

**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

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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 Professor Miller's profile page at the Baylor Law School web site.

II. Recent Texas Cases Involving Partnerships

A. Creation/Existence of General Partnership

Palasota v. Doron, No. 10-16-00326-CV, 2018 WL 2054511 (Tex. App.—Waco May 2, 2018, no pet. h.) (mem. op.).

The court reversed the trial court's summary judgment that a partner's wife was a partner in a partnership between her husband and son and rendered summary judgment in favor of the wife that she was not a partner because there was no more than a scintilla of evidence that the wife was a partner considering the five factors indicating a partnership under the Texas Business Organizations Code and the totality of the circumstances.

The plaintiff contracted with Brazos Valley Services and its partners, Ricky J. Palasota, Sr. and Rick J. Palasota, Jr. When the contract was breached, the plaintiff sued the partnership and obtained a default judgment. The plaintiff added Ricky, Rick, and Ricky's wife, Elaine, as individual defendants. Rick and Ricky filed bankruptcy while the plaintiff was attempting to collect on the judgment against the partnership. Elaine and the plaintiff each filed motions for summary judgment on the issue of whether Elaine was a partner in the partnership, and the trial court granted summary judgment in favor of the plaintiff. Elaine appealed.

The court of appeals began its analysis by pointing out relevant provisions of the Texas Business Organizations Code, which provides that an association of two or more persons to carry on a business for profit as owners creates a partnership, regardless of whether they intended to create a partnership or whether the association is called a "partnership." Tex. Bus. Orgs. Code § 152.051(b). Further, the statute states that the factors indicating that persons have created a partnership include: (1) receipt or right to receive a share of the profits of the business; (2) expression of an intent to be partners in the business; (3) participation or right to participate in control of the business; (4) agreement to share or sharing losses of the business or liability for claims by third parties against the business; and (5) agreement to contribute or contributing money or property to the business. Tex. Bus. Orgs. Code § 152.052(a). The court also noted the "totality-of-the-circumstances" test adopted by the Texas Supreme Court in *Ingram v. Deere* and guidance provided by the supreme court for applying the test. The plaintiff relied on bankruptcy schedules of Rick and Ricky in support of the plaintiff's motion for summary judgment but "made no effort to distinguish the relevant factors in the Business Organizations Code to be considered in determining whether Elaine was a partner in Brazos Valley Services." Ricky did not identify Elaine as a partner in his bankruptcy schedules, and he identified the debt to the plaintiff as a community debt, but not a debt for which Elaine was jointly liable. Rick Jr. listed Elaine as a partner in an unnamed partnership with Rick and Ricky, but listed only Ricky as a co-debtor on the debts of Brazos Valley Services and stated that he and his father each owned a 50% interest in Brazos Valley Services. The court concluded that this evidence was "no more than a mere scintilla to establish that Elaine was a partner in Brazos Valley Services. There was no evidence regarding profits of the partnership, control of the partnership, Elaine's agreement to participate as a partner, or any contributions made by Elaine to the partnership. The evidence relating to liabilities based on the bankruptcy schedules is nothing more than a surmise to show that Elaine was liable for any debt as a partner rather than potentially liable as a spouse of the partner." Considering the statutory factors under the totality of the circumstances, the court held that the trial court erred by granting the plaintiff's traditional motion for summary judgment and failing to grant Elaine's no-evidence motion for summary judgment. Thus, the court reversed and rendered judgment in favor of Elaine.

Gobezie v. Castillo, No. 05-16-00841-CV, 2018 WL 1044271 (Tex. App.—Dallas Feb. 26, 2018, no pet. h.) (mem. op.).

There was sufficient evidence to support the existence of a partnership in which the defendant was a general partner and thus personally liable for the partnership’s obligation to the partnership’s customer where the defendant signed a business formation agreement to form a limited liability company that was never formed and two weeks later signed and filed an assumed name certificate identifying the defendant as an owner of a general partnership.

Castillo bought a car from a business identified in various documents in the transaction as “Pro life Garland,” “Prolife Auto,” and “Prolife-MJMD,” and Castillo never received the paperwork to obtain legal title to the vehicle. Castillo sued Gudaye Gobezie d/b/a Prolife Auto Garland. Gobezie claimed that the evidence was insufficient to support a judgment against her, but Castillo testified as to numerous instances in which she dealt with Gobezie in connection with the purchase of the vehicle, and the evidence included an assumed name certificate showing Gobezie was one of two owners of “Prolife Auto Garland,” a general partnership operating at the location where Castillo purchased the vehicle. There was also evidence of a civil complaint filed by Gobezie against two other individuals in which Gobezie alleged that those two individuals convinced her to invest in a business to buy used cars and resell them at a profit. The complaint had attached a business formation agreement in which Gobezie agreed to contribute to a limited liability company in exchange for a 20% interest. There was no evidence the LLC was ever formed, but two weeks after the agreement was signed, Gobezie signed the assumed name certificate for Prolife Auto Garland.

The court pointed out that Tex. Bus. Orgs. Code § 152.051(b) provides that, in general, an association of two or more persons to carry on a business for profit as owners creates a partnership, regardless of whether they intended to create a partnership. The court also listed the five factors that indicate the creation of a partnership: right to receive a share of the business profits, expression of intent to become partners, right to participate in control of the business, agreement to share business losses or liability to third parties, and agreement to contribute or contribution of money or property to the business. The court concluded that a reasonable factfinder could have determined that Gobezie was a partner in Prolife Auto Garland, the business from which Castillo purchased the vehicle. As a partner in this general partnership, Gobezie was thus jointly and severally liable for the partnership’s failure to provide title to the vehicle purchased from the partnership. The court rejected Gobezie’s argument that the judgment against her in this case was barred by a judgment in the other lawsuit between Gobezie and the two other individuals who were parties to the business formation agreement mentioned above. The judgment in the other lawsuit declared Gobezie not competent to enter into business agreements with the other two individuals and declared the assumed name certificate for Prolife Auto Garland null and void, but the court in this case held that collateral estoppel was not established because there was no privity between the two individuals in the other suit and the purchaser of the vehicle in this suit.

Harun v. Rashid, No. 05-16-00584-CV, 2018 WL 329292 (Tex. App.—Dallas Jan. 9, 2018, no pet. h.) (mem. op.).

The court of appeals affirmed the trial court’s judgment awarding Sharif Rashid actual damages, exemplary damages, and attorney’s fees on his claim for breach of a partner’s fiduciary duty.

Mohammed Harun was in the restaurant business, and Rashid was a technical analyst. In November 2008, Harun was interested in opening a new restaurant in Irving, and he approached Rashid to see if he might provide funding for the venture. Rashid was interested and invested approximately \$60,000. Ultimately, the two had a falling out. Harun removed Rashid as a signatory on the restaurant’s bank account and blocked his access to the restaurant premises. Rashid sued, alleging the existence of a partnership to operate the restaurant and a breach of fiduciary duty by Harun. At trial, the court entered a judgment awarding Rashid actual damages of \$36,000 (the difference between Rashid’s investment of \$60,000 and the amount that Rashid had been repaid), exemplary damages of \$36,000, attorney’s fees of \$79,768.64, pre-judgment and post-judgment interest, and costs.

Harun challenged the legal and factual sufficiency of the evidence establishing the existence of a partnership. The court noted that, in determining whether a partnership has been created, several factors are considered, including “(1) the parties’ receipt or right to receive a share of profits of the business; (2) any expression of an intent to be partners in the business; (3) participation or right to participate in control of the business; (4) any agreement to share or sharing losses of the business or liability for claims by third parties against the business; and (5) any agreement to contribute or contributing money or property to the business.” Proof of each factor is not necessary to establish a partnership, and the factors are reviewed under a totality of the circumstances.

Harun argued that the finding of a partnership was refuted by the acknowledgment of the restaurant's bookkeeper that no partnership existed. The court noted, however, that the bookkeeper was testifying simply about what the paperwork showed and how that affected her work. Moreover, the bookkeeper testified that although the papers identified the business as a sole proprietorship, she knew that it was supposed to be a partnership.

At trial, Rashid presented evidence that "(a) [Harun] approached him indicating he had found a good location to open a restaurant and needed a partner to finance the operation; (b) [Harun] asked him to be his partner; (c) he and [Harun] were equal business partners in the restaurant; (d) he and [Harun] agreed to share equally in the profits and losses; (e) he and [Harun] met with the leasing agents to negotiate the lease of the restaurant space; (f) he and [Harun] had equal access to the restaurant's bank account; (g) he hired and communicated with the bookkeeper; (h) he was very involved in preparing paperwork for the restaurant; (i) he paid restaurant related bills, and purchased furniture and equipment for the restaurant; (j) he was not an employee of the restaurant or [Harun], nor did he receive any pay for the work he performed on behalf of the restaurant; and (k) he invested approximately \$60,000 in the business." The court concluded that the trial court's partnership finding was supported by more than a scintilla of evidence. Further, the finding was not against the great weight and preponderance of the evidence so as to be clearly wrong and unjust.

Harun also argued that there was a lack of evidence of an agreement to share losses. The court observed that the Texas Business Organizations Code expressly provides that an agreement to share losses is not necessary to create a partnership. In addition, the court noted that Rashid did present evidence that he and Harun had agreed to share losses in the business.

Rainier Southlake DST v. Woodbury Strategic Partners Fund, LP, No. 02-16-00263-CV, 2017 WL 6047725 (Tex. App.—Fort Worth Dec. 7, 2017, no pet. h.) (mem. op.).

The trial court found that a partnership did not exist between Rainier and Woodbury and that Woodbury did not owe or breach a fiduciary duty. The court of appeals affirmed the grant of summary judgment.

Rainier and Woodbury were negotiating over the purchase of Rainier's \$15.4 million loan. Woodbury submitted a proposed term sheet to Rainier (which contained provisions relating to the capital to be invested, the preferred return, a profit split, a disposition fee, an asset management fee, an acquisition fee, and other issues), and Rainier proposed changes. Rainier ultimately alleged that the proposed term sheet constituted a partnership agreement and that Woodbury breached a fiduciary duty by using Rainier's confidential information to help Woodbury's affiliate purchase the loan.

Rainier claimed that the proposed term sheet constituted more than a scintilla of evidence of three of the five partnership-formation factors: (1) the right to receive a share of the profits of the business; (2) an expression of an intent to be partners in the business; and (3) an agreement to contribute or contributing money or property to the business. The court first concluded that the proposed term sheet did not constitute an enforceable contract between Rainier and Woodbury, including an enforceable written partnership agreement, because Rainier did not accept and return the proposed term sheet to Woodbury before the term sheet's deadline. Moreover, even if Rainier could have accepted after the deadline, it did not do so because it made material changes to the proposed term sheet, which resulted in a counteroffer that was never accepted.

The court then analyzed whether a partnership agreement existed under the five factors stated in § 152.052 of the Business Organizations Code. With respect to the right to share profits, the court noted that the proposed term sheet did provide for such a right. Nevertheless, because the term sheet was not an enforceable contract, its terms could not constitute an agreement between Rainier and Woodbury to share profits.

When analyzing an expression of intent to be partners, the court of appeals observed that "courts should review the alleged partners' speech, conduct, and writings and consider evidence that is not specifically probative of other partnership-formation factors." There must be evidence that "both parties expressed their intent to be partners." Rainier contended that the term sheet repeatedly used the term "Partnership," but the court pointed out that "Partnership" was defined in the term sheet as "[a] single purpose limited liability company," and it refused to impose a different meaning on a defined term. Although Woodbury in a deposition indicated that it might have had "some new partnership with Rainier" after the loan had been sold, the court held that the statement was no evidence that the parties had expressed an intention to form a partnership prior to the sale of the loan.

With respect to the right to participate in control, Rainier did not argue that the evidence supported this factor. Even the proposed term sheet stated that Woodbury shall maintain all control of the venture. Rainier also

did not argue that the evidence supported the existence of an agreement to share losses or liabilities for third-party claims.

Rainier again pointed to the term sheet as evidence of the final partnership factor—an agreement to contribute money or property to the business. Because the term sheet was not an enforceable contract, the court concluded that its provisions could not constitute such an agreement. The court also determined that deposition testimony indicating that Woodbury “anticipated” or “projected” putting money into the business was not evidence that the parties reached an actual agreement to do so. Rainier also argued that it contributed confidential information and expertise to the business by providing “due diligence” information to Woodbury, but the court stated that “providing information to reach a business deal is no evidence of the partnership-formation factor of an agreement to contribute money or property to the business.”

The court concluded by observing that “[w]hether we apply contract principles as urged by Woodbury or section 152.052’s partnership-formation factors as urged by Rainier, no evidence exists of the establishment of a partnership between Woodbury and Rainier, and consequently, summary judgment for Woodbury was proper on both Rainier’s breach-of-fiduciary-duty claim and breach-of-the-alleged-term-sheet-partnership-contract claim.”

NMRO Holdings, LLC v. Williams, No. 01-16-00816-CV, 2017 WL 4782793 (Tex. App.—Houston [1st Dist.] Oct. 24, 2017, no pet. h.) (mem. op.).

The court of appeals affirmed a summary judgment that denied partnership and joint enterprise theories of liability.

Finger Interests obtained a judgment against Robert Parker in the amount of \$604,871.38 plus interest. The judgment was later assigned to NMRO. Parker married Anna Williams who owned an LLC (CD Homes) engaged in the home building business. NMRO sued Williams and CD Homes seeking to recover Parker’s unpaid judgment on various theories, including partnership and joint enterprise. The trial court granted summary judgment against NMRO on all of its claims, and NMRO appealed.

With respect to the partnership theory, the court cited the five factors of § 152.052 of the Business Organizations Code and stated that in determining whether a partnership exists, courts consider all of the evidence bearing on the statutory factors. The statute does not require proof of all of the listed factors in order for a partnership to exist; rather, evidence of the five factors is considered on a continuum. At one end, a partnership exists as a matter of law when conclusive evidence supports all five factors, and at the other end, a partnership does not exist as a matter of law when there is no evidence as to any of the five factors. Conclusive evidence of only one factor will normally be insufficient to establish the existence of a partnership.

In support of the right to receive profits, an expression of intent to be partners, and an agreement to share losses, the court observed that NMRO relied exclusively on evidence that was not part of the summary judgment record. The court determined that it could not consider this evidence. In support of whether the partners agreed to contribute money or property to the business, NMRO asserted that Williams and CD Homes contributed money to the alleged partnership and that Parker contributed his reputation, experience, and investor money. The court stated that although one’s reputation is a type of goodwill that may be valuable intangible property, the testimony cited by NMRO did not support its assertion. Instead, the evidence related only to the degree of Parker’s participation in the control of the business—a different factor all together. The court concluded that “[b]ecause the summary judgment evidence supports, at most, only one partnership factor, it is insufficient to establish the existence of a partnership.”

To prove a joint enterprise under Texas law, “NMRO had to prove that Parker, on the one hand, and Williams and CD Homes, on the other, (1) entered into an express or implied agreement, (2) with a common purpose, (3) a community of pecuniary interest in that purpose, and (4) an equal right to a voice in the direction of the enterprise giving each an equal right of control.” With respect to the third element, NMRO argued only that “the community of pecuniary interest in defrauding Parker’s creditor is obvious, because without it the parties would be working to pay off their debts rather than to line their pockets and pay for luxuries, such as the River Oaks Country Club.” NMRO provided no additional argument, evidence, or authority to support its assertion. The court concluded that “[b]ecause NMRO failed to demonstrate that a genuine issue of material fact exists as to whether Williams, CD Homes, and Parker shared a community of pecuniary interest in a common purpose, the trial court properly granted summary judgment on NMRO’s joint enterprise claim.”

Intrepid Ship Mgmt., Inc. v. PRC Env'tl., Inc., 711 Fed. App'x 208 (5th Cir. 2017) (per curiam).

The Fifth Circuit affirmed a ruling that title to a rig did not transfer to a joint venture and, therefore, that a party to the alleged joint venture did not have standing to sue for damages to the rig.

PRC Environmental sued for damage to a rig. It claimed that it held a proprietary interest in the rig by virtue of a joint venture with Francisco Moreno, the title owner of the rig. The Fifth Circuit concluded that PRC failed to bring forth facts that, if true, proved the existence of a joint venture. PRC “failed to prove an agreement between Moreno and PRC to share profits and losses, meaning PRC could not gain a proprietary interest in the Rig through the joint venture.” (The court cited a Houston Court of Appeals case for the proposition that a valid Texas joint venture required an express agreement to share both profits and losses.)

Black v. Redmond, 709 Fed. App'x 766 (5th Cir. 2017) (per curiam).

The Fifth Circuit affirmed the district court's denial of defendant's motion for a new trial. The court found sufficient evidence of a partnership and a breach of the partnership agreement to support the jury's findings.

John Black patented a design for wind-resistant billboard frames called “Universal Flex Frames.” He met with James Redmond, and the two men agreed to create Universal Flex Frames of Texas for the purpose of building, marketing, and selling Black's patented frames and splitting the profits. They entered into an oral agreement to start the venture on a 50/50 basis.

After about 18 months, the relationship between Black and Redmond soured when Black discovered that Redmond had been selling Universal Flex Frames to Redmond's other company at wholesale prices. After a fight between the two men, Redmond sent Black an email stating that the partnership was over. Black sued, alleging that the two had formed an oral partnership agreement, that Redmond had breached the agreement, and that Black was entitled to \$248,714.50—half of the alleged value of the partnership at the time that it was terminated. A jury found for Black and awarded him \$200,000. Redmond unsuccessfully sought a new trial, and appealed on the ground that the jury's findings were against the great weight of the evidence.

The Fifth Circuit found that it was permissible for the jury to conclude that a partnership agreement existed. After citing the five factors from § 152.052 of the Business Organizations Code, the court noted that “[t]hese factors are nonexclusive and even one factor standing on its own can be strong enough to support the existence of a partnership.” The evidence, according to the court, allowed the jury to find that three of the five factors supported the existence of a partnership. Black testified that he and Redmond had orally agreed to form a “50/50 partnership,” and further stated that he was going to provide his patent, construction expertise, and uncompensated work to the partnership as part of the agreement. Concerning profit sharing, both Black and Redmond testified that they had discussed splitting the profits from selling the Universal Flex Frames. Further, in Redmond's final email to Black, he wrote “[l]ooks like the frame partnership is over with.” Despite the suggestion that Redmond exercised most or all of the management authority in the venture (and no evidence was presented on an agreement to share losses or liability), the court concluded that there was more than sufficient evidence of a partnership to support the jury's verdict.

The Fifth Circuit also found that the jury's determination that the partnership agreement was breached was not against the great weight of the evidence. Black alleged that Redmond breached the agreement in numerous ways, including: (1) kicking Black out of the partnership, (2) failing to split funds generated from the sales of the billboards, (3) refusing to properly account for the partnership business, (4) engaging in self-dealing by selling to his own business at wholesale prices, and (5) neglecting to deposit money into the partnership's joint account. The court determined that there was sufficient evidence to support these breach allegations. Most importantly, there was direct evidence that Redmond unilaterally terminated the partnership agreement. The jury's finding was further supported by Black's testimony that Redmond had been self dealing by selling the Universal Flex Frames to his own company for \$50 over cost. The evidence also supported a finding that Black never received complete financial reports that he requested as a partner in the business.

Elvir v. Brazos Paving, Inc., No. 13-16-00546-CV, 2017 WL 3769015 (Tex. App.—Corpus Christi Aug. 31, 2017, no pet.) (mem. op.).

The plaintiff in this personal injury matter brought various vicarious liability causes of action, including partnership, joint venture, and joint enterprise. The court of appeals affirmed a summary judgment in favor of defendant Brazos Paving, primarily on the ground that there was insufficient evidence of Brazos Paving's control.

The court noted that “[a]ll of [the plaintiff]’s vicarious liability theories required some evidence that Brazos Paving controlled JBP Trucking and Galvan,” including the partnership, joint venture, and joint enterprise theories.

In re Marriage of Armstrong, No. 12-15-00300-CV, 2017 WL 3225053 (Tex. App.—Tyler July 31, 2017, no pet.) (mem. op.).

The court of appeals affirmed a final decree of divorce and rejected Ronald Armstrong’s claim that real estate was owned by a partnership of himself and his former mother-in-law.

The trial court granted a divorce and divided the property of Ronald and Stephanie Armstrong. Ronald argued that the trial court abused its discretion by awarding the Warehouse real estate (the “Warehouse Property”) to Stephanie. More specifically, he contended that the Warehouse Property was not part of the marital estate because it was deeded to his LLC or, alternatively, was held in a partnership between him and his mother-in-law, Dotie Adams. The evidence showed that Ronald and Dotie bought the Warehouse Property and both of their names were listed on the general warranty deed. Dotie paid the entire purchase price of \$30,000.

Ronald argued that he deeded the Warehouse Property to Warehouse Enterprises, an LLC that he formed two years before trial. The court of appeals disagreed, noting that Ronald testified that he deeded the hardware store (a store that operated on the Warehouse Property), and not the Warehouse Property itself, to the LLC. The court further noted that there was no trial exhibit or evidence showing the assets of Warehouse Enterprises, or any paperwork showing its formation. The court concluded that “there is no evidence that Ronald deeded the ‘Warehouse Property’ to Warehouse Enterprises.”

In the alternative, Ronald argued that the Warehouse Property was held in a partnership between himself and Dotie. The court of appeals cited the five factors of § 152.052 of the Business Organizations Code and concluded that Ronald and Dotie met none of them. Regarding the parties’ receipt or right to receive a share of the profits of the business, there was no testimony that Dotie received any profits or a share of the business. Moreover, neither Ronald nor Dotie expressed an intent to be partners in the business. Ronald characterized the Warehouse Property and the hardware store as his personal assets, and Dotie did not even realize the possibility of partnership until trial.

With respect to participation or a right to participate in the control of the business, Dotie stated that how Ronald spent money on the store was not any of her business. Further, Ronald and Dotie did not have any agreement to share losses of the business or to contribute money to the business. Dotie testified that she did not owe half of the judgments against the hardware store. Further, according to the court: “Even though Dotie loaned the hardware store \$15,000 for inventory, Ronald stated that he never promised to pay Dotie back for the loan because she was an ‘investor’ in the hardware business. Thus, there is no evidence that Ronald or Dotie were partners in the ‘Warehouse Property.’”

Super Starr Int’l, LLC v. Fresh Tex Produce, LLC, 531 S.W.3d 829 (Tex. App.—Corpus Christi 2017, no pet.).

The court of appeals reversed the trial court’s temporary injunction order, dissolved it, and denied various restrictions based in part on its determination that an LLC’s business was not a partnership and that there was no evidence of a breach of fiduciary duty.

Fresh Tex Produce, LLC (the “Distributor”) filed suit individually and derivatively on behalf of Tex Starr Distributing, LLC. The defendants were Super Starr International, LLC (the “Importer”); Lance Peterson, the President of the Importer; Red Starr, SPR de R.L. de C.V. (the “Grower”); and Kemal Mert Gumus, an employee of the Importer.

In December 2010, Kenneth Alford, president of the Distributor, and Lance and David Peterson, on behalf of the Importer, created Tex Starr Distributing, LLC (the “LLC”). Under the Tex Starr operating agreement, the Distributor and the Importer were the LLC’s only members, Alford and David Peterson were the only managers, and Alford was the president. The operating agreement also included an exclusivity provision mandating that the LLC serve as the “sole and exclusive distributor of papayas exported into the United States by [the Importer] and/or other existing or future companies of Lance Peterson and/or David Peterson pertaining in whole or in part to the growing, production, shipping or packaging of papayas.” The provision lasted until the end of 2013. In January 2014, a nearly identical operating agreement took effect. The exclusivity provision in the revised operating agreement lasted until the end of 2015.

At the end of December 2015, the exclusivity provision under the revised operating agreement expired. Alford testified that he and Lance Peterson attempted to negotiate a new term of exclusive distributorship, but the two sides were unable to reach an agreement. From January 2016 through March 2016, the Distributor and the Importer continued working together under the same terms as the revised operating agreement. In March 2016, Lance Peterson told Alford that beginning in July 2016, the Importer would no longer supply the LLC with papayas. Instead, the Importer would distribute and market the papayas to customers in the United States on its own.

In October 2016, the Distributor filed an original petition and application for injunctive relief. After a hearing, the trial court signed a temporary injunction order finding that the Distributor had demonstrated a probable right to relief through its claims against the defendants. It granted injunctive relief mandating that the Importer, Lance Peterson, and the Grower (collectively “appellants”) continue the exclusive business relationship with the LLC and prohibiting conduct deemed competitive against the LLC.

Restrictions 1 and 6 of the temporary injunction order mandated that appellants refrain from (1) distributing any papayas without such distribution going through the LLC and dividing proceeds as previously agreed; and (2) refusing to supply papayas for the LLC orders if such papayas were available. Appellants complained that these restrictions were premised on the trial court’s finding of a partnership, joint venture, and joint enterprise between the Distributor, the Importer, and the LLC, and that the Distributor presented no evidence on these theories. The court of appeals agreed with the somewhat obvious proposition that the LLC was not a partnership. The court noted that the operating agreements provided that the LLC shall not be a partnership, and it observed that the LLC was created under the Business Organizations Code provisions governing LLCs (and thus, by default, was not a partnership). The Distributor highlighted two pieces of evidence where the parties referred to the LLC as a “partnership,” but the court stated that the references were “diplomatic gestures” rather than “a formal reclassification of LLC’s legal character.” The court observed that “[t]he term ‘partner’ is regularly used in common vernacular and may be used in a variety of ways,” and it stated that “[r]eferring to . . . a ‘partner’ in a colloquial sense is not legally sufficient evidence of expression of intent to form a business partnership.” As the court concluded, “[a]bsent something more, we conclude that the Distributor presented no evidence that conclusively negates the plain text of the business organizations code and the operating agreements, both of which require us to determine as a matter of law that the LLC was solely a limited liability company, not a partnership.” Moreover, “[t]he same considerations lead us to hold that a limited liability company, such as the LLC, does not qualify for the overlapping labels of joint venture or joint enterprise.” Ultimately, the court found no evidence that could reasonably support the trial court’s decision to grant injunctive relief premised on claims for partnership, joint venture, and joint enterprise, and it concluded that the trial court had abused its discretion in imposing the above-described restrictions.

Enterprise Prods. Partners, L.P. v. Energy Transfer Partners, L.P., 529 S.W.3d 531 (Tex. App.—Dallas 2017, pet. filed).

The court of appeals concluded (1) that the unfulfilled conditions precedent in the parties’ written agreements precluded the formation of a partnership; (2) that Energy Transfer Partners (“ETP”) failed to obtain a jury finding that the parties waived the conditions precedent; and (3) that ETP failed to prove as a matter of law that the parties waived the conditions precedent.

ETP and Enterprise were builders and operators of oil and gas pipelines. In early 2011, Enterprise approached ETP about working together to build a pipeline that would transport crude oil from Cushing, Oklahoma to Houston. ETP owned a natural gas pipeline that Enterprise thought could be converted to carry crude oil, which would save considerable time and expense in building the Cushing-to-Houston pipeline. ETP agreed to work with Enterprise in determining the viability of the project, which they called the “Double E” pipeline.

After executing various agreements, the executives of ETP and Enterprise worked together to determine whether the pipeline would be economically feasible. They agreed that, before building the pipeline, they would need oil shippers to commit during an “open season” to shipping at least 250,000 barrels per day for ten years at certain rates. Despite the executives’ efforts, they were unable to receive sufficient commitments from shippers. On August 15, 2011, Enterprise contacted ETP and terminated its participation in the Double E project.

Unbeknownst to ETP, before the open season ended, Enterprise had entered into discussions with Enbridge (US) Inc. Enterprise told Enbridge that if the open season failed to garner sufficient shipping commitments, then Enterprise was interested in pursuing a Cushing-to-Houston pipeline with Enbridge. Enterprise did not disclose these communications to ETP. The day after Enterprise withdrew from the Double E project, Enterprise executives

met with Enbridge executives. Ultimately, Enterprise and Enbridge agreed to modify an existing pipeline to carry oil from Cushing to Houston. The two companies received sufficient commitments from shippers for their project, and they began operating their Cushing-to-Houston pipeline.

On September 30, 2011, ETP sued Enterprise for breach of fiduciary duty. Its theory was that ETP and Enterprise had a partnership to market and pursue a Cushing-to-Houston pipeline, and that Enterprise used information from that partnership to usurp a partnership opportunity. ETP argued that Enterprise owed a duty of loyalty to ETP to account for the profits from its usurpation, and that Enterprise owed ETP 50% of the discounted net profits that Enterprise would receive during the lifetime of its pipeline with Enbridge. The jury found that ETP and Enterprise created a partnership to market and pursue a pipeline, and it determined that Enterprise failed to prove that it complied with its duty of loyalty. The trial court awarded ETP \$319,375,000 in damages found by the jury, along with disgorgement against Enterprise in the amount of \$150 million.

In its first issue, Enterprise contended that the trial court erred in denying its motions for directed verdict and JNOV. According to Enterprise, its written agreements with ETP prohibited the formation of a partnership without the approval of the parties' boards of directors and the delivery of executed definitive agreements—neither of which occurred. The Letter Agreement between the parties stated that they were entering into negotiations to form a joint venture for the construction and operation of a pipeline, and the term sheet attached to the Agreement indicated that the parties would form an LLC to build and operate the pipeline. The Letter Agreement also stated that “no binding or enforceable obligations shall exist between the Parties with respect to the Transaction unless and until the Parties have received their respective board approvals and definitive agreements memorializing the terms and conditions of the Transaction have been negotiated, executed and delivered by both of the Parties.” The term “Transaction” was defined as “a proposed joint venture transaction involving the construction (or conversion, as applicable) and operation of a pipeline to move crude oil from Cushing, Oklahoma to the Houston, Texas market.”

The court noted that “a joint venture is governed by the same rules as a partnership” and stated that “[t]he question before us is whether this Letter Agreement created conditions precedent to the formation of a partnership, which, being unmet, prevented the parties from forming the alleged partnership through their conduct in this case.” ETP agreed that the conditions had not been met, but it argued that partnership formation was governed solely by the five-factor test of § 152.052 of the Business Organizations Code. According to ETP, the conditions were evidence of only one factor—expression of an intent to be partners in the business—and that the unfulfilled conditions precedent did not necessarily preclude the formation of a partnership.

The court determined that § 152.052 was not the sole source of rules for determining partnership formation, and it stated that the law of conditions precedent supplemented the partnership provisions. According to the court, board approval and execution of definitive agreements were events “that had to happen or be performed before a partnership between ETP and Enterprise arose.”

ETP argued that the Letter Agreement did not apply to the partnership because the Agreement's definition of “Transaction” as “involving the construction . . . and operation of a pipeline” did not include the partnership that the jury had found—i.e., a partnership to “market and pursue” a pipeline project. Trial witnesses had defined “market and pursue” to mean the first of two phases in the process of developing a pipeline. (Phase one involved a viability assessment that sought sufficient shipping commitments, and phase two involved seeking funding and approval to move forward on the project.) According to ETP, the partnership found by the jury was a phase one partnership, while the Letter Agreement only covered phase two partnerships.

The court rejected ETP's argument that the jury could find a partnership limited to phase one because “an association limited to the determination of the feasibility of constructing and operating a pipeline . . . cannot generate a profit.” According to the court, “[b]ecause a partnership under the Business Organizations Code requires the potential for profit from the association, ETP's assertion of an association limited to the determination of the feasibility of constructing and operating a pipeline is not a partnership.”

ETP further argued that the Letter Agreement could not create enforceable conditions precedent because the Agreement stated that it did not create any binding or enforceable obligations between the parties. The court disagreed, stating that conditions precedent do not create binding or enforceable obligations; instead, “they place an impediment on the parties' ability to ‘create any binding or enforceable obligations.’”

After discussing the decision of *Thompson v. Thompson*, 500 S.W.2d 203 (Tex. Civ. App.—Dallas 1973), the court observed that “unperformed conditions precedent to forming a partnership will prevent the partnership from forming unless the parties waive the performance of the conditions precedent or other rules of law or equity

nullify them.” In discussing waiver, the court cited Texas Supreme Court decisions for the propositions that “waiver is an independent ground of recovery or defense and must be pleaded and proved as such,” and, effectively, that a party arguing waiver must secure a jury finding or establish waiver as a matter of law. Although ETP did not plead waiver of the conditions precedent, the court did not address the effect of that failure to plead. Instead, the court noted that “ETP did not request a jury finding on waiver of the conditions precedent,” and that “unless waiver of the conditions precedent was established as a matter of law, ETP cannot recover on its claims.”

ETP attempted to argue waiver by asserting that the parties acted inconsistently with the Letter Agreement by entering into a later Reimbursement Agreement that required Enterprise to begin engineering-design work and ETP to reimburse Enterprise for up to \$1 million in expenses. Although the court agreed with ETP that “the Reimbursement Agreement was in part inconsistent with the ‘no binding or enforceable obligations’ clause of the Letter Agreement because it purported to impose obligations on the parties without definitive agreements and approval of the boards of directors,” the court emphasized that the Reimbursement Agreement explicitly stated that it created obligations “only as set forth herein” and that “[n]othing herein shall be deemed to create or constitute a joint venture [or] a partnership” Given this language, the court concluded that the parties “did not intend for the Reimbursement Agreement to waive the ‘no binding or enforceable obligations’ clause of the Letter Agreement beyond the obligations imposed by the Reimbursement Agreement.”

ETP also presented evidence purporting to show that the parties acted inconsistently with the conditions precedent by forming the partnership sometime in May 2011. According to ETP, by that time the parties had agreed to share costs, liabilities, profits, and losses, and they had agreed on the allocation of control. The court, however, referenced its earlier point in stating that “no evidence showed that there could be any profits until after the construction of the pipeline, and the parties’ agreements did not require them to build the pipeline regardless of its apparent future profitability.” As the court stated, “[a]ll of this evidence shows there could not be an association to operate a business for profit until the parties agreed to build the pipeline, which required the approvals of both parties’ boards of directors.” In addition, the court noted that “this testimony is at least equally consistent with an agreement regarding the terms that would be included in a forthcoming definitive agreement if approved by the respective boards of directors.” As a result, “it does not conclusively prove the required waiver.”

Because the court found that the conditions precedent were not performed and that ETP had not conclusively established a waiver of the conditions, the court determined that there was no partnership between Enterprise and ETP. The court sustained Enterprise’s first issue and concluded that the trial court erred in denying Enterprise’s motions for directed verdict and JNOV.

Sutton v. Lowry, No. SA-11-CA-00287-OLG(JWP), 2012 WL 13029763 (W.D. Tex. Apr. 4, 2012), report and recommendation adopted, 2012 WL 13033970 (W.D. Tex. May 8, 2012). (Although the court issued this opinion in 2012, it is included in this year’s update because it did not appear in the Westlaw database until recently.)

