's partner in F&G and made several representations about the project. Based on these defendants' representations, the plaintiff decided to invest \$11 million in EpiCentre Development Associates, LLC ("EDA"). EDA was a Texas LLC managed by Delaney, Botero, and Iragorri. Over the course of six years, the venture misspent \$25 million obtained through loans and investments made by the plaintiff. EDA only acquired a small portion of the property formerly known as AstroWorld, which it transferred to a newly created LLC, EpiCentre Development Associates II, LLC ("EDA II"), in which the plaintiff had no interest and about which the plaintiff knew nothing. The plaintiff sued the defendants after learning that EDA misspent all of the plaintiff's investment and still had no ownership interest in the AstroWorld property.

The plaintiff brought breach-of-contract claims against Botero, Delaney, and two entities, arguing that these defendants were liable under veil-piercing theories even though the contracts were between EDA and the plaintiff. The court identified three broad categories in which Texas law allows plaintiffs to "pierce the corporate veil"—when the corporation is used as the shareholder's alter ego, when it is used for illegal purposes, and when it is used as a sham to perpetuate a fraud. While the court recognized the sham-to-perpetuate-a-fraud theory requires different levels of fraud in tort cases (in which constructive fraud suffices) than in contractual disputes (in which actual fraud is required), the court found there was evidence of the defendants' actual fraud that would meet either standard. The summary judgment evidence showed that EDA, EDA II, and the two entity defendants shared office space, directors, and officers. Money that the plaintiff invested in EDA moved freely between these companies and was used to pay off the other entities' debts. Based on this evidence and the allegations of actual fraud, the court found there was a fact issue as to whether the corporate form should be pierced so as to impose liability for the breach-of-contract claim against these defendants.

Transfirst Grp., Inc. v. Magliarditi, Civil Action No. 3:16-CV-1918-L, 2017 WL 528776 (N.D. Tex. Feb. 9, 2017).

The court applied reverse corporate veil-piercing principles to exercise personal jurisdiction over a trust, a corporation, and two Nevada LLCs, on the basis that these entities were the alter ego of a judgment debtor who allegedly used the entities to hide assets and defraud the judgment creditor. The court stated that reverse veil piercing "is a common-law doctrine in many states, including Nevada and Texas, that renders the assets of a corporation liable for the debts of a corporate insider based on a showing of alter ego of the individual." The court cited the Nevada Supreme Court for the proposition that Nevada courts have found it "particularly appropriate to apply the alter ego doctrine in 'reverse' when the controlling party uses the controlled entity to hide assets or secretly to conduct business to avoid a pre-existing liability fo the controlling party." The court listed the factors considered under Nevada law as indicative of an alter-ego relationship and concluded that the plaintiff had sufficiently alleged a prima facie case of personal jurisdiction over the entities at issue.

Chico Auto Parts & Serv., Inc. v. Crockett, 512 S.W.3d 560 (Tex. App.—El Paso 2017, pet. denied).

The court held that summary judgment in favor of an LLC's managing member was properly granted in a case where the plaintiff attempted to hold the managing member liable in connection with a contract for remediation services performed by the plaintiff. The plaintiff sought to hold the managing member liable based on: (1) the managing member's part ownership of the well where the remediation services were performed, (2) veil

piercing of the LLC, and (3) the managing member's alleged fraudulent misrepresentations. The court held that: (1) the managing member's part ownership of the well did not make the managing member liable to the plaintiff under the Texas Natural Resources Code, (2) the plaintiff did not allege facts supporting a veil-piercing claim, and (3) the plaintiff did not allege facts supporting a fraud claim.

The plaintiff remediated a water leak at an oil well. It was undisputed that the plaintiff completed the remediation, but there was uncertainty regarding who contracted for the plaintiff's services. The plaintiff billed a corporation that was a part owner of the well, and the plaintiff sued the corporation and obtained an agreed judgment. The corporation did not pay the judgment and filed for bankruptcy. The plaintiff then filed this lawsuit against the fee simple land owner, the LLC operator of the well, and the LLC's managing member. The LLC and its managing member were also part owners of the oil well. The plaintiff asserted claims for breach of contract and quantum meruit, alleging each of the parties were jointly and severally liable for the remediation expenses. The plaintiff also alleged that the LLC and its managing member misrepresented the identity of the parties and their relation to the well. The trial court dismissed all of the plaintiff's claims, but subsequently allowed the plaintiff to pursue its quantum meruit claim against the LLC and granted the managing member's motion to sever. Thus, the only issues being heard on appeal were those relating to the managing member. The court of appeals reviewed two theories to hold the managing member personally liable: (1) as a co-owner of the well based on the Texas Natural Resources Code, and (2) in his capacity as managing member or president of the LLC.

First, the plaintiff argued that the managing member could be held personally liable for breach of contract based on his status as a part owner of the well and a provision of the Texas Natural Resources Code that imposes individual liability on "officers, owners, and operators" for environmental cleanup of wells. Even assuming the managing member was a responsible person against whom the Railroad Commission could proceed, that fact did not establish that the managing member was in privity with and liable to the plaintiff.

The court next turned to the plaintiff's arguments that the managing member was personally liable through the LLC. The court cited Texas case law in the corporate context for the proposition that a corporation is a separate legal entity that generally shields its owners, directors, and officers from liability absent use of the corporation "as part of a basically unfair device to achieve an inequitable result." The court noted that "the most frequent basis for disregarding the corporate shield at common law was the use of the 'alter ego' theory, in which a corporate obligee was required to demonstrate that the corporate officer had essentially used the corporation for its own 'personal purposes,' without any regard for corporate formalities." The court pointed out that, at the time the plaintiff performed its services in July of 2011, two statutes "severely limited the circumstances under which a member of an LLC could be held personally liable for an LLC's contractual obligations." Tex. Bus. Orgs. Code §§ 101.113, 101.114. Section 101.002, which made the actual-fraud requirement in Section 21.223 applicable to LLCs, did not become effective until September 1, 2011. The court further pointed out, however, that Texas courts did not view the statutory liability protection provided to a managing member as absolute, but uniformly applied the same common-law principles for "piercing the corporate veil" as were previously applied to corporations prior to the adoption of the actual-fraud requirement in the Business Organizations Code in determining whether an LLC's member could be held liable for the LLC's contractual obligations. When a plaintiff at common law sought to hold a corporate affiliate personally liable for a contractual obligation of a corporation under any of the veil-piercing theories, the plaintiff had the burden to plead and prove the basis on which the plaintiff sought to pierce the veil. In both his answer and his motion for summary judgment, the managing member asserted that he was shielded from liability based on his status as a managing member of an LLC, and the plaintiff failed to come forward with any pleadings, argument, or evidence to establish that the managing member could be held liable on any veil-piercing theory. The plaintiff tried to salvage its veil-piercing claim by relying on its fraud claim against the managing member, but the court rejected this argument after reviewing the record and finding the only allegations of fraud related to alleged misrepresentations after the contract was entered into regarding whom to invoice for the work. The plaintiff never alleged that the managing member committed any fraud in the formation of the contract, or that he used the LLC to fraudulently induce the plaintiff into entering into the alleged contract or otherwise used the LLC to perpetrate any fraud on the plaintiff.

Next, instead of piercing, the plaintiff relied on a fraudulent misrepresentation theory to hold the managing member liable. The court agreed with the plaintiff that a party may sue a corporation's affiliate for his torts, including fraud, without the need to pierce the corporate veil. The court concluded, however, that the plaintiff failed to allege how the alleged misrepresentations would be material. The plaintiff alleged that the managing member misrepresented ownership of the well, but the court said that the plaintiff's allegations as to the true ownership were

immaterial to the real issue of who were the parties to the contract with the plaintiff. The court further concluded that the plaintiff could not have justifiably relied on any misrepresentation because a party in an arm's length transaction is charged with knowledge of all the facts that would have been discoverable. Here, the well's true ownership, who operated the well, and who the plaintiff was contracting with were all facts that the plaintiff could have discovered before any remediation and certainly before the first suit. Without a material representation and justifiable reliance the court concluded that the trial court properly granted summary judgment on the fraud claim.

Austin Capital Collision, LLC v. Pampalone, No. 03-15-00447-CV, 2016 WL 7187478 (Tex. App.—Austin Dec. 8, 2016, no pet. h.)(mem. op.).

The plaintiff could not recover directly against the managing member of an LLC because the trial court's findings did not include the necessary elements to support a veil-piercing claim, and the plaintiff did not properly request them. Even if the findings of fact addressed some of the elements of the plaintiff's alter-ego claim, there would be no injustice because the plaintiff did not present evidence that the LLC could not pay the debt sued on.

Pampalone loaned \$80,000 to a general partnership pursuant to an unwritten loan agreement. The two partners of the partnership were corporations, one owned by Eric Hinojosa and the other owned by Pampalone's son. The partnership made regular payments on the note. After Pampalone's son left the partnership, Hinojosa formed a new LLC and began to operate under the same name as the partnership. Hinojosa owned 99% of the LLC and was the sole managing member, and Hinojosa's wife owned the other 1%. The LLC operated substantially the same business, with the same assets, in the same location. The LLC continued to make payments on the loan for more than three years before stopping payments.

Pampalone sued the LLC and Hinojosa for breach of contract on the loan agreement. The trial court held, in a bench trial, that the partial performance exception to the statute of frauds was met and that the LLC was liable on the loan but not the managing member. Both the LLC and Pampalone appealed the judgment.