The court held that the plaintiff established a prima facie case for exercising specific personal jurisdiction over a business that sold lamps to the plaintiff on the basis that the business was a partnership such that its partner’s activities toward the forum state could be imputed to the partnership.

The plaintiff sued Elvery Lowry and Lamps and Art Glass asserting various causes of action based on the plaintiff’s claim that he purchased Tiffany lamps from Lowry, a Florida resident, that were not authentic. The plaintiff alleged that Lamps and Art Glass was a partnership whose partners were Lowry and non-party Howard Booher, and that Lowry was acting in his capacity as a partner of Lamps and Art Glass in his dealings with the plaintiff. Lamps and Art Glass argued that it was not a general partnership and did not direct any activities at the forum state.

The court listed the five statutory factors considered in determining whether a partnership has been formed under Texas law: (1) the receipt or right to receive a share of profits; (2) the expression of an intent to be partners; (3) the right to participate in control of the business; 4) an agreement to share losses or liability; and (5) an agreement to contribute money to the business. *See* Tex. Bus. Orgs. Code § 152.052 The court also noted that no single factor is dispositive, not all factors need be demonstrated, and the existence of a partnership depends on the totality of the circumstances. Considering the totality of the circumstances and resolving all factual conflicts in the plaintiff’s favor, the court concluded that the plaintiff established a prima facie case for specific personal jurisdiction over Lamps and Art Glass. Lowry admitted that he and Booher sold lamps and “split the profits,” and there was evidence that Lowry made checks out in substantial amounts to both Lowry and Booher, thus reflecting

that both Lowry and Booher received a share of profits from the sale of lamps. The website for Lamps and Art Glass reflected the parties' intent to be partners and Lowry's right to participate in control of the business, as evidenced by statements that the content and copyright depicted on the website was owned by Lowry and Booher and that the website was launched by "the partnership of Howard Booher & Dean Lowry." Although there was not any evidence of an agreement to share losses or liability and contribute money to the business, the court found that the combination of factors present was sufficient to establish a prima facie case that Lamps and Art Glass was a partnership between Lowry and Booher. Further, Lowry contacted the plaintiff in Texas, representing that he was a partner in Lamps and Art Glass and had authority to buy and sell lamps for Lamps and Art Glass, and Lowry sold lamps to the plaintiff on behalf of Lamps and Art Glass, thereby directing its activities toward the forum state or purposefully availing Lamps and Art Glass of the benefits and protections of the forum state. A partner's actions may be imputed to the partnership for purposes of personal jurisdiction; therefore, the requirement for minimum contacts in Texas was satisfied. The court then concluded that the other two requirements—that the plaintiff's cause of action arose out of the defendant's forum related contacts and that the exercise of jurisdiction is fair and reasonable—were satisfied as well.

B. Partnership by Estoppel

Fleishman-Hillard, Inc. v. Oman, No. SA-11-CA-921-H, 2012 WL 13028770 (W.D. Tex. Nov. 21, 2012). (Although the court issued this opinion in 2012, it is included in this year's update because it did not appear in the Westlaw database until recently.)

The court granted summary judgment in favor of two individuals whom the plaintiff alleged were liable on a contract between the plaintiff and an LLC based on equitable estoppel and partnership by estoppel. Although the individuals had been falsely represented to be investors and co-founders of the LLC, the plaintiff knew that it was contracting with an LLC when the contract was executed.

The plaintiff, a marketing firm, entered into a contract with an LLC to promote a golf resort development project managed by the LLC. The contract was negotiated and entered into on behalf of the LLC by its sole member, Oman. At a press conference held after the contract was entered into, defendants Oman, Jones, and McCombs met with representatives of the plaintiff and reviewed materials that referred to each of the defendants as principals and/or co-founders of the LLC. The LLC defaulted on payment of amounts owed to the plaintiff under the contract, and the plaintiff obtained a judgment against the LLC in a previous action. In this action, the plaintiff sought to recover from Oman, Jones, and McCombs as partners of a partnership that was alleged to exist distinct from the LLC, relying on equitable estoppel and partnership by estoppel.

The court concluded that the plaintiff's claim based on equitable estoppel failed. The court set forth the requirements for equitable estoppel as follows: (1) a false representation or concealment of material facts; (2) made with knowledge, actual or constructive, of those facts; (3) with the intention that it should be acted on; (4) to a party without knowledge or means of obtaining knowledge of the facts; (5) who detrimentally relies on the representations. The evidence established false representations that would satisfy the first three elements because the defendants knew the LLC was a Delaware LLC whose only principal was Oman, and the representations that Jones and McCombs were principals were made to give the project credibility. The court said that the plaintiff did not, however, show that the plaintiff did not have knowledge of the truth or the means of obtaining the truth because the plaintiff signed a contract with a Delaware LLC and could have easily discovered that Oman was the sole owner and the company was severely undercapitalized.

The court next set forth the elements of partnership by estoppel as follows: (1) a representation that the one sought to be bound is a member of a partnership; and (2) reliance by one to whom the representation is made by giving credit to the partnership. The court further explained that the representation may be made directly by the alleged partner or by others whom the alleged partner knowingly allows to make the representation. There was no dispute that each defendant made representations that there was a partnership and/or that he was a partner, but the use of the terms "partners" and "partnership" occurred only at a press conference after the plaintiff had executed a contract with the LLC. Before executing the contract with the LLC, the only representations made to the plaintiff were that McCombs and Jones were "co-founders" and Jones was an "investor" in the LLC. Additionally, the plaintiff had no interactions with Jones or McCombs before the contract was executed. According to the court: "While falsely claiming that individuals are co-founders and investors of an LLC is certainly unethical, it is not enough to impute liability to others on a theory of partnership by estoppel. Even if Jones and McCombs were

actually principals and co-founders of Flagship Group, LLC, they would still be immune from liability because the Flagship Group is a limited liability company and not a partnership. Moreover, Plaintiff knew it was signing a contract with a limited liability company when it executed the contract with Flagship Group, LLC. Thus, Plaintiff's claim for partnership by estoppel fails as a matter of law."

C. Partnership Name

Hole v. Comm'n for Lawyer Discipline, No. 13-15-00522-CV, No. 13-15-00528-CV, 2017 WL 3634128 (Tex. App.—Corpus Christi Aug. 24, 2017, pet. filed) (mem. op.).

The court of appeals affirmed the trial court's grant of summary judgment in favor of the Commission for Lawyer Discipline. The court concluded that the Commission established as a matter of law that spouses Ronald and Cheryl Hole violated Texas Disciplinary Rules of Professional Conduct (the "TDRPC") by continuing to use the name of a former partner—one who became a federal judge—in their firm name.

In December 2014, the Commission filed disciplinary actions against the Holes, who practiced with Micaela Alvarez in a law firm named "Hole & Alvarez, L.L.P." In 2004, Alvarez was appointed as a United States District Judge, and the Commission alleged that the Holes violated Rule 7.01(c) of the TDRPC by continuing to use "Alvarez" in the firm name. Rule 7.01(c) states that "[t]he name of a lawyer occupying a judicial, legislative, or public executive or administrative position shall not be used in the name of a firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm." The court of appeals found that the Commission had met its burden to conclusively establish a violation of Rule 7.01(c).

The Holes argued that Alvarez was a retired member and that Rule 7.01(a) allowed them to continue to use the name of a retired member in the firm name. The court disagreed: "Judge Alvarez was not a retired member of the firm because she did not terminate her career in the practice of law by becoming a federal judge to make use of her name 'otherwise lawful' under Rule 7.01(a)." Because Rule 7.01(a) prevents a lawyer from practicing in a firm whose name includes persons other than lawyers in the firm, the court of appeals upheld the determination that the Holes also violated Rule 7.01(a).

D. Partner's Personal Liability

Gobezie v. Castillo, No. 05-16-00841-CV, 2018 WL 1044271 (Tex. App.—Dallas Feb. 26, 2018, no pet. h.) (mem. op.).

There was sufficient evidence to support the existence of a partnership in which the defendant was a general partner and thus personally liable for the partnership's obligation to the partnership's customer.

Castillo bought a car from a business identified in various documents in the transaction as "Pro life Garland," "Prolife Auto," and "Prolife-MJMD," and Castillo never received the paperwork to obtain legal title to the vehicle. Castillo sued Gudaye Gobezie d/b/a Prolife Auto Garland. The court concluded that a reasonable factfinder could have determined that Gobezie was a partner in Prolife Auto Garland, the business from which Castillo purchased the vehicle. As a partner in this general partnership, Gobezie was thus jointly and severally liable for the partnership's failure to provide title to the vehicle purchased from the partnership. The court rejected Gobezie's argument that the judgment against her in this case was barred by a judgment in another lawsuit between Gobezie and the two other individuals who were parties to the business formation agreement that led to the formation of the partnership. The judgment in the other lawsuit declared Gobezie not competent to enter into business agreements with the other two individuals and declared the assumed name certificate for Prolife Auto Garland null and void, but the court in this case held that collateral estoppel was not established because there was no privity between the two individuals in the other suit and the purchaser of the vehicle in this suit.

Scott Pelley P.C. v. Wynne, No. 05-15-01560-CV, 2017 WL 3699823 (Tex. App.—Dallas Aug. 28, 2017, pet. denied) (mem. op.).

This case involved a complicated set of claims arising out of the dissolution of a law partnership. Only a few claims, however, were squarely partnership-law issues. The court of appeals ultimately upheld the trial court's determinations that breach of fiduciary duty claims failed and that joint and several liability was properly imposed.

In the late 1980s, Nall, Pelley, and Wynne were partners in the law firm of Nall, Pelley, and Wynne. In the late 2000s, Smith became a partner. The law firm was renamed Nall, Pelley, Wynne & Smith, and it was a

general partnership between Pelley, Scott Pelley P.C., Wynne, and Smith. Pelley, Wynne, and Smith, in their individual capacities, signed a written agreement (the “2008 Agreement”) which set out a monthly draw that each partner would receive and how all law firm revenue would be distributed. It also described how distributions were to be made to Pelley and Wynne for the Gibbs Estate and Shankles Estate cases, which were Nall, Pelley & Wynne assets prior to the 2008 Agreement.

After discord arose between the partners, the partnership dissolved. Pelley and Scott Pelley P.C. withheld payments from the Gibbs Estate and Shankles Estate cases. Pelley also deposited monies into the Scott Pelley P.C. account from clients who had contracted with Nall, Pelley, Wynne & Smith before the dissolution. Similarly, Wynne and Smith deposited monies into an account under their control from clients who had contracted with the firm before the dissolution.

Scott Pelley P.C., The Pelley Family L.P., and Pelley (collectively “the Pelley parties”) contended that the trial court erred in imposing joint and several liability as to Wynne’s and Smith’s counterclaims against Scott Pelley P.C. and The Pelley Family L.P. The court noted that: (1) a general partnership is “an association of two or more persons to carry on a business for profit as owners”; (2) all partners are jointly and severally liable for all obligations of the general partnership unless otherwise agreed or provided by law; (3) piercing the corporate veil is inapplicable to partnerships; and (4) there is no veil that needs piercing because a general partner is always liable for the debts and obligations of the partnership to third parties. The trial court made express findings that (1) a general partnership existed between Pelley, Scott Pelley P.C., Wynne, and Smith, and (2) Wynne and the M&S Wynne Family L.P., and Pelley and The Pelley Family L.P., were partners with respect to the Gibbs Estate and Shankles Estate cases. Because the Pelley parties did not challenge these findings of fact on appeal, the court of appeals found them binding. As the court concluded: “These findings of fact support the trial court’s conclusion that they are jointly and severally liable. Because the trial court found that the business relationships were that of a general partnership, there was no need to pierce the corporate veil. Accordingly, we conclude the trial court did not err when it concluded the Pelley parties were jointly and severally liable.”

Lemon v. Hagood, No. 08-15-00309-CV, 2017 WL 3167488 (Tex. App.—El Paso July 26, 2017, pet. denied).

The court of appeals reversed a jury’s award of damages to a lawyer who had sued a partner in a law partnership over a fee dispute.

The facts of the dispute are complicated, but suffice it to say that, at trial, a jury found that Van Shaw and D. Brent Lemon were in a partnership when they asked Daniel Hagood to assist them in a lawsuit (the “Carpenter lawsuit”). The jury found that Lemon failed to pay Hagood for his services in trying the Carpenter lawsuit. The jury further found that Hagood was excused from, and Lemon was quasi-estopped to complain about, any failure of Hagood to first satisfy a judgment against the partnership.

Lemon claimed that Hagood was required to have first obtained a judgment against the partnership before he could directly sue Lemon. At the time of the first trial in the dispute, precedent in the Dallas Court of Appeals held that there was no requirement to first sue and obtain a judgment against the partnership before pursuing an individual partner. *See Reagan v. Lyberger*, 156 S.W.3d 925, 929 (Tex. App.—Dallas 2005, no pet.). In 2015, however, the Supreme Court of Texas issued its opinion in *American Star Energy and Minerals Corp. v. Stowers*, 457 S.W.3d 427 (Tex. 2015), which referenced § 152.306 of the Business Organizations Code in concluding that a judgment against the partnership is necessary before pursuing the assets of a partner.

The court of appeals stated that a Texas partnership is an entity distinct from its partners, and it then cited § 152.306 in concluding that “[a] creditor must obtain a judgment both against the partnership as an entity and the partner before the partner’s individual assets may be executed upon, though this may be accomplished in the same lawsuit.” Section 152.306(b) states that a creditor may proceed against a partner’s assets only if a judgment is also obtained against a partner that remains unsatisfied for ninety days. Section 152.306(b), however, is subject to several exceptions in § 152.306(c), including (1) the partnership is a debtor in bankruptcy; (2) the creditor and the partnership agree that the creditor is not required to comply with Subsection (b); (3) a court orders otherwise, based on a finding that partnership property subject to execution in the state is clearly insufficient to satisfy the judgment or that compliance with Subsection (b) is excessively burdensome; or (4) liability is imposed on the partner by law independently of the person’s status as a partner.

Hagood focused on the third exception and argued that it excused his failure to obtain a judgment against the partnership. The court of appeals disagreed, stating that the trial court never made a specific finding that the

partnership property was “clearly insufficient” to satisfy the judgment, or that suing the partnership would have been “excessively burdensome.” Moreover, the court concluded that the exceptions in § 152.306(c) are exceptions to the ninety-day waiting period, and not to the requirement for obtaining a judgment against the partnership.

Hagood also argued that his failure to first obtain and attempt to satisfy a judgment against the partnership was excused by waiver or estoppel, which the jury found. The court stated that although parties cannot waive a mandatory statutory duty that is jurisdictional, they can waive mandatory statutory duties that are not jurisdictional in nature. The court concluded that the legislature did not intend to make the requirement to obtain a judgment against the partnership jurisdictional; consequently, the waiver and estoppel questions were proper questions for the jury.

The court of appeals then found that there was some evidence that Lemon waived the requirement to obtain a judgment against the partnership. Further, there was some evidence to support the jury’s quasi-estoppel finding because Lemon testified inconsistently on whether he believed that a partnership with Shaw existed. (The implication appears to be that the jury may have believed that it was unconscionable to demand that Hagood obtain a judgment against the partnership when Lemon also took the position that a partnership did not exist.)

Despite these favorable rulings for Hagood, the court of appeals ultimately concluded that Hagood could not recover because the Carpenter lawsuit became property of the bankruptcy estate when the Carpenters filed for bankruptcy. That lawsuit was then sold back to the Carpenters “free and clear of all liens, claims and encumbrances.” The court held that such language was sufficient to eliminate Shaw and Lemon’s contingency interest in the litigation—an interest that was a necessary predicate for Hagood’s recovery: “The Sale Order thus extinguished Shaw & Lemon’s fee interest in the claim. Hagood’s interest in the contingency fee was dependent on Shaw & Lemon’s fee. In his words, ‘If we got nothing, I got nothing.’ When Shaw & Lemon’s fee interest was extinguished, so to [sic] was his potential recovery.”

Castro v. Precision Demolition LLC, Civ. A. No. 3:15-CV-0213-D, 2017 WL 2954784 (N.D. Tex. July 11, 2017).

Castro brought a collective action on behalf of himself and others similarly situated against defendants Precision Demolition LLC and Precision Demolition, LP (collectively, “Precision Demolition”), Holfords Prairie Partners, LLC (“Holfords”), Raymond D. Rinker III, and Aaron Smith. Castro asserted various claims, including one for unpaid overtime wages. The parties tried the case to a jury, which returned a verdict partly in favor of Castro and partly in favor of defendants. Regarding Castro’s Fair Labor Standards Act (“FLSA”) overtime claim, the jury found that Castro had proven the claim’s essential elements against Precision Demolition, Rinker, and Smith, but not against Holfords.

Castro moved for judgment as a matter of law, contending that because Holfords was the general partner of the limited partnership that employed Castro (i.e., Precision Demolition), Holfords was a joint employer and jointly and severally liable for Castro’s damages. The court noted that “[i]t is undisputed that Holfords is the general partner of Precision Demolition,” and it stated that “[u]nder Texas law, general partners of a limited partnership are jointly and severally liable with each other and with the partnership for partnership debts.” Accordingly, the court held that Holfords was jointly and severally liable for Castro’s unpaid overtime compensation under Texas law without considering whether Holfords also qualified as Castro’s employer under the FLSA.

Al-Saud v. Youtoo Media, L.P., No. 3:15-CV-3074-C, 2017 WL 3841197 (N.D. Tex. Mar. 15, 2017).

An individual who signed a letter of intent on behalf of a limited partnership and on behalf of himself as general partner was personally liable for the obligations owed under the letter of intent because general partners have personal liability for partnership obligations under Texas law, and the individual’s attempt to argue that he was not in fact the general partner of the limited partnership was precluded by the parol evidence rule since the assertion contradicted the plain and unambiguous representation in the letter or intent that he was the general partner.

Thompson v. Flintrock Feeders, Ltd., No. 2:09-CV-0010-J, 2010 WL 11561929 (N.D. Tex. May 10, 2010). (Although the court issued this opinion in 2010, it is included in this year’s update because it did not appear in the Westlaw database until recently.)

The court held that an individual sole member of an LLC general partner of a limited partnership was personally liable for the limited partnership’s debts after the LLC’s charter was forfeited for failure of the LLC to

pay franchise taxes. As general partner of the limited partnership, the LLC was liable for the limited partnership's debts, and as the sole member of the member-managed LLC, the member "was liable for the debts during the time the [LLC's] charter was suspended." Further, the LLC's member was also a limited partner in the limited partnership, and he personally authorized the actions of the limited partnership's employee who dealt with the plaintiffs in connection with the events underlying the lawsuit. The court said that "[p]ersonal liability attaches to a limited partner when he takes part in the control and management of the business."

E. Authority of Partner

BMO Harris Bank, N.A. v. Schmidt Land Services Inc., Civ. A. No. 2:16-CV-254, 2017 WL 4280653 (S.D. Tex. Sept. 27, 2017).

The court granted the defendant's motion for summary judgment after concluding that there was no evidence of actual authority, apparent authority, or ratification to support the plaintiff's position that a loan guarantee signed on behalf of a joint venture was authorized.

Plaintiff BMO Harris Bank, N.A. ("BHB") filed this action to recover on loans issued to Schmidt Land Services, Inc. ("SLS") and allegedly guaranteed by Walker M. Schmidt individually and Schmidt Oilfield Service Venture ("SOSV"). BHB and SOSV both filed cross-motions for summary judgment seeking a determination as to whether the loan guarantees signed only by Schmidt on behalf of SOSV properly bound SOSV.

The court noted that actual authority included both express and implied authority. Express authority exists when the principal has made it clear to the agent that he wants the act to be done. Implied authority exists when appearances justify a finding that the agent was authorized, such as (1) from some indication from the principal that the agent possessed the authority; (2) from being the necessary implication of an expressly authorized act; and (3) from a previous course of dealing.

With respect to express authority, Schmidt did not claim that SOSV authorized him to incur the debts. In fact, he admitted the falsity of his representations to BHB that he could properly sign on behalf of SOSV. This admission of no express authority was consistent with the express terms of the joint venture agreement ("JVA"), which made it clear that Berry Contracting, LP was the sole managing party for SOSV, subject to the directives of the executive committee. Although Schmidt was on the executive committee, the court pointed out that he was not authorized to act unilaterally under the JVA. In addition, the executive committee's authority was also limited in these circumstances.

With respect to implied authority, the court did not believe that SOSV indicated to Schmidt or SLS that the loan guarantees were permitted. Likewise, nothing in the evidence demonstrated that SOSV intended that Schmidt serve as SOSV's managing party for signing a guaranty. Finally, nothing in the evidence suggested "that the parties had engaged in any course of dealing that would justify a conclusion that Schmidt regularly represented SOSV as a member authorized to incur debt on its behalf for the benefit of SLS." The court concluded that, as a matter of law, Schmidt did not have actual authority (express or implied) to bind SOSV. On that point, BHB's motion for summary judgment was denied, and SOSV's motion for summary judgment was granted.

The court then proceeded to discuss apparent authority. After observing that joint ventures are treated like partnerships under Texas law, the court cited § 152.301 of the Business Organizations Code for the proposition that each partner is an agent of the partnership for the purpose of its business. The court further observed that this partnership agency is circumscribed by (a) the limits as set out in the partnership agreement and known to the third party, or (b) the partnership business actually or customarily conducted in the industry.

BHB acknowledged that the JVA set out limits on the authority to manage the joint venture, but it argued that it did not know of those limits at the time Schmidt executed the guarantees. Schmidt testified that the lender was aware of the terms of the JVA at the time the obligations were signed. The court concluded that "there is still admissible evidence on both sides of the question whether the JVA was a part of the Lender's file prior to accepting the false SOSV Guaranties and whether the Lender knew of the contents of the JVA sufficient to understand the limits on Schmidt's authority." Therefore, according to the court, a disputed issue of material fact existed.

Even if BHB did not have knowledge of the JVA's limitations on Schmidt's authority, the court noted that a "potentially dispositive question regarding apparent agency is whether the SOSV Guaranties were outside the scope of SOSV's ordinary course of business from a third party perspective." The purpose of the SOSV joint venture was described as performing and completing Land Services Contracts, and BHB described the nature of the business as construction and trucking services for the oil and gas industry. The court then observed:

The question is whether it is in the ordinary course of that Land Service[s] Contracts or construction and trucking business for the joint venture to supply a Guaranty to secure a participant's loan to purchase heavy equipment and vehicles titled exclusively in that participant's own name. Nothing in the JVA authorizes this (rather the JVA prohibits it) and no other evidence has been offered on this narrow issue.

The only relevant case law indicates that the apparent authority to bind a partnership to a negotiable instrument such as the loans at issue here exists only where the object of the business is based upon such financing. As stated above, there is no evidence that the Land Services Contracts business of SOSV required SLS, the field participant, to purchase equipment in its own name using SOSV's guaranty.

The court concluded that BHB failed to supply any evidence that a financial transaction of the type it sued upon was within the ordinary business of SOSV or other companies in the same business. On this issue, BHB's motion for summary judgment was denied and SOSV's motion for summary judgment was granted.

BHB also argued that SOSV knew about the loans and ratified them. The court stated that ratification may occur when a principal, with no knowledge of the unauthorized act of his agent, retains the benefits of a transaction after acquiring full knowledge. According to the court, "it is not knowledge of the transaction that triggers ratification, but knowledge of the otherwise wrongful act that was a part of the transaction that matters."

BHB relied on evidence that SOSV used the equipment that SLS purchased and made payments for that use, which included interest payments on the loans. According to the court, this was evidence that SOSV was aware of SLS's purchase of the equipment, financed through BHB. It was not evidence, however, that SOSV knew that Schmidt had executed the unauthorized guarantees to induce the financing. The court determined that BHB had no evidence that SOSV continued to accept the benefits of SLS's equipment purchases after learning of the guarantees. BHB's motion for summary judgment on ratification was denied, and SOSV's cross-motion on the same point was granted.

F. Fiduciary Duties of Partners and Affiliates

Vaschenko v. Novosoft, Inc., No. 03-16-00022-CV, 2018 WL 1547270 (Tex. App.—Austin Mar. 30, 2018, no pet. h.) (mem. op.).

The court held that the trial court did not err in rendering summary judgment on the basis that a party's claims for breach of fiduciary duty were barred by limitations where the party did not fairly apprise the trial court of the party's argument that the claims were based on an ongoing oral partnership and continuous breaches of duties that tolled the limitations period.

In this dispute between Vladimir Vaschenko and three defendants that included Philip Brenan, Vaschenko argued that the trial court erred in granting the defendants' motion for summary judgment on Vaschenko's claim for breach of fiduciary duty. The court of appeals held that Vaschenko did not fairly apprise the trial court of his argument that he and Brenan were in an ongoing oral partnership and that Brenan engaged in continuous breaches of fiduciary duties that tolled the limitations period. The factual and legal bases of Vaschenko's appellate theories were not presented as required in the court below because Vaschenko's summary-judgment response did not cite the relevant facts or law applicable to the alleged partnership formation and its continued existence, did not describe any related duties or continuous breaches, and did not explain the effect of any such breaches on the limitations period for any such cause of action. In a footnote, the court stated that, even if Vaschenko had presented these arguments in the court below, he did not explain how the continued existence of the partnership would support his continuing-tort defense to limitations. The court cited the 4-year statute of limitations for breach of fiduciary duty set forth in the Texas Civil Practice and Remedies Code, Tex. Bus. Orgs. Code § 152.221(c) (which the court parenthetically stated does not expand applicable limitations), and a case in which the court concluded that the cause of action accrued when partners knew of the transactions that served as the foundation for the alleged breaches of fiduciary duty.

Home Comfortable Supplies, Inc. v. Cooper, 544 S.W.3d 899 (Tex. App.—Houston [14th Dist.] Feb. 22, 2018, no pet. h.).

The court of appeals upheld the trial court’s award of punitive damages where the actual damages awarded were not tied to any particular cause of action and the defendants did not challenge the trial court’s findings that they fraudulently induced the plaintiffs to enter into the agreements and breached fiduciary duties owed to them as partners.

The parties formed a scrap metal business as a limited partnership whose limited partners were Home Comfortable Supplies, Inc. (“HCS”), which owned a 97% interest, and Cooper and Bonner, who each owned a 1% interest through their respective individual companies. The remaining 1% interest was owned by the general partner, an LLC that was owned 80% by HCS and 20% by Cooper. HCS was run by Zhao. After the business was formed, Zhao denied Cooper and Bonner access to financial records and bank accounts, refused to capitalize the business as promised, shut down the business, seized the business’s tangible assets, and allowed a new company owned by Zhao’s wife to use the assets free of charge.

On appeal, HCS and Zhao argued that the trial court erred in awarding punitive damages because punitive damages are not recoverable for breach of contract. This argument failed because it did not appear that the trial court’s award of damages was limited to damages for breach of contract. Although Zhao and HCS initially argued that the only damages awarded were for compensation owed under the management agreement, they admitted in their reply brief that the actual damages awarded by the trial court exceeded the amounts due under the management and partnership agreements. The trial court was not asked to, and did not, identify the damage elements it considered or link a specific amount of damages to a particular cause of action. Thus, the argument that the trial court erred by awarding punitive damages for breach of contract was mistaken because the underlying premise that the trial court only awarded actual damages based on breach of contract was mistaken.

HCS and Zhao alternatively argued that Cooper and Bonner failed to prove that they suffered any damages other than damages for breach of the partnership agreement. HCS and Zhao did not challenge the trial court’s findings that they fraudulently induced Cooper and Bonner to enter into the agreements in this case and engaged in conduct that constituted a breach of fiduciary duty, both of which are causes of action for which punitive damages are recoverable. The court pointed out that damages caused by fraudulent inducement may exceed those caused by mere breach of contract, and Zhao and Bonner testified as to injuries beyond the compensation they were due. Further, the court of appeals addressed damages for breach of fiduciary duty, relying on *Bohatch v. Butler Binion*, 977 S.W.2d 543, 545 (Tex. 1998), for the proposition that “[p]artners share ‘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.’” Zhao and HCS did not challenge findings by the trial court that they wrongfully took possession and control of the partnership’s assets and transferred the assets with the intention of destroying the partnership’s business, harming the partners, and enriching themselves. Thus, the court of appeals said that damages for breach of fiduciary duty may have included the value of Cooper’s and Bonner’s interests in the partnership’s assets if the assets had been liquidated as required, as well as the money Cooper invested to acquire an interest in the general partner. Because the court of appeals did not know how the trial court calculated the damages, the court of appeals could not rule out the possibility that the damages were awarded in large measure based on the tortious conduct of Zhao and HCS.

Patel v. Harbor Hospice of Beaumont, L.P., No. 13-15-00452-CV, 2017 WL 4296615 (Tex. App.—Corpus Christi Sept. 28, 2017, pet. denied) (mem. op.).

The court of appeals reversed the trial court’s grant of summary judgment that dismissed a limited partner’s breach of fiduciary duty claim.

Harbor Hospice, a limited partnership, was created to build and operate a hospice in Beaumont, Texas. Sandeep Patel owned a 6% limited partnership interest and also served as a guarantor on a construction loan to build the hospice.

The bank that made the construction loan requested updated financial information from Patel, but Patel did not respond. General counsel for the limited partnership sent Patel a letter advising him that if he did not provide the bank with the requested information, he would be in material breach of his obligations under the partnership agreement. The letter further informed Patel that the general partner may expel him for failure to comply and that, upon expulsion, Patel would forfeit the value of his partnership interest. Patel allegedly did not comply.

Patel eventually sued and complained about the manner in which his limited partnership interest was dealt with. He alleged various causes of action, including breach of fiduciary duty. The defendants appeared to be the limited partnership, the general partner, and at least some of the limited partners. The court referred to them all collectively as “Harbor Hospice.” Harbor Hospice filed a motion for summary judgment seeking dismissal of Patel’s claims, and the trial court granted the motion. Patel appealed.

The court of appeals noted that “[p]artners owe a duty of loyalty to the joint concern of the partnership” and that “[p]artners also owe a duty of ‘the utmost good faith, fairness, and honesty in their dealings with each other with respect to matters pertaining to the enterprise.’” To prevail on the breach of fiduciary duty claim, the court observed that Patel had to prove (1) the existence of a fiduciary relationship; (2) a breach of the duty; and (3) the defendant benefitted from the breach or harmed the plaintiff.

The court agreed that Patel could not legally state a claim for breach of fiduciary duty by alleging merely that he should not have been expelled pursuant to the partnership agreement. Patel, however, never premised his claim on the fact of expulsion, nor did the summary judgment evidence conclusively establish that Patel was expelled. Instead, the summary judgment record contained conflicting accounts of what happened to Patel and his interest. Some of the evidence suggested that Patel was expelled and that his interest was forfeited to the partnership under the provisions of the partnership agreement. Other evidence indicated that Patel’s interest was improperly transferred to another limited partner without Patel’s knowledge or consent and without any payment. Still other evidence suggested that the limited partnership redeemed Patel’s interest without providing sixty days’ advance notice to Patel, as required by the partnership agreement.

The court observed that Patel’s claim for breach of fiduciary duty depended upon which account the fact finder believed. For example, if Patel was properly expelled under the partnership agreement, his claim would lack merit because partners do not owe a fiduciary duty to refrain from expelling a partner. On the other hand, according to the court, if Harbor Hospice clandestinely transferred Patel’s interest to another limited partner, or retroactively redeemed it, then the fact that such actions were allegedly taken without payment or notice to Patel implicated fiduciary duties. The court concluded that a fact issue concerning the disposition of Patel’s interest precluded summary judgment on his claim for breach of fiduciary duty.

Harbor Hospice’s summary judgment motion also argued that Patel did not suffer any damage. The court noted that, under the transferred partnership interest scenario, there was some evidence that the interest was transferred without consideration. Moreover, under the redemption scenario, there was some evidence that Patel was not paid the value of his capital account, as required under the partnership agreement. Thus, the court concluded that Harbor Hospice did not sustain its burden to establish that Patel suffered no damage. The trial court’s summary judgment was reversed.

Scott Pelley P.C. v. Wynne, No. 05-15-01560-CV, 2017 WL 3699823 (Tex. App.—Dallas Aug. 28, 2017, pet. denied) (mem. op.).

This case involved a complicated set of claims arising out of the dissolution of a law partnership. Only a few claims, however, were squarely partnership-law issues. The court of appeals ultimately upheld the trial court’s determinations that breach of fiduciary duty claims failed and that joint and several liability was properly imposed.

In the late 1980s, Nall, Pelley, and Wynne were partners in the law firm of Nall, Pelley, and Wynne. In the late 2000s, Smith became a partner. The law firm was renamed Nall, Pelley, Wynne & Smith, and it was a general partnership between Pelley, Scott Pelley P.C., Wynne, and Smith. Pelley, Wynne, and Smith, in their individual capacities, signed a written agreement (the “2008 Agreement”) which set out a monthly draw that each partner would receive and how all law firm revenue would be distributed. It also described how distributions were to be made to Pelley and Wynne for the Gibbs Estate and Shankles Estate cases, which were Nall, Pelley & Wynne assets prior to the 2008 Agreement.

After discord arose between the partners, the partnership dissolved. Pelley and Scott Pelley P.C. withheld payments from the Gibbs Estate and Shankles Estate cases. Pelley also deposited monies into the Scott Pelley P.C. account from clients who had contracted with Nall, Pelley, Wynne & Smith before the dissolution. Similarly, Wynne and Smith deposited monies into an account under their control from clients who had contracted with the firm (the “Cobb and LJH” cases) before the dissolution.

Scott Pelley P.C. argued that the trial court erred when it concluded that Wynne and Smith did not breach their fiduciary duties of loyalty and care. It claimed that Wynne and Smith breached their duties by failing to pay a bonus to Scott Pelley P.C. and by their “theft” of the Cobb and LJH fees. The court of appeals rejected the claim

because it had already determined that “the trial court did not err in concluding [that] Wynne and Smith did not convert or steal the 2010 bonus [and] the Cobb and LJM fees.”

Wynne and Smith contested the trial court’s conclusion that Pelly did not breach his fiduciary duties. The court of appeals stated that even if the trial court erred, Wynne and Smith must show that the error probably caused the rendition of an improper judgment. Even though Wynne and Smith argued that the breach of fiduciary duty resulted in gain to Pelley and loss to Wynne, the court found that those findings addressed their breach of contract claim against Pelley and not their breach of fiduciary duty claim. According to the court, “Wynne and Smith present no argument as to how they were harmed by the trial court’s alleged errors as to their cross-claim for breach of fiduciary duty.”

United States v. Woodward, No. B-09-638, 2011 WL 13182857 (S.D. Tex. Sept. 9, 2011), aff’d, 493 Fed. App’x 483 (5th Cir. 2012). (Although the court issued this opinion in 2011, it is included in this year’s update because it did not appear in the Westlaw database until recently.)