The court of appeals reviewed the record and concluded that the evidence supported the trial court's findings of partial performance by the partnership and of partial performance and assumption of the debt by the LLC. The court then turned to Pampalone's appeal of the alter-ego decision by the trial court. The court of appeals cited Section 21.223 of the Texas Business Organizations Code and corporate case law in describing the elements of alter ego in a breach-of-contract case as follows: "(1) the defendant has a financial interest in, ownership of, or control of the corporation, (2) there is unity between corporation and defendant so that separateness has ceased, (3) it would be an injustice to hold only the corporation liable, (4) the defendant caused the corporation to be used for perpetrating a fraud, and (5) the defendant perpetrated an actual fraud for his direct personal benefit." The trial court's findings made no reference to unity or lack of separateness and no mention of fraud or injustice in only holding the LLC liable. Without these findings, the court could not rule in Pampalone's favor. Pampalone did not request amended or additional findings before the trial court, and the court of appeals concluded that Pampalone had waived her complaint regarding the lack of a finding in support of her alter-ego theory. The court of appeals went on to note that, even if it construed some elements in Pampalone's favor, the evidence did not support a finding that holding only the LLC liable would result in injustice. No evidence was presented that the LLC would be unable to pay the judgment. The court concluded it would not find injustice on these facts even if the other elements were contained in the record.

Rocklon, LLC v. Paris, No. 09-16-00070-CV, 2016 WL 6110911 (Tex. App.—Beaumont Oct. 20, 2016, no pet.) (mem. op.).

The court held that the trial court properly enjoined an LLC from accessing, distributing, or disbursing the proceeds of the sale of the LLC's property based on evidence that the member had used the LLC as his alter ego and had fraudulently transferred the LLC's bank account to his son.

The surviving spouse and estate of Kristin Paris (collectively, "the plaintiff") brought a wrongful death suit against Rocklon, L.L.C. ("Rocklon"), Rockal, Inc. ("Rockal"), and Rockline George Kennedy, among others, after Kristin Paris died in a car accident with Kennedy. A key point of dispute in the lawsuit was Kennedy's relationship to his co-defendant entities. The plaintiff alleged that the two entities were the alter egos of Kennedy, while Kennedy alleged that he had no ownership interest in the entities.

According to the plaintiff's pleadings, Kennedy had been drinking at the bar and strip club that was operated by Rockal on real property owned by Rocklon. Kennedy then left the club in his vehicle, crossed the

median of a highway and struck Kristin Paris's vehicle head on. Kennedy was arrested shortly after the incident and released a few days later. Upon his release Kennedy accompanied his son to Rocklon's bank and transferred full control of Rocklon's account to the son. Eight days after Kennedy filed his answer in the suit, Rocklon sold its primary asset, the real estate where the club was located, for approximately one million dollars. The trial court entered a temporary injunction preventing the proceeds of the real estate sale from being accessed by Rocklon, and Rocklon filed a notice of interlocutory appeal challenging the temporary injunction.

On appeal, Rocklon argued that there was no evidence that Rocklon was liable to the plaintiff on the underlying claims because the evidence did not establish that Rocklon was the alter ego of Kennedy and there was no evidence of a fraudulent transfer. In a fraudulent transfer action under the Texas Uniform Fraudulent Transfer Act (TUFTA), the statute provides that a creditor may obtain "an injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property." Tex. Bus. & Com. Code § 24.008(a)(3)(A). In this case, the plaintiff alleged TUFTA claims against all defendants, including Rocklon. The plaintiff alleged that Rocklon was an alter ego of Kennedy and thus a debtor under TUFTA, and that Rocklon had fraudulently transferred or was likely to fraudulently transfer its property with actual intent to hinder, delay, or defraud the plaintiff.

Turning first to Rocklon's challenge to the plaintiff's veil piercing theory, the court noted that Texas intermediate courts of appeal and other jurisdictions have applied to LLCs the same state-law principles for piercing the veil as they have applied to corporations. Rocklon did not challenge the plaintiff's contention that veil-piercing theories are applicable to LLCs, but rather argued that the plaintiff failed to present evidence to support the plaintiff's reverse-piercing theory. The court explained that a creditor who relies on reverse veil piercing seeks to apply the alter-ego doctrine in reverse, i.e., "to hold a corporation's assets accountable for the liability of individuals who treated the corporation as their alter ego." To determine whether an alter-ego relationship exists, a court looks at the total dealings of a corporation and the individual and considers the degree to which corporate and individual property have been kept separately, the amount of financial interest, ownership, and control the individual maintains over the corporation, and whether the individual used the corporation for personal purposes. Other relevant factors include whether corporate debts were paid with personal checks or other evidence of the commingling of funds. An individual's representations that he would financially back the corporation and diversion of company profits to the individual for personal use is also evidence tending to support a finding of an alter-ego relationship. Finally, the court may also consider inadequate capitalization of the corporation. "The rationale behind the alter ego theory is that if the shareholder disregarded the separateness of the corporation, then the law will also disregard it in so far as it is necessary to protect creditors." The applicable standard of review in this case was for abuse of discretion. This standard required the court of appeals to examine the evidence in the record to see if it reasonably supported the trial court's decision. The court organized its discussion of the evidence of alter ego around three issues: (1) ownership interest and control of Rocklon; (2) commingling of funds; and (3) Kennedy's representations.

With regard to the issue of ownership and control, Rocklon argued that it was merely a real estate business that leased property to Rockal, the company that owned and operated the club, and that Rocklon was owned solely by Kennedy's son and not Kennedy. The court reviewed basic statutory concepts relating to an LLC, such as the certificate of formation, company agreement, members, membership interests, and assignees. Rocklon's certificate of formation filed with the Secretary of State on February 1, 2006 indicated that it was a member-managed LLC whose registered agent and only member was Kennedy. Two nearly identical company agreements were produced by Rocklon's bank. One version, which was unexecuted, indicated that Kennedy was the sole and initial member. The other version, which was executed, indicated that Kennedy's son was the sole and initial member. Both company agreements were dated February 1, 2006. The record also contained an assignment of membership interest in Rocklon from Kennedy to Kennedy's son dated February 1, 2006, but the court of appeals concluded that the trial court could have reasonably determined that the assignment was void due to its failure to meet the requirements of the company agreements for a valid assignment.

Both of the Rocklon company agreements contained in the record defined an assignee as "a person who receives a Transfer of all or a portion of the Membership Interest of a Member, but who has not been admitted to the Company as a Member." Another provision of the company agreement stated that "[a]ny attempted Transfer by a person of an interest or right, or any part thereof, in or in respect of the Company other than as specifically provided by this Agreement shall be, and is hereby declared, null and void ab initio." The company agreements also stated that an assignee did not have any voting right or right to participate in the operations or management of the

company until admitted as a substituted member. Further, an assignee was admitted as a substituted member only when the member making the transfer granted the assignee the right to be admitted and the instrument assigning the membership interest contained an agreement by the assignee that the assignee agreed to be bound by all of the terms and provisions of the company agreement. The assignment purporting to transfer Kennedy's interest in Rocklon to his son was only signed by Kennedy and did not contain any agreement by the son as an assignee. Thus, the court concluded that the trial court could reasonably have determined the assignment failed and was void based on the provisions of Rocklon's company agreement. Further, the record contained an apparent transmittal letter from an attorney to Kennedy dated June 5, 2006, in which the attorney instructed Kennedy to execute the assignment of interest to his son and have his son execute the company agreement. When questioned in the trial, Kennedy's son stated that he was not sure when the assignment was executed and refused to confirm or deny that it was executed on February 1, 2006. Based on the conflicting documents, the court held that the trial court could properly have found that neither the assignment nor the executed version of the company agreement were reliable to show the true membership or ownership of Rocklon.

The court continued its review of the documents in the record by looking at franchise tax and bank records, finding that they too were inconclusive as to ownership of Rocklon. In the franchise tax reports for 2010, 2012, and 2013, Kennedy was identified as the only officer, director, or member of Rocklon. Although the Tax Code does not require all members to be listed, the court found that the documents, interpreted reasonably, could lead to the conclusion that Kennedy was at least the managing member of Rocklon. The court of appeals described the testimony of Kennedy's son as conflicting with the documents relating to Rocklon's formation in that Kennedy's son testified that he was the owner from the very beginning and that his father's only role was in guaranteeing the real estate loan to Rocklon to purchase its property. On appeal, Rocklon acknowledged that Kennedy was identified as the initial member in the certificate of formation, but argued that Kennedy's son executed the company agreement as its sole member and accepted an assignment of his father's membership interest. Given the conflicting evidence, the court of appeals said that the trial court could have discredited the son's testimony.

Bank records also supported the contention that Kennedy was the sole member of Rocklon and had sole control of its bank account. Kennedy's signature was the only signature on the signature card, he was identified as president of Rocklon, and his personal address was listed as the address of the company. Also, in June of 2006, after the purported transfer to his son, Kennedy applied for a real estate loan on behalf of Rocklon, and the loan worksheet identified Kennedy as a member of Rocklon. Kennedy pledged his personal life insurance policy to secure the loan. Despite these records, the bank records relating to this loan also contained a resolution signed by Kennedy's son in which he represented that he was the sole member of Rocklon. Kennedy's son testified that his father was only the "land manager" of Rocklon.

Before reaching its ultimate conclusion on the issue of ownership and control, the court also mentioned Rocklon's income tax return forms for two years (which were signed by Kennedy's son as the sole "stockholder"), statements of emergency personnel at the scene of the car accident (reporting that Kennedy represented that he owned the bar and strip club), and statements of employees of the club (who were uncertain about the ownership of the club but described involvement by Kennedy in its operations). After noting that alternative conclusions could be drawn from the evidence, the court ultimately concluded that the record contained some evidence to show that Kennedy had full, seemingly unchecked control over every aspect of Rocklon's business until shortly after his release from jail.

The court next discussed evidence of commingling of funds of Kennedy, Rockal, and Rocklon. Under its lease of the premises from Rocklon, Rockal was to pay monthly rent to Rocklon as well as real estate taxes. However, evidence showed that Kennedy used Rocklon's assets to pay the real estate taxes and that Rocklon received substantially less than it was entitled to receive in rent payments. Additionally, there was evidence that Kennedy wrote checks from Rocklon's account for his personal benefit. This commingling led the court to conclude that "[g]iven all the evidence, the trial court could have found that Kennedy was at the heart of both of these entities and that he commingled funds from Rocklon, Rockal, and his personal account in disregard of the corporate fictions."

Finally, the court of appeals noted that Kennedy personally represented to the bank that he was a member of Rocklon, and he guaranteed its loan. He took out a life insurance policy to support his representations to the bank. The court stated that the trial court could have reasonably considered this as some evidence of Kennedy's use of the corporate fiction as his alter ego.

Based on all of the evidence before the trial court concerning Kennedy's total dealings with Rocklon, and viewing the evidence in a light most favorable to the trial court's finding, the court of appeals concluded that the evidence reasonably supported a probable right of recovery at trial based on an alter-ego relationship between Kennedy and Rocklon.

The court then turned its attention to whether Kennedy's transfer of Rocklon's bank account to his son was a fraudulent transfer. Based on the evidence that Rocklon was the alter ego of Kennedy, the court stated that it could consider a transfer by Rocklon as a transfer by Kennedy. After Kennedy was released from jail he passed control of Rocklon's account to his son. Further, Kennedy and his son executed corporate resolutions authorizing the son to communicate with the bank regarding payoff of the loan on the property and to pay off the promissory note to the bank, thus allowing the son to sell the real estate owned by Rocklon. This resolution also gave the son authority to transfer any proceeds from Rocklon's bank account. The court found this evidence was sufficient to be a transfer of an asset under TUFTA.

The court then examined whether "badges of fraud" were present in the transfer. The facts the court found persuasive were that the transfer was to Kennedy's son, an insider, that the real estate was substantially all of the assets of Rocklon, that there was some evidence that Kennedy tried to conceal the transfer by going to an out-of-town branch of the bank, that Kennedy received no value in return for the transfer, and finally that the transfer was only made after Kennedy had been charged with intoxication manslaughter and could have known that the civil lawsuit was likely imminent.

The last TUFTA requirement of imminent and irreparable harm was satisfied by evidence that following the sale of the real estate, Kennedy's son had begun writing checks to himself out of the Rocklon account. The court agreed with the plaintiff that should the temporary injunction not be in place, the proceeds of the sale of Rocklon's asset could be gone before completion of a trial. The court thus held that the temporary injunction was properly granted and affirmed the order of the trial court.

TMX Fin. Holdings, Inc. v. Wellshire Fin. Servs., LLC, 2016 WL 5920776, __ S.W.3d __ (Tex. App.—Houston [1st Dist.] 2016, pet. filed).

The court of appeals held that the plaintiff failed to establish that a Delaware corporation was subject to personal jurisdiction in Texas based on an alter-ego relationship with a Delaware LLC subsidiary because the plaintiff did not establish that the parent exercised actual control of the subsidiary to a degree that was abnormal or atypical. The Texas Supreme Court has identified four factors that are relevant to whether a parent exercises a greater-than-normal degree of control for purposes of determining whether the two entities are "fused" for personal-jurisdiction purposes: (1) the amount of the subsidiary's stock owned by the parent; (2) the existence of separate headquarters; (3) the observance of corporate formalities; and (4) the degree of the parent's control over the general policy and administration of the subsidiary. Common ownership and shared headquarters are not enough without the exercise of actual control, and the control must rise to the level of abnormal or atypical. Although a 10-K filing stated that the founder and CEO of the parent holding company gave him the ability to control all matters of significance to the LLC, this statement did not identify the parent company as the party with control. Furthermore, the court distinguished between the ability to control, as referenced in the 10-K, from actual abnormal or atypical control. The evidence of reporting and monitoring and a capital infusion cited by the plaintiff were insufficient to show abnormal control. Further, relying on provisions in Chapter 21 of the Texas Business Organizations Code and Texas case law, the court declined to conclude that the failure to follow formalities, in particular for this family-held group of entities, was sufficient in itself to demonstrate that the two entities were one.

E & S Land Dev., L.P. v. Shuomali (In re Shuomali), No. 14-60808, 2016 WL 4991490 (Bankr. E.D. Tex. Sep. 16, 2016).

The court rejected a creditor's attempt to reverse pierce the veil of a debtor's business entities in order to prove an exception to discharge.

Yaser Shuomali managed a variety of businesses in Texas beginning in 2010. His business engagements in Texas included a convenience store ("Quick Fill"). In 2011, E & S Land Development, L.P. ("E&S"), contacted Shuomali to operate Quick Fill as a lessee on land owned by E&S. Shuomali was personally obligated on the lease with E&S, but he formed an LLC to manage the new convenience store on the E&S property. Over the next few years Shuomali attempted, unsuccessfully, to manage multiple businesses in the area. Ultimately, he reduced his portfolio of business holdings and focused solely on the Quick Fill store, but the Quick Fill store was also

unsuccessful. He abandoned the property in December 2013. E&S filed a lawsuit for breach of contract against Shuomali in April of 2014. Before the answer date, Shuomali filed for bankruptcy under Chapter 7 of the Bankruptcy Code. In August of 2014, E&S filed this adversary complaint in the bankruptcy court asserting that Shuomali's debt to E & S was nondischargeable under several grounds, including § 727(a)(2)(A) of the Bankruptcy Code. Ultimately, the court concluded that E&S failed to establish any of its asserted grounds for an exception to discharge.

Section 727(a)(2)(A) provides an exception to discharge if there was: (1) a transfer or concealment of property; (2) belonging to the debtor; (3) within one year of the filing of the petition; (4) performed with an intent to hinder, delay, or defraud a creditor or an officer of the estate. Specifically at issue in this case was the requirement that the property belong to the debtor because E&S based its objection to discharge on transfers of property belonging to Shuomali's corporation and solely-managed LLCs. When a corporation is a bona fide entity distinct from an individual debtor-shareholder, transfers of property belonging to the corporation are outside the scope of Section 727(a)(2)(A). Thus, E&S sought to show that the property of Shuomali's entities was his personally. The court found this effort to reverse pierce the veils of these entities problematic.

The court recited several non-bankruptcy law principles relevant to its determination that E & S failed to establish its claim for an exception to discharge. First, the court noted the fundamental principle of corporate law that a corporation and its stockholders are separate entities and that the title to corporate property is vested in the corporation rather than the shareholders. Next, the court acknowledged that Texas permits the formation of a limited liability company as an alternative to a corporation, and the court characterized an LLC as working "somewhat like an incorporated partnership." The court explained that an LLC protects owners from personal liability for business debts as does a corporation but avoids a second level of federal taxation. The court stated that this protection from liability is not lost merely because a single-member LLC may elect through the IRS's check-the-box regulations to be disregarded as a separate entity for the purposes of federal income taxation. The court then turned to "reverse veil piercing" and explained that this doctrine is a common-law doctrine under which the assets of a corporation or other entity are deemed to be the assets of its shareholder. The court stated that this doctrine "appl[ies] the traditional veil piercing doctrine in reverse, so that a corporation's assets are held accountable for the liabilities of individuals who treated the corporation as their alter ego." The court characterized the application of veil-piercing principles, particularly reverse veil-piercing, as "rather problematic when dealing with an individual's role with a limited liability company, particularly with a single-member LLC" for the reason that "many smaller LLC's are managed by few members, perhaps a single member, who are actively involved in all phases of the LLC's business." The court said that the disregard of corporate formalities—a key factor in veil-piercing determinations—is simply inapplicable in these situations because the liability protection should not hinge on "meaningless formalities such as formal meetings." In this regard, the court explained that the Texas legislature has adopted the same principles for veil-piercing in an LLC context as have been previously adopted in the corporate context, including that the corporate veil may not be pierced in Texas based on failure to follow corporate formalities. The court concluded its discussion of Texas veil piercing by noting that the Texas business organization statutes generally allow veil piercing only on proof of actual fraud for the direct personal benefit of a shareholder based upon a showing of dishonesty of purpose or an intent to deceive. Ultimately, the court concluded that E&S failed to prove that Shuomali transferred, removed, or concealed any individually owned property within a year of his bankruptcy filing with an actual intent to hinder, delay, or defraud creditors, and the court thus denied E&S's requested relief of a denial of discharge under § 727(a)(2)(A).

B Choice Ltd v. Epicentre Dev. Ass'n LLC, No. H-14-2096, 2016 WL 3911123 (S.D. Tex. May 12, 2016), adopted, 2016 WL 3763268 (S.D. Tex. July 14, 2016).

A magistrate judge concluded that the plaintiff had properly pleaded a sham-to-perpetrate-a-fraud theory of corporate veil piercing and recommended denial of the defendants' motion to dismiss claims for breach of contract brought by an investor in a Texas LLC formed to build a residential and commercial development project on the old AstroWorld site. The district court adopted the memorandum and recommendation of the magistrate court and declined to dismiss the claims.