The court held that an individual who controlled limited partnership car dealerships breached a fiduciary duty owed to the limited partners and was thus subject to a sentencing enhancement for “abuse of a position of trust” under the federal sentencing guidelines where the individual used his control over the car dealerships to facilitate a check-kiting scheme.

The defendant objected to a recommendation of an enhancement for “abuse of a position of trust” in a pre-sentence investigation report relating to the defendant’s guilty plea to bank fraud. After concluding that defendant’s conduct as a bank customer and car salesman did not support an enhancement for abuse of a position of trust vis a vis the bank or car dealership customers in this case, the court addressed the defendant’s position of control over two car dealerships and related entities (the details of which were not set forth but which were apparently organized as limited partnerships). Based on Fifth Circuit cases, the court stated that “there is absolutely no doubt about the duty that the general partner of a limited partnership owes to the limited partners or that one partner or joint venturer owes another. Texas law (as well as the law in virtually every jurisdiction) holds that a general partner owes a fiduciary duty to his limited partners.” The court went on to state that “[t]his fiduciary duty has been described as ‘one of the highest fiduciary duties recognized in law’” and noted that “[t]his same duty is owed by a partner in a general partnership to another or by one joint venturer to another.” In a footnote, the court stated that it need not analyze each entity as to its exact organizational status “[s]ince the duty owed to partners, limited partners, and joint venturers is the same,” and the court stated that the defendant occupied a position of trust to his co-investor by virtue of the defendant’s position “regardless of the form of their relationship, even if they were just co-owners of stock.” The court said that the evidence showed that the defendant used all of the entities, including the two car dealerships, to facilitate a check-kiting scheme. The defendant directed employees to falsify records and exposed the limited partners to large losses. The court concluded that “[u]sing partnership assets and partnership personnel to perpetuate a check-kiting scheme, while skimming off large amounts of money for one’s personal benefit, is an abuse of the fiduciary relationship that a general partner has with his limited partners or joint venturers.” By abusing his position of trust to “his partners/joint venturers/business associates” to facilitate and conceal his crime, the defendant was subject to the enhancement for abuse of a position of trust.

Akuna Matata Invs. Ltd. v. Texas NOM Ltd. P’ship, No. SA-05-CA-1053-WRF, 2007 WL 9702865 (W.D. Tex. Mar. 16, 2007). (Although the court issued this opinion in 2007, it is included in this year’s update because it did not appear in the Westlaw database until recently.)

The court held that the plaintiff’s claim for judicial dissolution and an accompanying accounting and receivership were not barred by the statute of limitations, nor were any claims for breach of fiduciary duty that were based on ongoing breaches after the rendition of a state-court judgment in a previous lawsuit. However, any claims for breach of fiduciary duty that occurred before the previous lawsuit were barred by the statute of limitations based on Section 4.06 of the Texas Revised Partnership Act (Tex. Rev. Civ. Stat. Art. 6132b-4.06), “which indicates the Legislature’s desire to require partners to pursue claims during the life of the partnership rather than waiting until dissolution.”

G. Partnership Property and Partnership Interest

McCurry v. Farmer, No. 06-17-00052-CV, 2017 WL 5907712 (Tex. App.—Texarkana Dec. 1, 2017, no pet. h.) (mem. op.).

The court of appeals affirmed the trial court’s ruling that a tract of land was partnership property.

Best friends Don Farmer and Terry McCurry married sisters Sherry and Mary. In 1995, the couples purchased an 80-acre tract of land, the title of which was placed in the names of Terry and Mary. Several years after Terry’s death, Mary claimed sole ownership of the 40-acre portion of the tract that had not been sold. Don and Sherry filed a declaratory judgment action alleging an oral agreement between the couples that the 40-acre tract would be co-owned by the couples and asking the trial court to determine that the property was owned one-half by Mary and one-half by Don and Sherry. They also asked the trial court to impose a constructive trust on the property. After a bench trial, the trial court granted the relief requested by Don and Sherry.

On appeal, Mary contended that the trial court erred in making implied findings that the Farmers and the McCurrys were in a partnership and that the remaining 40-acre tract was partnership property. Citing § 152.102(c) of the Business Organizations Code, Mary argued that there was no evidence that the property was acquired with partnership assets and, because it was acquired only in the names of Terry and Mary with no indication that they were acquiring it for a partnership, it was presumed to be the property of Terry and Mary.

The court concluded that the “evidence shows that Terry and Don agreed to purchase the 40-Acre Tract together, that Don and Sherry paid valuable consideration, that the couples jointly made improvements to the property, that they jointly occupied and shared the costs and benefits of the property, and that both Terry and Mary affirmed the agreement even though record title remained solely in their names.” As a result, the court found that there was some evidence supporting (a) the trial court’s implied finding that the couples had an oral agreement to purchase and jointly own the property, and (b) the trial court’s judgment declaring that Mary owned a fifty percent undivided interest and that Don and Sherry owned a fifty percent undivided interest in the property.

Abdullatif v. Choudhri, 536 S.W.3d 48 (Tex. App.—Houston [14th Dist.] 2017, mand. denied).

“The judgment’s declarations that Choudhri owns interests in a partnership and a limited liability company show that Choudhri’s ‘recovery’ includes ‘interest[s] in personal property.’ An interest in a partnership is personal property. Tex. Bus. Orgs. Code Ann. § 154.001(a) (West 2012) (‘A partner’s partnership interest is personal property for all purposes.’). A membership interest in a limited liability company is also personal property. *Id.* § 101.106(a) (‘A membership interest in a limited liability company is personal property.’). Rule 24.2(a)(2) therefore governs how appellants may supersede this portion of the judgment.” (citations omitted).

Intrepid Ship Mgmt., Inc. v. PRC Env’tl., Inc., 711 Fed. App’x 208 (5th Cir. 2017) (per curiam).

The Fifth Circuit affirmed a ruling that title to a rig did not transfer to a joint venture and, therefore, that a party to the alleged joint venture did not have standing to sue for damages to the rig.

PRC Environmental sued for damage to a rig. It claimed that it held a proprietary interest in the rig by virtue of a joint venture with Francisco Moreno, the title owner of the rig. The district court concluded that title to the rig never passed from Moreno to the joint venture. PRC appealed.

The Fifth Circuit concluded that PRC failed to bring forth facts that, if true, proved the existence of a joint venture. PRC “failed to prove an agreement between Moreno and PRC to share profits and losses, meaning PRC could not gain a proprietary interest in the Rig through the joint venture.” (The court cited a Houston Court of Appeals case for the proposition that a valid Texas joint venture required an express agreement to share both profits and losses.) Even assuming that a joint venture was created, the Fifth Circuit also determined that PRC did not bring forth sufficient facts “to prove that Moreno either actually transferred or intended to transfer the Rig as required for individual property to become joint venture property.” Because PRC had no proprietary interest in the rig, it had no standing to maintain the suit.

Moss v. Princip, No. 3:14-CV-3088-BF, 2016 WL 9245113 (N.D. Tex. May 31, 2016). (Although the court issued this opinion in 2016, it is included in this year’s update because it did not appear in the Westlaw database until recently.)

After a jury trial, the jury determined that a partnership existed between the plaintiffs, Moss and Keating, and the defendants, Princip and Martin. The jury found that Moss and Keating each owned a 30% interest in the partnership and that Princip and Martin each owned a 20% interest. The jury also found that Princip and Martin engaged in wrongful conduct in response to questions regarding conduct that is grounds for judicial expulsion under Tex. Bus. Orgs. Code § 152.501(b)(5). The plaintiffs sought judgment ordering that Princip and Martin were judicially expelled and that certain property was property of the partnership. Princip and Martin responded that they should be paid for their interests if they were to be expelled.

The plaintiffs argued that VideoGames YouTube Channel (“VG”) was partnership property and not the individual property of Princip. The court prefaced its analysis by quoting provisions of the Texas Business Organizations Code addressing the partnership as an entity and certain presumptions that may arise regarding the ownership of property. Tex. Bus. Orgs. Code § 152.056 (providing that a partnership is an entity distinct from its partners); § 152.102(b) (providing that property is presumed to be partnership property if acquired with partnership property); § 152.102(c) (providing that property is presumed to be the partner’s property if acquired in the name of the partner and is not acquired with partnership property). The court also stated that “ownership of property intended to be a partnership asset is not determined by legal title, but rather by the intention of the parties as supported by the evidence,” citing *Keller v. United States*, 697 F.3d 238, 243 (5th Cir. 2012). Princip argued that VG was his property because he acquired it before the partnership was formed and without partnership funds. However, the court concluded that VG was partnership property based on a declaration by Princip that he created VG on May 20, 2012, which was after he entered into a partnership agreement with Keating (as evidenced by a document dated May 11, 2012), and conversations between Princip and Moss in which Princip made clear that he needed an investment by Moss to start a YouTube channel.

The court concluded that a judicial decree of expulsion of Princip and Martin was appropriate based on the jury’s findings in response to questions based on Tex. Bus. Orgs. Code § 152.501(b)(5). According to the court, “[t]he jury returned the charge indicating that both Princip and Martin engaged in wrongful conduct that constituted wrongful withdrawal.” The court then addressed the defendants’ contention that they should be paid for their share of the partnership if they are expelled. The court cited Tex. Bus. Orgs. Code § 152.601 for the proposition that the interest of a withdrawn partner is automatically redeemed as of the date of withdrawal and that “[t]he redemption price of a partner who wrongfully withdraws’ is the lesser of the fair market value on the date of withdrawal or the amount the partner would have received if a partnership wind-up had occurred.” The court noted that interest is payable on the amount owed from the date of withdrawal to the date of payment, that payment to a wrongfully withdrawn partner may be deferred, and that a withdrawn partner may seek security for the deferred payment. Tex. Bus. Orgs. Code §§ 152.602, 152.605, 152.608. The court ordered the parties to submit briefing and evidence establishing “both the fair-market and wind-up values” of the partnership and stated that the value of the defendants’ shares, if any, would be credited against the amount owed by the defendants to the plaintiffs as a result of the jury’s findings.

Gandy Mktg. & Trucking, Inc. v. Tree Town Holdings, Ltd., No. H-08-1053, 2010 WL 11579500 (S.D. Tex. Aug. 18, 2010), report and recommendation adopted, 2010 WL 11579502 (S.D. Tex. Oct. 4, 2010). (Although the court issued this opinion in 2010, it is included in this year’s update because it did not appear in the Westlaw database until recently.)

The court denied the IRS’s requests to order liquidation and distribution of the assets of a limited partnership in which a taxpayer was a partner because the taxpayer had no right or interest in the partnership’s assets. The court granted the IRS’s requests for a charging order and receiver with respect to the taxpayer’s interest in the partnership.

After the IRS pursued Dennis Gandy for tax fraud, Gandy set up various entities, including a limited partnership, to which Gandy transferred his business and personal assets. A large judgment was ultimately entered against Gandy for taxes, penalties, and interest. The Gandys and their entities brought this suit against the purchaser of assets from the limited partnership to collect from an escrow account established in connection with the purchase of the assets, and the United States intervened seeking to collect on its judgment against Gandy. The United States sought the following alternative types of relief: (1) appointment of a receiver to liquidate and administer the

interests of Gandy in the limited partnership to pay Gandy's tax liability; (2) appointment of a receiver to liquidate and administer the assets of the limited partnership to pay Gandy's tax liability; (3) issuance of a charging order to pay Gandy's tax liability. The court acknowledged that Gandy had "avoided his tax liability for years by tying up his personal assets in [the limited partnership] and by paying personal expenses directly from [the limited partnership's] funds. Regardless of Gandy's recalcitrance, the United States' lien enforcement is limited to property or rights to property that belong to Gandy himself." The court rejected the United States' contention that it could reach the property of the limited partnership because the United States was only entitled to collect against the property of the taxpayer. Texas law provides that partnership property is the property of the partnership rather than the individual partners, and a partner has no interest in specific partnership property. Tex. Bus. Orgs. Code § 152.101. Although Gandy had no interest in the partnership's property, he owned 85% of the limited partnership as a limited partner, and he owned 40% of the partnership's corporate general partner. In order to enforce its judgment against these interests, the United States sought a charging order and receivership. The parties agreed that both remedies were available and the court found both were necessary. According to the court, if "the charging order prove[s] to be an insufficient method for collecting Gandy's tax debt, the receiver can determine whether it would be necessary or appropriate to divest Gandy of his ownership interests in [the limited partnership] and [corporate general partner] in order to enforce the judgment."

ADD Real Estate, Ltd. v. United States, No. 6:09-cv-5, 2009 WL 10677322 (E.D. Tex. Mar. 2, 2009). (Although the court issued this opinion in 2009, it is included in this year's update because it did not appear in the Westlaw database until recently.)

The court enjoined the IRS from levying on a brokerage account of a limited partnership to satisfy the tax liability of an individual limited partner because partnership property is not the property of the partners, and a partner has no specific interest in partnership property. The court stated that the IRS failed to meet its burden to establish by substantial evidence a nexus between the partnership's account and the taxpayer. The court stated in a footnote that the alter-ego theory does not apply to partnerships in Texas and that the IRS failed to produce substantial evidence indicating the limited partnership was the alter ego of Gandy even if the court assumed the alter-ego theory could apply to limited partnerships.

H. Assignment of Interest

Yazdani-Beiooky v. Sharifan, 2018 WL 2050450, __ S.W.3d __ (Tex. App.—Houston [14th Dist.] 2018, no pet. h.).

The court of appeals affirmed the trial court's judgment awarding damages based on breach of an oral contract by the majority limited partner to buy the interest of the minority limited partner for \$12.5 million, and the court held that any forfeiture or reduction of the minority limited partner's interest due to failure to meet a capital call made after the majority limited partner's breach of the agreement to purchase the minority partner's interest was immaterial to the breach-of-contract claim or the trial court's declaration that the majority partner owned all the interests in the partnership.

Yazdani and Sharifan formed a limited partnership in which Yazdani was the 59.9% limited partner and Sharifan was the 40% limited partner. An LLC of which Yazdani was the sole member and manager was the .1% general partner. After the two men had a falling out, the manager of the hotel owned and operated by the limited partnership acted as a go-between to negotiate a buyout by Yazdani of Sharifan's interest in the partnership. The manager and Sharifan testified that Yazdani and Sharifan orally agreed in August 2008 that Yazdani would buy Sharifan's interest for \$12.5 million cash. After Sharifan went to see Yazdani's lawyer as instructed by Yazdani to complete the paperwork, Yazdani's lawyer emailed Sharifan saying Yazdani would pay only \$7.5 million. Sharifan retained a lawyer who continued negotiations with other lawyers of Yazdani with no resolution. The two men continued to negotiate through another acquaintance who acted as a go-between. Yazdani denied the interactions in August 2008, stated that he had no memory of any subsequent negotiations, and denied that he ever made an offer to purchase Sharifan's interest at any price. In June and August of 2009, Yazdani made capital calls, and Sharifan contributed his share of these capital calls. At the end of August 2009, Yazdani made another capital call, and Sharifan did not contribute to that capital call. Yazdani contributed Sharifan's share under a provision of the partnership agreement addressing "Failure to Make Capital Contributions."

Yazdani along with the partnership and its general partner sued Sharifan seeking a declaratory judgment that Sharifan had no interest in the partnership or a determination of Sharifan's interest. Sharifan counterclaimed for breach of the August 2008 oral agreement to buy his interest. After a bench trial, the trial court ordered that Sharifan recover \$12,365,000 based on Yazdani's oral agreement to buy Sharifan's interest for \$12.5 million and an offset of \$135,000 (based on a claim by the plaintiffs against Sharifan for reimbursement of funds provided to Sharifan by the partnership in excess of the expenses actually incurred by Sharifan in connection with travel for which the funds were provided). The trial court also declared that the interest in the limited partnership formerly owned by Sharifan belonged to Yazdani. On appeal, the court of appeals affirmed the trial court's judgment.

After rejecting Sharifan's argument that Yazdani had acquiesced in the judgment by accepting the benefits of the judgment, the court of appeals addressed Yazdani's argument that Sharifan failed to prove the existence of an enforceable oral contract for the purchase and sale of Sharifan's partnership interest. The court of appeals held that Sharifan did prove such an agreement. The court of appeals reviewed findings of fact by the trial court in which the trial court found the testimony of Sharifan and the hotel manager who was involved as a go-between in the negotiations between Yazdani and Sharifan to be credible and found Yazdani was generally not a credible witness and did not testify truthfully. The court of appeals rejected Yazdani's argument that the August 2008 oral agreement was unenforceable as a matter of law because a written draft was contemplated to conclude the negotiations. The court of appeals said that a reasonable person would interpret the parties' words and conduct to indicate that Yazdani and Sharifan had a meeting of the minds that Yazdani would buy Sharifan's entire interest for \$12.5 million cash. Yazdani's request that Sharifan go see Yazdani's lawyer to sign paperwork reasonably could be interpreted as merely a means to memorialize the transfer that was previously agreed upon. The court also rejected the argument that the parties did not agree on all material terms. Yazdani argued that the parties did not reach an agreement on the timing and manner of payment by Yazdani and transfer by Sharifan, but the court said that the law will imply a reasonable time and that the facts and circumstances indicated that the parties intended that the transfer would occur within a few days with the entire purchase price paid in cash. The court also concluded that the failure of the parties to address other matters that could have been addressed but were not (such as Sharifan's liability on a guaranty and the settling of amounts owed by and to Sharifan) did not mean the oral agreement was missing material and essential terms.

The court of appeals next discussed at length whether the trial court's judgment awarded specific performance or an award of damages for breach of contract, and the court of appeals concluded that the trial court awarded damages for breach of contract rather than specific performance. The court rejected Yazdani's argument that the only measure of damages for breach of contract was the difference between the contract price of \$12.5 million and the market value of Sharifan's interest at the time, which Sharifan had testified was worth more than \$12.5 million. The court concluded that the trial court's award was supported by the evidence because the parties agreed on a price of \$12.5 million, Sharifan tendered his interest and thus performed his obligation, and Yazdani never paid anything to Sharifan. Thus, the difference between the value promised and expected (\$12.5 million) and the value received (\$0) was \$12.5 million, and that was Sharifan's economic loss.

The court next rejected Yazdani's argument that Sharifan waived his claim for breach of the alleged oral agreement by continuing to negotiate after the August 2008 agreement. The court said that the evidence did not conclusively establish that Sharifan through his words or conduct unequivocally intended to renounce his rights to enforce the August 2008 agreement.

Yazdani argued that the trial court erred in rendering judgment against Yazdani on his claim to determine the interests owned by Yazdani and Sharifan after the trial court found that Sharifan failed to comply with the August 2009 capital call and became a defaulting partner. The court of appeals concluded that these matters were immaterial because the trial court found that Yazdani breached the August 2008 oral agreement and that Sharifan fully performed the agreement. According to the court, "Anything Sharifan did afterward in response to the August 31, 2009 capital call and any subsequent readjustment of partnership interests could not have affected Yazdani's ownership of all the partnership interests."

Abdullatif v. Choudhri, 2018 WL 1559995, ___ S.W.3d ___ (Tex. App.—Houston [14th Dist.] 2018, no pet. h.).

In a dispute regarding the ownership of a limited partnership and its general partner, the court of appeals concluded that: (1) the trial court erred in submitting a jury question inquiring whether the parties to written assignments of interests in the limited partnership and its LLC general partner agreed to an alleged oral condition

because the alleged condition contradicted the unambiguous terms of the assignments and was thus precluded by the parol evidence rule; (2) the language of certain assignments did not transfer any interest in the LLC general partner of the limited partnership; (3) certain purported transfers of interest in the LLC general partner were null and void ab initio because they were prohibited under the company agreement, and subsequent consent or ratification could not operate to give life to an attempted transfer that was null and void; (4) certain purported transfers of interests in the limited partnership were valid even if the transfers were prohibited by the partnership agreement because the partnership agreement allowed the general partner to recognize a transfer that would otherwise be null and void under the terms of the agreement.

Osama Abdullatif (“Latif”) and Ali Mokaram entered into a real estate investment venture by forming Mokaram Latif West Loop, L.P. (“ML Partnership”) in which Mokaram and Latif were each 49.5% limited partners and Mokaram-Latif General, LLC (“ML General”) was the 1% general partner. Mokaram and Latif were the managers and equal members of ML General. Mokaram and Ali Choudhri became friends and engaged in business transactions together, including transactions in 2008 and 2010 involving ML Partnership and ML General.

The 2008 transaction included an agreement in which Mokaram purported to transfer to Choudhri a limited partnership interest in ML Partnership, and the 2010 transaction included purported assignments by Mokaram to Choudhri of interests in ML Partnership and ML General. Disputes regarding these transactions arose, and eventually Latif purchased all of Mokaram’s interests in ML Partnership and ML General along with all of Mokaram’s claims against Choudhri relating to interests in the entities. Mokaram agreed to continue to pursue his claims against Choudhri in this lawsuit in which Mokaram, Latif, Choudhri, and ML Partnership were parties. The trial court entered a declaratory judgment regarding the ownership of the entities, and Mokaram and Latif appealed.

The first issue the court of appeals addressed was whether the trial court erred in submitting a jury question inquiring whether Mokaram and Choudhri agreed that the 2010 assignment was not effective and that Mokaram would return the money paid by Choudhri to Mokaram. Because the unambiguous language of the assignment provided that it was effective immediately and did not indicate that it was contingent on any condition, the court of appeals concluded that the testimony regarding an alleged oral condition was precluded by the parol-evidence rule from contradicting the unambiguous language of the assignment. Thus, the trial court should not have submitted any question inquiring into the enforceability of the oral condition. The court stated that the parol-evidence rule would not have precluded the trial court from submitting a question about an alleged subsequent agreement to rescind, but the jury question that was submitted did not ask about a subsequent agreement to rescind. The court also stated that the evidence did not raise a genuine fact issue as to whether Mokaram and Choudhri agreed to rescind the assignment after they executed it.

The court next addressed the argument that the trial court lacked jurisdiction over the declaratory judgment claims regarding Choudhri’s ownership and management rights in ML General because ML General was not a party. The court of appeals held that the trial court did not lack jurisdiction over the claims. Although the declaratory judgment did not bind ML General, it was binding on the parties in this action.

Next the court of appeals discussed whether the trial court erred in declaring that Choudhri had owned an interest in ML General since the date of the 2008 assignment. Based on the language of the documents executed in 2008, which purported to transfer to Choudhri an interest in ML Partnership and certain real property, the court concluded that Mokaram did not purport to transfer any interest in ML General. The documents indicated that Mokaram and Choudhri thought that ML Partnership owned the real property referred to in the assignments and that they intended to transfer an indirect interest in the real property by transferring an interest in ML Partnership. However, assuming that ML Partnership owned the real property referred to in the assignments, that would not mean that ML General had any ownership in the property, and the court concluded that the evidence did not show that Mokaram transferred any interest in ML General to Choudhri by virtue of the 2008 assignments.

The 2010 assignments purported to transfer from Mokaram to Choudhri interests in both ML General and ML Partnership. Both the company agreement of ML General and the partnership agreement of ML Partnership contained restrictions on transfer, and the court discussed the effect of the purported transfers by Mokaram.

The ML General company agreement prohibited a member from transferring any of its membership interest except in limited circumstances, such as with the approval of members having more than 66.67% of the interests of all members. The company agreement stated that a transfer in violation of its provisions was “null and void ab initio.” Assuming Mokaram’s execution of the assignments represented his approval of the transfers, there was no evidence that Latif, the other 50% member at the time, approved the assignments before Mokaram purported to assign his interest, and there was no evidence that any of the other circumstances under which a transfer was

permitted were present. Choudhri relied on a 2011 consent signed by Latif as manager and member of ML General in which Latif consented to any prior transfers by Mokaram to Choudhri of a membership interest in ML General. The court concluded that the purported assignments were null and void from the outset under the unambiguous language of the company agreement, and as such the purported transfers could not be ratified or validated after the fact. Thus, the trial court erred in declaring that Choudhri had owned 50% of ML General and had been a manager of ML General from and after the 2010 assignments.

The ML Partnership agreement also contained prohibitions on transfer, and the court next addressed the effect of purported assignments in 2010 by Mokaram to Choudhri of limited partnership interest in ML Partnership. Section 10.1 of the partnership agreement prohibited a limited partner from transferring all or any portion of the limited partner's interest without the prior written consent of the general partner. Section 10.2 of the partnership agreement contained a right-of-first-refusal provision in favor of the other partners in the event a limited partner received a bona fide offer to purchase all or any portion of the limited partner's interest. Section 10.3 provided for certain "Permitted Transfers" (to a trust for the benefit of the limited partner, the guardian or estate of a limited partner, or a person approved by all the partners) notwithstanding the consent otherwise required by Section 10.1. Section 10.6 provided that a transfer that was not permitted under the partnership agreement "shall be null and void and of no effect whatever; provided that if the Partnership is required to recognize a Transfer that is not permitted (or if the Partnership, in its sole discretion, elects to recognize a Transfer that is not permitted)," the transferred interest was limited to the transferor's rights to allocations and distributions. Finally, Section 10.10 provided that the partnership was not required to recognize the interest of any transferee who obtained a purported transferred interest pursuant to a transfer that was not authorized by the partnership agreement, and such a transfer was "null and void for all purposes."

The court stated that the plain meaning of "null and void and of no effect whatever" would preclude a transfer that was not permitted by the partnership agreement from being subject to ratification, confirmation, or waiver, but the court concluded that the phrase "null and void and of no effect whatever" was not used in its ordinary sense given that the agreement unambiguously provided that the partnership could elect to recognize a transfer that was not permitted and thus was or would have been "null and void and of no effect whatever." The court noted the difference between the ML General company agreement (which the court had held did not permit ratification of a null and void transfer) and the ML Partnership agreement and concluded that the two agreements were separate and independent agreements that should not be construed together as one. Further, assuming the agreements should be construed as a single contract, the provisions unambiguously allowed the recognition of an otherwise void transfer of a partnership interest but did not allow the recognition of a void transfer of a membership interest.

Because Mokaram signed the assignment of his interests to Choudhri not only as assignor, but in his capacity as manager of ML General, the general partner of ML Partnership, under a legend stating that the transfer was consented to by the general partner, the court concluded that ML Partnership recognized the transfer of the interests. Relying on the language of the ML General company agreement (which provided that the managers shall have the sole and exclusive control of the management of ML General and shall make all decisions not otherwise provided for in the company agreement) and Section 101.254 of the Business Organizations Code (which provides that each governing person is an agent of the LLC for the purpose of its business), the court stated that Mokaram's signature as manager was binding on ML General, and ML Partnership thus recognized the transfer as valid and effective as provided by Section 10.6 of the partnership agreement. The court concluded that an earlier purported transfer in 2008 by Mokaram to Choudhri of a limited partnership interest was not effective because there was no evidence that the transfer was permitted under any of the provisions of the partnership agreement nor was there any evidence that the partnership was required to recognize the transfer or exercised its discretion to recognize the transfer.

Finally, the court concluded that the trial court did not err in refusing to clarify what rights Choudhri had as a result of his ownership of an interest in ML Partnership. The trial court declared that Choudhri owned 49.5% of ML Partnership from and after the 2010 assignments and that he had "all beneficial rights and interests" that flowed from his ownership of an interest in ML Partnership. The court stated that the interests transferred to Choudhri were limited to rights to allocations and distributions under the unambiguous language of Section 10.6 of the partnership agreement, and neither Section 10.2 nor 10.6 gave Choudhri the right to become a limited partner under the assignments. The trial court did not declare that Choudhri was a limited partner, and although the "beneficial rights and interests" were significantly limited by the agreement, the trial court did not inaccurately

characterize them. Thus, the court of appeals concluded that the trial court did not err in making the declaration and in refusing to clarify it.

I. Interpretation and Enforcement of Partnership Agreement

1. Financial Rights and Obligations

Pike v. Texas EMC Mgmt., LLC, No. 10–14–00274–CV, 2017 WL 2507783 (Tex. App.—Waco June 7, 2017, pet. filed) (mem. op.).

The court of appeals affirmed the jury’s breach-of-contract finding with respect to a partnership agreement.

The partners in EMC Products, a Texas limited partnership, were EMC Management, EMC Cement, Walker and certain members of his family, and Wilson. EMC Management was a general partner with a 1% share in the partnership. EMC Cement was a Class A limited partner with a 49.5% ownership stake. Walker and his family and Wilson were Class B limited partners with a collective 49.5% ownership stake in the partnership. Under the Partnership Agreement, the following was required of Class B limited partners Walker and Wilson:

Section 2.5. Financing Assistance by Class B Limited Partners. The Class B Limited Partners shall loan funds to and/or obtain financing for the Partnership to meet the Primary Objective until such time as the Partnership has the financial ability to obtain such financing on its own resources. The General Partner and the Class A Limited Partner shall have no obligation to make loans to and/or obtain financing for the Partnership.

Section 1.5 of the Partnership Agreement outlined the “Primary Objective” of the Partnership as follows: “The Partners agree that the primary objective of the partnership will be to maximize the degree and speed of market penetration for the Products in the State of Texas, in accordance with market demand and potential, respecting sound business principals.”

Walker and Wilson argued that the breach-of-contract claim against them was invalid as a matter of law because, among other grounds, the failure to provide an infinite amount of money was not a breach of the Partnership Agreement. The court observed that the usage of the term “shall” in Section 2.5 of the Partnership Agreement imposed a mandatory duty on Walker and Wilson to loan funds and/or obtain financing. Despite that language, Walker and Wilson argued that their duty to loan or obtain funds was limited by the “sound business principals” language of the primary objective; thus, the failure to provide an infinite amount of money did not constitute a breach of the agreement. The court disagreed: “The ‘sound business principles’ language modifies the language about the partnership’s goal of maximizing market penetration, not Walker and Wilson’s obligation to loan funds and/or obtain financing for the partnership. The interpretation advanced on appeal by Walker [and] Wilson . . . would require us to rewrite the agreement to move the ‘sound business principles’ language from Section 1.5 to Section 2.5 of the Partnership Agreement—something we cannot do.”

The court also observed that “to the extent that Walker [and] Wilson . . . contend that they did not have to provide further financing because the partnership was unable to meet the primary objective, we note that such a contention raises the affirmative defense of excuse—something that Walker and Wilson had to plead and prove in the trial court.” The court found that they did neither, and “[a]s such, Walker and Wilson waived any excuse argument brought on appeal.”

Walker and Wilson also argued that their breach of the Partnership Agreement was excused because of the jury’s findings that EMC Products also breached the agreement. The court noted “the well-settled rule that when a party materially breaches an agreement, the non-breaching party can elect to either rescind the agreement or affirm and seek damages, but not both.” Treating a contract as continuing after a breach deprives the non-breaching party of any excuse for terminating their own performance. According to the court, at the point in time that Walker and Wilson believed that EMC Products breached the agreement, they were faced with one of two mutually exclusive courses of action: (1) discontinue their performance, rescind the contract, and sue for material breach; or (2) continue performing and lose the other party’s material breach as an excuse for its own non-performance. Because they chose to continue performing their duties under the Partnership Agreement after they believed EMC Products breached the agreement, the court concluded that they forfeited any excuse for their own breach.

Walker and Wilson also argued that they were entitled to recover sums they “loaned” to EMC Products. Their claim was premised on the jury’s award of \$250,000 to Walker and Wilson for “unpaid loans made to EMC Products,” which they contended omitted funds that were still owed. Specifically, Walker and Wilson alleged that they should be reimbursed for \$25,000 monthly principal payments made to the bank from July 2009 to December 2010. The court pointed out that, under the express terms of the Partnership Agreement, any payments made by Walker and Wilson to the bank as a result of their personal guarantees were deemed to be additional capital contributions to the partnership rather than loans. As the court observed: “Because Walker and Wilson admitted that they made \$25,000 monthly principal payments because of their personal guarantees, and because Walker admitted that he understood the payments to be additional capital contributions under the terms of the Partnership Agreement, we cannot say that it was error to not include the principal payments in the judgment.”

2. Restrictions on Transfer

Abdullatif v. Choudhri, 2018 WL 1559995, __ S.W.3d __ (Tex. App.—Houston [14th Dist.] 2018, no pet. h.).

In a dispute regarding the ownership of a limited partnership and its general partner, the court of appeals concluded that: (1) the trial court erred in submitting a jury question inquiring whether the parties to written assignments of interests in the limited partnership and its LLC general partner agreed to an alleged oral condition because the alleged condition contradicted the unambiguous terms of the assignments and was thus precluded by the parol evidence rule; (2) the language of certain assignments did not transfer any interest in the LLC general partner of the limited partnership; (3) certain purported transfers of interest in the LLC general partner were null and void ab initio because they were prohibited under the company agreement, and subsequent consent or ratification could not operate to give life to an attempted transfer that was null and void; (4) certain purported transfers of interests in the limited partnership were valid even if the transfers were prohibited by the partnership agreement because the partnership agreement allowed the general partner to recognize a transfer that would otherwise be null and void under the terms of the agreement.

Osama Abdullatif (“Latif”) and Ali Mokaram entered into a real estate investment venture by forming Mokaram Latif West Loop, L.P. (“ML Partnership”) in which Mokaram and Latif were each 49.5% limited partners and Mokaram-Latif General, LLC (“ML General”) was the 1% general partner. Mokaram and Latif were the managers and equal members of ML General. Mokaram and Ali Choudhri became friends and engaged in business transactions together, including transactions in 2008 and 2010 involving ML Partnership and ML General.

The 2008 transaction included an agreement in which Mokaram purported to transfer to Choudhri a limited partnership interest in ML Partnership, and the 2010 transaction included purported assignments by Mokaram to Choudhri of interests in ML Partnership and ML General. Disputes regarding these transactions arose, and eventually Latif purchased all of Mokaram’s interests in ML Partnership and ML General along with all of Mokaram’s claims against Choudhri relating to interests in the entities. Mokaram agreed to continue to pursue his claims against Choudhri in this lawsuit in which Mokaram, Latif, Choudhri, and ML Partnership were parties. The trial court entered a declaratory judgment regarding the ownership of the entities, and Mokaram and Latif appealed.

The first issue the court of appeals addressed was whether the trial court erred in submitting a jury question inquiring whether Mokaram and Choudhri agreed that the 2010 assignment was not effective and that Mokaram would return the money paid by Choudhri to Mokaram. Because the unambiguous language of the assignment provided that it was effective immediately and did not indicate that it was contingent on any condition, the court of appeals concluded that the testimony regarding an alleged oral condition was precluded by the parol-evidence rule from contradicting the unambiguous language of the assignment. Thus, the trial court should not have submitted any question inquiring into the enforceability of the oral condition. The court stated that the parol-evidence rule would not have precluded the trial court from submitting a question about an alleged subsequent agreement to rescind, but the jury question that was submitted did not ask about a subsequent agreement to rescind. The court also stated that the evidence did not raise a genuine fact issue as to whether Mokaram and Choudhri agreed to rescind the assignment after they executed it.

The court next addressed the argument that the trial court lacked jurisdiction over the declaratory judgment claims regarding Choudhri’s ownership and management rights in ML General because ML General was not a party. The court of appeals held that the trial court did not lack jurisdiction over the claims. Although the declaratory judgment did not bind ML General, it was binding on the parties in this action.

Next the court of appeals discussed whether the trial court erred in declaring that Choudhri had owned an interest in ML General since the date of the 2008 assignment. Based on the language of the documents executed in 2008, which purported to transfer to Choudhri an interest in ML Partnership and certain real property, the court concluded that Mokaram did not purport to transfer any interest in ML General. The documents indicated that Mokaram and Choudhri thought that ML Partnership owned the real property referred to in the assignments and that they intended to transfer an indirect interest in the real property by transferring an interest in ML Partnership. However, assuming that ML Partnership owned the real property referred to in the assignments, that would not mean that ML General had any ownership in the property, and the court concluded that the evidence did not show that Mokaram transferred any interest in ML General to Choudhri by virtue of the 2008 assignments.

The 2010 assignments purported to transfer from Mokaram to Choudhri interests in both ML General and ML Partnership. Both the company agreement of ML General and the partnership agreement of ML Partnership contained restrictions on transfer, and the court discussed the effect of the purported transfers by Mokaram.

The ML General company agreement prohibited a member from transferring any of its membership interest except in limited circumstances, such as with the approval of members having more than 66.67% of the interests of all members. The company agreement stated that a transfer in violation of its provisions was “null and void ab initio.” Assuming Mokaram’s execution of the assignments represented his approval of the transfers, there was no evidence that Latif, the other 50% member at the time, approved the assignments before Mokaram purported to assign his interest, and there was no evidence that any of the other circumstances under which a transfer was permitted were present. Choudhri relied on a 2011 consent signed by Latif as manager and member of ML General in which Latif consented to any prior transfers by Mokaram to Choudhri of a membership interest in ML General. The court concluded that the purported assignments were null and void from the outset under the unambiguous language of the company agreement, and as such the purported transfers could not be ratified or validated after the fact. Thus, the trial court erred in declaring that Choudhri had owned 50% of ML General and had been a manager of ML General from and after the 2010 assignments.

The ML Partnership agreement also contained prohibitions on transfer, and the court next addressed the effect of purported assignments in 2010 by Mokaram to Choudhri of limited partnership interest in ML Partnership. Section 10.1 of the partnership agreement prohibited a limited partner from transferring all or any portion of the limited partner’s interest without the prior written consent of the general partner. Section 10.2 of the partnership agreement contained a right-of-first-refusal provision in favor of the other partners in the event a limited partner received a bona fide offer to purchase all or any portion of the limited partner’s interest. Section 10.3 provided for certain “Permitted Transfers” (to a trust for the benefit of the limited partner, the guardian or estate of a limited partner, or a person approved by all the partners) notwithstanding the consent otherwise required by Section 10.1. Section 10.6 provided that a transfer that was not permitted under the partnership agreement “shall be null and void and of no effect whatever; provided that if the Partnership is required to recognize a Transfer that is not permitted (or if the Partnership, in its sole discretion, elects to recognize a Transfer that is not permitted),” the transferred interest was limited to the transferor’s rights to allocations and distributions. Finally, Section 10.10 provided that the partnership was not required to recognize the interest of any transferee who obtained a purported transferred interest pursuant to a transfer that was not authorized by the partnership agreement, and such a transfer was “null and void for all purposes.”

The court stated that the plain meaning of “null and void and of no effect whatever” would preclude a transfer that was not permitted by the partnership agreement from being subject to ratification, confirmation, or waiver, but the court concluded that the phrase “null and void and of no effect whatever” was not used in its ordinary sense given that the agreement unambiguously provided that the partnership could elect to recognize a transfer that was not permitted and thus was or would have been “null and void and of no effect whatever.” The court noted the difference between the ML General company agreement (which the court had held did not permit ratification of a null and void transfer) and the ML Partnership agreement and concluded that the two agreements were separate and independent agreements that should not be construed together as one. Further, assuming the agreements should be construed as a single contract, the provisions unambiguously allowed the recognition of an otherwise void transfer of a partnership interest but did not allow the recognition of a void transfer of a membership interest.

Because Mokaram signed the assignment of his interests to Choudhri not only as assignor, but in his capacity as manager of ML General, the general partner of ML Partnership, under a legend stating that the transfer was consented to by the general partner, the court concluded that ML Partnership recognized the transfer of the

interests. Relying on the language of the ML General company agreement (which provided that the managers shall have the sole and exclusive control of the management of ML General and shall make all decisions not otherwise provided for in the company agreement) and Section 101.254 of the Business Organizations Code (which provides that each governing person is an agent of the LLC for the purpose of its business), the court stated that Mokaram's signature as manager was binding on ML General, and ML Partnership thus recognized the transfer as valid and effective as provided by Section 10.6 of the partnership agreement. The court concluded that an earlier purported transfer in 2008 by Mokaram to Choudhri of a limited partnership interest was not effective because there was no evidence that the transfer was permitted under any of the provisions of the partnership agreement nor was there any evidence that the partnership was required to recognize the transfer or exercised its discretion to recognize the transfer.

Finally, the court concluded that the trial court did not err in refusing to clarify what rights Choudhri had as a result of his ownership of an interest in ML Partnership. The trial court declared that Choudhri owned 49.5% of ML Partnership from and after the 2010 assignments and that he had "all beneficial rights and interests" that flowed from his ownership of an interest in ML Partnership. The court stated that the interests transferred to Choudhri were limited to rights to allocations and distributions under the unambiguous language of Section 10.6 of the partnership agreement, and neither Section 10.2 nor 10.6 gave Choudhri the right to become a limited partner under the assignments. The trial court did not declare that Choudhri was a limited partner, and although the "beneficial rights and interests" were significantly limited by the agreement, the trial court did not inaccurately characterize them. Thus, the court of appeals concluded that the trial court did not err in making the declaration and in refusing to clarify it.

J. Withdrawal or Expulsion of Partner

Moss v. Princip, No. 3:14-CV-3088-BF, 2016 WL 9245113 (N.D. Tex. May 31, 2016). (Although the court issued this opinion in 2016, it is included in this year's update because it did not appear in the Westlaw database until recently.)

After a jury trial, the jury determined that a partnership existed between the plaintiffs, Moss and Keating, and the defendants, Princip and Martin. The jury found that Moss and Keating each owned a 30% interest in the partnership and that Princip and Martin each owned a 20% interest. The jury also found that Princip and Martin engaged in wrongful conduct in response to questions regarding conduct that is grounds for judicial expulsion under Tex. Bus. Orgs. Code § 152.501(b)(5). The plaintiffs sought judgment ordering that Princip and Martin were judicially expelled and that certain property was property of the partnership. Princip and Martin responded that they should be paid for their interests if they were to be expelled.

The court concluded that a judicial decree of expulsion of Princip and Martin was appropriate based on the jury's findings in response to questions based on Tex. Bus. Orgs. Code § 152.501(b)(5). According to the court, "[t]he jury returned the charge indicating that both Princip and Martin engaged in wrongful conduct that constituted wrongful withdrawal." The court then addressed the defendants' contention that they should be paid for their share of the partnership if they are expelled. The court cited Tex. Bus. Orgs. Code § 152.601 for the proposition that the interest of a withdrawn partner is automatically redeemed as of the date of withdrawal and that "[t]he redemption price of a partner who wrongfully withdraws' is the lesser of the fair market value on the date of withdrawal or the amount the partner would have received if a partnership wind-up had occurred." The court noted that interest is payable on the amount owed from the date of withdrawal to the date of payment, that payment to a wrongfully withdrawn partner may be deferred, and that a withdrawn partner may seek security for the deferred payment. Tex. Bus. Orgs. Code §§ 152.602, 152.605, 152.608. The court ordered the parties to submit briefing and evidence establishing "both the fair-market and wind-up values" of the partnership and stated that the value of the defendants' shares, if any, would be credited against the amount owed by the defendants to the plaintiffs as a result of the jury's findings.

Frost Nat'l Bank v. Fortkort, No. A-05-CA-866 LY, 2007 WL 9701329 (W.D. Tex. Aug. 8, 2007), report and recommendation adopted, 2007 WL 9701330 (W.D. Tex. Aug. 27, 2007). (Although the court issued this opinion in 2007, it is included in this year's update because it did not appear in the Westlaw database until recently.)

The court held that the resignation of one partner from a two-person partnership did not cause the partnership to cease to exist, and the partnership continued to exist as the same partnership after the addition of several partners a few months later.

This case involved claims by a partner of a failed law firm against the bank that advanced funds to the law firm at its inception and to partners who were admitted as partners after one of the original partners left the firm. In 2003, Hulsey and Calkins formed Hulsey & Calkins, L.L.P. and obtained a line of credit from Frost National Bank (“Frost”). In August of that year, Calkins left the law firm, and a few months later Kelton and three other lawyers joined Hulsey in the partnership. Each of the four arranged to borrow \$50,000 from Frost for the express purpose of making capital contributions to the firm. Thus, Kelton executed a \$50,000 promissory note to Frost for her capital contribution to the reconstituted and renamed firm, Hulsey, Grether + Fortkort, LLP (“Hulsey, Grether + Fortkort”). In the disbursement request that accompanied Kelton’s loan, the “specific purpose of the loan” was characterized as “capital injection into law firm.” Each of the four new partners signed identical notes and disbursement requests. Frost disbursed the \$50,000 in proceeds from each of the four notes, and transferred the funds into the partnership’s checking account. Because the law firm had an outstanding balance due to Frost on the line-of-credit loan made at the inception of the firm, Frost, apparently at the direction of Hulsey, transferred most of the funds from the partnership checking account back to Frost to pay off the outstanding balance of the original loan. Soon after, disputes arose between the new partners and Hulsey, the managing partner of the firm, and Hulsey left the firm. After making a few payments on their notes, the partners made no further payments. Frost sued the partners to recover on the notes, and Kelton asserted counterclaims for usury, fraud, and breach of contract. In this opinion, the court addressed Frost’s motion for summary judgment against Kelton.

The court first addressed Kelton’s claim that Hulsey and Calkins, LLP ceased to exist as a legal entity when Calkins resigned from the firm because this issue was central to the analysis of many of Kelton’s contentions. The court rejected this proposition based on the partnership agreement and the Texas Revised Partnership Act. First, the court pointed out that the partnership agreement of Hulsey & Calkins stated, under the heading “Events Requiring a Winding Up,” that “[t]he withdrawal, removal or retirement of a Partner shall not be an event causing dissolution or otherwise requiring the business and affairs of the Partnership to be wound up.” Further, the partnership agreement for Hulsey, Grether + Fortkort, which Kelton signed, stated: “The Partnership was formerly known as Hulsey & Calkins, LLP. Effective the date of the filing of Articles of Amendment for Registered Limited Liability Partnership . . . the name of the Partnership shall be amended to be Hulsey, Grether + Fortkort, LLP and all business of the Partnership shall be conducted in such name.” The court commented that Kelton’s argument seemed to be mistakenly premised on pre-1994 partnership law, i.e., the Texas Uniform Partnership Act, under which the withdrawal of a partner caused dissolution of the partnership. However, the Texas Revised Partnership Act changed the law such that the withdrawal of a partner, by itself, is not an event requiring the winding up of a partnership. Tex. Bus. Orgs. Code § 152.502; Tex. Rev. Civ. Stat. art. 6132b-2.06(a). Instead, withdrawal of a partner ordinarily triggers the partnership’s obligation to buy out the withdrawn partner’s interest unless the terms of the partnership agreement provide otherwise, as in this case. Based on these provisions, the court concluded that Hulsey & Calkins did not cease to exist when Calkins left.

The court stated that Kelton also seemed to confuse individual liability with partnership liability. Kelton argued that a partner in a registered limited liability partnership is not directly or indirectly liable for debts and obligations of the partnership, but this proposition did not mean that the partnership was not indebted to Frost and did not affect the liability of the partnership to pay its debts and obligations out of partnership property. *See* Tex. Bus. Orgs. Code § 152.801; Tex. Rev. Civ. Stat. art. 6132b-3.08. The indebtedness on the line of credit was the indebtedness of Hulsey, Grether, + Fortkort, LLP, and that indebtedness was secured by property of the firm. Thus, when the \$200,000 infusion of capital from the four new partners took place and \$184,000 of that was used to reduce the partnership’s debt, the debt that was paid was not the debt of a different firm than that in which the four were partners. With this background, the court next addressed each of Kelton’s three counterclaims.

Kelton contended that the \$50,000 loan Frost made to her was usurious because the proceeds of the loan were used to reduce the debt of a third party. She contended that because Frost applied her capital contribution to a third-party debt, the true principal amount advanced to Kelton was zero and any interest charged to her was usurious. The court stated that this argument rested upon the groundless assumption that Hulsey & Calkins was a separate entity from Hulsey Grether + Fortkort, and that Hulsey & Calkins was thus a “third party.” Further, the court explained that the common-law doctrine that might support this sort of usury claim (the so-called *Alamo Lumber* rule) did not apply to this transaction by its own terms. Under *Alamo Lumber Co. v. Gold*, 661 S.W.2d 926

(Tex. 1983), if payment or assumption of another's existing debt is required as a condition for the extension of credit, then the amount of indebtedness paid or assumed is treated as additional interest for usury calculations. However, the *Alamo Lumber* doctrine is qualified by the principle that if the discharge of the third party debt is "of value" to the borrower, then there can be no usury in such circumstances. Because the debt paid with the proceeds of Kelton's loan was that of the partnership to which Kelton was a partner, and was a debt secured by all of the partnership's assets, the court concluded that its payment was clearly of value to Kelton, and the *Alamo Lumber* rule did not apply in this case.

Kelton's fraud counterclaim rested on the claim that Frost misrepresented to her that she would have control over the \$50,000 loan to her and would determine when and how much would be paid to her new law firm. She also contended that Frost committed fraud by failing to disclose to her that her personal line of credit would be used to pay the Hulsey & Calkins debt. The court reiterated that the four partners' \$200,000 capital contributions did not go to pay the debt of some unrelated firm, but to pay off the debt of the law firm—Hulsey, Grether + Fortkort—of which they were partners. A partnership is required to pay its debts and obligations out of partnership property, which the evidence demonstrated is what happened. The court stated that Kelton essentially complained of two things: that she never gave Frost authority to disburse the loan proceeds to the partnership account, and that even if she did, she never approved of the use of her \$50,000 capital contribution for payment of the partnership's pre-existing debt. The court stated that neither of these were fraud claims. The first was a claim for breach of contract, and the second had nothing to do with Frost because there was no evidence that Frost was the entity that decided to use the funds to reduce the firm's indebtedness to Frost. The summary judgment evidence indicated that Hulsey, the managing partner, made that decision.

The court concluded that Kelton's final counterclaim for breach of contract withstood summary judgment because there was a disputed fact question as to whether Kelton authorized Frost to disburse any of her loan proceeds to the partnership.

K. Dissolution/Winding Up

Ginger B. Stagg, D.D.S., P.A. v. Lisa Richardson, D.D.S., P.A., No. 01-17-00543-CV, 2018 WL 1320834 (Tex. App.—Houston [1st Dist.] Mar. 15, 2018, no pet. h.) (mem. op.).

The court held that the amount determined by a partnership's accountant to be the "Net Amount Due to Each Doctor" was the amount required to be paid under a partnership dissolution agreement that provided for a buyout by one partner of the other partner's interest and an analysis of the customary partner-splits by the partnership's accountant and payment by the purchasing partner of the "Net Amount Due" to the other partner.

Stagg and Richardson were dentists who each formed her own professional association, which in turn formed a pediatric dental partnership. After a falling out, Stagg and Richardson entered a mediated settlement agreement providing for dissolution of their practice. Richardson agreed to purchase Stagg's interest for \$1,000,000, and Stagg was to receive an additional amount that proved impossible to calculate because their practice did not maintain the records needed to calculate the amount. Stagg and Richardson thus executed an addendum providing that the partnership's accountant would "perform the customary partner-splits analysis that incorporates Stagg's production" and that Richardson would "pay Stagg the 'Net Amount Due to [Stagg].'" The accountant made the required analysis and determined amounts designated "Net Amount Due to Each Doctor" and "Available Cash to Each." Both parties agreed that the terms of the addendum were unambiguous. Stagg contended that the phrase "Net Amount Due to [Stagg]" in the addendum referred to Stagg's portion of the "Net Amount Due to Each Doctor" calculated by the accountant. Richardson responded that her purchase of Stagg's partnership interest included the partnership's operating capital and that she thus only owed the "Available Cash Due to [Stagg]." The addendum did not define the meaning of "Net Amount Due to [Stagg]," but the court said that the "capitalization of the words, the enclosure of the phrase in quotation marks, and the use of brackets all indicate that the phrase "'Net Amount Due to [Stagg]'" is terminology borrowed directly from the partner-splits analysis, which the addendum references as the basis for the calculation of the additional sum owed to Stagg." The partner-splits analysis specified the "Net Amount Due to Each Doctor" accompanied by a separate entry for Stagg. The court thus concluded that the addendum's phrase "Net Amount Due to [Stagg]" unambiguously referred to the entry for Stagg for the "Net Amount Due to Each Doctor" in the partner-splits analysis.

Scott Pelley P.C. v. Wynne, No. 05-15-01560-CV, 2017 WL 3699823 (Tex. App.—Dallas Aug. 28, 2017, pet. denied) (mem. op.).

This case involved a complicated set of claims arising out of the dissolution of a law partnership. Only a few claims, however, were squarely partnership-law issues. The court of appeals ultimately upheld the trial court’s determinations that breach of fiduciary duty claims failed and that joint and several liability was properly imposed.

In the late 1980s, Nall, Pelley, and Wynne were partners in the law firm of Nall, Pelley, and Wynne. In the late 2000s, Smith became a partner. The law firm was renamed Nall, Pelley, Wynne & Smith, and it was a general partnership between Pelley, Scott Pelley P.C., Wynne, and Smith. Pelley, Wynne, and Smith, in their individual capacities, signed a written agreement (the “2008 Agreement”) which set out a monthly draw that each partner would receive and how all law firm revenue would be distributed. It also described how distributions were to be made to Pelley and Wynne for the Gibbs Estate and Shankles Estate cases, which were Nall, Pelley & Wynne assets prior to the 2008 Agreement.

After discord arose between the partners, the partnership dissolved. Pelley and Scott Pelley P.C. withheld payments from the Gibbs Estate and Shankles Estate cases. Pelley also deposited monies into the Scott Pelley P.C. account from clients who had contracted with Nall, Pelley, Wynne & Smith before the dissolution. Similarly, Wynne and Smith deposited monies into an account under their control from clients who had contracted with the firm before the dissolution.

Pelley argued that the trial court erred in its conclusions of law relating to Wynne’s and Smith’s cross-claims requesting a voluntary judicial winding up of the partnership. The court of appeals began by rejecting Pelley’s claim that the trial court applied the Family Code instead of the Business Organizations Code. According to the court of appeals, the trial court did not apply the Family Code to the dispute.

The court of appeals then quoted various provisions of the Business Organizations Code related to partnership dissolution and concluded that the trial court had supervised a voluntary winding up of the partnership. (The trial court made no findings of the existence of exigent circumstances listed in § 11.314 of the Business Organizations Code that would have authorized it to order involuntary dissolution.) Pelley argued that the trial court should have applied the “reasonable compensation theory” in distributing the law firm’s assets, which he claimed was “based upon a remuneration to the attorney at his hourly rate.” The only authority he provided for this theory was § 152.203(c) of the Business Organizations Code, which states: “[a] partner is not entitled to receive compensation for services performed for a partnership other than reasonable compensation for services rendered in winding up the business of the partnership.” The court of appeals noted that Pelley did not explain how this section pertained to the distribution of the firm’s assets on dissolution, nor did he cite to (nor did the court find) any authority describing or discussing the “reasonable compensation theory.” Accordingly, the court concluded that the trial court did not err when it determined that the law firm’s assets should be distributed in accordance with the 2008 Agreement.

Black v. Redmond, 709 Fed. App’x 766 (5th Cir. 2017) (per curiam).

The Fifth Circuit affirmed the district court’s denial of defendant’s motion for a new trial. The court found sufficient evidence of a partnership and a breach of the partnership agreement to support the jury’s findings.

John Black patented a design for wind-resistant billboard frames called “Universal Flex Frames.” He met with James Redmond, and the two men agreed to create Universal Flex Frames of Texas for the purpose of building, marketing, and selling Black’s patented frames and splitting the profits. They entered into an oral agreement to start the venture on a 50/50 basis.

After about 18 months, the relationship between Black and Redmond soured when Black discovered that Redmond had been selling Universal Flex Frames to Redmond’s other company at wholesale prices. After a fight between the two men, Redmond sent Black an email stating that the partnership was over. Black sued, alleging that the two had formed an oral partnership agreement, that Redmond had breached the agreement, and that Black was entitled to \$248,714.50—half of the alleged value of the partnership at the time that it was terminated. A jury found for Black and awarded him \$200,000. Redmond unsuccessfully sought a new trial, and appealed on the ground that the jury’s findings were against the great weight of the evidence.

Redmond also challenged the damages award. He contended that there was insufficient evidence to find that the parties agreed to an equal division of the partnership assets upon dissolution, which was the basis for the award. The court noted that § 152.707 of the Business Organizations Code (“BOC”) specified default rules for what should happen upon the termination and winding up of a partnership. Once terminated, a partnership is expected

to distribute to each partner the balance of his or her capital account. The court quoted § 151.001(1) of the BOC in observing that a capital account is computed by “adding the amount of a partner’s original and additional contributions of cash to a partnership, the agreed value of any other property that that partner originally or additionally contributed to the partnership, and allocations of partnership profits to that partner; and subtracting the amount of distributions to that partner and allocations of partnership losses to that partner.”

The court noted that Redmond was likely correct that the mere fact that the partnership was on a 50/50 basis did not necessarily entitle Black to a straight split of the remaining partnership assets at the time of dissolution. Nevertheless, the court found enough evidence to support a finding that Black suffered \$200,000 in damages. Black testified that the value of the tools, machinery, jigs, and parts that he contributed had a value of \$50,000; he testified that he valued the license to use his patent, which he granted to the partnership, at \$100,000 per year; and he argued that he put significant “know-how and sweat equity” into the partnership and never received payments for his contributions. Given this testimony, the court concluded that the award was not against the great weight of the evidence or otherwise in error.

Finally, Redmond challenged the award on the ground that this was not an action to account for the dissolution of a partnership; thus, he argued that any payout of Black’s capital account should have been decided in a separate trial. The Fifth Circuit observed that the argument was untimely as it was not raised in Redmond’s initial brief. Nevertheless, the court concluded that it would reject the argument even if it were timely. Citing its decision in *Akuna Matata Investments, Ltd. v. Texas Nom Ltd. P’ship*, 814 F.3d 277 (5th Cir. 2016), the court observed that *Akuna* dealt with a question of res judicata when a prior trial had awarded damages, but made no official determination on the dissolution of the partnership. In contrast, Black asked in a single trial for a finding of breach, and, as damages for that breach, a payout of Black’s capital account.

Akuna Matata Invs. Ltd. v. Texas NOM Ltd. P’ship, No. SA-05-CA-1053-HLH, 2011 WL 13267745 (W.D. Tex. Jan. 25, 2011). (Although the court issued this opinion in 2011, it is included in this year’s update because it did not appear in the Westlaw database until recently.)

The court granted a motion to compel production of a partner’s tax records and related correspondence because the documents were arguably relevant to the determination of the value of the partnership’s assets and the relative share of each partner in this suit for judicial dissolution.

Akuna Matata Invs. Ltd. v. Texas NOM Ltd. P’ship, No. SA-05-CA-1053-H, 2010 WL 11595935 (W.D. Tex. Oct. 4, 2010). (Although the court issued this opinion in 2010, it is included in this year’s update because it did not appear in the Westlaw database until recently.)

The plaintiff obtained summary judgment that the statutory conditions for a judicial decree of winding up and termination of a partnership were satisfied under Section 8.02 of the Texas Revised Partnership Act (Tex. Rev. Civ. Stat. Art. 6132b-8.02, which allows a partner to obtain a judicial decree requiring winding up and termination of a partnership if a court determines: (1) the economic purpose of the partnership is likely to be unreasonably frustrated; (2) another partner has engaged in conduct relating to the partnership business that makes it unreasonably practicable to carry on the business with that partner; or (3) it is not otherwise reasonably practicable to carry on the business of the partnership in conformity with the partnership business.) After successfully suing the defendant in state court to establish the existence of a partnership and breach of fiduciary duty, breach of contract, and breach of partnership, the plaintiff brought this action for judicial dissolution of the partnership. The district court here concluded that the statutory conditions under Tex. Rev. Civ. Stat. Art. 6132b-8.02(2) (another partner has engaged in conduct making relating to the partnership business that makes it unreasonably practicable to carry on the business with that partner) were satisfied based on the defendants’ denial of the partnership’s existence; breaches of contract, fiduciary duty, and partnership; failure to provide the plaintiff any profits from the partnership; and protracted litigation contesting the plaintiff’s claims. The court stated that the only remaining issues were determination of the value of the partnership’s assets and the relative share that each partner owned.

Akuna Matata Invs. Ltd. v. Texas NOM Ltd. P’ship, No. SA-05-CA-1053-WRF, 2007 WL 9702865 (W.D. Tex. Mar. 16, 2007). (Although the court issued this opinion in 2007, it is included in this year’s update because it did not appear in the Westlaw database until recently.)

The court held that the plaintiff’s claim for judicial dissolution and an accompanying accounting and receivership were not barred by the statute of limitations, nor were any claims for breach of fiduciary duty that were

based on ongoing breaches after the rendition of a state-court judgment in a previous lawsuit, but any claims for breach of fiduciary duty that occurred before the previous lawsuit were barred by the statute of limitations based on Section 4.06 of the Texas Revised Partnership Act (Tex. Rev. Civ. Stat. Art. 6132b-4.06), “which indicates the Legislature’s desire to require partners to pursue claims during the life of the partnership rather than waiting until dissolution.”

The plaintiff sued the defendants in state court in 2002 asserting the existence of an oral partnership with the defendants and asserting claims for breach of fiduciary duty and breach of the partnership agreement based on the defendants’ failure to share profits with the plaintiff. After the state-court judgment in favor of the plaintiff was affirmed on appeal, the plaintiff filed this suit seeking judicial dissolution, receivership, and an accounting. The plaintiff asserted claims for breach of fiduciary duty in the second suit as well. The defendants sought summary judgment on the basis that the statute of limitations barred the plaintiff’s claim for an accounting.

To determine the timeliness of the plaintiff’s claims, the court examined Section 4.06 of the Texas Revised Partnership Act and Section 16.004 of the Texas Civil Practice and Remedies Code. The court explained that some understanding of the background of Section 4.06 of the Texas Revised Partnership Act was required to resolve the question in this case. Before the adoption of the Texas Revised Partnership Act, partners were not permitted to sue one another on claims arising out of partnership affairs until after an accounting and settlement, but Section 4.06 of the Texas Revised Partnership Act provided for several situations in which a partner can sue another partner *before* an accounting as follows:

A partner may maintain an action against the partnership or another partner . . . , *with or without an accounting* as to partnership business, to: . . . [E]nforce a right under this Act, including: . . . the partner’s rights [to enforce fiduciary duties]; . . . and . . . the partner’s rights under [dissolution and winding up] [emphasis added]

Section 4.06 of the Texas Revised Partnership Act also expressly granted the right to an accounting upon dissolution. While preserving the right to pursue an accounting, it also provided that accrual of limitations on remedies under Section 4.06 is governed by other law. That “other law” in the case of a partnership accounting is Section 16.004 of the Texas Civil Practice and Remedies Code, which provides that a suit for settlement of partnership accounts must be brought within four years from “the day that the dealing in which the parties were interested together cease.” The court noted that the relevance of Section 16.004 in light of the provisions of the current partnership statute was unclear, but what did seem clear to the court was that Section 4.06 of the Texas Revised Partnership Act “indicates the Legislature’s desire to require partners to pursue claims during the life of the partnership rather than waiting until dissolution.” Because the statute provides that the “right to an accounting does not revive a claim barred by law,” a partner can only seek an accounting on claims that would not be time-barred outside of an accounting.

The defendants in this case argued that their dealings with the plaintiff ceased based on their failure to pay profits to the plaintiff in 2001, but the court agreed with the plaintiff that there was no evidence that the partnership or its activities (oil and gas development) had ceased. The court found that the plaintiff’s claim for judicial dissolution was “undoubtedly timely” as it would “make little sense to time bar Plaintiff’s claim for dissolution, thereby requiring the parties to maintain an unworkable business relationship.” As part of the claim for dissolution, the plaintiff was entitled to an accounting, and thus the requests for receivership and audit that accompanied a proper accounting were also timely. With respect to the fiduciary-duty claims, the court concluded that claims for actions occurring before the state-court judgment were barred because the plaintiff certainly had notice of the breaches as early as 2001 when the plaintiff made demand on the defendants for the plaintiff’s share of the partnership profits. Complaints for ongoing breaches after the state-court judgment, however, were timely.

L. Piercing Partnership Veil

Scott Pelley P.C. v. Wynne, No. 05-15-01560-CV, 2017 WL 3699823 (Tex. App.—Dallas Aug. 28, 2017, pet. denied) (mem. op.).

This case involved a complicated set of claims arising out of the dissolution of a law partnership. Only a few claims, however, were squarely partnership-law issues. The court of appeals ultimately upheld the trial court’s determinations that breach of fiduciary duty claims failed and that joint and several liability was properly imposed.

In the late 1980s, Nall, Pelley, and Wynne were partners in the law firm of Nall, Pelley, and Wynne. In the late 2000s, Smith became a partner. The law firm was renamed Nall, Pelley, Wynne & Smith, and it was a general partnership between Pelley, Scott Pelley P.C., Wynne, and Smith. Pelley, Wynne, and Smith, in their individual capacities, signed a written agreement (the “2008 Agreement”) which set out a monthly draw that each partner would receive and how all law firm revenue would be distributed. It also described how distributions were to be made to Pelley and Wynne for the Gibbs Estate and Shankles Estate cases, which were Nall, Pelley & Wynne assets prior to the 2008 Agreement.

After discord arose between the partners, the partnership dissolved. Pelley and Scott Pelley P.C. withheld payments from the Gibbs Estate and Shankles Estate cases. Pelley also deposited monies into the Scott Pelley P.C. account from clients who had contracted with Nall, Pelley, Wynne & Smith before the dissolution. Similarly, Wynne and Smith deposited monies into an account under their control from clients who had contracted with the firm before the dissolution.

Scott Pelley P.C., The Pelley Family L.P., and Pelley (collectively “the Pelley parties”) contended that the trial court erred in imposing joint and several liability as to Wynne’s and Smith’s counterclaims against Scott Pelley P.C. and The Pelley Family L.P. The court noted that: (1) a general partnership is “an association of two or more persons to carry on a business for profit as owners”; (2) all partners are jointly and severally liable for all obligations of the general partnership unless otherwise agreed or provided by law; (3) piercing the corporate veil is inapplicable to partnerships; and (4) there is no veil that needs piercing because a general partner is always liable for the debts and obligations of the partnership to third parties. The trial court made express findings that (1) a general partnership existed between Pelley, Scott Pelley P.C., Wynne, and Smith, and (2) Wynne and the M&S Wynne Family L.P., and Pelley and The Pelley Family L.P., were partners with respect to the Gibbs Estate and Shankles Estate cases. Because the Pelley parties did not challenge these findings of fact on appeal, the court of appeals found them binding. As the court concluded: “These findings of fact support the trial court’s conclusion that they are jointly and severally liable. Because the trial court found that the business relationships were that of a general partnership, there was no need to pierce the corporate veil. Accordingly, we conclude the trial court did not err when it concluded the Pelley parties were jointly and severally liable.”

Shoop v. Devon Energy Prod. Co., L.P., No. 3:10-cv-00650-P, 2013 WL 12251353 (N.D. Tex. Mar. 29, 2013). (Although the court issued this opinion in 2013, it is included in this year’s update because it did not appear in the Westlaw database until recently.)

The court held that there was a material fact issue as to whether the defendant limited partnership and an affiliated limited partnership should be treated as the same entity on the basis that they entered into a sham transaction to deprive the plaintiff of higher royalties.

This case involved a dispute regarding oil and gas royalty payments. The plaintiffs were royalty owners, assignees, and lessors pursuant to numerous oil and gas leases. As the lessee, the defendant, Devon Production Company, L.P., sold gas produced under the plaintiffs’ leases to another limited partnership, Devon Gas Services, L.P. (“DGS”). The sales occurred under a gas purchasing and processing agreement between the partnerships. In essence, the lawsuit involved claims that the defendant circumvented its royalty obligations by selling gas to DGS at reduced prices, thus allowing DGS to profit through sales to third parties. The defendant allegedly used this lower price to calculate the plaintiffs’ royalties, thereby depriving the plaintiffs of royalty figures available at higher pricing.

The defendant and DGS were separate legal entities independently organized as limited partnerships, and they did not share a general partner or any limited partners. Furthermore, the direct owners of the general partners for both entities were different. However, the defendant and DGS were affiliates who shared the same parent companies, the ultimate parent company being Devon Energy Company (“DEC”). The defendant and DGS were referred to as divisions of DEC, and the defendant encouraged the plaintiffs to consider the Devon affiliates as “one big company.” The court mentioned that neither the defendant nor DGS held partner meetings, and the court described features of the interactions and shared mutual operations of the Devon affiliates, such as inter-entity transfers of positive operating capital, operating under a single Securities and Exchange Commission registration, and filing consolidated income tax returns and financial statements. The entities also shared the same principal place of business and had access to and shared a single software system for accounting. Business cards, stationery, and annual reporting referred to the operation as “Devon” without breaking down the separate entities. The entities had common directors, officers, and employees and shared expenses.