B Choice Limited (incorporated under the laws of England and Wales) brought claims against multiple defendants for fraud, breach of fiduciary duty, and breach of contract arising out of an investment project structured as a Texas LLC. Defendants Delaney, Botero, and Iragorri contacted defendant Guiduzzi, who was B Choice Limited's director, about a proposed residential and commercial project that would be built on the old AstroWorld

site. The plaintiff decided to invest \$11 million in EpiCentre Development Associates, LLC (“EDA”). EDA was a Texas LLC managed by Delaney, Botero, and Iragorri. Over the course of six years, the venture misspent \$25 million obtained through loans and investments made by the plaintiff. EDA only acquired a small portion of the property formerly known as AstroWorld, which it transferred to a newly created LLC, EpiCentre Development Associates II, LLC (“EDA II”), in which the plaintiff had no interest and about which the plaintiff knew nothing. The plaintiff sued the defendants after learning that EDA misspent all of the plaintiff’s investment and still had no ownership interest in the AstroWorld property.

Defendants Delaney and Botero argued that the court should dismiss the breach-of-contract claim against them because the contract was between the plaintiff and EDA. The plaintiff argued that it had properly alleged a claim to pierce the corporate veil. The court noted that corporate veil piercing is not an independent cause of action, but rather a method to impose liability on shareholders and corporate officers. The court recognized that the corporate veil may be pierced when the corporate form has been used as a “sham to perpetuate a fraud,” and the court cited Tex. Bus. Orgs. Code § 21.223(b) for the proposition that a plaintiff must allege sufficient facts that the defendant has committed fraud against the plaintiff. Here the plaintiff alleged that the defendants misled the plaintiff regarding the structure of EDA and that EDA II was formed without its knowledge and without a legitimate purpose in order to hide information from the plaintiff. The court concluded that the plaintiff had properly pleaded a sham-to-perpetrate-a-fraud theory of corporate veil piercing, and the court recommended that the motion to dismiss the breach-of-contract claims against Delaney and Botero be denied.

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

Pajoooh v. Royal W. Inv. LLC, Series E, 2017 WL 1173892, ___ S.W.3d___ (Tex. App.–Houston [1st Dist.] 2017, no pet. h.).

The court of appeals analyzed the exclusivity provisions of Sections 101.112 and 153.256 of the Texas Business Organizations Code and concluded that the trial court erred in permitting a receiver to assume control of assets of a limited partnership, but the court upheld the trial court’s turnover and receivership order against the LLC general partner pursuant to Section 31.002 of the Texas Civil Practice and Remedies Code, as well as its order of receivership over the LLC and the individual who owned 99% of the LLC and the limited partnership under Section 64.001, concluding that these orders were appropriate measures to effectuate the charging orders issued with respect to the ownership interests in those entities.

A judgment creditor sought to enforce a judgment against two judgment debtors, Pajoooh and U.S. Capital Investments, LLC (“US Capital”). Pajoooh was the 99% limited partner of County Investment, LP (“County Investment”), and Pajoooh also owned 99% of U.S. Capital, the 1% general partner of County Investment. County Investment held assets valued at approximately \$4 million, including commercial real estate, the Lexus SUV driven by Pajoooh, antique cars, antique rugs, oil paintings and other investments. The judgment creditor obtained a charging order against Pajoooh’s membership interest in U.S. Capital and a charging order against the partnership interests of Pajoooh and U.S. Capital in County Investment. The trial court also entered a turnover order and appointed a receiver under Sections 31.002 and 64.001 of the Texas Civil Practice and Remedies Code. Although the trial court originally entered a receivership order that expressly excepted the partnership and membership interests of the judgment debtors from the receiver’s powers over the judgment debtors’ assets, the trial court entered an amended order that appointed a receiver over all nonexempt assets of Pajoooh and U.S. Capital, “including (but not limited to) their interest in County Investment L.P.” A portion of the receivership order authorized the receiver to take control of assets of County Investment. On appeal, Pajoooh and U.S. Capital argued that the trial court erred in appointing a receiver.

The court of appeals analyzed the exclusivity provisions of BOC Sections 101.112 and 153.256 and concluded that the trial court erred in permitting the receiver to assume control of assets of County Investment. Sections 101.112 and 153.256 provide that a charging order is the exclusive remedy by which a creditor of a partner, member, or other owner of an interest in a partnership or LLC may satisfy a judgment out of the judgment debtor’s interest in the partnership or LLC. In the course of its discussion, the court distinguished and refused to follow opinions in other jurisdictions in which courts did not confine relief to a charging order in the context of single-member LLCs. The court also rejected the argument that the plain text of the statute vitiated fraudulent transfer laws, stating that “to the extent that a debtor is shown to have fraudulently transferred an asset to a partnership in which the debtor has a partnership interest, the creditor’s remedies are not limited to the debtor’s

partnership interest. Instead, the creditor is authorized to obtain an avoidance of the fraudulent transfer to the extent necessary to satisfy the creditor's claim, as well as other remedies under the Uniform Fraudulent Transfer Act." The court commented that there was no apparent conflict in this case between fraudulent transfer laws and the exclusivity provision since the judgment creditor did not allege any fraudulent transfer. Based on the plain statutory text of the exclusivity provision, the court of appeals held that the trial court erred by imposing a receivership and turnover order as to County Investment and as to Pajoooh's U.S. Capital membership interest.

The court of appeals upheld the trial court's turnover and receivership order against U.S. Capital pursuant to Section 31.002 of the Texas Civil Practice and Remedies Code, as well as its order of receivership over U.S. Capital and Pajoooh under Section 64.001, concluding that these orders were appropriate measures to effectuate the charging orders. While acknowledging that the charging order is the exclusive remedy by which a judgment creditor of a partner may satisfy a judgment from the judgment debtor's partnership interest, the court stated that a judgment creditor is not deprived of procedures to put the charging order into effect. A turnover order and receivership may be used to reach both present and future rights to nonexempt property that cannot be readily attached or levied on by ordinary legal process, and the court thus concluded that a Chapter 31 turnover and receivership order may be used to monitor distributions and effectuate a charging order. Here the court viewed the turnover and receivership order against U. S. Capital as an appropriate measure to monitor distributions from County Investment and effectuate the existing charging order in favor of the judgment creditor. Likewise, the court of appeals concluded that receivership over U.S. Capital and Pajoooh under Section 64.001(a)(6), pursuant to which a court may appoint a receiver in any case in which a receiver may be appointed under the rules of equity, was appropriate based on a threat of serious injury to the judgment creditor. The parties disputed whether money Pajoooh had been receiving from County Investment was salary or a distribution subject to the charging order, and the court stated that Pajoooh's de facto domination of County Investment could obstruct the enforcement of the charging orders. The court noted that the judgment creditor may never collect on the judgment because it could not compel a distribution by County Investment, but the court of appeals recognized that the trial court could have found a threat that County Investment's assets could dissipate into the hands of the judgment debtors without the judgment creditor's knowledge or a meaningful opportunity to seek to have distributions remitted to the judgment creditor.

Gillet v. ZUPT, LLC, 2017 WL 716633, __ S.W.3d __ (Tex. App.–Houston [14th Dist.] 2017, no pet. h.).

In a case of first impression in Texas, the court of appeals held that a charging order was not the exclusive remedy of an LLC judgment creditor where the LLC judgment creditor sought to reach the membership interest of one of its own members to enforce a judgment obtained by the LLC against its member. Under the circumstances in this case, the court held that the trial court did not err in granting a turnover order in favor of the LLC against the member's membership interest.

A 45% member sued an LLC to enforce a buy-out of the member's interest under a buy-sell agreement, and the LLC counterclaimed for misappropriation of trade secrets of the LLC. An arbitrator awarded each party damages and declined to offset the damages. The arbitrator determined that the LLC owed the member \$499,050 for the value of his 45% interest plus attorney's fees. The arbitration award stated that the member's ownership interest would cease upon receipt of payment and the member was ordered to surrender all indicia of ownership on receipt of payment. The arbitrator also determined that the member breached his fiduciary duty to the LLC and that the LLC was entitled to damages in the amount of \$1,870,164 plus attorney's fees. The trial court confirmed the arbitration award and granted the LLC a turnover order and appointment of a receiver to collect non-exempt property to apply to the judgments. The member appealed, arguing that the trial court erred in granting a turnover order because a charging order was the exclusive remedy available against his membership interest. The court of appeals noted that the question of whether a charging order is the exclusive remedy when the judgment creditor is the LLC in which the judgment debtor owns a membership interest was an apparent case of first impression. The court held that requiring turnover of a membership interest in these circumstances was proper for two reasons. First, the reasoning behind the exclusivity of the charging order (to prevent the creditor of an owner from disrupting the business by a forced sale of the owner's interest and causing injustice to the other owners) is inapposite when the judgment creditor seeking the membership interest is the same entity from which the membership derives. Second, unlike a case in which a judgment creditor is seeking to collect on a money judgment by forcing a sale of a membership interest, this case involved an explicit award of the interest from one party to the other as part of the judgment.

Goodman v. Compass Bank, No. 05-15-00812-CV, 2016 WL 4142243 (Tex. App.—Dallas Aug. 3, 2016, no pet.)(mem. op.).

The court concluded that a judgment creditor is not precluded from obtaining a turnover order requiring proceeds of a distribution from a partnership or LLC to be turned over after the judgment debtor has received the proceeds, and an LLC or partnership need not be named as a party in an action by a judgment creditor of a partner or member to have a charging order issued against interests in the LLC or partnership.

Compass Bank sued Goodman, a guarantor of a promissory note, to collect on a deficiency owed after foreclosure on real property securing the indebtedness. The court granted a turnover order, injunctive relief, and charging orders to enforce the judgment against Goodman. An amended turnover order was subsequently entered providing for turnover of nonexempt property including proceeds from all limited partnerships and LLCs in which Goodman was a member. Goodman appealed, asserting numerous points of error.