The plaintiffs relied on a sham transaction theory as one basis for the plaintiffs' claim that the defendant had not complied with its contractual royalty obligations, and the court concluded that there was a material fact issue that precluded granting the defendant's motion for summary judgment on the breach of contract claim. The court explained that "a sham transaction may arise where a lessor has 'used an arrangement with [its affiliates] to create an unfair device to deprive plaintiffs of their rightful royalties.'" In such a case, a court may disregard the purported sale at the well and find that the true sale was off the premises. The court cited corporate veil-piercing cases for the following proposition: "The mere fact that a subsidiary is wholly owned by the parent and there is an identity of management does not justify disregarding the corporate entity of the subsidiary, but where management and operations are assimilated to the extent that the subsidiary is simply a name or a conduit through which the parent conducts its business, the corporate fiction may be disregarded in order to prevent fraud and injustice." The court further explained that "alleging a sham transaction is a vehicle to disregard the lines between legally distinct entities in an effort to avoid a transaction without imputing liability." In other words, the plaintiffs were not attempting to impute liability but rather were alleging that the sale between the defendant and its affiliate DGS should be disregarded because the defendant and DGS should be treated as one and the same.

The court concluded that the breach-of-contract claim survived summary judgment based on evidence that the defendant and DGS and their parent and other affiliates had: (1) common officers, directors, and employees (paid and employed by the defendant); (2) common ownership; (3) common financial interest and control; (4) the same offices, business names, and logos; (5) comingled property; (6) consolidated financial statements and tax returns; (7) shared services and capital expenses; and (8) common business identities in the ordinary course of business. The defendant relied on the Texas Supreme Court's holding in *SSP Partners v. Gladstrong Investments (USA) Corp.*, 275 S.W.3d 444, 447 (Tex. 2008), that affiliates cannot be liable for each other's actions under the single business enterprise doctrine, but the court distinguished this case as follows: "[W]hile the Texas Supreme Court noted that it has never 'approved of imposing joint liability on separate entities merely because they were a part of a single business enterprise,' the issue in *that case* did not involve a theory espousing that the corporate structure was abused to 'perpetuate fraud.' *SSP Partners*, 275 S.W.3d at 451. Rather than hitting a brick wall by merely alleging corporate affinity, this claim positively breaks through with evidence supporting the notion a corporate structure was 'used as part of a basically unfair device to achieve an inequitable result.'" *Id.* (quoting *Castleberry v. Branscum*, 721 S.W.2d 270, 271 (Tex. 1986))."

Gandy Mktg. & Trucking, Inc. v. Tree Town Holdings, Ltd., No. H-08-1053, 2010 WL 11579503 (S.D. Tex. Mar. 3, 2010), report and recommendation adopted, 2010 WL 11579494 (S.D. Tex. Mar. 30, 2010). (Although the court issued this opinion in 2010, it is included in this year's update because it did not appear in the Westlaw database until recently.)

The court held that there were fact issues precluding summary judgment with respect to the IRS's claims that a taxpayer fraudulently transferred assets to a limited partnership and other entities and that the limited partnership and other entities were the alter ego or nominee of the taxpayer.

After the IRS pursued Dennis Gandy for tax fraud, Gandy set up various entities, including a limited partnership, to which Gandy transferred his business and personal assets. The limited partnership paid all of the personal expenses of Gandy and his family. When the IRS sought to levy against a brokerage account of the limited partnership, the limited partnership sued to enjoin the IRS from doing so. That case was removed to federal court in the Eastern District, which enjoined the IRS from levying on the brokerage account. The United States intervened in this case, attempting to reach funds that were interpleaded by an escrow agent for the purchaser of assets from the limited partnership. The United States claimed a right to the funds on the basis that the transfers to the limited partnership and other Gandy entities were fraudulent transfers and on the basis that the limited partnership or another Gandy entity was the nominee or alter ego of Gandy. The Gandy entities as well as the IRS sought summary judgment on the claims. The Gandy entities argued that Texas law precludes the United States from reaching the assets of the limited partnership, as determined in the litigation in the Eastern District. However, the court in this case stated that the issues raised here were not addressed by the court in the litigation in the Eastern District. The court in the Eastern District case severed the nominee/alter-ego claim, and there was no fraudulent transfer claim considered in that case.

The court reviewed the fraudulent transfer claims asserted by the United States under Sections 24.005 and 24.006 of the Texas Uniform Fraudulent Transfer Act and concluded that there were disputed issues regarding intent, adequacy of consideration, and insolvency that required the claims to be resolved by a trier of fact.

As an alternative to voiding the transfers made by Gandy to the Gandy entities, the IRS argued that it was entitled to collect Gandy's tax liability from the limited partnership or another Gandy entity under either a nominee or alter-ego theory of liability. The court discussed case law addressing each of these two theories and concluded that fact issues precluded summary judgment as to each of the theories. With respect to the nominee theory, the court stated that the arguments made by the parties were very general, and the court concluded it was not appropriate at the summary judgment stage to weigh the evidence as to the six factors to be considered. With respect to the alter-ego theory, the court listed twelve factors to be considered and concluded that the transfers by Gandy might satisfy several of the factors. (Although the court mentioned earlier in its opinion the Gandy entities' argument that the alter-ego doctrine did not apply to partnerships under Texas law, the court cited Fifth Circuit case law in the corporate context and did not address the argument.) Specifically, the court said that there was evidence that Gandy set up and controlled the limited partnership and its general partner, that Gandy financed the limited partnership by transferring all of his assets to it, and that Gandy used the limited partnership's property as his own personal piggy bank. The court acknowledged that the Gandys and their entities had arguments supporting their position that none of the entities was the alter ego of Gandy. They pointed to testimony from their accountants and lawyers that all formalities were observed in the formation of the limited partnership and other entities and Gandy's testimony that the limited partnership and the other entities were set up for estate-planning purposes. Because the relevant factors were contested, the court concluded that a trier of fact would have to determine whether the limited partnership and other entities were alter egos of Gandy.

ADD Real Estate, Ltd. v. United States, No. 6:09-cv-5, 2009 WL 10677322 (E.D. Tex. Mar. 2, 2009). (Although the court issued this opinion in 2009, it is included in this year's update because it did not appear in the Westlaw database until recently.)

The court enjoined the IRS from levying on a brokerage account of a limited partnership to satisfy the tax liability of an individual limited partner because partnership property is not the property of the partners, and a partner has no specific interest in partnership property. The court stated that the IRS failed to meet its burden to establish by substantial evidence a nexus between the partnership's account and the taxpayer. The court stated in a footnote that the alter-ego theory does not apply to partnerships in Texas and that the IRS failed to produce substantial evidence indicating the limited partnership was the alter ego of Gandy even if the court assumed the alter-ego theory could apply to limited partnerships. Evidence that Gandy owned 85% of the limited partnership and 40% of its general partner, claimed a large non-passive loss from the partnership on his tax return, and did not have a personal checking account was insufficient to establish that the partnership was Gandy's alter ego.

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

Rainier Southlake DST v. Woodbury Strategic Partners Fund, LP, No. 02-16-00263-CV, 2017 WL 6047725 (Tex. App.—Fort Worth Dec. 7, 2017, no pet. h.) (mem. op.).

The court noted that “[a] constructive trust is a remedy, not a cause of action,” and that “[b]ecause summary judgment was properly granted on Rainier's breach-of-fiduciary-duty and breach-of-contract claims—the only liability claims brought by Rainier—summary judgment was also proper as to Rainier's request for the imposition of a constructive trust.”

Heckert v. Heckert, No. 02-16-00213-CV, 2017 WL 5184840 (Tex. App.—Fort Worth Nov. 9, 2017, no pet. h.) (mem. op.).

The court of appeals held that the trial court did not abuse its discretion in ordering the turnover of a judgment debtor's interest in a limited partnership and an LLC.

In a personal injury action that Teresa Heckert brought against her ex-husband Clyde Heckert, a jury awarded Teresa \$381,342.27. Teresa filed a motion seeking the turnover of any of Clyde's nonexempt assets, including his interest in a limited partnership (A2R, Ltd.) and a single-member LLC (Averse 2 Risk, LLC). Both entities were formed after the divorce while Teresa's personal injury suit was pending against Clyde. The LLC was the general partner of the limited partnership, and Clyde was the sole limited partner. Clyde was also the sole member of the LLC. The limited partnership owned stock that was awarded to Clyde in the divorce.

The court determined that Clyde's ownership interests in the entities were nonexempt. Nevertheless, Clyde argued that the interests were not susceptible to turnover because, according to Clyde, “sections 101.112 and

153.256 of the Business Organizations Code provide that the exclusive remedy by which a judgment creditor of a limited partnership or limited liability company may satisfy a judgment out of the judgment debtor's interest in that limited partnership or limited liability company is a charging order."

The court agreed that "[t]he plain language of sections 101.112(d) and 153.256(d) provides that a charging order is generally the exclusive remedy by which to satisfy a judgment out of the judgment debtor's interest in a limited partnership or limited liability company." Nevertheless, the court noted that "courts have held that there are some exceptions to this rule." For example, the Dallas Court of Appeals held that the sections do not preclude turnover of a person's distributions from an LLC or limited partnership. In addition, the Houston (14th) Court of Appeals held that "turnover of a member's interest in a limited liability company was not precluded by section 101.112 'when the judgment creditor seeking the membership interest is the entity from which the membership interest derives,' and when the turnover order 'involves an explicit award of the membership interest itself from one party to the other as part of the judgment.'" According to the *Heckert* court, "[t]his is because in these types of situations, the purpose of a charging order has not come into play: the charging order was developed to prevent a judgment creditor's disruption of an entity's business by forcing an execution sale of the partner's or member's entity interest to satisfy a debt of the individual partner or member."

The *Heckert* court determined that "the same reasoning applies here because neither A2R, Ltd. nor Averse 2 Risk, LLC is an operating business; both entities appear to have been formed by Clyde for the sole purpose of taking ownership of nonexempt assets awarded to him in the divorce." The court noted that "[n]o other party's interest will be disrupted by the turnover of those interests and the stock owned by A2R, Ltd.," and it observed that "Clyde has already assigned his interests and the [stock] to the receiver, subject to his right of appeal." As a result of this analysis, the court held that the trial court did not abuse its discretion in ordering the turnover of Clyde's interest in the limited partnership and the LLC.

Imes v. Galasso, No. A-10-CA-373-SS, 2011 WL 13196081 (W.D. Tex. Dec. 21, 2011). (Although the court issued this opinion in 2011, it is included in this year's update because it did not appear in the Westlaw database until recently.)

The court granted a charging order against a judgment debtor's limited partnership interest in a law firm organized as a limited partnership, but the court denied the judgment creditor's request for a receiver over the judgment debtor's professional corporation that was the general partner of the limited partnership.

A judgment debtor was the 99% limited partner, as well as the sole shareholder of the 1% general partner, of a law firm limited partnership. The judgment creditor sought a charging order against the judgment debtor's limited partnership interest. The court rejected the judgment debtor's argument that the judgment creditor should first seek satisfaction through a turnover order previously obtained in state court with respect to distributions made to the judgment debtor. Relying on *Stanley v. Reef Securities, Inc.*, 314 S.W.3d 659 (Tex. App.—Dallas 2010, no pet.), the court stated that a judgment creditor can pursue both remedies. The court rejected the judgment creditor's request for a receivership over the professional corporation that was the general partner of the limited partnership, stating that such relief would be contrary to the protective intent found in the current charging order statute. The court stated that a receivership would not be directly foreclosed in this case by Section 153.256 of the Texas Business Organizations Code since the receiver was sought for the professional corporation rather than the limited partnership, but the court declined to exercise its discretion to appoint a receiver on the basis that doing so on these facts would frustrate the intent of the statute.

Gandy Mktg. & Trucking, Inc. v. Tree Town Holdings, Ltd., No. H-08-1053, 2010 WL 11579500 (S.D. Tex. Aug. 18, 2010), report and recommendation adopted, 2010 WL 11579502 (S.D. Tex. Oct. 4, 2010). (Although the court issued this opinion in 2010, it is included in this year's update because it did not appear in the Westlaw database until recently.)

The court denied the IRS's requests to order liquidation and distribution of the assets of a limited partnership in which a taxpayer was a partner because the taxpayer had no right or interest in the partnership's assets. The court granted the IRS's requests for a charging order and receiver with respect to the taxpayer's interest in the partnership.

After the IRS pursued Dennis Gandy for tax fraud, Gandy set up various entities, including a limited partnership, to which Gandy transferred his business and personal assets. A large judgment was ultimately entered against Gandy for taxes, penalties, and interest. The Gandys and their entities brought this suit against the purchaser

of assets from the limited partnership to collect from an escrow account established in connection with the purchase of the assets, and the United States intervened seeking to collect on its judgment against Gandy. The United States sought the following alternative types of relief: (1) appointment of a receiver to liquidate and administer the interests of Gandy in the limited partnership to pay Gandy's tax liability; (2) appointment of a receiver to liquidate and administer the assets of the limited partnership to pay Gandy's tax liability; (3) issuance of a charging order to pay Gandy's tax liability. The court acknowledged that Gandy had "avoided his tax liability for years by tying up his personal assets in [the limited partnership] and by paying personal expenses directly from [the limited partnership's] funds. Regardless of Gandy's recalcitrance, the United States' lien enforcement is limited to property or rights to property that belong to Gandy himself." The court rejected the United States' contention that it could reach the property of the limited partnership because the United States was only entitled to collect against the property of the taxpayer. Texas law provides that partnership property is the property of the partnership rather than the individual partners, and a partner has no interest in specific partnership property. Tex. Bus. Orgs. Code § 152.101. Although Gandy had no interest in the partnership's property, he owned 85% of the limited partnership as a limited partner, and he owned 40% of the partnership's corporate general partner. In order to enforce its judgment against these interests, the United States sought a charging order and receivership. The parties agreed that both remedies were available and the court found both were necessary. As a judgment creditor of Gandy, the United States was entitled to a charging order, under Tex. Bus. Orgs. Code § 153.256, against any distribution made to Gandy or to which he became entitled from the limited partnership. The court concluded, however, that a charging order alone was insufficient because of Gandy's manipulation of the limited partnership's assets for his benefit. Rather than taking distributions directly from the partnership, Gandy had used its funds to pay personal expenses and debt. If Gandy continued this process with the charging order in place, collection of the tax liability would remain in jeopardy. The court concluded that the appointment of a receiver for Gandy's partnership interests and his interests in the corporate general partner was necessary to monitor the disbursements made by the limited partnership and to capture disbursements that were directly or indirectly made to Gandy. According to the court, if "the charging order prove[s] to be an insufficient method for collecting Gandy's tax debt, the receiver can determine whether it would be necessary or appropriate to divest Gandy of his ownership interests in [the limited partnership] and [corporate general partner] in order to enforce the judgment."

N. Standing or Capacity to Sue

Matter of Marriage of Dilick, 2018 WL 1866029, __ S.W.3d __ (Tex. App.—Houston [14th Dist.] 2018, no pet. h.).

A limited partner did not have standing to appeal a judgment against the limited partnership. Although the Texas Business Organizations Code permits a limited partner to sue derivatively on behalf of a limited partnership to recover a judgment in favor of the partnership, the court did not interpret the statute to permit a limited partner to prosecute an appeal of a judgment against the limited partnership.

A judgment for attorney's fees under the Texas Uniform Fraudulent Transfer Act was entered in favor of Dilick against the bankruptcy trustee for three limited partnerships. The judgment was entered in Dilick's divorce action, in which the bankruptcy trustee had intervened in an attempt to protect the collectability of a judgment obtained by the trustee against Dilick in an adversary proceeding in the bankruptcy case. Entities controlled by Dilick were the general partners of each of the limited partnerships, and Dilick was also a limited partner. The judgment for attorney's fees in the divorce action was appealed by the bankruptcy trustee. After the trustee perfected the appeal, the bankruptcy was dismissed, and Cohen—a limited partner in the partnerships—sought to be substituted for the trustee in order to prosecute the appeal of the judgment on behalf of the partnerships.

The court of appeals stated that the principles that preclude a stakeholder such as a limited partner from asserting claims that belong to the entity apply equally to appellate standing, and the court said that the instant case was controlled by a case in which the court had held that an LLC member lacked standing to appeal a charging order entered in a case against the LLC to which the member was not a party. Cohen was not a party to the attorney's fee judgment against the partnerships, and he was not authorized by the partnership agreement to sue on the partnerships' behalf. Cohen argued that his authority to continue the appeal was supported by Section 153.401 of the Texas Business Organizations Code, which addresses when a limited partner may bring an action on behalf of a limited partnership to recover a judgment in favor of the limited partnership. The court pointed out that the statute allows a limited partner to sue to recover a judgment *in favor of* the limited partnership, but Cohen did not

cite, and the court did not find, any case in which the court relied on Section 153.401 to allow a limited partner to prosecute the appeal of a judgment *against* a limited partnership.

The court also concluded that the doctrine of virtual representation did not confer standing on Cohen to appeal because one of the requirements of that doctrine is that the party invoking the doctrine must be bound by the judgment. The court pointed out that “[a] defining characteristic of a limited partnership is that its limited partner are not liable for the partnership’s obligations.” Tex. Bus. Orgs. Code § 153.102(a). Although the statute provides two exceptions to that rule (*see* Tex. Bus. Orgs. Code § 153.102(b)), neither of those exceptions applied in this case. The first exception applies to a limited partner who is also a general partner, and Cohen was not also a general partner. The second exception applies to a limited partner who participates in the control of the business, and there was no suggestion that Cohen participated in the control of the business. Even if he did, he would only be liable to a person who transacted business with the partnerships believing that he was a general partner based on his conduct. Assuming Dilick was the person who transacted business with Cohen, he could not have reasonably believed that Cohen was a general partner because Dilick was a partner himself and knew the makeup of the partnership.

Finally, Cohen contended that it would be unfair to leave the fate of the appeal to the Dilick-controlled general partners because the general partners had no interest in reversing a judgment in favor of Dilick. Acknowledging that Dilick might not cause the partnerships to appeal the judgment, the court nevertheless concluded that it did not have the power to create standing where it did not exist.

Intrepid Ship Mgmt., Inc. v. PRC Env'tl., Inc., 711 Fed. App'x 208 (5th Cir. 2017) (per curiam).

The Fifth Circuit affirmed a ruling that title to a rig did not transfer to a joint venture and, therefore, that a party to the alleged joint venture did not have standing to sue for damages to the rig.

PRC Environmental sued for damage to a rig. It claimed that it held a proprietary interest in the rig by virtue of a joint venture with Francisco Moreno, the title owner of the rig. The district court concluded that title to the rig never passed from Moreno to the joint venture. PRC appealed.

The Fifth Circuit concluded that PRC failed to bring forth facts that, if true, proved the existence of a joint venture. PRC “failed to prove an agreement between Moreno and PRC to share profits and losses, meaning PRC could not gain a proprietary interest in the Rig through the joint venture.” (The court cited a Houston Court of Appeals case for the proposition that a valid Texas joint venture required an express agreement to share both profits and losses.) Even assuming that a joint venture was created, the Fifth Circuit also determined that PRC did not bring forth sufficient facts “to prove that Moreno either actually transferred or intended to transfer the Rig as required for individual property to become joint venture property.” Because PRC had no proprietary interest in the rig, it had no standing to maintain the suit.

Pike v. Texas EMC Mgmt., LLC, No. 10–14–00274–CV, 2017 WL 2507783 (Tex. App.—Waco June 7, 2017, pet. filed) (mem. op.).

The court of appeals affirmed the jury’s breach of contract finding with respect to a partnership agreement.

The partners in EMC Products, a Texas limited partnership, were EMC Management, EMC Cement, Walker and certain members of his family, and Wilson. EMC Management was a general partner with a 1% share in the partnership. EMC Cement was a Class A limited partner with a 49.5% ownership stake. Walker and his family and Wilson were Class B limited partners with a collective 49.5% ownership stake in the partnership. Under the Partnership Agreement, the following was required of Class B limited partners Walker and Wilson:

Section 2.5. Financing Assistance by Class B Limited Partners. The Class B Limited Partners shall loan funds to and/or obtain financing for the Partnership to meet the Primary Objective until such time as the Partnership has the financial ability to obtain such financing on its own resources. The General Partner and the Class A Limited Partner shall have no obligation to make loans to and/or obtain financing for the Partnership.

Section 1.5 of the Partnership Agreement outlined the “Primary Objective” of the Partnership as follows: “The Partners agree that the primary objective of the partnership will be to maximize the degree and speed of

market penetration for the Products in the State of Texas, in accordance with market demand and potential, respecting sound business principals.”

Walker and Wilson argued that EMC Cement lacked standing to bring a claim against them for breach of the Partnership Agreement because that cause of action belonged to the partnership and not to the individual partners. The court first concluded that the argument that EMC Cement did not have authority to prosecute the breach of Partnership Agreement claim involved capacity and not standing. While standing may be raised for the first time on appeal, capacity must be raised by a verified plea in the trial court; otherwise, it is deemed waived. Because the record did not contain a verified plea filed in the trial court under Texas Rule of Civil Procedure 93, the court concluded that the argument had been waived. In a footnote, the court mentioned that even if the argument was construed as a standing challenge, § 152.210 of the Business Organizations Code provides that “[a] partner is liable to a partnership and the other partners for . . . [a] breach of the partnership agreement.” According to the court, § 152.210 would have conferred standing on EMC Cement, a Class A limited partner.

See also Buck v. Palmer, No. A-08-CA-572-SS, 2008 WL 11340039 (W.D. Tex. 2008), summarized below under “Direct and Derivative Claims.”

O. Direct and Derivative Claims

Matter of Marriage of Dilick, 2018 WL 1866029, __ S.W.3d __ (Tex. App.—Houston [14th Dist.] 2018, no pet. h.).

A limited partner did not have standing to appeal a judgment against the limited partnership. Although the Texas Business Organizations Code permits a limited partner to sue derivatively on behalf of a limited partnership to recover a judgment in favor of the partnership, the court did not interpret the statute to permit a limited partner to prosecute an appeal of a judgment against the limited partnership.

A judgment for attorney’s fees under the Texas Uniform Fraudulent Transfer Act was entered in favor of Dilick against the bankruptcy trustee for three limited partnerships. The judgment was entered in Dilick’s divorce action, in which the bankruptcy trustee had intervened in an attempt to protect the collectability of a judgment obtained by the trustee against Dilick in an adversary proceeding in the bankruptcy case. Entities controlled by Dilick were the general partners of each of the limited partnerships, and Dilick was also a limited partner. The judgment for attorney’s fees in the divorce action was appealed by the bankruptcy trustee. After the trustee perfected the appeal, the bankruptcy was dismissed, and Cohen—a limited partner in the partnerships—sought to be substituted for the trustee in order to prosecute the appeal of the judgment on behalf of the partnerships.

The court of appeals stated that the principles that preclude a stakeholder such as a limited partner from asserting claims that belong to the entity apply equally to appellate standing, and the court said that the instant case was controlled by a case in which the court had held that an LLC member lacked standing to appeal a charging order entered in a case against the LLC to which the member was not a party. Cohen was not a party to the attorney’s fee judgment against the partnerships, and he was not authorized by the partnership agreement to sue on the partnerships’ behalf. Cohen argued that his authority to continue the appeal was supported by Section 153.401 of the Texas Business Organizations Code, which addresses when a limited partner may bring an action on behalf of a limited partnership to recover a judgment in favor of the limited partnership. The court pointed out that the statute allows a limited partner to sue to recover a judgment *in favor of* the limited partnership, but Cohen did not cite, and the court did not find, any case in which the court relied on Section 153.401 to allow a limited partner to prosecute the appeal of a judgment *against* a limited partnership.

Buck v. Palmer, No. A-08-CA-572-SS, 2008 WL 11340039 (W.D. Tex. 2008). (Although the court issued this opinion in 2008, it is included in this year’s update because it did not appear in the Westlaw database until recently.)

The court concluded that a minority partner of a general partnership had adequately alleged circumstances that allowed the minority partner to sue derivatively on behalf of the partnership, and the minority partner thus had capacity to assert the claims asserted in the case.

Buck sued Palmer and two entities in which Palmer owned interests, alleging claims for trademark infringement under the Lanham Act as well as various common-law causes of action. Palmer was the 80% managing partner and Buck was the 20% partner of a joint venture/general partnership. The alleged infringement involved

trademarks owned by the joint venture, and the defendants sought dismissal of Buck's claims on the basis that he did not have standing and lacked capacity to assert the claims.

The court first reviewed the concept of standing and then examined five factors to be considered in determining a party's standing to assert claims under Section 43(a) of the Lanham Act. The five factors weighed heavily against recognizing Buck's standing to assert the claims individually because the claims could be totally addressed by allowing the joint venture—the real injured party—to sue. Denying Buck standing to sue individually also comported with Texas case law holding that an individual stakeholder in an entity does not ordinarily have a right to recover personally for harms to the entity. Specifically, partners in a partnership have no separate, individual right to sue for injuries to the partnership that diminish the value of their interests, and the partnership is the exclusive party with a justiciable interest in redressing injuries suffered by the partnership. Thus, the court declined to recognize Buck's standing to sue individually.

The court next addressed whether Buck had capacity to assert his claims on behalf of the joint venture. It was undisputed that the joint venture had standing to sue as owner of the trademarks at issue. The parties agreed that a partner lacking specific authority, such as a minority, non-managing partner, cannot as a general rule bring suit on behalf of a partnership absent “exceptional circumstances.” *Cates v. Int'l Tel. & Tel. Corp.*, 756 F.2d 1161, 1176 (5th Cir. 1985). The joint venture agreement did not give Buck the authority to sue, but Buck claimed that the “exceptional circumstances” exception recognized in *Cates* was met in this case. Despite the silence of the Texas Uniform Partnership Act (the applicable statute in *Cates*) as to derivative actions and the absence of Texas case law on point, the Fifth Circuit in *Cates* held:

[I]n a proper case—one where the controlling partners, for improper, ulterior motives and not because of what they in good faith believe to be the best interests of the partnership, decline to sue on a valid, valuable partnership cause of action which it is advantageous to the partnership to pursue—Texas law would afford some remedy to the minority partner or partnership interest owner other than merely a damage or accounting suit against the controlling partners, at least where the latter would not be reasonably effective to protect the substantial rights of the minority.

The Fifth Circuit instructed the district court in *Cates* to address a minority partner's allegations that his partners had wrongfully conspired with the other defendants and acted in collusion with them, with improper and ulterior motives, and not in an effort to further the best interests of the partnership. The opinion suggested that an individual, non-controlling partner might maintain suit on partnership causes of action derivatively on behalf of the partnership or for the partner's percentage of the claims, or alternatively might have the case deferred until a receivership application could be acted on or the partnership's winding up could be completed. The Fifth Circuit in *Cates* declined to define precisely what sort of impropriety authorizes a minority partner to maintain a derivative suit, but the court suggested that a suit by minority partners may be authorized where “controlling non-consenting partners have conspired with the defendant third party in committing some material part of the wrongs complained of and have, in bad faith for their own personal interests and not with a view to the best interests of the partnership, colluded with the third party to prevent the suit.” The court warned, however, that “this remedy is not available to invade ‘the good faith managerial business judgment of the controlling partners, despite the fact that the court might disagree with such judgment or even view it as not being entirely reasonable.’”

The court said that Buck's allegations, if taken as true, clearly stated “exceptional circumstances” as described by the court in *Cates*. Buck alleged a conflict of interest between Palmer and the joint venture because Palmer allegedly appropriated trademarks owned by the joint venture for Palmer's own personal gain and the use of his other companies in direct competition with the joint venture. The court stated that this scenario did “not paint the picture of a good faith manager exercising his business judgement. Instead, if the allegations are to be believed, they paint exactly the picture contemplated by the *Cates* exception: that of a controlling partner conspiring with third-party defendant companies to commit material wrongs against the JV, in bad faith and for personal gain.” The defendants argued that Buck did not plead the “proper elements” of a derivative action under *Cates*, but the court in *Cates* did not specify any immutable requirements for a derivative action under these circumstances. The court here was governed by the rule that pleadings are to be construed liberally in the case of a dismissal on the merits for failure to state a claim. Because Buck adequately stated a claim for a derivative suit under *Cates*, and the interests of justice were better served by allowing Buck to pursue the joint venture's claims, the court found that he had capacity to do so.

P. Accounting

Akuna Matata Invs. Ltd. v. Texas NOM Ltd. P'ship, No. SA-05-CA-1053-WRF, 2007 WL 9702865 (W.D. Tex. Mar. 16, 2007). (Although the court issued this opinion in 2007, it is included in this year's update because it did not appear in the Westlaw database until recently.)

The court held that the plaintiff's claim for judicial dissolution and an accompanying accounting and receivership were not barred by the statute of limitations, nor were any claims for breach of fiduciary duty that were based on ongoing breaches after the rendition of a state-court judgment in a previous lawsuit, but any claims for breach of fiduciary duty that occurred before the previous lawsuit were barred by the statute of limitations based on Section 4.06 of the Texas Revised Partnership Act (Tex. Rev. Civ. Stat. Art. 6132b-4.06), "which indicates the Legislature's desire to require partners to pursue claims during the life of the partnership rather than waiting until dissolution."

The plaintiff sued the defendants in state court in 2002 asserting the existence of an oral partnership with the defendants and asserting claims for breach of fiduciary duty and breach of the partnership agreement based on the defendants' failure to share profits with the plaintiff. After the state-court judgment in favor of the plaintiff was affirmed on appeal, the plaintiff filed this suit seeking judicial dissolution, receivership, and an accounting. The plaintiff asserted claims for breach of fiduciary duty in the second suit as well. The defendants sought summary judgment on the basis that the statute of limitations barred the plaintiff's claim for an accounting.

To determine the timeliness of the plaintiff's claims, the court examined Section 4.06 of the Texas Revised Partnership Act and Section 16.004 of the Texas Civil Practice and Remedies Code. The court explained that some understanding of the background of Section 4.06 of the Texas Revised Partnership Act was required to resolve the question in this case. Before the adoption of the Texas Revised Partnership Act, partners were not permitted to sue one another on claims arising out of partnership affairs until after an accounting and settlement, but Section 4.06 of the Texas Revised Partnership Act provided for several situations in which a partner can sue another partner *before* an accounting as follows:

A partner may maintain an action against the partnership or another partner . . . , *with or without an accounting* as to partnership business, to: . . . [E]nforce a right under this Act, including: . . . the partner's rights [to enforce fiduciary duties]; . . . and . . . the partner's rights under [dissolution and winding up] [emphasis added]

Section 4.06 of the Texas Revised Partnership Act also expressly granted the right to an accounting upon dissolution. While preserving the right to pursue an accounting, it also provided that accrual of limitations on remedies under Section 4.06 is governed by other law. That "other law" in the case of a partnership accounting is Section 16.004 of the Texas Civil Practice and Remedies Code, which provides that a suit for settlement of partnership accounts must be brought within four years from "the day that the dealing in which the parties were interested together cease." The court noted that the relevance of Section 16.004 in light of the provisions of the current partnership statute was unclear, but what did seem clear to the court was that Section 4.06 of the Texas Revised Partnership Act "indicates the Legislature's desire to require partners to pursue claims during the life of the partnership rather than waiting until dissolution." Because the statute provides that the "right to an accounting does not revive a claim barred by law," a partner can only seek an accounting on claims that would not be time-barred outside of an accounting.

The defendants in this case argued that their dealings with the plaintiff ceased based on their failure to pay profits to the plaintiff in 2001, but the court agreed with the plaintiff that there was no evidence that the partnership or its activities (oil and gas development) had ceased. The court found that the plaintiff's claim for judicial dissolution was "undoubtedly timely" as it would "make little sense to time bar Plaintiff's claim for dissolution, thereby requiring the parties to maintain an unworkable business relationship." As part of the claim for dissolution, the plaintiff was entitled to an accounting, and thus the requests for receivership and audit that accompanied a proper accounting were also timely. With respect to the fiduciary-duty claims, the court concluded that claims for actions occurring before the state-court judgment were barred because the plaintiff certainly had notice of the breaches as early as 2001 when the plaintiff made demand on the defendants for the plaintiff's share of the partnership profits. Complaints for ongoing breaches after the state-court judgment, however, were timely.

Q. Discovery

In re Howeth, No. 03-17-00286-CV, 2017 WL 2729680 (Tex. App.—Austin June 22, 2017, no pet.) (mem. op.).

The court in this mandamus action held that the trial court did not err in ordering production of an individual's tax returns and correspondence and other materials exchanged between the taxpayer and his accountant because the materials were material and relevant to the central issue in the underlying case—the existence of an alleged partnership. A party seeking tax returns must show that the party cannot obtain whatever relevant information is contained in the tax returns from another source, and the individual resisting production of his tax returns argued that the information was available from his Quickbooks records. The court concluded, however, that the information in the tax returns and accountant documents was not available from another source. The court held that the trial court erred in denying the individual's request to redact irrelevant information from the tax returns and accountant documents. Although the trial court attempted to safeguard the individual's privacy by entering a protective order, the court of appeals said the order did not go far enough to balance the privacy concerns underlying the protection of tax returns with the pursuit of discoverable information. Redaction was necessary to limit disclosure solely to the discoverable information outlined in the trial court's order.

Akuna Matata Invs. Ltd. v. Texas NOM Ltd. P'ship, No. SA-05-CA-1053-HLH, 2011 WL 13267745 (W.D. Tex. Jan. 25, 2011). (Although the court issued this opinion in 2011, it is included in this year's update because it did not appear in the Westlaw database until recently.)

The court granted a motion to compel production of a partner's tax records and related correspondence because the documents were arguably relevant to the determination of the value of the partnership's assets and the relative share of each partner in this suit for judicial dissolution.

After obtaining a judgment in state court for breach of fiduciary duty and breach of an oral partnership agreement, the plaintiff brought this suit in federal court for judicial dissolution of the partnership and to determine the value of the partnership's assets and each partner's share. The defendants sought to compel the plaintiff to produce tax returns and related correspondence, and the plaintiff argued that all the partnership assets were in the defendants' possession and control and that the plaintiff's tax returns were not relevant to the issues in the case. The court's in camera inspection revealed that the plaintiff reported various expenses, income, and assets pertaining to partnership investments, which were arguably relevant to the plaintiff's claims as to the partnership's value. "[T]he amounts plaintiff reported to the IRS as income or assets with respect to the partnership interest, as well as any losses, are arguably relevant to the determination of the value of the partnership's assets." Thus, the court granted the defendants' motion to compel production.

R. Attorney's Fees

Mor-Pak Specialties, Inc. v. Andra Group, LP, No. 05-16-00864-CV, 2017 WL 3405185 (Tex. App.—Dallas Aug. 9, 2017, no pet.) (mem. op.).

The court of appeals upheld the trial court's denial of appellant's request for attorney's fees on the ground that § 38.001 of the Civil Practice and Remedies Code does not allow for attorney's fees to be recovered from limited partnerships.

The court of appeals noted its earlier holding that "[u]nder the plain language of section 38.001, a trial court cannot order limited liability partnerships, limited liability companies, or limited partnerships to pay attorney's fees." The court then observed that appellee, Andra Group, LP, was a limited partnership, and it concluded that "[b]ecause attorney's fees are not recoverable from limited partnerships under chapter 38 of the civil practice and remedies code, we conclude that appellant cannot recover attorney's fees from appellee in this case."

Freeman v. Harleton Oil & Gas, Inc., 528 S.W.3d 708 (Tex. App.—Texarkana 2017, pet. filed).

In a footnote, the court noted that "our sister court concluded that attorney fees under Section 38.001 could not be assessed against a limited liability partnership because it was not a 'person or corporation.'" It also stated that "a few of our sister courts have also concluded that the plain language of Section 38.001 does not permit recovery of attorney fees from limited partnerships," but "[o]ur court has not previously decided this issue."

Windmill Inv., LLC v. RedHill Realty Inv'rs, LP, Civ. No. 5:16-cv-345-OLG, 2017 WL 3713471 (W.D. Tex. June 13, 2017).

“Section 38.001 of the Texas Civil Practice and Remedies Code provides for the recovery of attorney’s fees in breach of contract claims ‘from an individual or corporation,’ which Texas courts have interpreted to exclude recovery from limited partnerships and limited liability companies. Since it is not disputed that the Defendants in this case are not individuals or corporations, but are, respectively, a limited partnership and a limited liability company, the summary judgment evidence establishes that Plaintiff may not recover attorney’s fees for his breach of contract claim.” (citations omitted).

Al-Saud v. Youtoo Media, L.P., No. 3:15-CV-3074-C, 2017 WL 3773543 (N.D. Tex. May 31, 2017).

The court stated that “[i]t is clear that the plain language of section 38.001 [of the Texas Civil Practice and Remedies Code] does not authorize any recovery of fees from Defendant Youtoo Media because it is a partnership rather than an individual or corporation,” but the court concluded that attorney’s fees were recoverable against the individual general partner because the jury found that the individual entered into and breached the letter of intent at issue in his individual capacity. (The court explained that the individual “signed the Letter of Intent twice—once on behalf of Youtoo Media, L.P. and again on behalf of *himself* (purportedly ‘as the General Partner’).”)

S. Pro Se Representation

Moore v. Vednor, No. 3:17-CV-1436-G-BH, 2017 WL 3616444 (N.D. Tex. July 27, 2017), report and recommendation adopted, 2017 WL 3601887 (N.D. Tex. Aug. 22, 2017).

A pro se individual filed answers on behalf of corporate defendants, and the court stated that “[i]t is well-established that although individuals have the right to represent themselves or proceed pro se under this statute, corporations are fictional legal persons who can only be represented by licensed counsel.” Further, “[t]he rationale for this long-standing rule applies equally to ‘all artificial entities,’ such as partnerships and associations.” Moreover, according to the court, “[a]s a cross between a corporation and a partnership, a limited liability company is also an artificial entity that may only appear in federal court through licensed counsel.”

III. Recent Texas Cases Involving Limited Liability Companies

A. Nature of Limited Liability Company

Steer Wealth Mgmt., LLC v. Denson, 537 S.W.3d 558 (Tex. App.—Houston [1st Dist.] 2017, no pet. h.).

The court of appeals concluded that the trial court did not err in denying a motion to compel arbitration on the ground that the movant was not a third-party beneficiary of the contracts that included the arbitration provision.

Jack Vacardos was the financial advisor for John and Margaret Denson. Vacardos worked for LPL Financial, LLC. The brokerage account applications, signed by the Densons and Vacardos, included an arbitration clause that affected “any controversy between you [Densons] and LPL and/or your Representative(s).” Vacardos later formed Steer Wealth, LLC, and he was the sole manager of that entity.

Margaret Denson eventually sued Steer Wealth and alleged that Steer Wealth assisted in improperly depleting the Denson community estate of its financial assets. Steer Wealth, as an alleged third-party beneficiary, moved to compel arbitration under the provision contained in the LPL account agreements. The trial court denied the motion.

On appeal, Steer Wealth argued that it was a third-party beneficiary of Denson’s contracts with LPL Financial because the express language of the arbitration agreement provided that it applied to controversies “between [Denson] and LPL and/or your Representative(s),” which, Steel Wealth contended, referred to Vacardos and Steer Wealth as his “DBA.” Steer Wealth further contended that because it could act only through Vacardos, its sole manager, “the LPL arbitration provision is intended to benefit Steer Wealth which is a DBA for Vacardos, the ‘Representative’ identified in the arbitration provision.” (There was evidence in the record that Vacardos used Steer Wealth to conduct his financial advising business for LPL Financial.)

The court of appeals rejected Steer Wealth’s argument. It noted that a DBA is simply a trade name and that a trade name has no legal existence. It further observed that an LLC is a separate legal entity from its members, and

that Steer Wealth was therefore a distinct legal entity from both Vacardos and LPL Financial. As the court concluded, “[w]e thus agree with Denson that Varcados and Steer Wealth cannot be conflated such that references in the Master Account Agreement—and its arbitration provision—to Denson’s ‘Representative’ refer to both Varcados and the separate legal entity of Steer Wealth.”

The court also noted that “Representative” was defined as the customer’s “registered representative,” and that “registered representative” was a term of art referring to a person who has passed an examination administered by FINRA and has obtained a license to sell securities. The court stated that Vacardos could be a registered representative, but “Steer Wealth, an entity and not a natural person, cannot be.” The court agreed with Denson that “the terms of the arbitration provision itself do not contemplate that Steer Wealth—a party not named in the arbitration provision, the Master Account Agreement, or the account applications—may rely upon that provision or benefit from it.” It concluded that the trial court did not err to the extent that it denied Steer Wealth’s motion to compel arbitration on the basis that it was not a third-party beneficiary to the contracts between the Densons and LPL Financial.

Super Starr Int’l, LLC v. Fresh Tex Produce, LLC, 531 S.W.3d 829 (Tex. App.—Corpus Christi 2017, no pet.).

The court of appeals reversed the trial court’s temporary injunction order, dissolved it, and denied various restrictions based in part on its determination that an LLC’s business was not a partnership and that there was no evidence of a breach of fiduciary duty.

Fresh Tex Produce, LLC (the “Distributor”) filed suit individually and derivatively on behalf of Tex Starr Distributing, LLC. The defendants were Super Starr International, LLC (the “Importer”); Lance Peterson, the President of the Importer; Red Starr, SPR de R.L. de C.V. (the “Grower”); and Kemal Mert Gumus, an employee of the Importer.

In December 2010, Kenneth Alford, president of the Distributor, and Lance and David Peterson, on behalf of the Importer, created Tex Starr Distributing, LLC (the “LLC”). Under the Tex Starr operating agreement, the Distributor and the Importer were the LLC’s only members, Alford and David Peterson were the only managers, and Alford was the president. The operating agreement also included an exclusivity provision mandating that the LLC serve as the “sole and exclusive distributor of papayas exported into the United States by [the Importer] and/or other existing or future companies of Lance Peterson and/or David Peterson pertaining in whole or in part to the growing, production, shipping or packaging of papayas.” The provision lasted until the end of 2013. In January 2014, a nearly identical operating agreement took effect. The exclusivity provision in the revised operating agreement lasted until the end of 2015.

At the end of December 2015, the exclusivity provision under the revised operating agreement expired. Alford testified that he and Lance Peterson attempted to negotiate a new term of exclusive distributorship, but the two sides were unable to reach an agreement. From January 2016 through March 2016, the Distributor and the Importer continued working together under the same terms as the revised operating agreement. In March 2016, Lance Peterson told Alford that beginning in July 2016, the Importer would no longer supply the LLC with papayas. Instead, the Importer would distribute and market the papayas to customers in the United States on its own.

In October 2016, the Distributor filed an original petition and application for injunctive relief. After a hearing, the trial court signed a temporary injunction order finding that the Distributor had demonstrated a probable right to relief through its claims against the defendants. It granted injunctive relief mandating that the Importer, Lance Peterson, and the Grower (collectively “appellants”) continue the exclusive business relationship with the LLC and prohibiting conduct deemed competitive against the LLC.

Restrictions 1 and 6 of the temporary injunction order mandated that appellants refrain from (1) distributing any papayas without such distribution going through the LLC and dividing proceeds as previously agreed; and (2) refusing to supply papayas for the LLC orders if such papayas were available. Appellants complained that these restrictions were premised on the trial court’s finding of a partnership, joint venture, and joint enterprise between the Distributor, the Importer, and the LLC, and that the Distributor presented no evidence on these theories. The court of appeals agreed with the somewhat obvious proposition that the LLC was not a partnership. The court noted that the operating agreements provided that the LLC shall not be a partnership, and it observed that the LLC was created under the Business Organizations Code provisions governing LLCs (thus, by default, it was not a partnership). The Distributor highlighted two pieces of evidence where the parties referred to the LLC as a “partnership,” but the court stated that the references were “diplomatic gestures” rather than “a formal

reclassification of LLC's legal character." The court observed that "[t]he term 'partner' is regularly used in common vernacular and may be used in a variety of ways," and it stated that "[r]eferring to . . . a 'partner' in a colloquial sense is not legally sufficient evidence of expression of intent to form a business partnership." As the court concluded, "[a]bsent something more, we conclude that the Distributor presented no evidence that conclusively negates the plain text of the business organizations code and the operating agreements, both of which require us to determine as a matter of law that the LLC was solely a limited liability company, not a partnership." Moreover, "[t]he same considerations lead us to hold that a limited liability company, such as the LLC, does not qualify for the overlapping labels of joint venture or joint enterprise." Ultimately, the court found no evidence that could reasonably support the trial court's decision to grant injunctive relief premised on claims for partnership, joint venture, and joint enterprise, and it concluded that the trial court had abused its discretion in imposing the above-described restrictions.

Kenolyn Camp v. Wilson, No. 4:16-CV-00163-ALM-CAN, 2017 WL 933129 (E.D. Tex. Feb. 17, 2017), report and recommendation adopted, 2017 WL 916408 (E.D. Tex. Mar. 8, 2017).

The court held that the managing member of two LLCs was a "vice principal," similar to the president of the corporation in *Bennett v. Reynolds*, 315 S.W.3d 867, 870-71, 883-85 (Tex. 2010), for purposes of holding the LLCs liable for exemplary damages based on the vice principal's wrongful conduct.

Fleishman-Hillard, Inc. v. Oman, No. SA-11-CA-921-H, 2012 WL 13028770 (W.D. Tex. Nov. 21, 2012). (Although the court issued this opinion in 2012, it is included in this year's update because it did not appear in the Westlaw database until recently.)

The court granted summary judgment in favor of two individuals whom the plaintiff alleged were liable on a contract between the plaintiff and an LLC based on equitable estoppel and partnership by estoppel. Although the individuals had been falsely represented to be investors and co-founders of the LLC, the plaintiff knew that it was contracting with an LLC when the contract was executed.

The plaintiff, a marketing firm, entered into a contract with an LLC to promote a golf resort development project managed by the LLC. The contract was negotiated and entered into on behalf of the LLC by its sole member, Oman. At a press conference held after the contract was entered into, defendants Oman, Jones, and McCombs met with representatives of the plaintiff and reviewed materials that referred to each of the defendants as principals and/or co-founders of the LLC. The LLC defaulted on payment of amounts owed to the plaintiff under the contract, and the plaintiff obtained a judgment against the LLC in a previous action. In this action, the plaintiff sought to recover from Oman, Jones, and McCombs as partners of a partnership that was alleged to exist distinct from the LLC, relying on equitable estoppel and partnership by estoppel.

The court concluded that the plaintiff's claim based on equitable estoppel failed. The court set forth the requirements for equitable estoppel as follows: (1) a false representation or concealment of material facts; (2) made with knowledge, actual or constructive, of those facts; (3) with the intention that it should be acted on; (4) to a party without knowledge or means of obtaining knowledge of the facts; (5) who detrimentally relies on the representations. The evidence established false representations that would satisfy the first three elements because the defendants knew the LLC was a Delaware LLC whose only principal was Oman, and the representations that Jones and McCombs were principals were made to give the project credibility. The court said that the plaintiff did not, however, show that the plaintiff did not have knowledge of the truth or the means of obtaining the truth because the plaintiff signed a contract with a Delaware LLC and could have easily discovered that Oman was the sole owner and the company was severely undercapitalized.

The court next set forth the elements of partnership by estoppel as follows: (1) a representation that the one sought to be bound is a member of a partnership; and (2) reliance by one to whom the representation is made by giving credit to the partnership. The court further explained that the representation may be made directly by the alleged partner or by others whom the alleged partner knowingly allows to make the representation. There was no dispute that each defendant made representations that there was a partnership and/or that he was a partner, but the use of the terms "partners" and "partnership" occurred only at a press conference after the plaintiff had executed a contract with the LLC. Before executing the contract with the LLC, the only representations made to the plaintiff were that McCombs and Jones were "co-founders" and Jones was an "investor" in the LLC. Additionally, the plaintiff had no interactions with Jones or McCombs before the contract was executed. According to the court: "While falsely claiming that individuals are co-founders and investors of an LLC is certainly unethical, it is not

enough to impute liability to others on a theory of partnership by estoppel. Even if Jones and McCombs were actually principals and co-founders of Flagship Group, LLC, they would still be immune from liability because the Flagship Group is a limited liability company and not a partnership. Moreover, Plaintiff knew it was signing a contract with a limited liability company when it executed the contract with Flagship Group, LLC. Thus, Plaintiff's claim for partnership by estoppel fails as a matter of law."

See also cases summarized below under "Attorney's Fees," in which courts have held that attorney's fees may not be awarded against a limited liability company under Tex. Civ. Prac. & Rem. Code § 38.001 because a limited liability company is not "an individual or corporation."

B. Fraud or Fraudulent Inducement to Invest in LLC

Clement v. Blackwood, No. 11-16-00087-CV, 2018 WL 826856 (Tex. App.—Eastland Feb. 8, 2018, pet. denied) (mem. op.).

The court held that an LLC was the alter ego of its members and was liable under reverse veil-piercing principles for the fraudulent actions of its members.

David and Sharon Blackwood and Kyle and Valerie Clement agreed to enter into a cow-calf venture pursuant to which the Blackwoods would provide the capital and the Clements would provide the expertise and labor. The venture was to be conducted through Rimrock Land & Cattle Co., LLC ("Rimrock"), an existing LLC owned by the Clements in which the Blackwoods were to become 50% owners. The Blackwoods contributed more than \$650,000 to the venture, and the Clements used some of the funds for personal purposes and were not able to substantiate the legitimacy of many expenses for which the funds were used. In addition to their investment in Rimrock, the Blackwoods lent \$240,000 to the Clements to pay the mortgage on the Clements' family ranch after Kyle Clement informed David Blackwood that the ranch, which was owned by Clement Cattle Company, LLC ("Clement Cattle LLC") was in immediate danger of foreclosure. Kyle Clement represented that the liquidation of Rimrock would yield between \$900,000 and \$1 million and that he could sell all the cattle in sixty to ninety days. Relying on this representation, David Blackwood agreed to provide the funds to pay the Clements' mortgage and to be repaid from the liquidation of Rimrock's assets. When the last of Rimrock's cattle was finally sold seven months later, the Clements produced a check to the Blackwoods for less than \$100,000 and informed the Blackwoods that the Clements could not pay back the \$240,000 loan. When the business between the Blackwoods and the Clements ended, the Blackwoods had suffered a \$747,505 loss on their investment and the loan that they had extended to the Clements to stop foreclosure of the Clements' ranch.

The Blackwoods sued the Clements, Rimrock, and Clement Cattle LLC for breach of fiduciary duty, fraud, theft, and other causes of action. A jury found that the defendants owed a fiduciary duty to the Blackwoods due to a "relationship of trust and confidence" and that each defendant breached this duty. The jury also found that the Clements committed fraud against the Blackwoods and were responsible for the conduct of both Rimrock and Clement Cattle LLC under the theory of alter ego. Finally, the jury determined that the defendants stole the Blackwoods' property. The jury assessed damages of \$747,505, and the trial court entered judgment against the defendants accordingly.

On appeal, the court concluded that the evidence was sufficient to support a finding that the Clements committed fraud by making promises that they did not intend to perform when they induced the Blackwoods to invest in Rimrock without intending to use the Blackwoods' funds to operate a profitable cow-calf operation as promised. The court also held that the evidence was sufficient to support a finding that the Clements obtained the \$240,000 loan from the Blackwoods through fraudulent misrepresentations.

The Clements did not challenge the jury's findings that Rimrock was the alter ego of the Clements, but argued that the evidence was insufficient to support a finding that Clement Cattle LLC was the alter ego of the Clements. The court described alter ego as a legal basis to disregard the corporate fiction where there is unity between the entity and the individual such that the entity's separate existence has ceased. The court explained that the doctrine has traditionally been applied to hold an individual liable for the debts of a corporation but that Texas also allows the alter-ego doctrine to be applied in reverse so that a corporation's assets can be used to satisfy the liabilities of an individual who treated the corporation as the individual's alter ego. The court stated that courts look to the total dealings of the entity and the individual (listing a number of factors) to determine whether the individual is operating the entity as the individual's alter ego or "shadow of his personality." The court also cited Tex. Bus.

Orgs. Code § 21.223 for the proposition that there must be evidence that the Clements perpetrated actual fraud for their direct personal benefit in order to pierce the veil of Clement Cattle LLC. The court held that the evidence supported the finding that the \$240,000 loan was the product of actual fraud and that the loan was for the Clements' direct personal benefit. The defendants cited cases involving LLCs to support their argument that only Clement Cattle LLC received a direct benefit when the Clements paid off its loan. The defendants contended that the fact that they could continue living on the ranch was merely an "incidental benefit," akin to a shareholder receiving property or a corporation reducing its debt. However, the court stated that the defendants ignored the fact "that Clement Cattle LLC's sole purpose was to own the Clements family ranch. It was formed for 'estate planning' purposes, not to operate a business" and "it existed exclusively to directly benefit the Clements." The Clements directly benefitted when the Blackwoods satisfied Clement Cattle LLC's mortgage because the Clements continued to have a place to live. Because Clement Cattle LLC was an alter ego of the Clements, it was also liable for the Clements' fraudulent actions.

Mackenzie Leigh, LLC v. Nardos Imam (In re Imam), No. 16-33362-hdh7, Adv. No. 16-03156-hdh, 2018 WL 614937 (Bankr. N.D. Tex. Jan. 29, 2018).

The debt resulting from an LLC member's failure to contribute intellectual property as represented in the LLC agreement was not a debt that was nondischargeable based on false pretenses, false representations, or actual fraud because the evidence indicated that the member did not understand that she was making the representation that was made in the LLC agreement.

Mackenzie Brittingham and Nardos Imam became friends when Imam created Brittingham's wedding gown and fur wraps for Brittingham's bridal attendants. Imam was a successful fashion designer, and she and Brittingham decided to go into business together to operate a clothing salon and bridal boutique. The business was structured as an LLC named Nardos Imam Limited Liability Company (the "LLC"), of which Imam and an LLC owned by Brittingham were equal members. Although Imam and Brittingham were both well-educated, neither had a complete grasp of the legal terms used while negotiating the terms of the company agreement for their newly formed LLC (in particular, they did not seem to have an understanding of what constitutes "intellectual property"), and misunderstandings may have come into play due to the fact that English was not Imam's first language. Matters were also complicated by the fact that the business began operating before the company agreement was finalized.

Brittingham's lawyer prepared the first draft of a company agreement, and several drafts were exchanged among Brittingham, Imam, and their respective lawyers over the course of more than a year. Each draft contained a provision that addressed contribution by Imam of certain categories of property, including intellectual property. At some point, Brittingham's attorneys suggested that there should be a separate assignment for intellectual property to be contributed by Imam, and the final draft of the company agreement had an assignment of intellectual property and a bill of sale for property other than intellectual property attached as two separate exhibits. Meanwhile, Imam had become uncomfortable with transferring her intellectual property, and Imam communicated to her lawyer that she did not intend to do so. When the parties signed the company agreement, Imam did not sign the assignment of intellectual property. Imam testified that the assignment was intentionally removed from the stack of papers because Imam did not intend to assign the intellectual property, but Imam said she did not realize that the company agreement still had language requiring the assignment to be signed. Brittingham claimed that the failure to sign the assignment was a mistake and that there was not a conscious decision to remove it. Although the business was initially successful, managerial disagreements arose, and Imam eventually obtained a judicial winding up and termination of the LLC in state court based on deadlock. Imam subsequently filed a petition for Chapter 7 bankruptcy. In the bankruptcy proceeding, the plaintiff (i.e., Brittingham's LLC that was Imam's co-member in the terminated LLC) asserted a claim for fraud on the basis that Imam fraudulently induced the plaintiff to contribute funds to the LLC based on representations that Imam would assign certain intellectual property. Although the record indicated that neither Brittingham nor Imam understood the meaning of the term "intellectual property" when it was included in the draft agreements, both probably knew that brand names are crucial in the fashion industry and that the brand name for their business would be Imam's name. The crux of Brittingham's complaint seemed to be that Imam did not assign her brand name—which is her name—to the LLC. Instead, Imam allowed the LLC to use her name during its operation, but refused to allow LLC to own her name. The court found that the evidence did not establish that Imam knew she was making a false representation when she signed the company agreement because she believed that removing the assignment of intellectual property from the documents and not signing it effectively removed it from the deal. Imam did not realize that the company agreement contained a representation that she

would transfer her intellectual property in the assignment. Thus, the plaintiff did not meet its burden of proof to show that Imam made the representation with the intent to deceive the plaintiff. In addition, the court found that the plaintiff was not justified in relying on alleged oral promises (which Imam denied she made) to convey “intellectual property” without obtaining a written commitment specifically identifying the intellectual property to be transferred with a reasonable degree of certainty and specificity. The plaintiff also was not justified in relying on the representation in the company agreement with respect to advancing any post-agreement funds because the plaintiff knew or should have known that Imam did not sign the assignment at closing. Even if the plaintiff relied on the representation, the court stated that the plaintiff’s reliance was not the cause its loss. The LLC was initially successful and continued after Brittingham knew that Imam had not signed the assignment. Thus, the LLC did not fail due to Imam’s failure to convey any intellectual property; the LLC failed because of the managerial deadlock of the 50-50 owners.

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

State v. Morello, 2018 WL 1025685, __ S.W.3d __ (Tex. 2018).

The State of Texas sued an individual member/manager of an LLC for violations of the Texas Water Code based on the individual’s role in the LLC’s failure to satisfy the compliance plan accompanying the LLC’s hazardous waste permit. The court of appeals relied on the liability protection provided to members and managers of LLCs under the Texas Business Organizations Code and concluded that the State had not shown that the alleged failures to satisfy the compliance plan constituted the type of “tortious or fraudulent” acts for which corporate officers can be held personally liable when they participate in or perform such acts as agents of a corporation. The supreme court acknowledged the liability protection provided to members and managers of LLCs under the Texas Business Organizations Code but stated that the individual was personally liable based on the language of the Texas Water Code and the individual’s own actions, which subjected the individual to liability regardless of whether the individual was acting as an agent of the LLC.

Bernard Morello formed White Lion, L.L.C. (“White Lion”) to purchase property out of a bankruptcy estate. When White Lion purchased the property, a hazardous-waste permit and compliance plan associated with the property were transferred to White Lion. A few years later, the State of Texas sued White Lion alleging that White Lion did not meet the requirements of the compliance plan. The State subsequently amended its petition and sued Morello individually as well as White Lion. After the trial court granted the State’s motion for summary judgment against White Lion and severed the claims against Morello, the State moved for summary judgment against Morello. The State alleged that Morello was the sole decision maker for White Lion and was personally and substantially involved in operating, managing, and making decisions concerning White Lion’s facility. The State also asserted that Morello personally removed and disposed of water-treatment systems and equipment. Morello’s actions, the State asserted, violated Water Code § 7.101, which provides that it is a violation of the Water Code for a “person” to “cause, suffer, allow, or permit a violation of a statute within the commission’s jurisdiction or a rule adopted or an order or permit issued under such a statute.” The trial court granted the State’s motion for summary judgment and ordered Morello to pay \$367,250 in civil penalties.

Morello appealed the trial court’s judgment, arguing that he could not be held individually liable because the State was not attempting to pierce the veil of the LLC and did not allege the type of conduct for which an agent of an LLC may be held individually liable when acting on behalf of the company. The court of appeals recognized that the formation of an LLC is intended to shield members from the company’s liabilities and obligations, but also acknowledged the common-law principle that a corporate officer may be held individually liable when the officer “knowingly participates in tortious or fraudulent acts” even though the officer performed the acts as an agent of the corporation. The court of appeals concluded that the State had not shown that the alleged failures to comply with the compliance plan constituted “tortious or fraudulent conduct of Morello individually or that those failures to comply should somehow be treated as if they were.” The State appealed.

The Texas Supreme Court explained that Morello’s claim that he could not be held personally liable was premised on the liability protection provided members and managers of LLCs under Sections 101.114 and 101.101(a) of the Texas Business Organizations Code, but the State relied on application of the Texas Water Code directly to Morello because of his own actions, not because of the LLC’s liability. The court examined the plain language of Section 7.01 of the Water Code, which provides that “[a] person may not cause, suffer, allow, or permit

a violation of a statute within the commission’s jurisdiction or a rule adopted or an order or permit issued under such a statute.” Section 7.02 provides that “[a] person who causes, suffers, allows, or permits a violation of a statute, rule, order, or permit relating to any other matter within the commission’s jurisdiction to enforce . . . shall be assessed” a civil penalty. Morello argued that he was not a “person” within the meaning of Section 7.02, but the court determined that the plain meaning of “person,” which is not defined in Chapter 7 of the Water Code, includes an individual in the absence of a definition excluding an individual.

Morello argued that he never assumed or was transferred any obligations under the permit, but the court said nothing in the language of the Water Code limits the number of persons to whom its penalties apply. The plain language of the statute permitted assessment of a penalty against Morello if he was “a” person who caused or allowed violation of the permit; he did not have to be “the” person holding the permit. Thus, the State could assess a penalty against him regardless of whether White Lion or others were also subject to penalties arising from violations and regardless of who had obligations under the permit.

The Austin Court of Appeals had agreed with Morello that he could not be individually liable because his acts as an agent of White Lion were not the type of “tortious” or “fraudulent” acts for which agents can be held personally liable when acting in their agency capacity. The court of appeals distinguished or disagreed with other cases in which employees or officers had been held personally liable for statutory violations based on acts taken in their representative capacity. According to the court of appeals, statutory violations must be in the nature of “fraudulent” or “tortious” conduct in order to hold an individual liable for actions taken in a representative capacity. The Texas Supreme Court rejected this distinction and stated that the analysis in the other cases focused on whether the individual could be liable under the language of the statute and whether the individual personally engaged in the conduct constituting the violation. For example, the supreme court pointed to a case in which it held that a corporate agent acting in the scope of his employment could be held personally liable for violations of the Texas Deceptive Trade Practices Act (DTPA). Based on the plain language of the DTPA—which permits a claim against “any person”—the court held that a sales agent of a homebuilder was personally liable for DTPA violations based on misrepresentations made by the agent. The court also pointed to two cases in which a Texas appellate court interpreted the Water Code as providing for liability of individual agents for their own actions, and the court stated that “federal and state courts have consistently rejected the position that where an environmental statute applies to a ‘person,’ corporate officers can avoid individual liability for violating the statute if they personally participated in the wrongful conduct.” Although the federal and state cases cited by the court did not involve the provision of the Water Code at issue in this case, the court said that the cases were consistent with the court’s view that an individual is not protected by the corporate shield when an environmental regulation applies to a “person” and the individual personally participates in conduct that violates a statute. In sum, Morello was not held liable for an obligation or liability of White Lion (which he asserted is prohibited by the Texas Business Organizations Code) but was held liable based on his individual, personal actions.

The supreme court also rejected Morello’s argument that the severance of the claims against him from the claims against White Lion resulted in two judgments based on identical theories of liability and facts and violated his constitutional rights to equal protection and due course of law by imposing excessive fines leading to a double recovery for the State. The court stated that the trial court’s severance of the cases was not improper since they were two causes of action that could have been brought separately. Further, although the cases were factually intertwined, the State’s case against Morello involved evidence of his personal actions (such as Morello’s removal and disposal of certain systems and equipment) that was not presented in the case against White Lion. Thus, the trial court did not abuse its discretion in severing the claims against White Lion from the claims against Morello. The court also explained that the severance of the claims did not result in a double recovery for the State because the civil penalties do not reimburse the State for loss or damage but are instead penalties against Morello and White Lion. The civil penalties “are not recoveries designed to make the State whole for damages it suffered and undertook to prove, much less are they two separate recoveries for the same damages the State suffered. Thus, the civil penalties assessed against Morello are constitutional.”

Haynes v. Gay, No. 05-17-00136-CV, 2018 WL 774334 (Tex. App.—Dallas Feb. 8, 2018, no pet. h.) (mem. op.).

The court of appeals concluded that an LLC’s members were not individually liable for a debt of the LLC created or incurred before tax forfeiture of the LLC’s charter.

An LLC breached a property management agreement in 2013 and 2014. In 2015, the LLC's charter was forfeited under the Texas Tax Code, and a judgment against the LLC for breach of the property management agreement was rendered in 2016. The plaintiff sought to hold the members of the LLC liable for the LLC's liability on the property management agreement based on Section 171.255(a) of the Texas Tax Code. Section 171.255(a) provides that an officer or director of a corporation is personally liable for a debt of a forfeited corporation if the debt is created or incurred after the date on which the report, tax, or penalty is due and before the corporation's privileges are revived. The LLC members in this case did not dispute that the liability of officers and directors of a corporation under the statute extended to them as members of an LLC if the debt at issue was "created or incurred" after the forfeiture. If the debt was not created or incurred until the judgment against the LLC was rendered, the members would be liable for the debt, but the court of appeals stated that a debt arising out of the performance of a contract is created or incurred when the contract is entered into by the parties. Although the date of the contract was not apparent in the record, the dates of the breaches and forfeiture were clear in the record, and those dates established that the debt was created or incurred prior to the forfeiture. Thus, the members were not personally liable under Section 171.255 of the Tax Code.

Deaton v. Moreno, No. 02-16-00188-CV, 2017 WL 4683940 (Tex. App.—Fort Worth Oct. 19, 2017, pet. denied) (mem. op.).

An individual's status as a member of a Rhode Island LLC law firm did not shield the individual from personal liability for his own alleged negligence and wrongful acts or omissions. The court recognized that LLC members are not personally liable for the LLC's debts, obligations, and liabilities under Texas and Rhode Island law, but the court cited Rhode Island statutory and case law and Texas case law supporting the proposition that LLC members are liable for their own torts and are not protected by their status as members from liability for torts committed while acting on the LLC's behalf.

Tomlinson v. Clem (In re Clem), 583 B.R. 329 (Bankr. N.D. Tex. 2017).

In this adversary proceeding to determine the dischargeability of a debt arising out of a contract between the plaintiffs and an LLC of which the debtor defendant was the manager and a member, the court concluded that an arbitration award imposed personal liability on the debtor based on the Texas Deceptive Trade Practices Act. Thus, it was not necessary to pierce the veil of the LLC in order to consider the debt to be that of the debtor.

The plaintiffs, LaDainian and LaTorsha Tomlinson, objected to the discharge of a debt of the debtor, and the court first analyzed whether the debt that was the subject of the proceeding was a debt of the debtor since the debt stemmed from a contract between the plaintiffs and an LLC home-builder rather than the individual debtor, who was the manager and a member of the LLC. The plaintiffs had previously sued the LLC and the debtor in state court for breach of contract and violations of the Texas Deceptive Trade Practices Act, and the parties were required to arbitrate the dispute, which resulted in a final arbitration award against the LLC and the debtor. Citing Tex. Bus. Orgs. Code §§ 21.223, 101.002, 101.114, the bankruptcy court stated that the Texas Business Organizations Code provides that a member or manager of an LLC generally is not liable for a contractual debt, or a debt related to a contractual debt, of the LLC unless the manager or member used the LLC to perpetrate an actual fraud on the claimant for the direct personal benefit of the manager or member. However, the court pointed out that it was not necessary to pierce the veil of an LLC if a member is "otherwise liable" under an "other applicable statute," Tex. Bus. Orgs. Code § 21.225(2). The Texas Supreme Court has determined that officers and agents of an entity may be held personally liable under the DTPA, even though they are acting on behalf of the entity. Thus, if the arbitration award imposed liability on the debtor based on the Texas Deceptive Trade Practices Act, an "otherwise applicable statute" under Section 21.225(2), there would be no need to engage in a veil-piercing analysis. The court struggled, however, to discern the precise meaning of the arbitration award, which the court stated was "not a model of clarity." Ultimately, the court concluded that the arbitration award, which imposed personal liability on the debtor pursuant to some unspecified provision of the DTPA, caused the situation at issue to fall within the ambit of Section 21.225 of the Texas Business Organizations Code, and there was thus an "applicable statute" under which the debtor was liable on a debt of the LLC. Thus, the court proceeded to analyze whether the grounds for an exception to discharge were met, and the court concluded that they were.

Fleishman-Hillard, Inc. v. Oman, No. SA-11-CA-921-H, 2012 WL 13028770 (W.D. Tex. Nov. 21, 2012). (Although the court issued this opinion in 2012, it is included in this year's update because it did not appear in the Westlaw database until recently.)

The court granted summary judgment in favor of two individuals whom the plaintiff alleged were liable on a contract between the plaintiff and an LLC based on equitable estoppel and partnership by estoppel. Although the individuals had been falsely represented to be investors and co-founders of the LLC, the plaintiff knew that it was contracting with an LLC when the contract was executed.

The plaintiff, a marketing firm, entered into a contract with an LLC to promote a golf resort development project managed by the LLC. The contract was negotiated and entered into on behalf of the LLC by its sole member, Oman. At a press conference held after the contract was entered into, defendants Oman, Jones, and McCombs met with representatives of the plaintiff and reviewed materials that referred to each of the defendants as principals and/or co-founders of the LLC. The LLC defaulted on payment of amounts owed to the plaintiff under the contract, and the plaintiff obtained a judgment against the LLC in a previous action. In this action, the plaintiff sought to recover from Oman, Jones, and McCombs as partners of a partnership that was alleged to exist distinct from the LLC, relying on equitable estoppel and partnership by estoppel.

The court concluded that the plaintiff's claim based on equitable estoppel failed. The court set forth the requirements for equitable estoppel as follows: (1) a false representation or concealment of material facts; (2) made with knowledge, actual or constructive, of those facts; (3) with the intention that it should be acted on; (4) to a party without knowledge or means of obtaining knowledge of the facts; (5) who detrimentally relies on the representations. The evidence established false representations that would satisfy the first three elements because the defendants knew the LLC was a Delaware LLC whose only principal was Oman, and the representations that Jones and McCombs were principals were made to give the project credibility. The court said that the plaintiff did not, however, show that the plaintiff did not have knowledge of the truth or the means of obtaining the truth because the plaintiff signed a contract with a Delaware LLC and could have easily discovered that Oman was the sole owner and the company was severely undercapitalized.