Goodman argued that the charging order was the exclusive remedy with respect to his interests in limited partnerships and LLCs and that the court's order of the turnover of future proceeds from all limited partnerships and LLCs was thus improper. The court discussed the background of the charging order under Texas law and reviewed the language of the Texas Business Organizations Code. The court concluded that the plain language of Sections 101.112 and 153.256 does not preclude a judgment creditor from seeking the turnover of proceeds from an LLC or limited partnership distribution after the distribution has been made and the proceeds are in the judgment debtor's possession. This holding is consistent with other Texas case law permitting a judgment creditor to collect the proceeds of a partnership or LLC distribution after the debtor has received those proceeds.

Goodman next argued that a trial court may not enter a charging order against a partnership or LLC that is not a party to the suit. Goodman reasoned that the judgment affected the entity, much like a writ of garnishment, and that the entity must therefore be a party to the suit. The court relied on the Texas Business Organizations Code for its response to Goodman's argument. Specifically, the court found that the charging order provisions only require an application by a judgment creditor of a partner or an LLC member. Further, because the charging order does not affect the entity until the distribution is authorized to be made, the charged entity has no obligation under the charging order. Based on this reasoning, the court declined to read into the statutory provisions a limitation not expressly imposed by the legislature.

M. Attorney's Fees

CBIF Ltd. P'ship v. TGI Friday's Inc., No. 05-15-00157-CV, 2017 WL 1455407 (Tex. App.—Dallas Apr. 21, 2017, no pet. h.) (mem. op.).

The court of appeals overturned the attorney's fees awarded to the plaintiff on its breach-of-contract claim because Tex. Civ. Prac. & Rem. Code § 38.001 only covers "claims brought by a 'person' against 'an individual or corporation.'" The court applied the plain language of the statute and concluded that a party cannot recover attorney's fees under the statute from a limited liability company or a limited partnership. The defendants were neither individuals nor corporations—one was a limited partnership and the other an LLC—and the lower court thus erred in awarding the plaintiff attorney's fees on its breach-of-contract claim.

Siwell, Inc. v. Leverage Fin., LLC, No. 5:12-CV-185-D, 2017 WL 1397818 (N.D. Tex. Apr. 18, 2016).

The court denied a motion for an award of attorney's fees against an LLC under Tex. Civ. Prac. & Rem. Code § 38.001 on the basis that the statute only allows recovery of attorney's fees against an individual or a corporation.

The plaintiff prevailed on a breach-of-contract claim against the defendant and moved for attorney's fees. Section 38.001 of the Texas Civil Practice and Remedies Code allows recovery of attorney's fees from "an individual or corporation" in a breach-of-contract action. Therefore, the question was whether the plaintiff could recover attorney's fees from the defendant, a limited liability company. Because the Texas Supreme Court has not yet resolved whether attorney's fees may be recovered from an LLC under Section 38.001, the court had to predict how the Texas Supreme Court would answer the question if presented with the same case. Relying on its own opinion in *Hoffman v. L & M Arts*, 2015 WL 1000838 (N.D. Tex. Mar. 6, 2015) (Fitzwater, J.), aff'd in part, rev'd in part on other grounds, 838 F.3d 568 (5th Cir. 2016) and opinions of Texas courts of appeals holding that a court may

not award attorney's fees against an LLC under Section 38.001, the court held that Section 38.001 barred recovery of attorney's fees from the defendant LLC.

J.D. Fields & Co. v. N. Am. Fabricators, LLC, No. H-15-317, 2017 WL 7912455 (S.D. Tex. Nov. 7, 2016).

In this breach-of-contract case, the court held that no valid contract existed but the seller was entitled to recover in quantum meruit because the seller incurred reasonable expenses in complying with the buyer's last minute demands to change the shipping destination, saving the buyer millions of dollars in taxes. Section 38.001 of the Texas Civil Practice and Remedies Code allows a party to recover reasonable attorney's fees in quantum meruit claims that are "based on the rendering of services, performing labor, or furnishing materials," but the statute only allows a party to recover attorney's fees from "an individual or corporation." The court held the seller was not entitled to recover attorney's fees because the two defendant buyers were both LLCs. The court explained that Texas courts "have narrowly construed this provision to limit recovery of attorney's fees to individuals and corporations but not other legal entities, such as limited liability companies." Because both defendants in this case were LLCs, the seller was not entitled to recover attorney's fees.

Solid Sys. CAD Servs. v. Total Risc Tech., Ltd, No. 4:12-CV-03176, 2016 WL 5942935 (S.D. Tex. Oct. 13, 2016).

Consistent with other Texas case law, the court concluded that an LLC is not an individual or a corporation under Section 38.001 of the Texas Civil Practice and Remedies Code, and attorney's fees are thus not recoverable against an LLC under the statute. However, an LLC that identifies itself as a corporation in court filings can be liable for attorney's fees based either on a judicial admission or the "law of the case."

The defendant argued that attorney's fees were not recoverable against it on a breach-of-contract claim because the defendant was an LLC. The court analyzed 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" on a breach-of-contract claim. The court followed decisions by federal district courts in the Northern District of Texas and Texas courts of appeals in concluding that an LLC is not an individual or a corporation within the meaning of the statute. Thus, if the defendant was indeed an LLC, a prevailing party would not be able to recover attorney's fees against it based on Section 38.001(8).

In this case, however, the defendant identified itself as a corporation in filings with the court, and the court had identified the defendant as a corporation in a previously filed Memorandum and Order. Under these circumstances, the court concluded that it was permitted to treat the defendant as a corporation either by judicial admission or under the "law of the case" doctrine.

N. Standing or Capacity to Sue

Goradia Family Interests, Ltd. v. Sunoco, Inc., Civil Action No. H-16-0736, 2016 WL 4154462 (S.D. Tex. Aug. 4, 2016).

The court discussed the distinction between direct and derivative claims and concluded that the plaintiffs' claims to recover millions of dollars that they invested in an LLC based on misrepresentations made by individual defendants before the formation of the LLC provided a reasonable basis for the court to predict that the plaintiffs might be able to recover against the individual defendants and might be able to overcome the defendants' assertion of lack of standing because the plaintiffs alleged direct rather than derivative claims.

Combest v. Mustang Minerals, LLC, 502 S.W.3d 173 (Tex. App.-San Antonio 2016, pet. filed).

The defendant, a foreign LLC that was not registered to transact business in Texas under Tex. Bus. Orgs. Code § 9.001, was not precluded under Section 9.051(b) from obtaining a take-nothing judgment in a trespass to try title suit because Section 9.051(c)(2) provides that failure of a foreign entity to register does not prevent the entity from defending an action in a Texas court. The plaintiff argued that a take-nothing judgment in a trespass-to-try-title suit is affirmative relief as if the defendant had asserted a counterclaim because the effect of a take-nothing judgment is to vest title in the defendant. The court rejected that argument and held that the defendant was merely defending itself by filing a motion for summary judgment and obtaining a take-nothing judgment.

Siddiqui v. Fancy Bites, LLC, 504 S.W.3d 349 (Tex. App.—Houston [14th Dist.] 2016, pet. filed).

The court concluded that individual owners of LLC partners in a limited partnership lacked standing to bring claims that belonged to the entities.

Brothers Najeeb and Ajaz Siddiqui owned several entities that purchased property, built subdivisions, flipped properties, and built shopping centers. The Siddiquis owned Suncoast Environmental and Construction, Inc. (“Suncoast”), Fancy Bites, LLC (“Fancy Bites”), and Quick Eats, LLC (“Quick Eats”). Fancy Bites was the general partner for Blueline Real Estate, Limited Partnership (“Blueline”), and Quick Eats was the limited partner in Blueline. Ajaz was also the sole owner of Sunnyland Development, Inc., which owned the Bammel property on which the Siddiquis built a retail building.

The Siddiquis wanted to put a chicken restaurant in the empty building on the Bammel property. Najeeb spoke with two of his contacts about getting a Hartz Chicken franchise in the building. The two contacts, Farhan Qureshi and Syed Ali, decided to go into business with the Siddiquis on the project. Believing that Blueline owned the Bammel property, Qureshi and Ali each purchased a 25% membership interest in Quick Eats and Fancy Bites (the two LLCs that owned Blueline). As the members and managers of the LLCs, the Siddiquis, Qureshi, and Ali had equal voting power and ownership. The four executed a Restated Limited Partnership Agreement for Blueline and Restated Company Agreements for the two LLCs. Blueline’s partnership agreement included a provision allowing Blueline to contract with partners and affiliates, and the company agreements likewise allowed the two LLCs to contract with members, managers, and their affiliates.

After the Hartz restaurant opened on the Bammel property, Qureshi contracted with Suncoast to build a retail center on property Qureshi owned. Suncoast constructed a pad site on the property. The Siddiquis, Qureshi, and Ali then decided to open a second Hartz restaurant on the pad site, so Blueline bought the pad site from Qureshi. Blueline got two loans for the second restaurant, both guaranteed by Fancy Bites and the Siddiquis, Qureshi, and Ali.

The Hartz restaurants were not profitable enough to make the franchise payments and loan payments. Qureshi and Ali made payments on Blueline’s debts in an attempt to keep up with Blueline’s obligations. Five years after the four men began the first Hartz restaurant project, Blueline filed for Chapter 11 bankruptcy.

The Siddiquis and Suncoast sued Qureshi and Ali for their pro-rata shares of payments the Siddiquis made to the bank for Blueline’s loans. Qureshi and Ali brought counterclaims against the Siddiquis and Suncoast for fraud, breach of fiduciary duty, and unjust enrichment. The trial court found for Qureshi and Ali on their breach-of-fiduciary-duty and fraud claims and awarded them exemplary damages from Ajaz Siddiqui. Among the issues addressed on appeal were arguments by the Siddiquis that Qureshi and Ali lacked standing to assert claims that belonged to Blueline and that there was no evidence of a fiduciary relationship between the Siddiquis and Qureshi and Ali.