The court next set forth the elements of partnership by estoppel as follows: (1) a representation that the one sought to be bound is a member of a partnership; and (2) reliance by one to whom the representation is made by giving credit to the partnership. The court further explained that the representation may be made directly by the alleged partner or by others whom the alleged partner knowingly allows to make the representation. There was no dispute that each defendant made representations that there was a partnership and/or that he was a partner, but the use of the terms "partners" and "partnership" occurred only at a press conference after the plaintiff had executed a contract with the LLC. Before executing the contract with the LLC, the only representations made to the plaintiff were that McCombs and Jones were "co-founders" and Jones was an "investor" in the LLC. Additionally, the plaintiff had no interactions with Jones or McCombs before the contract was executed. According to the court: "While falsely claiming that individuals are co-founders and investors of an LLC is certainly unethical, it is not enough to impute liability to others on a theory of partnership by estoppel. Even if Jones and McCombs were actually principals and co-founders of Flagship Group, LLC, they would still be immune from liability because the Flagship Group is a limited liability company and not a partnership. Moreover, Plaintiff knew it was signing a contract with a limited liability company when it executed the contract with Flagship Group, LLC. Thus, Plaintiff's claim for partnership by estoppel fails as a matter of law."

Lowe v. L and S Lending, LLC, No. SA-09-CA-1034-H, 2010 WL 11601500 (W.D. Tex. Sept. 9, 2010). (Although the court issued this opinion in 2010, it is included in this year's update because it did not appear in the Westlaw database until recently.)

An LLC member was not personally liable for violations of the Texas Mortgage Broker License Act in the absence of any evidence that would support piercing the veil of the LLC.

The plaintiff sought partial summary judgment on its claim against the managing member of an LLC loan originator for violations of the Texas Mortgage Broker License Act (TMBLA). Under the TMBLA, it is unlawful to accept applications for mortgage loans or to hold oneself out as a mortgage broker or loan officer without an active license. The TMBLA confers a private right of action to civil litigants, and the plaintiff was a borrower from VCH Lending Corp., a mortgage lender that was subject to the TMBLA and was not licensed as required by the statute. The originator of the loans was an LLC that acted as a mortgage broker and loan officer under the TMBLA but did not hold a license. The LLC had no assets from which to satisfy a judgment, and the plaintiff argued that

the managing member of the LLC was personally liable under the TMBLA. The court recited the statutory rule that a member or manager is not liable for the debt, liability, or obligation of the LLC (Tex. Bus. Orgs. Code § 101.114), but the court stated that corporate veil-piercing principles apply to LLCs. The plaintiff argued that the managing member was personally liable for violating the TMBLA because the TMBLA does not contemplate anyone other than an individual acting as a loan officer. The court stated that the fact that the LLC did not comply with the TMBLA did not support a finding that the managing member was personally liable for the LLC's mistakes. In the absence of evidence that supported piercing the veil of the LLC, the court denied summary judgment against the managing member.

Thompson v. Flintrock Feeders, Ltd., No. 2:09-CV-0010-J, 2010 WL 11561929 (N.D. Tex. May 10, 2010). (Although the court issued this opinion in 2010, it is included in this year's update because it did not appear in the Westlaw database until recently.)

The court held that an individual sole member of an LLC general partner of a limited partnership was personally liable for the limited partnership's debts after the LLC's charter was forfeited for failure of the LLC to pay franchise taxes. As general partner of the limited partnership, the LLC was liable for the limited partnership's debts, and as the sole member of the member-managed LLC, the member "was liable for the debts during the time the [LLC's] charter was suspended." Further, the LLC's member was also a limited partner in the limited partnership, and he personally authorized the actions of the limited partnership's employee who dealt with the plaintiffs in connection with the events underlying the lawsuit. The court said that "[p]ersonal liability attaches to a limited partner when he takes part in the control and management of the business."

D. Authority of Member, Manager, or Officer

Abdullatif v. Choudhri, 2018 WL 1559995, ___ S.W.3d ___ (Tex. App.—Houston [14th Dist.] 2018, no pet. h.).

In a dispute regarding the ownership of a limited partnership and its LLC general partner, the court of appeals addressed numerous questions arising from purported transfers of interests in the limited partnership and its LLC general partner. In the course of its analysis, the court addressed the authority of the LLC general partner's manager to act on behalf of the LLC and concluded that one of the purported transfers of an interest in the limited partnership was valid even if prohibited by the partnership agreement because the partnership agreement allowed the partnership to recognize a transfer that would otherwise be null and void under the terms of the agreement, and the LLC general partner's manager (who was also the transferor) approved the transfer in his capacity as manager of the general partner. Although the court concluded that a prohibited transfer that was characterized as "null and void and of no effect whatever" by the partnership agreement would not ordinarily be subject to ratification, confirmation, or waiver, the court concluded that the phrase "null and void and of no effect whatever" was not used in its ordinary sense given that the agreement also unambiguously provided that the partnership could elect to recognize a transfer that was not permitted. Because the assignor limited partner signed the assignment of his interest not only as assignor, but in his capacity as manager of the LLC general partner, under a legend stating that the general partner consented to the transfer, the court concluded that the partnership recognized the transfer of the interest. Relying on the language of the LLC general partner's company agreement (which provided that the managers shall have the sole and exclusive control of the management of the LLC and shall make all decisions not otherwise provided for in the company agreement) and Section 101.254 of the Business Organizations Code (which provides that each governing person is an agent of the LLC for the purpose of its business), the court stated that the assignor's signature as manager was binding on the LLC, and the partnership thus recognized the transfer as valid and effective as provided by its partnership agreement. The court concluded that an earlier purported transfer of a limited partnership interest by the same individual was not effective because there was no evidence that the transfer was permitted under any of the provisions of the partnership agreement nor was there any evidence that the partnership was required to recognize the transfer or exercised its discretion to recognize the transfer.

Kennolyn Camp v. Wilson, No. 4:16-CV-00163-ALM-CAN, 2017 WL 933129 (E.D. Tex. Feb. 17, 2017), report and recommendation adopted, 2017 WL 916408 (E.D. Tex. Mar. 8, 2017).

The court held that the managing member of two LLCs was a “vice principal,” similar to the president of the corporation in *Bennett v. Reynolds*, 315 S.W.3d 867, 870-71, 883-85 (Tex. 2010), for purposes of holding the LLCs liable for exemplary damages based on the vice principal’s wrongful conduct.

E. Fiduciary Duties

Pak v. AD Villarai, LLC, No. 05–14–01312–CV, 2018 WL 2077602 (Tex. App.—Dallas May 4, 2018, no pet. h.) (mem. op.).

The court of appeals held that the removal of an individual as co-manager of an LLC was effective where half of the members signed a written consent voting to remove the individual as manager, and the remaining members (one of whom was the individual who was being removed) did not object after receiving written notice of the written consent. The court also held that the subsequent expulsion of the individual as a member from a related LLC was valid under the terms of the company agreement of that LLC.

Pak was the majority member of Villas on Raiford Carrollton Senior Housing, LLC (“Villas CSH”) and Villas on Raiford, LLC (“Villas Manager”), the ownership and management entities of a low-income senior housing project. Pak and AD Villarai, LLC, an entity controlled by Anderson, were co-managers of Villas Manager. After various acts of mismanagement by Pak came to light, the Villas entities sued Pak. Certain members of Villas Manager took action to remove Pak as a manager and member of that entity, and members of Villas CSH subsequently took action to expel Pak as a member from that entity. The issues were tried in a bench trial, and the trial court concluded that Pak was validly removed as co-manager of Villas Manager and that Pak breached his fiduciary duties to Villas CSH and Villas Manager and materially breached the company agreements of each entity. However, the trial court found that the member consent expelling Pak as a member of Villas CSH did not comply with the company agreement and was not effective. Both sides appealed.

After concluding that removal of Pak as a manager of Villas Manager and expulsion of Pak as a member of Villas CSH were validly accomplished under the terms of the company agreements, the court addressed Pak’s arguments regarding his liability for breach of fiduciary duty. Pak challenged the sufficiency of the evidence to support the trial court’s conclusion that Pak breached his fiduciary duties and contractual obligations, but the court of appeals held that there was ample evidence that Pak’s actions and inactions breached his fiduciary duties and contractual obligations. The evidence included various misrepresentations on the part of Pak as well as instances in which he forged other members’ signatures on documents and engaged in undisclosed self dealing. Pak did not dispute the accuracy of this evidence but rather expressed his regrets and sought to explain and justify his actions as attempts to resolve the problems Villas CSH had encountered. The court of appeals stated that these regrets and excuses did not negate the evidence, and the court affirmed the trial court’s judgment with respect to these issues.

Teel v. Sumrow, No. 05-16-00840-CV, 2017 WL 5559149 (Tex. App.—Dallas Nov. 13, 2017, pet. denied) (mem. op.).

The court held that the plaintiff’s claim for breach of fiduciary duty, which was asserted in this lawsuit filed in 2014, was barred by the statute of limitations because the plaintiff’s units in the LLC at issue were repurchased in 2007, and the evidence thus established that the defendant did not owe any duty to the plaintiff that he could have breached within the four-year limitations period. The plaintiff argued that the discovery rule applied, but the court concluded that the plaintiff knew or in the exercise of reasonable diligence should have known of the facts giving rise to his cause of action.

Super Starr Int’l, LLC v. Fresh Tex Produce, LLC, 531 S.W.3d 829 (Tex. App.—Corpus Christi 2017, no pet.).

The court of appeals reversed the trial court’s temporary injunction order, dissolved it, and denied various restrictions based in part on its determination that an LLC’s business was not a partnership and that there was no evidence of a breach of fiduciary duty.

Fresh Tex Produce, LLC (the “Distributor”) filed suit individually and derivatively on behalf of Tex Starr Distributing, LLC. The defendants were Super Starr International, LLC (the “Importer”); Lance Peterson, the

President of the Importer; Red Starr, SPR de R.L. de C.V. (the “Grower”); and Kemal Mert Gumus, an employee of the Importer.

In December 2010, Kenneth Alford, president of the Distributor, and Lance and David Peterson, on behalf of the Importer, created Tex Starr Distributing, LLC (the “LLC”). Under the Tex Starr operating agreement, the Distributor and the Importer were the LLC’s only members, Alford and David Peterson were the only managers, and Alford was the president. The operating agreement also included an exclusivity provision mandating that the LLC serve as the “sole and exclusive distributor of papayas exported into the United States by [the Importer] and/or other existing or future companies of Lance Peterson and/or David Peterson pertaining in whole or in part to the growing, production, shipping or packaging of papayas.” The provision lasted until the end of 2013. In January 2014, a nearly identical operating agreement took effect. The exclusivity provision in the revised operating agreement lasted until the end of 2015.

At the end of December 2015, the exclusivity provision under the revised operating agreement expired. Alford testified that he and Lance Peterson attempted to negotiate a new term of exclusive distributorship, but the two sides were unable to reach an agreement. From January 2016 through March 2016, the Distributor and the Importer continued working together under the same terms as the revised operating agreement. In March 2016, Lance Peterson told Alford that beginning in July 2016, the Importer would no longer supply the LLC with papayas. Instead, the Importer would distribute and market the papayas to customers in the United States on its own.

In October 2016, the Distributor filed an original petition and application for injunctive relief. After a hearing, the trial court signed a temporary injunction order finding that the Distributor had demonstrated a probable right to relief through its claims against the defendants. It granted injunctive relief mandating that the Importer, Lance Peterson, and the Grower (collectively “appellants”) continue the exclusive business relationship with the LLC and prohibiting conduct deemed competitive against the LLC.

The temporary injunction order also imposed non-competition restrictions against the appellants, premised in part on the Distributor’s claims for breach of fiduciary duty. The court observed that the elements of a breach of fiduciary duty claim are (1) the existence of a fiduciary duty, (2) breach of the duty, (3) causation, and (4) damages. The court concluded that the order’s non-competition restrictions could not be premised on the Distributor’s breach of fiduciary duty claim because the exclusivity provision in the revised operating agreement expired on December 31, 2015. Even if that were not the case, the Distributor failed to reference any evidence that supported the breach element of the claim. Finally, the court noted that the gravamen of the Distributor’s breach of fiduciary duty action duplicated its claim based on the Texas Uniform Trade Secrets Act (“TUTSA”). Because TUTSA generally “displaces conflicting tort, restitutionary, and other law of this state providing civil remedies for misappropriation of a trade secret,” the court concluded that the preemption provision in TUTSA precluded the Distributor’s breach of fiduciary duty claim from serving as a basis for temporary injunctive relief.

In discussing the claim based on TUTSA, the court concluded that § 6.4 of the operating agreement (which stated that the LLC’s books and records shall be open to inspection and copying at all reasonable times) did not give the Importer the absolute right to take all of the LLC’s confidential information without regard to any trade secret protection. Section 3.4(a) of the operating agreement mandated that “[e]ach Member shall keep confidential” the “private, secret, and confidential information.” According to the court, read in conjunction, § 6.4 allowed inspection, but § 3.4(a) mandated confidentiality. Furthermore, there was no indication that § 6.4 undercut the confidentiality requirement of § 3.4(a).

The court also noted that § 3.5 of the operating agreement, which allowed each Manager and Member to engage in any activity whatsoever, whether or not such activity competed with the LLC, did not allow members to use the LLC’s trade secrets. To the contrary, § 3.5 began with the phrase “except as prohibited by [§] 3.4”—a provision obligating the members to maintain the confidentiality of the LLC’s information. Moreover, the court stated that appellants’ interpretation of § 3.5 did not comport with another provision that “[a]ll property owned by [the LLC], tangible or intangible, shall be deemed to be owned by [the LLC] as an entity, and no Member shall have any ownership of such property individually.” Similarly, the Business Organizations Code provides that the member of an LLC or an assignee of a membership interest in an LLC does not have an interest in any specific property of the company. Thus, according to the court, any trade secrets belonged to the LLC.

The only claim lodged against the Grower was aiding and abetting a breach of fiduciary duty. The court stated that “[g]enerally, when a breach of fiduciary duty claim fails, so should an aiding and abetting in the breach of fiduciary duty claim, to the extent one exists in Texas.”

Sandt v. Energy Maint. Servs. Group I, LLC, 534 S.W.3d 626 (Tex. App.—Houston [1st Dist.] 2017, pet. denied).

The court of appeals rejected fraud and fiduciary duty claims on the basis that the statute of limitations had expired.

Energy Maintenance, a Delaware LLC, asserted fraud and breach of fiduciary duty claims against Timothy Nesler, the company's CEO. The trial court granted summary judgment against the company based on limitations. The court of appeals noted that limitations issues are generally procedural in nature and are thus governed by Texas law. Under Texas law, fraud and breach of fiduciary duty claims are subject to a four-year statute of limitations. The company argued that it was protected by the discovery rule, as it did not learn of Nesler's misconduct until 2011 (it filed suit in 2013). Although the court of appeals noted that "[i]njuries arising from fraud or breach of fiduciary duty are generally considered inherently undiscoverable due to the deceit inherent in the former and the relationship of trust and confidence involved in the latter," the court also stated that "if the facts relating to the injury are readily available to the injured party, then the discovery rule does not apply." The court held that the claims for fraud and breach of fiduciary duty were not inherently undiscoverable for the company because the evidence showed that the company was on inquiry notice of the allegations against Nesler. According to the court, the nature of the allegations was detailed in publicly available court filings (a former officer and member of the company had sued Nesler in 2005 for wrongdoing), the board was obligated to investigate those allegations when it became aware of them in August 2007, and a rudimentary inquiry by the board would have divulged the nature of Nesler's wrongdoing. Because the discovery rule did not apply, the four-year statute of limitations barred the company's fraud and fiduciary duty claims against Nesler.

Ishee v. Ishee, No. 09-15-00197-CV, 2017 WL 2293150 (Tex. App.—Beaumont May 25, 2017, no pet.).

The court held that an LLC member did not owe his ex-wife, as an assignee of 50% of his interest pursuant to their divorce decree, any fiduciary duty under the Texas Business Organizations Code, but the member owed her a fiduciary duty under the Texas Family Code to remit her share of distributions actually received.

Janice and Michael Ishee divorced in 2010, and the divorce decree awarded Janice a percentage of Michael's interests in the closely held businesses in which he was an owner at the time of the divorce. In 2013, Janice sued Michael, World Environmental, LLC ("World Environmental"), Charles Hall (who held a majority interest in World Environmental when Michael and Janice divorced), and the other businesses identified in the divorce decree. Janice alleged that Michael never paid her the money she was entitled to receive based on her assigned interest in the businesses identified in the decree. Additionally, Janice requested that the court declare her rights under the assignment she acquired in Michael's interest in the businesses identified in the decree when she and Michael divorced.

Michael claimed that he never sent Janice any money after they divorced because the businesses identified in the decree never distributed any income, gains, losses, deductions, credits, distributions, or similar items. In large part, the parties' dispute centered on whether the rights Janice obtained in the businesses in which Michael held memberships required Michael to remit any of the amounts that he had received in guaranteed payments from the businesses after he and Janice divorced. World Environmental's accountant testified that the guaranteed payments Michael received from World Environmental were reported on the K1s Michael received from the company, and the tax forms that the accountant generated for the company reflected the company's income, loss, distributions, and business activities of the company. Janice did not call an accountant to dispute this testimony, so there was no testimony showing that the activities reflected in Michael's K1s were fraudulent, that World Environmental improperly accounted for its income or its expenses, or that Michael's K1s failed to properly reflect the monetary benefits that he received from World Environmental after he and Janice divorced. In final argument, Janice's attorney asked the jury to ignore the testimony and evidence about the manner in which World Environmental accounted for its activities and suggested to the jury that Janice was entitled to receive a percentage of all of the benefits Michael received from World Environmental based on the assigned interest she held in the business following the divorce, including a percentage of the guaranteed payments Michael received as well as a percentage of the cash value of his fringe benefits, such as a company car, company cell phone, and health insurance. The jury found that Michael breached a fiduciary duty to Janice and awarded actual and exemplary damages and disgorgement.

On appeal, Michael argued that he did not owe Janice a fiduciary duty following their divorce because the decree did not make Janice a member of the businesses in which he held memberships upon their divorce. The court

observed that any fiduciary duty that might exist between spouses generally terminates when they divorce if the spouses are independently represented by separate attorneys. In this case, however, Janice was awarded a percentage of Michael's interests in several LLCs and became an assignee of Michael's interests pursuant to Tex. Bus. Orgs. Code § 101.1115(a) (which provides that "on the divorce of a member, the member's spouse, to the extent of the spouse's membership interest, if any, is an assignee of the membership interest"). The court explained that, as an assignee, Janice did not have the same rights that Michael had as a member. For example, as an assignee whose membership was not approved by the members of the LLCs, she did not have the right to participate in the management and affairs of the LLCs or to become a member. Tex. Bus. Orgs. Code § 101.108(b). As an assignee, Janice was, however, entitled to be allocated a percentage of the LLC's income, gain, loss, deduction, credit or similar items allocated to Michael. Notwithstanding these rights as assignee, the court stated that "nothing in Chapter 101 of the Business Organizations Code creates a statutory fiduciary duty between the members of a limited company and those who become assignees of a member's rights upon a member's divorce. *See id.* §§ 101.101–114 (West 2012). We agree with Michael's argument that the fiduciary duty he owed to Janice is not a duty imposed on him under the provisions of Chapter 101 of the Business Organizations Code."

Janice argued that Michael's fiduciary duty to turn over the portion she was entitled to receive in the benefits he received from the businesses identified in the decree arose under Tex. Fam. Code § 9.011(b). Section 9.011(b) provides that "[t]he subsequent actual receipt by the non-owning party of property awarded to the owner in a decree of divorce or annulment creates a fiduciary obligation in favor of the owner and imposes a constructive trust on the property for the benefit of the owner." The court held that this provision imposed on Michael a fiduciary duty to remit to Janice, as his assignee, Janice's percentage of the amount of income, loss, or distributions he actually received from the businesses identified in the decree. There was evidence that Michael received some distributions from World Environmental and another LLC identified in the divorce decree and that Michael did not remit Janice's share to her; therefore, the evidence supported the jury's finding that Michael failed to comply with his fiduciary duty to Janice after the divorce.

Michael next argued that the evidence did not support the amount of the jury's damage and disgorgement awards. The jury awarded Janice \$111,520 in compensatory damages, \$130,00 in exemplary damages, and \$111,520 for disgorgement. The court stated that it appeared that the bulk of the \$111,520 awarded by the jury consisted of income Michael received in the form of guaranteed payments for services. Although Janice's attorney asked the jury to award Janice damages based on the value of all of the benefits Michael received from the businesses identified in the decree, the court said the decree did not assign Janice a right to every benefit Michael received from these businesses, and there was no evidence that any of the businesses identified in the decree distributed any income, gains, losses, deductions, or credits to their members. Capital accounts were adjusted annually to reflect profits and losses, but distributions were not made. The evidence showed that the amounts of the guaranteed payments were consistent with the amounts paid as guaranteed payments before the divorce and were based on the market for individuals with similar expertise. Based on the court's review of the evidence, the court concluded that Michael only received distributions of approximately \$5,000 from the businesses after the divorce. Based on the decree, Janice was entitled to 50% of that amount, approximately \$2,500. In concluding that the damage award was excessive the court stated: "Importantly, the decree in Janice and Michael's divorce did not give Janice a percentage interest in the [guaranteed] payments, representing Michael's salary after the divorce from his work as an environmental consultant. In our opinion, the guaranteed payments World Environmental paid Michael, standing alone, is but one part of World Environmental's operations so it was not individually an item that World Environmental allocated to its members, nor were the payments distributions allocated by World Environmental to its members. *See Tex. Bus. Orgs. Code Ann.* § 101.109(1), (2)." Because the exemplary damage award was unliquidated, the court was unable to suggest a remittitur, and the disgorgement award appeared to the court to constitute a double recovery since the jury awarded the same amount it awarded as compensatory damages and there was no showing Michael used the \$2,500 withheld from Janice to obtain additional benefits that should, in fairness, be disgorged. Under the circumstances, the court remanded Janice's claims for retrial.

The court disagreed with Janice that her recovery could be sustained on a breach-of-contract theory, stating that the jury's breach-of-contract award of \$111,331 suffered from the same flaws that resulted in reversal of the breach-of-fiduciary duty award.

World Environmental argued that the trial court's declaratory judgment that Janice "owned" an interest in World Environmental should be reformed, but the court of appeals found no error in the trial court's declaration that Janice "owned" a percentage interest where the phrase was qualified by the following language: "with the rights

and duties of an assignee of a membership interest as set forth in Section 101.109” of the Texas Business Organizations Code. The court of appeals stated that “the qualifying phrase makes it clear that Janice is not an owner of the company, but instead that she has an interest in World Environmental allowing her to participate in the organization as an assignee.” After reviewing the rights given and restrictions placed on an assignee under Section 101.109, the court stated: “Based on the language the trial court used in granting Janice’s claim for declaratory relief, the judgment is clear that Janice’s rights are those of an assignee under the Business Organizations Act, and the language in the judgment does not grant Janice full ownership in the business with the same rights that are held by World Environmental’s approved members.”

Montreux Financial, LLC v. Steiner (In re Steiner), No. 16–30203–SGJ7, Adv. No. 16–03053–SGJ, 2017 WL 1476118 (Bankr. N.D. Apr. 17, 2017).

The court held that the attorney and sole manager of an LLC was in a relationship of trust and confidence with the LLC and owed the LLC fiduciary duties that were breached by her theft of the LLC’s funds and conduct attempting to cover up her theft. The court found that clear and convincing evidence established fraud, breach of fiduciary duties, and willful and malicious injuries so as to entitle the LLC to exemplary damages.

Schoen v. Underwood, No. W-11-CA-00016, 2012 WL 13029591 (W.D. Tex. May 15, 2012). (Although the court issued this opinion in 2012, it is included in this year’s update because it did not appear in the Westlaw database until recently.)

The court held that the shareholder-standing rule that applies in the corporate context applies to LLCs and that the member of an LLC thus did not have standing to assert claims for injuries suffered by the LLC even though the member may have been indirectly injured by the decrease in value of her membership interest. The court also held that any fiduciary duties owed by an officer of an LLC were owed to the company rather than to the members, and members generally do not owe other members a fiduciary duty.

Anita Underwood contracted to sell 100% of the membership interest in her LLC to four other individuals pursuant to a Membership Purchase Agreement that provided the sale would be executed in a series of steps over several months. The parties also executed an Interim Management Services Agreement. After disagreements arose and Underwood refused to go through with the purchase, one of the purchasers who was providing the financing for the purchase, Schoen, sued Underwood, and Underwood asserted counterclaims. Schoen moved for summary judgment on Underwood’s counterclaims.

The first issue addressed by the court was whether Underwood had standing to assert the claims she was asserting or whether the claims must be brought by the LLC. The court discussed the shareholder-standing rule, under which the Fifth Circuit requires a court to look to state law to determine whether a shareholder is prohibited from initiating actions to enforce the rights of a corporation. Although Texas courts follow the shareholder-standing rule that precludes a shareholder from recovering on claims that belong to the corporation, the court pointed out that the entity in this case was a limited liability company rather than a corporation, but the court predicted that Texas courts would apply the shareholder-standing rule to LLCs for several reasons. First, an LLC is an entity separate and distinct from its members like a corporation. In addition, harms suffered by an LLC do not directly injure the members. A membership interest in the LLC is the personal property of the member, but a member does not have an interest in specific LLC property. Without ownership in the LLC’s assets, a member cannot be directly injured when the company is deprived of its assets. Further, the availability of a derivative action indicates that a member cannot sue and recover personally for harm to the LLC. Finally, the court stated that the policies supporting the shareholder-standing rule apply equally to LLCs. When the LLC is harmed, each member is harmed in relation to the member’s interest, and recovery by the LLC will make all members whole. Allowing only the LLC to sue avoids a multiplicity of suits and ensures that damages recovered will be available to pay LLC creditors and for such other purposes as the managers and members determine.

Applying the shareholder-standing rule to the claims asserted by Underwood in this case, the court concluded that Underwood did not have standing to assert claims for misappropriation of the LLC’s name and likeness and breach of fiduciary duty by Schoen as an officer of the LLC, but Underwood had standing to sue for breach of fiduciary duty to her as a member, tortious interference with prospective contractual relations, and business disparagement.

On the question of whether Schoen was entitled to summary judgment against Underwood on her remaining claims, the court concluded that Schoen was entitled to summary judgment on the claims except for a claim by

Underwood for breach of contract. With respect to her claim for tortious interference with prospective contractual relations, Underwood failed to present any evidence that would allow a reasonable and fair-minded jury to conclude that she likely would have contracted with another prospective buyer of her membership interest. With respect to her business disparagement claim, Underwood presented no evidence that she suffered special damages from any disparaging communication made by Schoen. With respect to Underwood's claim for breach of fiduciary duty, Underwood argued that Schoen owed her fiduciary duties based on two sources: (1) Schoen's position as an officer of the LLC and (2) Schoen's and Underwood's relationship as co-members of the LLC. As the court discussed previously in this opinion, any duties owed by Schoen as an officer of the LLC were owed to the LLC, and Underwood lacked standing to raise a claim based on breach of fiduciary duty as an officer. As for the claim that Schoen owed her a duty as a fellow member of the LLC, the court stated that Texas courts have indicated that members owe fiduciary duties to the LLC itself but not to other members. The court acknowledged that one court has recognized a fiduciary relationship between members when a member controls the LLC and purchases another member's interest or causes the company to redeem the interest, a situation that was not present in this case. Thus, because Schoen did not owe Underwood fiduciary duties based merely on their relationship as members, Schoen was entitled to summary judgment on the claim for breach of fiduciary duties. The court held that Schoen had not met his summary judgment burden with respect to Underwood's claim for breach of contract since Underwood was a party to the Membership Purchase Agreement. Schoen's claim that Underwood failed to present any evidence that Schoen breached the contract was raised for the first time in Schoen's reply brief and thus was not considered by the court.

F. LLC Property and LLC Membership Interest

Pelletier v. Victoria Air Conditioning, Ltd., Nos. 6:17-CV-006, 6:17-CV-062, 2018 WL 1523694 (S.D. Tex. Mar. 28, 2018).

The individual who was the primary actor in three LLCs that owned and operated a hotel did not have standing to assert claims for damages caused by faulty plumbing installed in the hotel by the defendant since the individual was not the owner of the hotel.

The plaintiff was a member or manager of three LLCs that owned and operated a hotel in Texas, and the plaintiff asserted claims pro se in this case for damages caused by faulty plumbing installed in the hotel by the defendant. The court stated that it was apparent that the plaintiff was the primary actor in each of the LLCs, but the deed records and appraisal records showed that one of the LLCs was the owner of the land on which the hotel was located. Furthermore, deeds of trust securing loans for the hotel's construction declared that the LLC was owner of the property including any improvements. In addition, the other two LLCs had previously brought a lawsuit in state court claiming the same damages for the same events, and the LLCs claimed in that lawsuit to be the owners of the hotel. The plaintiff offered only one document in this lawsuit to support his claim that he was the owner of the hotel. That document was a land lease agreement in which the LLC landowner granted the plaintiff a thirty-year lease on the site to build and operate a hotel. The court did not interpret the lease to clearly convey real property or any improvements. The court found it significant that the plaintiff did not offer any other documentary evidence that would ordinarily be involved in the construction of a hotel, such as construction contracts, a management agreement with the LLC management company, building permits, insurance policies, or invoices and purchase orders. The court characterized the plaintiff's testimony as showing that the plaintiff "was often merging himself and his own interests in a limited liability company with the limited liability company itself." The court concluded that the plaintiff failed to prove by a preponderance of the evidence that he owned the hotel structure or the hotel business and thus did not have standing to sue for lost revenues from the delay in opening the hotel and costs of repair to the building, citing Tex. Bus. Orgs. Code §§ 101.113 ("A member of a limited liability company may be named as a party in an action by or against the limited liability company only if the action is brought to enforce the member's right against or liability to the company") and 101.106(b) ("A member of a limited liability company . . . does not have an interest in any specific property of the company").

Abdullatif v. Choudhri, 536 S.W.3d 48 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

"The judgment's declarations that Choudhri owns interests in a partnership and a limited liability company show that Choudhri's 'recovery' includes 'interest[s] in personal property.' An interest in a partnership is personal property. Tex. Bus. Orgs. Code Ann. § 154.001(a) (West 2012) ('A partner's partnership interest is personal

property for all purposes.’). A membership interest in a limited liability company is also personal property. *Id.* § 101.106(a) (‘A membership interest in a limited liability company is personal property.’). Rule 24.2(a)(2) therefore governs how appellants may supersede this portion of the judgment.” (citations omitted).

Senger Creek Dev., LLC v. Fuqua, No. 01-15-01098-CV, 2017 WL 2376529 (Tex. App.—Houston [1st Dist.] June 1, 2017, no pet.) (mem. op.).

“Senger Creek is a limited liability company and, as such, is a legal entity separate from Gilbert, Moore, and Torregrosa. Gilbert, Moore, and Torregrosa, as members of Senger Creek, do not have an interest in any property of the company. *See* TEX. BUS. ORGS. CODE ANN. § 101.106(b) (West 2012). ‘A member of a limited liability company lacks standing to assert claims individually where the cause of action belongs to the company.’ But, a limited liability company member may have an individual action against a defendant for a claim that the defendant has breached a contractual duty owed directly to the [member], individually. The nature of the alleged wrong indicates whether the individual or solely the company has standing.

Senger Creek’s amended petition states that Gilbert, Moore, and Torregrossa each own a 16 2/3% membership interest in Senger Creek It is clear that Senger Creek, as a limited liability company, asserts a wrongful foreclosure claim against the Fuqua Defendants. However, it is not entirely clear whether the individual plaintiffs are also asserting a wrongful foreclosure claim. To the extent that the individual plaintiffs assert a claim for wrongful foreclosure, we agree with the Fuqua Defendants that Gilbert, Moore, and Torregrossa lack standing to assert claims individually when the wrongful foreclosure claim belongs to the company. We therefore conclude that Gilbert, Moore, and Torregrossa lack standing to bring a wrongful foreclosure claim against the Fuqua Defendants and we dismiss them from this portion of the suit.” (citations omitted).

In re Marriage of Armstrong, No. 12-15-00300-CV, 2017 WL 3225053 (Tex. App.—Tyler July 31, 2017, no pet.) (mem. op.).

The court of appeals affirmed a final decree of divorce and rejected Ronald Armstrong’s claim that real estate was owned by his LLC.

The trial court granted a divorce and divided the property of Ronald and Stephanie Armstrong. Ronald argued that the trial court abused its discretion by awarding the Warehouse real estate (the “Warehouse Property”) to Stephanie. More specifically, he contended that the Warehouse Property was not part of the marital estate because it was deeded to his LLC or, alternatively, was held in a partnership between him and his mother-in-law, Dotie Adams. The evidence showed that Ronald and Dotie bought the Warehouse Property and both of their names were listed on the general warranty deed. Dotie paid the entire purchase price of \$30,000.

Ronald argued that he deeded the Warehouse Property to Warehouse Enterprises, an LLC that he formed two years before trial. The court of appeals disagreed, noting that Ronald testified that he deeded the hardware store (a store that operated on the Warehouse Property), and not the Warehouse Property itself, to the LLC. The court further noted that there was no trial exhibit or evidence showing the assets of Warehouse Enterprises, or any paperwork showing its formation. The court concluded that “there is no evidence that Ronald deeded the ‘Warehouse Property’ to Warehouse Enterprises.”

Super Starr Int’l, LLC v. Fresh Tex Produce, LLC, 531 S.W.3d 829 (Tex. App.—Corpus Christi 2017, no pet.).

The court of appeals held that an LLC operating agreement did not permit the unauthorized use of trade secrets, which were property of the LLC and not the members.

Fresh Tex Produce, LLC (the “Distributor”) filed suit individually and derivatively on behalf of Tex Starr Distributing, LLC. The defendants were Super Starr International, LLC (the “Importer”); Lance Peterson, the President of the Importer; Red Starr, SPR de R.L. de C.V. (the “Grower”); and Kemal Mert Gumus, an employee of the Importer.

In December 2010, Kenneth Alford, president of the Distributor, and Lance and David Peterson, on behalf of the Importer, created Tex Starr Distributing, LLC (the “LLC”). Under the Tex Starr operating agreement, the Distributor and the Importer were the LLC’s only members, Alford and David Peterson were the only managers, and Alford was the president. The operating agreement also included an exclusivity provision mandating that the LLC serve as the “sole and exclusive distributor of papayas exported into the United States by [the Importer] and/or

other existing or future companies of Lance Peterson and/or David Peterson pertaining in whole or in part to the growing, production, shipping or packaging of papayas.” The provision lasted until the end of 2013. In January 2014, a nearly identical operating agreement took effect. The exclusivity provision in the revised operating agreement lasted until the end of 2015.