In their first issue on fiduciary duty, the appellants contended in a sub-issue that Qureshi and Ali lacked standing to assert construction-related claims belonging to Blueline. The appellate court determined Qureshi and Ali did not have standing to assert claims for construction-related damages sustained by either Blueline or the LLCs because those claims belong to the legal entity, not an individual stakeholder. The court stated that “[i]t is well-settled that an individual stakeholder in a legal entity does not have a right to recover personally for harms done to the legal entity.” Thus, a limited partner does not have standing to sue for injuries to the partnership that decrease the value of the partnership interests or partnership income, and a member of an LLC lacks standing to assert claims individually when the cause of action belongs to the company. The construction-related claims included alleged self-dealing and fraud based on Suncoast (owned by the Siddiquis) charging Blueline more than the actual cost of building each restaurant. Blueline contracted with Suncoast to build the restaurants, as was allowed under the limited partnership agreement, and Blueline owned both properties on which the restaurants were built. The appellate court found that all claims relating to Suncoast’s construction of the two restaurants belonged to Blueline, not Qureshi and Ali individually. While Qureshi and Ali were stakeholders in Blueline through their membership interests in the two LLCs that held partnership interests in Blueline, Qureshi and Ali did not sustain injuries separate from those Blueline sustained. Thus, the court concluded that all construction-related claims belonged to Blueline and agreed with the Siddiquis that Qureshi and Ali lacked standing to bring those claims.

Kalakonda v. Aspri Invs., LLC, No. 04-16-00109-CV, 2016 WL 3796998 (Tex. App.–San Antonio July 13, 2016, no pet.) (mem. op.).

The individual guarantors of a lease did not have standing to compel arbitration of the LLC lessee’s claim regarding the termination of the lease, and they could not appear pro se for the LLC. A member of an LLC does not have standing to assert claims individually where the cause of action belongs to the LLC, and Texas courts have consistently held that a nonattorney may not appear pro se on behalf of a corporation. The court dismissed the appeal but gave the LLC a reasonable time to obtain counsel and amend the motion to compel arbitration.

DiSalvatore v. Foretravel, Inc., No. 9:14-CV-150, 2016 WL 3951426 (E.D. Tex. June 30, 2016).

The sole member of an LLC that purchased an RV sued the seller of the RV for negligence, DTPA claims, breach of contract, manufacturing defect, design defect, and failure to warn after the plaintiff became ill from mold in the RV that resulted from leaking. The court held that the plaintiff had standing to assert the claims.

The plaintiff, a Florida resident, purchased the RV from a business in Texas. To save sales tax, the plaintiff created a Montana LLC, of which he was the sole member, to purchase the RV. The RV was designed and manufactured in Texas, but DiSalvatore accepted delivery of it in Florida. The RV’s leak and resulting mold occurred in Florida. While it was unclear where the sale took place, the sales and warranty paperwork for the RV were prepared in Texas.

The court first engaged in a conflict-of-laws analysis. The court determined that Texas, as the forum state, required that the law of the state with the “most significant relationship” would apply to the dispute. After considering all the evidence, the court concluded that Texas was the jurisdiction with the most significant relationship because the parties’ relationship and the injury centered around the RV, which was designed, manufactured, and sold in Texas.

Next, the court addressed the breach-of-contract claim. The defendant argued that the plaintiff’s breach-of-contract claim failed because the contract to purchase the RV was between the defendant and the plaintiff’s LLC. Under Texas law, the plaintiff would only have standing to sue based on the contract if he was a third-party beneficiary, meaning the contract was clearly intended to benefit the plaintiff. The plaintiff was the sole member of the LLC and created the LLC for sales tax purposes, a common practice among sophisticated consumers. While the named party to the sales contract was the LLC, the defendant dealt with the plaintiff, the plaintiff signed the purchase order, the only name on the defendant’s warranty was the plaintiff’s, and the plaintiff was the listed customer on later service orders. Based on this evidence, the court determined that the LLC and the defendant intended the plaintiff to use the RV himself for recreational purposes. Thus, the court determined the plaintiff was a third-party beneficiary to the contract and had standing to bring the breach-of-contract claim.

O. Direct and Derivative Claims

Angel v. Tauch (In re Chiron Equities, LLC), 552 B.R. 674 (Bankr. S.D. Tex. 2016).

After an LLC’s bankruptcy trustee sold claims belonging to the LLC to a creditor of the LLC, a dispute arose over who owned the right to sue the LLC’s original manager for claims of breach of fiduciary duty, fraud, and breach of contract. The court held that the claims at issue were derivative, and the court enjoined litigation in state court in which the majority member was asserting the claims.

The debtor LLC was owned by two members, minority member Jay Krasoff (also the original manager of the LLC) and majority member K Realty Development, LLC (“KRD”), which was solely owned by another individual. Following the LLC’s bankruptcy, the bankruptcy court approved an order under which a creditor of the LLC (a trust of which Krasoff’s wife was trustee) bought the debtor LLC’s claims, which included “any and all causes of action against pre-petition officers, directors, and or managers of” the LLC. KRD sued Krasoff in state court for fraud and for breaching fiduciary and contractual duties Krasoff owed to the LLC and to KRD. The purchaser of the LLC’s claims (the plaintiff in this action) asked the bankruptcy court to grant a temporary injunction in KRD’s state court action on the basis that the plaintiff, not KRD, owned the right to file suit on these claims based on its purchase of the LLC’s claims.

The bankruptcy court analyzed each of KRD’s claims to determine if the claims were derivative claims belonging to the LLC prior to the bankruptcy or direct claims belonging to KRD prior to the bankruptcy. Relying on Texas case law relating to corporations, the court explained the difference between derivative and direct claims.

The court stated that Texas law is clear that a cause of action for injury to the corporation's property or destruction of its business belongs to the corporation rather than a shareholder. The court relied on *Wingate v. Hajdik*, 795 S.W.2d 717, 719 (Tex. 1990), superseded by statute on other grounds as stated in *Sneed v. Webre*, 465 S.W.3d 169 (Tex. 2015), for the proposition that a shareholder cannot personally recover for an injury solely to the corporation even though the shareholder may have been injured as well. If a shareholder's claim would require a demonstration of harm to the corporation in order to recover, the claim is a derivative claim. A direct claim requires the plaintiff to demonstrate personal harm suffered by the plaintiff.

KRD argued that its claim against Krasoff for breach of fiduciary duty was a direct claim because Krasoff "violated the fiduciary duties he owed directly to [KRD] as a fellow member of the [Debtor] and as a holder of a super majority of the membership interests of the [Debtor]." KRD asserted that it "justifiably expected Krasoff to act in the best interest of the [Debtor]." Relying on case law from the corporate context, the bankruptcy court disagreed with KRD for three reasons. First, the court pointed to Texas cases holding that a co-shareholder in a closely held corporation does not as a matter of law owe a co-shareholder a fiduciary duty. The court stated that these cases appeared to preclude the argument that a fiduciary duty existed between Krasoff and KRD. Second, the court pointed to Fifth Circuit case law that makes clear that an action for breach of fiduciary duty by an officer or director belongs to the corporation and not to individual shareholders under Texas law. *Gearhart Indus., Inc. v. Smith Int'l, Inc.*, 741 F.2d 707, 721-22 (Tex. 1984). Finally, the court relied on *Schautteet v. Chester State Bank*, 707 F. Supp. 885, 888 (E.D. Tex. 1988), in which the district court relied on *Gearhart* and held that officers and directors owe fiduciary duties only to the corporation. The court noted that the district court in *Schautteet* stated that a minority shareholder might have a direct claim against the majority shareholder in certain circumstances, but those circumstances were not present in this case. The court stated that Krasoff, as an officer of the LLC, definitely owed a fiduciary duty to the LLC. Thus, if Krasoff violated this fiduciary duty, the claim belonged to the LLC. Any looting of the LLC's funds by Krasoff was a violation of Krasoff's fiduciary duty to the LLC, and the claim was a derivative claim even though Krasoff's embezzlement of the LLC's funds may have harmed KRD by damaging the value of his interest in the LLC. Because the claim for breach of fiduciary duty was a derivative claim, it was sold to the plaintiff by the trustee and KRD had not standing to prosecute the claim in state court.

The court next concluded that the fraud claim was also a derivative claim. KRD claimed Krasoff fraudulently induced KRD to invest in the LLC by misrepresenting that he would not pay any of the funds to himself. KRD also claimed that Krasoff concealed or failed to disclose material facts he had a duty to disclose to KRD. The court stated that the diversion of funds by Krasoff to himself for his personal use resulted in harm to the LLC, and the fact that Krasoff may have lied to KRD, tricked KRD into transferring funds to the LLC, or failed to disclose his embezzlement did not somehow give KRD a direct cause of action. The court had already determined that Krasoff did not owe a duty to KRD, and any harm suffered by KRD due to the embezzlement of funds by Krasoff did not give rise to a personal or direct claim since the injury could not occur without injury to the LLC.

Finally, the court found KRD's contract claim was also derivative. KRD argued Krasoff violated a Memorandum of Understanding (MOU), directly harming KRD. KRD, Krasoff, and others, but not the LLC, signed the MOU, the purpose of which was to set operating guidelines and clarify ownership rights in the LLC. The court acknowledged that the Texas Supreme Court in *Ritchie v. Rupe*, 443 S.W.3d 856, 881 (Tex. 2014), recognized that shareholders can sue one another based on a contractual commitment. However, the court concluded that KRD could not base its breach-of-contract claim on the MOU for two reasons. First, the sole owner of KRD stated under oath that the MOU was "never consummated." The court treated this as a judicial admission that the MOU never took effect and was not an enforceable contract. Second, even assuming the MOU was enforceable, KRD did not establish that it had its own direct claim against Krasoff for breach of contract. The LLC was a third-party beneficiary of the MOU and suffered harm from Krasoff's breach of the contract, i.e., from Krasoff's draining the LLC account and using the funds to pay his personal expenses. According to the court, KRD and Krasoff signed the MOU in their capacity as "shareholders" of the LLC and Krasoff did not make any personal commitment to KRD. KRD failed to show that Krasoff owed it any duty separate and apart from the duty Krasoff owed to the LLC. Furthermore, any injury that stemmed from the alleged breach of the MOU caused damages to the LLC, not to KRD personally and separately from the LLC's damages. As previously noted, to the extent that the value of KRD's interest in the LLC was damaged, the harm stemmed from the harm to the LLC. Thus, the breach of contract claim was also derivative.

Because all three of KRD's claims were derivative claims rather than direct claims, the court enjoined KRD's state-court action in which the claims were asserted.

In re Black Elk Energy Offshore Operations, LLC, No. 15-34287, 2016 WL 4055044 (Bankr. S.D. Tex. July 26, 2016).

The court held that the provisions of the Texas Business Organizations Code that permit derivative claims of a closely held LLC to be asserted directly do not change the derivative claims into claims belonging to the owners, and the claims thus still belong to the bankruptcy estate and cannot be asserted by the owners. The court held that a claim against a nondebtor for interfering with the debtor LLC's payment of a distribution required by the company agreement of the debtor was a direct claim that belonged to the owners of the LLC rather than the LLC, and the owners could thus pursue that claim without violating the automatic stay.

The owners of the debtor LLC argued that the automatic stay did not apply to their assertion of derivative claims against a nondebtor. Creditors cannot exercise control over claims that belong to the debtor's estate, including derivative claims, when there is an automatic stay in place, but the owners of the debtor LLC argued they could bring derivative claims because the debtor was a closely held LLC. The owners relied on Section 101.463 of the Texas Business Organizations Code, which provides that a derivative proceeding brought by a member of a closely held limited liability company may be treated by a court as a direct action brought by the member for the member's own benefit under certain circumstances. The court did not agree with the owners' argument because courts addressing the comparable statutory provision in the corporate context have held that the statute does not convert a derivative claim into a personal claim; the claim maintains its derivative status regardless of any procedural benefits provided by statute. While the court recognized the disparity between its decision and the rights members in a closely held LLC have under the statute, the court explained its decision "ensures that interests are aligned to reflect the priority scheme established by the Bankruptcy Code. To allow an injured owner's recovery on her investment to bypass the recovery of an injured creditor's claim would reverse the equities of an insolvency case."

Next, the court determined that the owners' claim against a nondebtor for interfering with the debtor LLC's payment of a distribution was a direct claim that belonged to the owners of the LLC rather than the LLC. The owners argued that the debtor LLC failed to make tax distributions as required under the company agreement. In a bankruptcy case, the trustee has exclusive standing to assert claims belonging to the debtor's estate as well as claims that assert a generalized grievance that would benefit creditors. However, a creditor can bring claims affecting that creditor personally or multiple creditors so long as there is no asserted generalized injury to the debtor's estate. Here, the owners of the debtor LLC were injured by the company's failure to make distributions to cover tax liability of the owners. The debtor LLC was not injured by this failure but likely benefitted from it. Thus, the court determined this was a direct claim held by the owners and as such could be pursued without violating the automatic stay.

See also *Goradia Family Interests, Ltd. v. Sunoco, Inc.*, Civil Action No. H-16-0736, 2016 WL 4154462 (S.D. Tex. Aug. 4, 2016); *Siddiqui v. Fancy Bites, LLC*, 504 S.W.3d 349 (Tex. App.—Houston [14th Dist.] 2016, pet. filed), summarized above under "Standing or Capacity to Sue."

P. Fraudulent Transfer

Rocklon, LLC v. Paris, No. 09-16-00070-CV, 2016 WL 6110911 (Tex. App.—Beaumont Oct. 20, 2016, no pet.) (mem. op.).

The court held that the trial court properly enjoined an LLC from accessing, distributing, or disbursing the proceeds of the sale of the LLC's property based on evidence that the member had used the LLC as his alter ego and had fraudulently transferred the LLC's bank account to his son.

The surviving spouse and estate of Kristin Paris (collectively, "the plaintiff") brought a wrongful death suit against Rocklon, L.L.C. ("Rocklon"), Rockal, Inc. ("Rockal"), and Rockline George Kennedy, among others, after Kristin Paris died in a car accident with Kennedy. A key point of dispute in the lawsuit was Kennedy's relationship to his co-defendant entities. The plaintiff alleged that the two entities were the alter egos of Kennedy, while Kennedy alleged that he had no ownership interest in the entities.

According to the plaintiff's pleadings, Kennedy had been drinking at the bar and strip club that was operated by Rockal on real property owned by Rocklon. Kennedy then left the club in his vehicle, crossed the median of a highway and struck Kristin Paris's vehicle head on. Kennedy was arrested shortly after the incident

and released a few days later. Upon his release Kennedy accompanied his son to Rocklon's bank and transferred full control of Rocklon's account to the son. Eight days after Kennedy filed his answer in the suit, Rocklon sold its primary asset, the real estate where the club was located, for approximately one million dollars. The trial court entered a temporary injunction preventing the proceeds of the real estate sale from being accessed by Rocklon, and Rocklon filed a notice of interlocutory appeal challenging the temporary injunction.

On appeal, Rocklon argued that there was no evidence that Rocklon was liable to the plaintiff on the underlying claims because the evidence did not establish that Rocklon was the alter ego of Kennedy and there was no evidence of a fraudulent transfer. In a fraudulent transfer action under the Texas Uniform Fraudulent Transfer Act (TUFTA), the statute provides that a creditor may obtain "an injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property." Tex. Bus. & Com. Code § 24.008(a)(3)(A). In this case, the plaintiff alleged TUFTA claims against all defendants, including Rocklon. The plaintiff alleged that Rocklon was an alter ego of Kennedy and thus a debtor under TUFTA, and that Rocklon had fraudulently transferred or was likely to fraudulently transfer its property with actual intent to hinder, delay, or defraud the plaintiff.

Turning first to Rocklon's challenge to the plaintiff's veil-piercing theory, the court noted that Texas intermediate courts of appeal and other jurisdictions have applied to LLCs the same state-law principles for piercing the veil as they have applied to corporations. Rocklon did not challenge the plaintiff's contention that veil-piercing theories are applicable to LLCs, but rather argued that the plaintiff failed to present evidence to support the plaintiff's reverse-piercing theory. The court explained that a creditor who relies on reverse veil-piercing seeks to apply the alter-ego doctrine in reverse, i.e., "to hold a corporation's assets accountable for the liability of individuals who treated the corporation as their alter ego." The applicable standard of review applied by the court of appeals was for abuse of discretion. Under this standard, the court of appeals examined the evidence in the record to see if it reasonably supported the trial court's decision. The court organized its discussion of the evidence of alter ego around three issues: (1) ownership interest and control of Rocklon; (2) commingling of funds; and (3) Kennedy's representations. Based on all of the evidence before the trial court concerning Kennedy's total dealings with Rocklon, and viewing the evidence in a light most favorable to the trial court's finding, the court of appeals concluded that the evidence reasonably supported a probable right of recovery at trial based on an alter-ego relationship between Kennedy and Rocklon.

The court then turned its attention to whether Kennedy's transfer of Rocklon's bank account to his son was a fraudulent transfer. Based on the evidence that Rocklon was the alter ego of Kennedy, the court stated that it could consider a transfer by Rocklon as a transfer by Kennedy. After Kennedy was released from jail he passed control of Rocklon's account to his son. Further, Kennedy and his son executed corporate resolutions authorizing the son to communicate with the bank regarding payoff of the loan on the property and to pay off the promissory note to the bank, thus allowing the son to sell the real estate owned by Rocklon. This resolution also gave the son authority to transfer any proceeds from Rocklon's bank account. The court found this evidence was sufficient to be a transfer of an asset under TUFTA.

The court then examined whether "badges of fraud" were present in the transfer. The facts the court found persuasive were that the transfer was to Kennedy's son, an insider, that the real estate was substantially all of the assets of Rocklon, that there was some evidence that Kennedy tried to conceal the transfer by going to an out-of-town branch of the bank, that Kennedy received no value in return for the transfer, and finally that the transfer was only made after Kennedy had been charged with intoxication manslaughter and could have known that the civil lawsuit was likely imminent.

The last TUFTA requirement of imminent and irreparable harm was satisfied by evidence that following the sale of the real estate, Kennedy's son had begun writing checks to himself out of the Rocklon account. The court agreed with the plaintiff that should the temporary injunction not be in place, the proceeds of the sale of Rocklon's asset could be gone before completion of a trial. The court thus held that the temporary injunction was properly granted and affirmed the order of the trial court.

Q. Bankruptcy

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The owners of the debtor LLC argued that the automatic stay did not apply to their assertion of derivative claims against a nondebtor. Creditors cannot exercise control over claims that belong to the debtor's estate, including derivative claims, when there is an automatic stay in place, but the owners of the debtor LLC argued they could bring derivative claims because the debtor was a closely held LLC. The owners relied on Section 101.463 of the Texas Business Organizations Code, which provides that a derivative proceeding brought by a member of a closely held limited liability company may be treated by a court as a direct action brought by the member for the member's own benefit under certain circumstances. The court did not agree with the owners' argument because courts addressing the comparable statutory provision in the corporate context have held that the statute does not convert a derivative claim into a personal claim; the claim maintains its derivative status regardless of any procedural benefits provided by statute. While the court recognized the disparity between its decision and the rights members in a closely held LLC have under the statute, the court explained its decision "ensures that interests are aligned to reflect the priority scheme established by the Bankruptcy Code. To allow an injured owner's recovery on her investment to bypass the recovery of an injured creditor's claim would reverse the equities of an insolvency case."

Next, the court determined that the owners' claim against a nondebtor for interfering with the debtor LLC's payment of a distribution was a direct claim that belonged to the owners of the LLC rather than the LLC. The owners argued that the debtor LLC failed to make tax distributions as required under the company agreement. In a bankruptcy case, the trustee has exclusive standing to assert claims belonging to the debtor's estate as well as claims that assert a generalized grievance that would benefit creditors. However, a creditor can bring claims affecting that creditor personally or multiple creditors so long as there is no asserted generalized injury to the debtor's estate. Here, the owners of the debtor LLC were injured by the company's failure to make distributions to cover tax liability of the owners. The debtor LLC was not injured by this failure but likely benefitted from it. Thus, the court determined this was a direct claim held by the owners and as such could be pursued without violating the automatic stay.

E & S Land Dev., L.P. v. Shuomali (In re Shuomali), No. 14-60808, 2016 WL 4991490 (Bankr. E.D. Tex. Sep. 16, 2016).

The court rejected a creditor's attempt to reverse pierce the veil of a debtor's business entities in order to prove an exception to discharge.

Yaser Shuomali managed a variety of businesses in Texas beginning in 2010. His business engagements in Texas included a convenience store ("Quick Fill"). In 2011, E & S Land Development, L.P. ("E&S"), contacted Shuomali to operate Quick Fill as a lessee on land owned by E&S. Shuomali was personally obligated on the lease with E&S, but he formed an LLC to manage the new convenience store on the E&S property. Over the next few years Shuomali attempted, unsuccessfully, to manage multiple businesses in the area. Ultimately, he reduced his portfolio of business holdings and focused solely on the Quick Fill store, but the Quick Fill store was also unsuccessful. He abandoned the property in December 2013. E&S filed a lawsuit for breach of contract against Shuomali in April of 2014. Before the answer date, Shuomali filed for bankruptcy under Chapter 7 of the Bankruptcy Code. In August of 2014, E&S filed this adversary complaint in the bankruptcy court asserting that Shuomali's debt to E & S was nondischargeable under several grounds, including § 727(a)(2)(A) of the Bankruptcy Code. Ultimately, the court concluded that E&S failed to establish any of its asserted grounds for an exception to discharge.

Section 727(a)(2)(A) provides an exception to discharge if there was: (1) a transfer or concealment of property; (2) belonging to the debtor; (3) within one year of the filing of the petition; (4) performed with an intent to hinder, delay, or defraud a creditor or an officer of the estate. Specifically at issue in this case was the requirement that the property belong to the debtor because E&S based its objection to discharge on transfers of property belonging to Shuomali's corporation and solely-managed LLCs. When a corporation is a bona fide entity distinct from an individual debtor-shareholder, transfers of property belonging to the corporation are outside the scope of Section 727(a)(2)(A). Thus, E&S sought to show that the property of Shuomali's entities was his personally. The court found this effort to reverse pierce the veils of these entities problematic.

The court recited several non-bankruptcy law principles relevant to its determination that E & S failed to establish its claim for an exception to discharge. First, the court noted the fundamental principle of corporate law that a corporation and its stockholders are separate entities and that the title to corporate property is vested in the corporation rather than the shareholders. Next, the court acknowledged that Texas permits the formation of a limited liability company as an alternative to a corporation, and the court characterized an LLC as working "somewhat like an incorporated partnership." The court explained that an LLC protects owners from personal liability for business debts as does a corporation but avoids a second level of federal taxation. The court stated that this protection from liability is not lost merely because a single-member LLC may elect through the IRS's check-the-box regulations to be disregarded as a separate entity for the purposes of federal income taxation. The court then turned to "reverse veil piercing" and explained that this doctrine is a common-law doctrine under which the assets of a corporation or other entity are deemed to be the assets of its shareholder. The court stated that this doctrine "'appl[ies] the traditional veil piercing doctrine in reverse, so that a corporation's assets are held accountable for the liabilities of individuals who treated the corporation as their alter ego.'" The court characterized the application of veil-piercing principles, particularly reverse veil-piercing, as "rather problematic when dealing with an individual's role with a limited liability company, particularly with a single-member LLC" for the reason that "many smaller LLC's are managed by few members, perhaps a single member, who are actively involved in all phases of the LLC's business." The court said that the disregard of corporate formalities—a key factor in veil-piercing determinations—is simply inapplicable in these situations because the liability protection should not hinge on "meaningless formalities such as formal meetings." In this regard, the court explained that the Texas legislature has adopted the same principles for veil-piercing in an LLC context as have been previously adopted in the corporate context, including that the corporate veil may not be pierced in Texas based on failure to follow corporate formalities. The court concluded its discussion of Texas veil piercing by noting that the Texas business organization statutes generally allow veil piercing only on proof of actual fraud for the direct personal benefit of a shareholder based upon a showing of dishonesty of purpose or an intent to deceive. Ultimately, the court concluded that E&S failed to prove that Shuomali transferred, removed, or concealed any individually owned property within a year of his bankruptcy filing with an actual intent to hinder, delay, or defraud creditors, and the court thus denied E&S's requested relief of a denial of discharge under § 727(a)(2)(A).

Fire Prevention Techs. v. Fire Retardant Coatings of Texas, LLC, Civil Action No. 4:13-cv-942-O, 2015 WL 11120870 (N.D. Tex. Jan. 13, 2015).

In this trademark infringement action, the defendant LLC argued that the plaintiff's claims were barred by the bankruptcy court's discharge of the LLC's sole member in a prior bankruptcy proceeding and by the doctrine of res judicata. The LLC contended that the bankruptcy court found that the debtor/member was operating the business as a sole proprietorship and the next day was operating it as an LLC and that the LLC acted only through the debtor/member. Although the court recognized that there was a legal relationship between the debtor/member and the LLC, the court found that the debtor/member's representation of the LLC's interests in the bankruptcy was inadequate for preclusion purposes because the debtor/member did not understand himself to be acting in a representative capacity for the LLC.

R. Diversity Jurisdiction

Federal district courts and the Fifth Circuit Court of Appeals continue to hold that the citizenship of a limited liability company, like that of a partnership, is determined by the citizenship of each of the members. The cases are too numerous to include in this paper.

S. Personal Jurisdiction

TMX Fin. Holdings, Inc. v. Wellshire Fin. Servs., LLC, 2016 WL 5920776, __ S.W.3d __ (Tex. App.–Houston [1st Dist.] 2016, pet. filed).

The court of appeals held that the plaintiff failed to establish that a Delaware corporation was subject to personal jurisdiction in Texas based on an alter-ego relationship with a Delaware LLC subsidiary because the plaintiff did not establish that the parent exercised actual control of the subsidiary to a degree that was abnormal or atypical. The Texas Supreme Court has identified four factors that are relevant to whether a parent exercises a greater-than-normal degree of control for purposes of determining whether the two entities are “fused” for personal-jurisdiction purposes: (1) the amount of the subsidiary’s stock owned by the parent; (2) the existence of separate headquarters; (3) the observance of corporate formalities; and (4) the degree of the parent’s control over the general policy and administration of the subsidiary. Common ownership and shared headquarters are not enough without the exercise of actual control, and the control must rise to the level of abnormal or atypical. Although a 10-K filing stated that the founder and CEO of the parent holding company gave him the ability to control all matters of significance to the LLC, this statement did not identify the parent company as the party with control. Furthermore, the court distinguished between the ability to control, as referenced in the 10-K, from actual abnormal or atypical control. The evidence of reporting and monitoring and a capital infusion cited by the plaintiff were insufficient to show abnormal control. Further, relying on provisions in Chapter 21 of the Texas Business Organizations Code and Texas case law, the court declined to conclude that the failure to follow formalities, in particular for this family-held group of entities, was sufficient in itself to demonstrate that the two entities were one.

T. Pro Se Representation

Kalakonda v. Aspri Invs., LLC, No. 04-16-00109-CV, 2016 WL 3796998 (Tex. App.–San Antonio July 13, 2016, no pet.) (mem. op.).

The individual guarantors of a lease could not appear pro se for the LLC. The court said that Texas courts have consistently held that a nonattorney may not appear pro se on behalf of a corporation. The court dismissed the appeal but gave the LLC a reasonable time to obtain counsel.

U. Governing Law

DiSalvatore v. Foretravel, Inc., No. 9:14-CV-150, 2016 WL 3951426 (E.D. Tex. June 30, 2016).

The sole member of an LLC that purchased an RV sued the seller of the RV for negligence, DTPA claims, breach of contract, manufacturing defect, design defect, and failure to warn after the plaintiff became ill from mold in the RV that resulted from leaking. The plaintiff, a Florida resident, purchased the RV from a business in Texas. To save sales tax, the plaintiff created a Montana LLC, of which he was the sole member, to purchase the RV. The RV was designed and manufactured in Texas, but DiSalvatore accepted delivery of it in Florida. The RV’s leak and resulting mold occurred in Florida. While it was unclear where the sale took place, the sales and warranty paperwork for the RV were prepared in Texas.

The court engaged in a conflict-of-laws analysis and determined that Texas, as the forum state, required that the law of the state with the “most significant relationship” would apply to the dispute. After considering all the evidence, the court concluded that Texas was the jurisdiction with the most significant relationship because the parties’ relationship and the injury centered around the RV, which was designed, manufactured, and sold in Texas.