At the end of December 2015, the exclusivity provision under the revised operating agreement expired. Alford testified that he and Lance Peterson attempted to negotiate a new term of exclusive distributorship, but the two sides were unable to reach an agreement. From January 2016 through March 2016, the Distributor and the Importer continued working together under the same terms as the revised operating agreement. In March 2016, Lance Peterson told Alford that beginning in July 2016, the Importer would no longer supply the LLC with papayas. Instead, the Importer would distribute and market the papayas to customers in the United States on its own.

In October 2016, the Distributor filed an original petition and application for injunctive relief. After a hearing, the trial court signed a temporary injunction order finding that the Distributor had demonstrated a probable right to relief through its claims against the defendants. It granted injunctive relief mandating that the Importer, Lance Peterson, and the Grower (collectively “appellants”) continue the exclusive business relationship with the LLC and prohibiting conduct deemed competitive against the LLC. The court noted that § 3.5 of the LLC’s operating agreement, which allowed each Manager and Member to engage in any activity whatsoever, whether or not such activity competed with the LLC, did not allow members to use the LLC’s trade secrets. To the contrary, § 3.5 began with the phrase “except as prohibited by [§] 3.4”—a provision obligating the members to maintain the confidentiality of the LLC’s information. Moreover, the court stated that appellants’ interpretation of § 3.5 did not comport with another provision that “[a]ll property owned by [the LLC], tangible or intangible, shall be deemed to be owned by [the LLC] as an entity, and no Member shall have any ownership of such property individually.” Similarly, the Business Organizations Code provides that the member of an LLC or an assignee of a membership interest in an LLC does not have an interest in any specific property of the company. Thus, according to the court, any trade secrets belonged to the LLC.

G. Admission of Members

See *Sohani v. Sunesara*, 546 S.W.3d 393 (Tex. App.—Houston [1st Dist.] 2018, no pet. h.), summarized under “Capital Contributions.”

H. Assignment of Interest

Abdullatif v. Choudhri, 2018 WL 1559995, __ S.W.3d __ (Tex. App.—Houston [14th Dist.] 2018, no pet. h.).

In a dispute regarding the ownership of a limited partnership and its general partner, the court of appeals concluded that: (1) the trial court erred in submitting a jury question inquiring whether the parties to written assignments of interests in the limited partnership and its LLC general partner agreed to an alleged oral condition because the alleged condition contradicted the unambiguous terms of the assignments and was thus precluded by the parol evidence rule; (2) the language of certain assignments did not transfer any interest in the LLC general partner of the limited partnership; (3) certain purported transfers of interest in the LLC general partner were null and void ab initio because they were prohibited under the company agreement, and subsequent consent or ratification could not operate to give life to an attempted transfer that was null and void; (4) certain purported transfers of interests in the limited partnership were valid even if the transfers were prohibited by the partnership agreement because the partnership agreement allowed the general partner to recognize a transfer that would otherwise be null and void under the terms of the agreement.

Osama Abdullatif (“Latif”) and Ali Mokaram entered into a real estate investment venture by forming Mokaram Latif West Loop, L.P. (“ML Partnership”) in which Mokaram and Latif were each 49.5% limited partners and Mokaram-Latif General, LLC (“ML General”) was the 1% general partner. Mokaram and Latif were the managers and equal members of ML General. Mokaram and Ali Choudhri became friends and engaged in business transactions together, including transactions in 2008 and 2010 involving ML Partnership and ML General.

The 2008 transaction included an agreement in which Mokaram purported to transfer to Choudhri a limited partnership interest in ML Partnership, and the 2010 transaction included purported assignments by Mokaram to Choudhri of interests in ML Partnership and ML General. Disputes regarding these transactions arose, and

eventually Latif purchased all of Mokaram's interests in ML Partnership and ML General along with all of Mokaram's claims against Choudhri relating to interests in the entities. Mokaram agreed to continue to pursue his claims against Choudhri in this lawsuit in which Mokaram, Latif, Choudhri, and ML Partnership were parties. The trial court entered a declaratory judgment regarding the ownership of the entities, and Mokaram and Latif appealed.

The first issue the court of appeals addressed was whether the trial court erred in submitting a jury question inquiring whether Mokaram and Choudhri agreed that the 2010 assignment was not effective and that Mokaram would return the money paid by Choudhri to Mokaram. Because the unambiguous language of the assignment provided that it was effective immediately and did not indicate that it was contingent on any condition, the court of appeals concluded that the testimony regarding an alleged oral condition was precluded by the parol-evidence rule from contradicting the unambiguous language of the assignment. Thus, the trial court should not have submitted any question inquiring into the enforceability of the oral condition. The court stated that the parol-evidence rule would not have precluded the trial court from submitting a question about an alleged subsequent agreement to rescind, but the jury question that was submitted did not ask about a subsequent agreement to rescind. The court also stated that the evidence did not raise a genuine fact issue as to whether Mokaram and Choudhri agreed to rescind the assignment after they executed it.

The court next addressed the argument that the trial court lacked jurisdiction over the declaratory judgment claims regarding Choudhri's ownership and management rights in ML General because ML General was not a party. The court of appeals held that the trial court did not lack jurisdiction over the claims. Although the declaratory judgment did not bind ML General, it was binding on the parties in this action.

Next the court of appeals discussed whether the trial court erred in declaring that Choudhri had owned an interest in ML General since the date of the 2008 assignment. Based on the language of the documents executed in 2008, which purported to transfer to Choudhri an interest in ML Partnership and certain real property, the court concluded that Mokaram did not purport to transfer any interest in ML General. The documents indicated that Mokaram and Choudhri thought that ML Partnership owned the real property referred to in the assignments and that they intended to transfer an indirect interest in the real property by transferring an interest in ML Partnership. However, assuming that ML Partnership owned the real property referred to in the assignments, that would not mean that ML General had any ownership in the property, and the court concluded that the evidence did not show that Mokaram transferred any interest in ML General to Choudhri by virtue of the 2008 assignments.

The 2010 assignments purported to transfer from Mokaram to Choudhri interests in both ML General and ML Partnership. Both the company agreement of ML General and the partnership agreement of ML Partnership contained restrictions on transfer, and the court discussed the effect of the purported transfers by Mokaram.

The ML General company agreement prohibited a member from transferring any of its membership interest except in limited circumstances, such as with the approval of members having more than 66.67% of the interests of all members. The company agreement stated that a transfer in violation of its provisions was "null and void ab initio." Assuming Mokaram's execution of the assignments represented his approval of the transfers, there was no evidence that Latif, the other 50% member at the time, approved the assignments before Mokaram purported to assign his interest, and there was no evidence that any of the other circumstances under which a transfer was permitted were present. Choudhri relied on a 2011 consent signed by Latif as manager and member of ML General in which Latif consented to any prior transfers by Mokaram to Choudhri of a membership interest in ML General. The court concluded that the purported assignments were null and void from the outset under the unambiguous language of the company agreement, and as such the purported transfers could not be ratified or validated after the fact. Thus, the trial court erred in declaring that Choudhri had owned 50% of ML General and had been a manager of ML General from and after the 2010 assignments.

The ML Partnership agreement also contained prohibitions on transfer, and the court next addressed the effect of purported assignments in 2010 by Mokaram to Choudhri of a limited partnership interest in ML Partnership. Section 10.1 of the partnership agreement prohibited a limited partner from transferring all or any portion of the limited partner's interest without the prior written consent of the general partner. Section 10.2 of the partnership agreement contained a right-of-first-refusal provision in favor of the other partners in the event a limited partner received a bona fide offer to purchase all or any portion of the limited partner's interest. Section 10.3 provided for certain "Permitted Transfers" (to a trust for the benefit of the limited partner, the guardian or estate of a limited partner, or a person approved by all the partners) notwithstanding the consent otherwise required by Section 10.1. Section 10.6 provided that a transfer that was not permitted under the partnership agreement "shall be null and void and of no effect whatever; provided that if the Partnership is required to recognize a Transfer that

is not permitted (or if the Partnership, in its sole discretion, elects to recognize a Transfer that is not permitted),” the transferred interest was limited to the transferor’s rights to allocations and distributions. Finally, Section 10.10 provided that the partnership was not required to recognize the interest of any transferee who obtained a purported transferred interest pursuant to a transfer that was not authorized by the partnership agreement, and such a transfer was “null and void for all purposes.”

The court stated that the plain meaning of “null and void and of no effect whatever” would preclude a transfer that was not permitted by the partnership agreement from being subject to ratification, confirmation, or waiver, but the court concluded that the phrase “null and void and of no effect whatever” was not used in its ordinary sense given that the agreement unambiguously provided that the partnership could elect to recognize a transfer that was not permitted and thus was or would have been “null and void and of no effect whatever.” The court noted the difference between the ML General company agreement (which the court had held did not permit ratification of a null and void transfer) and the ML Partnership agreement and concluded that the two agreements were separate and independent agreements that should not be construed together as one. Further, assuming the agreements should be construed as a single contract, the provisions unambiguously allowed the recognition of an otherwise void transfer of a partnership interest but did not allow the recognition of a void transfer of a membership interest.

Because Mokaram signed the assignment of his interests to Choudhri not only as assignor, but in his capacity as manager of ML General, the general partner of ML Partnership, under a legend stating that the transfer was consented to by the general partner, the court concluded that ML Partnership recognized the transfer of the interests. Relying on the language of the ML General company agreement (which provided that the managers shall have the sole and exclusive control of the management of ML General and shall make all decisions not otherwise provided for in the company agreement) and Section 101.254 of the Business Organizations Code (which provides that each governing person is an agent of the LLC for the purpose of its business), the court stated that Mokaram’s signature as manager was binding on ML General, and ML Partnership thus recognized the transfer as valid and effective as provided by Section 10.6 of the partnership agreement. The court concluded that an earlier purported transfer in 2008 by Mokaram to Choudhri of a limited partnership interest was not effective because there was no evidence that the transfer was permitted under any of the provisions of the partnership agreement nor was there any evidence that the partnership was required to recognize the transfer or exercised its discretion to recognize the transfer.

Finally, the court concluded that the trial court did not err in refusing to clarify what rights Choudhri had as a result of his ownership of an interest in ML Partnership. The trial court declared that Choudhri owned 49.5% of ML Partnership from and after the 2010 assignments and that he had “all beneficial rights and interests” that flowed from his ownership of an interest in ML Partnership. The court stated that the interests transferred to Choudhri were limited to rights to allocations and distributions under the unambiguous language of Section 10.6 of the partnership agreement, and neither Section 10.2 nor 10.6 gave Choudhri the right to become a limited partner under the assignments. The trial court did not declare that Choudhri was a limited partner, and although the “beneficial rights and interests” were significantly limited by the agreement, the trial court did not inaccurately characterize them. Thus, the court of appeals concluded that the trial court did not err in making the declaration and in refusing to clarify it.

Ishee v. Ishee, No. 09-15-00197-CV, 2017 WL 2293150 (Tex. App.—Beaumont May 25, 2017, no pet.).

The court held that an LLC member did not owe his ex-wife, as an assignee of 50% of his interest pursuant to their divorce decree, any fiduciary duty under the Texas Business Organizations Code, but the member owed her a fiduciary duty under the Texas Family Code to remit her share of distributions actually received.

Janice and Michael Ishee divorced in 2010, and the divorce decree awarded Janice a percentage of Michael’s interests in the closely held businesses in which he was an owner at the time of the divorce. In 2013, Janice sued Michael, World Environmental, LLC (“World Environmental”), Charles Hall (who held a majority interest in World Environmental when Michael and Janice divorced), and the other businesses identified in the divorce decree. Janice alleged that Michael never paid her the money she was entitled to receive based on her assigned interest in the businesses identified in the decree. Additionally, Janice requested that the court declare her rights under the assignment she acquired in Michael’s interest in the businesses identified in the decree when she and Michael divorced.

Michael claimed that he never sent Janice any money after they divorced because the businesses identified in the decree never distributed any income, gains, losses, deductions, credits, distributions, or similar items. In large part, the parties' dispute centered on whether the rights Janice obtained in the businesses in which Michael held memberships required Michael to remit any of the amounts that he had received in guaranteed payments from the businesses after he and Janice divorced. World Environmental's accountant testified that the guaranteed payments Michael received from World Environmental were reported on the K1s Michael received from the company, and the tax forms that the accountant generated for the company reflected the company's income, loss, distributions, and business activities of the company. Janice did not call an accountant to dispute this testimony, so there was no testimony showing that the activities reflected in Michael's K1s were fraudulent, that World Environmental improperly accounted for its income or its expenses, or that Michael's K1s failed to properly reflect the monetary benefits that he received from World Environmental after he and Janice divorced. In final argument, Janice's attorney asked the jury to ignore the testimony and evidence about the manner in which World Environmental accounted for its activities and suggested to the jury that Janice was entitled to receive a percentage of all of the benefits Michael received from World Environmental based on the assigned interest she held in the business following the divorce, including a percentage of the guaranteed payments Michael received as well as a percentage of the cash value of his fringe benefits, such as a company car, company cell phone, and health insurance. The jury found that Michael breached a fiduciary duty to Janice and awarded actual and exemplary damages and disgorgement.

On appeal, Michael argued that he did not owe Janice a fiduciary duty following their divorce because the decree did not make Janice a member of the businesses in which he held memberships upon their divorce. The court observed that any fiduciary duty that might exist between spouses generally terminates when they divorce if the spouses are independently represented by separate attorneys. In this case, however, Janice was awarded a percentage of Michael's interests in several LLCs and became an assignee of Michael's interests pursuant to Tex. Bus. Orgs. Code § 101.1115(a) (which provides that "on the divorce of a member, the member's spouse, to the extent of the spouse's membership interest, if any, is an assignee of the membership interest"). The court explained that, as an assignee, Janice did not have the same rights that Michael had as a member. For example, as an assignee whose membership was not approved by the members of the LLCs, she did not have the right to participate in the management and affairs of the LLCs or to become a member. Tex. Bus. Orgs. Code § 101.108(b). As an assignee, Janice was, however, entitled to be allocated a percentage of the LLC's income, gain, loss, deduction, credit or similar items allocated to Michael. Notwithstanding these rights as assignee, the court stated that "nothing in Chapter 101 of the Business Organizations Code creates a statutory fiduciary duty between the members of a limited company and those who become assignees of a member's rights upon a member's divorce. *See id.* §§ 101.101–.114 (West 2012). We agree with Michael's argument that the fiduciary duty he owed to Janice is not a duty imposed on him under the provisions of Chapter 101 of the Business Organizations Code."

Janice argued that Michael's fiduciary duty to turn over the portion she was entitled to receive in the benefits he received from the businesses identified in the decree arose under Tex. Fam. Code § 9.011(b). Section 9.011(b) provides that "[t]he subsequent actual receipt by the non-owning party of property awarded to the owner in a decree of divorce or annulment creates a fiduciary obligation in favor of the owner and imposes a constructive trust on the property for the benefit of the owner." The court held that this provision imposed on Michael a fiduciary duty to remit to Janice, as his assignee, Janice's percentage of the amount of income, loss, or distributions he actually received from the businesses identified in the decree. There was evidence that Michael received some distributions from World Environmental and another LLC identified in the divorce decree and that Michael did not remit Janice's share to her; therefore, the evidence supported the jury's finding that Michael failed to comply with his fiduciary duty to Janice after the divorce.

Michael next argued that the evidence did not support the amount of the jury's damage and disgorgement awards. The jury awarded Janice \$111,520 in compensatory damages, \$130,00 in exemplary damages, and \$111,520 for disgorgement. The court stated that it appeared that the bulk of the \$111,520 awarded by the jury consisted of income Michael received in the form of guaranteed payments for services. Although Janice's attorney asked the jury to award Janice damages based on the value of all of the benefits Michael received from the businesses identified in the decree, the court said the decree did not assign Janice a right to every benefit Michael received from these businesses, and there was no evidence that any of the businesses identified in the decree distributed any income, gains, losses, deductions, or credits to their members. Capital accounts were adjusted annually to reflect profits and losses, but distributions were not made. The evidence showed that the amounts of the guaranteed

payments were consistent with the amounts paid as guaranteed payments before the divorce and were based on the market for individuals with similar expertise. Based on the court's review of the evidence, the court concluded that Michael only received distributions of approximately \$5,000 from the businesses after the divorce. Based on the decree, Janice was entitled to 50% of that amount, approximately \$2,500. In concluding that the damage award was excessive the court stated: "Importantly, the decree in Janice and Michael's divorce did not give Janice a percentage interest in the [guaranteed] payments, representing Michael's salary after the divorce from his work as an environmental consultant. In our opinion, the guaranteed payments World Environmental paid Michael, standing alone, is but one part of World Environmental's operations so it was not individually an item that World Environmental allocated to its members, nor were the payments distributions allocated by World Environmental to its members. *See* Tex. Bus. Orgs. Code Ann. § 101.109(1), (2)." Because the exemplary damage award was unliquidated, the court was unable to suggest a remittur, and the disgorgement award appeared to the court to constitute a double recovery since the jury awarded the same amount it awarded as compensatory damages and there was no showing Michael used the \$2,500 withheld from Janice to obtain additional benefits that should, in fairness, be disgorged. Under the circumstances, the court remanded Janice's claims for retrial.

The court disagreed with Janice that her recovery could be sustained on a breach-of-contract theory, stating that the jury's breach-of-contract award of \$111,331 suffered from the same flaws that resulted in reversal of the breach-of-fiduciary duty award.

World Environmental argued that the trial court's declaratory judgment that Janice "owned" an interest in World Environmental should be reformed, but the court of appeals found no error in the trial court's declaration that Janice "owned" a percentage interest where the phrase was qualified by the following language: "with the rights and duties of an assignee of a membership interest as set forth in Section 101.109" of the Texas Business Organizations Code. The court of appeals stated that "the qualifying phrase makes it clear that Janice is not an owner of the company, but instead that she has an interest in World Environmental allowing her to participate in the organization as an assignee." After reviewing the rights given and restrictions placed on an assignee under Section 101.109, the court stated: "Based on the language the trial court used in granting Janice's claim for declaratory relief, the judgment is clear that Janice's rights are those of an assignee under the Business Organizations Act, and the language in the judgment does not grant Janice full ownership in the business with the same rights that are held by World Environmental's approved members."

I. Capital Contributions

Sohani v. Sunesara, 546 S.W.3d 393 (Tex. App.—Houston [1st Dist.] 2018, no pet. h.).

The court of appeals held that the trial court erred in entering a judgment that a member of three LLCs was entitled to one-third of the profits of each of the LLCs because the Texas Business Organizations Code provides that profits and losses are allocated to the members based on the agreed value of the members' contributions as stated in the company's records, and none of the LLCs had a record of the member's alleged contribution. Although the member testified that he contributed cash to the LLCs, and the jury found that the member was entitled to a one-third profit distribution from each LLC, the court of appeals stated that allowing the member's oral testimony to establish his entitlement to one-third of the profits of the LLCs in the absence of any written records of his contributions would be contrary to the plain language of the LLC statute.

Nizar Sunesara and Anis Virani started selling smoking accessories and devices in flea markets on the weekends in 2002, and the next year they established a brick-and-mortar retail shop called "Zig Zag Smoke Shop." Sunesara created MNA Corporation to operate Zig Zag, and Virani and Sunesara offered Manisch Sohani (a supplier of Zig Zag) an ownership interest in the business. The three men each owned one third of MNA Corporation, and profits of Zig Zag were distributed in cash each month. Sunesara and Virani both took positions with Sohani's company, and Sunesara transitioned out of the day-to-day business of Zig Zag while Virani continued to manage Zig Zag's day-to-day operations as well as working for Sohani's company. Zig Zag did well, and in 2012, Virani and Sunesara started a second retail location, which they called "Burn Smoke Shop" ("Burn I"). Sunesara testified that he contributed \$10,000 cash to the start up of Burn I. He stated that he gave the money to Virani and did not request any receipt or documentation of his contribution. SSV Corporation, which was incorporated by Sunesara in 2007, owned the assets of both Zig Zag and Burn I. Sunesara and Virani each owned 50% of SSV Corporation, but records showed that Sohani shared equally with Sunesara and Virani in profit distributions, and Sunesara testified that Sohani was considered a partner even though he was not a formal owner.

Toward the end of 2012, Sunesara, Virani, and Sohani agreed to buy an existing retail smoke shop, whose name they changed to “Burn Smoke Shop Two” (“Burn II”). Sunesara testified that he contributed \$10,000 cash to the start up of Burn II, again giving the money to Virani without obtaining any receipt or documentation of his contribution. Before the purchase of Burn II was finalized, Sohani and Virani asked Sunesara to file paperwork with the Texas Secretary of State to form three LLCs to run the three smoke shops. Each certificate of formation, which was signed by Sunesara but not the other two men, listed Sohani, Virani, and Sunesara as governing persons. Signature cards and depository resolutions for the bank accounts for the three LLCs listed all three men as members and were signed by all three men. Virani and Sohani claimed that Sunesara handled the paperwork for forming the LLCs and opening the bank accounts, and Virani and Sohani claimed that they should have been listed as the only two members of the LLCs. The franchise tax public information report for 2013 listed all three men as members of the LLCs, but the franchise tax report for 2014 as well as federal income tax returns for 2013 and 2014 only listed Virani and Sohani as members or owners of the LLCs.

Sohani and Virani testified that Sunesara did not contribute anything to the three shops. They also testified that they never received any profit distributions from the LLCs because the profits went to Sohani’s company to pay back inventory Sohani contributed and to pay other vendors and creditors of the LLCs.

After federal law enforcement officers began targeting sellers of synthetic marijuana and raiding retailers, wholesalers, and distributors in the smoke shop industry, Sunesara became concerned because Sohani’s company and the three retail shops sold synthetic marijuana. Sunesara wanted Sohani’s company and the shops to stop selling the product. Sohani’s company was raided in 2013, and Sunesara took a leave of absence from the company and did not return. After the raid, Sohani and Virani realized that they lacked important documentation for the LLCs, such as operating agreements, and (after conducting internet research) the two men drafted and signed form operating agreements listing them as members and stating that they each made 50% of contributions and owned 50% of profits and assets. Sunesara’s name did not appear in any of the three agreements, and he was not involved in the drafting of the agreements. Sunesara testified that he received monthly profit distributions for the first five months of 2013 and inquired regularly “what the situation was with profit distributions” after the raid but was given excuses why there were no distributions until October of 2013, when the parties ceased communicating. The parties disagreed over whether Sunesara had a share of the business, and Sohani and Virani were unable to open new bank accounts or obtain loans for the LLCs without Sunesara’s authorization and signature. In 2015, Virani and Sohani sued Sunesara in Harris County Civil Court at Law, asserting various causes of action, including a claim for a declaratory judgment that Sunesara was not a member of the LLCs. Sunesara asserted several counterclaims, including a claim for a declaratory judgment that he was a member of the LLCs and was entitled to one-third of the profits. Eventually, Sunesara dropped all his claims other than his claims for a declaration that he was a member of the LLCs, was entitled to one-third of the profits of the LLCs, and was entitled to examine the LLCs’ books and records.

The jury answered “yes” to three questions inquiring whether Sunesara was a member entitled to a one-third profit distribution of each of the LLCs at the time they were formed. No definitions or instructions accompanied these questions. The jury also found that Sohani and Virani were estopped to deny Sunesara was a member of the LLCs and that Sunesara did not commit fraud against Virani and Sohani. After the verdict, Virani and Sohani moved to dismiss the action for lack of subject-matter jurisdiction based on documentation that they argued demonstrated the combined total of one-third profit distributions from the three LLCs exceeded \$200,000, the upper limit of the county court’s jurisdictional limits. Sohani and Virani also argued that Sunesara presented only his self-serving testimony that he was a member and had made contributions to the LLCs but presented no evidence of an oral or written operating agreement entitling him to membership and one-third of the profits of the LLCs. Virani and Sohani relied on Tex. Bus. Orgs. Code § 101.201, which provides that profits and losses of an LLC shall be allocated on the basis of the agreed value of the contributions made by each member, as stated in the company’s records. The trial court entered judgment in favor of Sunesara declaring that he was a member of the LLCs and entitled to one-third of the profits from the LLCs.

The court first addressed a challenge to the trial court’s subject-matter jurisdiction. Sohani and Virani argued that the trial court lacked jurisdiction because Sunesara sought damages in the form of one-third of the LLCs’ net profits in an amount that exceeded the jurisdictional limits of the county civil court at law. The Texas Government Code provides in general that a statutory county court has jurisdiction over all matters prescribed by law for county courts and has concurrent jurisdiction with the district court in cases in which the matter in controversy exceeds \$500 but does not exceed \$200,000 as alleged on the face of the petition. Provisions of the

Government Code specific to Harris County Civil Courts at Law provide that the Harris County Civil Courts at Law have jurisdiction to decide the issue of title to real or personal property without regard to the amount in controversy. All of the parties sought a declaratory judgment concerning Sunesara's status as a member of the LLCs, and Sunesara sought a declaration that he was the rightful owner of a membership interest and was entitled to one-third of the profits of the LLCs. The court of appeals pointed out that Section 101.106(a) of the Texas Business Organizations Code characterizes a membership interest in an LLC as personal property and Section 1.002(54) provides that a membership interest includes a member's share of profits and losses and the right to receive distributions. Thus, the court of appeals held that the Harris County Civil Court at Law had subject-matter jurisdiction to determine whether Sunesara was a member and was entitled to profits from the LLCs based on the county court's jurisdiction to determine issues relating to title to real and personal property.

The court of appeals next analyzed the contention of Sohani and Virani that the trial court's judgment, which declared that Sunesara was a member of each of the LLCs and was entitled to one-third of the profits from each of the LLCs, conflicted with Section 101.201 of the Business Organizations Code, which states that an LLC's allocation of profits and losses are to be made "on the basis of the agreed value of the contributions made by each member, as stated in the company's records." Sohani and Virani argued that there was no written record reflecting Sunesara's contributions to the LLCs or demonstrating that he was entitled to one-third of the profits. The court reviewed the definitions of a "member," "membership interest," "governing documents," "company agreement," and "contribution," and pointed out that the Business Organizations Code does not require a person to make a contribution in order to be admitted as a member or acquire a membership interest. The court also pointed out that the statutory provisions addressing allocation of profits and losses and the sharing of distributions provide that such matters are based on the agreed value of each member's contributions as stated in the company's records required to be kept under the statute. Tex. Bus. Orgs. Code §§ 101.201, 101.203. Section 3.151 of the Business Organizations Code contains general recordkeeping requirements for filing entities, and Section 101.501 has specific requirements for LLCs that include maintaining a record of "the amount of a cash contribution and a description and statement of the agreed value of any other contribution made or agreed to be made by each member." Tex. Bus. Orgs. Code § 101.501(a)(7).

The court's analysis of Sohani's and Virani's contention focused on the "plain meaning" of Sections 101.201 and 101.501 of the Business Organizations Code. At trial, Sunesara testified that he made contributions to the LLCs in the form of \$10,000 cash contributions and "deferred profits" to the startup of Burn I and the acquisition of Burn II. Sunesara did not, however, offer any documentary evidence reflecting those contributions. The record contained no writing setting out the specific contributions made by any of the three members or stating that Sunesara was entitled to one-third of the profits from the LLCs. The company agreements for each of the LLCs were admitted into evidence, but they listed only Sohani and Virani as members and stated, under each of their names, "Made 50% of contributions, Owns 50% of profits and assets." The court construed Section 101.501 of the Business Organizations Code to require an LLC to include a statement of the amount of cash contributions made by each member and a statement of the agreed value of any other contribution made by each member in the written records of the company and construed Section 101.201 to provide that these records establish the allocation of a member's share of the profits and losses of the company. Because Sunesara did not introduce any records of the LLCs reflecting the contributions that he made to the LLCs, the court concluded that he presented no evidence that he is entitled to one-third of the profits of the LLCs under Section 101.201.

Sunesara argued that his testimony that he made contributions to the LLCs sufficed to demonstrate his entitlement to one-third of the profits of the LLCs, but the court stated that the plain language of Section 101.201 requires profits and losses to be allocated on the basis of the agreed value of the contributions made by each member, as stated in the company's records required under Section 101.501, and the plain language of Section 101.501 requires an LLC to maintain a written record of the amount of a cash contribution and a description and statement of the agreed value of any other contribution made or agreed to be made by each member.

Sunesara pointed to the 2008 tax return of MNA Corporation (which stated that Sunesara, Virani, and Sohani were each allocated one-third of the profits for that corporation) and the records of SSV Corporation (which stated that Sunesara and Virani each owned fifty percent of that corporation) and argued that, when the LLCs were created and took over operation of the smoke shops, these records became a part of the records for the LLCs and satisfied the writing requirement of Section 101.201. But the court stated that the corporations and LLCs were all separate and distinct entities, and Sunesara cited no law supporting the proposition that the records from the earlier-formed entities became records of the new LLCs when they began operating the smoke shops. The court

stated that the documentary evidence reflecting that Sunesara had a one-third ownership interest in MNA Corporation and a one-half interest in SSV Corporation established only that he was entitled to distributions from MNA Corporation and SSV Corporation, not that he made contributions to the LLCs or that he was entitled to one-third of the profits from the LLCs. Thus, the court held that the trial court erred to the extent that it ruled that Sunesara was entitled to one-third of the profits from each of the LLCs. “Because Sunesara was not assigned a share of profits in the company agreements and presented no evidence that he was entitled to a one-third share of profits in the LLCs, he was not entitled to a share in profits as a matter of law.”

Mackenzie Leigh, LLC v. Nardos Imam (In re Imam), No. 16–33362–hdh7, Adv. No. 16–03156–hdh, 2018 WL 614937 (Bankr. N.D. Tex. Jan. 29, 2018).

The debt resulting from an LLC member’s failure to contribute intellectual property as represented in the LLC agreement was not a debt that was nondischargeable based on false pretenses, false representations, or actual fraud because the evidence indicated that the member did not understand that she was making the representation that was made in the LLC agreement.

Mackenzie Brittingham and Nardos Imam became friends when Imam created Brittingham’s wedding gown and fur wraps for Brittingham’s bridal attendants. Imam was a successful fashion designer, and she and Brittingham decided to go into business together to operate a clothing salon and bridal boutique. The business was structured as an LLC named Nardos Imam Limited Liability Company (the “LLC”), of which Imam and an LLC owned by Brittingham were equal members. Although Imam and Brittingham were both well-educated, neither had a complete grasp of the legal terms used while negotiating the terms of the company agreement for their newly formed LLC (in particular, they did not seem to have an understanding of what constitutes “intellectual property”), and misunderstandings may have come into play due to the fact that English was not Imam’s first language. Matters were also complicated by the fact that the business began operating before the company agreement was finalized.

Brittingham’s lawyer prepared the first draft of a company agreement, and several drafts were exchanged among Brittingham, Imam, and their respective lawyers over the course of more than a year. Each draft contained a provision that addressed contribution by Imam of certain categories of property, including intellectual property. At some point, Brittingham’s attorneys suggested that there should be a separate assignment for intellectual property to be contributed by Imam, and the final draft of the company agreement had an assignment of intellectual property and a bill of sale for property other than intellectual property attached as two separate exhibits. Meanwhile, Imam had become uncomfortable with transferring her intellectual property, and Imam communicated to her lawyer that she did not intend to do so. When the parties signed the company agreement, Imam did not sign the assignment of intellectual property. Imam testified that the assignment was intentionally removed from the stack of papers because Imam did not intend to assign the intellectual property, but Imam said she did not realize that the company agreement still had language requiring the assignment to be signed. Brittingham claimed that the failure to sign the assignment was a mistake and that there was not a conscious decision to remove it. Although the business was initially successful, managerial disagreements arose, and Imam eventually obtained a judicial winding up and termination of the LLC in state court based on deadlock. Imam subsequently filed a petition for Chapter 7 bankruptcy. In the bankruptcy proceeding, the plaintiff (i.e., Brittingham’s LLC that was Imam’s co-member in the terminated LLC) asserted a claim for fraud on the basis that Imam fraudulently induced the plaintiff to contribute funds to the LLC based on representations that Imam would assign certain intellectual property. Although the record indicated that neither Brittingham nor Imam understood the meaning of the term “intellectual property” when it was included in the draft agreements, both probably knew that brand names are crucial in the fashion industry and that the brand name for their business would be Imam’s name. The crux of Brittingham’s complaint seemed to be that Imam did not assign her brand name—which is her name—to the LLC. Instead, Imam allowed the LLC to use her name during its operation, but refused to allow LLC to own her name. The court found that the evidence did not establish that Imam knew she was making a false representation when she signed the company agreement because she believed that removing the assignment of intellectual property from the documents and not signing it effectively removed it from the deal. Imam did not realize that the company agreement contained a representation that she would transfer her intellectual property in the assignment. Thus, the plaintiff did not meet its burden of proof to show that Imam made the representation with the intent to deceive the plaintiff. In addition, the court found that the plaintiff was not justified in relying on alleged oral promises (which Imam denied she made) to convey “intellectual property” without obtaining a written commitment specifically identifying the intellectual property to be transferred with a reasonable degree of certainty and specificity. The plaintiff also was not justified in relying

on the representation in the company agreement with respect to advancing any post-agreement funds because the plaintiff knew or should have known that Imam did not sign the assignment at closing. Even if the plaintiff relied on the representation, the court stated that the plaintiff's reliance was not the cause its loss. The LLC was initially successful and continued after Brittingham knew that Imam had not signed the assignment. Thus, the LLC did not fail due to Imam's failure to convey any intellectual property; the LLC failed because of the managerial deadlock of the 50-50 owners.

J. Interpretation and Enforcement of Company Agreement

1. Financial Rights

Sohani v. Sunesara, 546 S.W.3d 393 (Tex. App.—Houston [1st Dist.] 2018, no pet. h.).

The court of appeals held that the trial court erred in entering a judgment that a member of three LLCs was entitled to one-third of the profits of each of the LLCs because the Texas Business Organizations Code provides that profits and losses are allocated to the members based on the agreed value of the members' contributions as stated in the company's records, and none of the LLCs had a record of the member's alleged contribution. Although the member testified that he contributed cash to the LLCs, and the jury found that the member was entitled to a one-third profit distribution from each LLC, the court of appeals stated that allowing the member's oral testimony to establish his entitlement to one-third of the profits of the LLCs in the absence of any written records of his contributions would be contrary to the plain language of the LLC statute.

Nizar Sunesara and Anis Virani started selling smoking accessories and devices in flea markets on the weekends in 2002, and the next year they established a brick-and-mortar retail shop called "Zig Zag Smoke Shop." Sunesara created MNA Corporation to operate Zig Zag, and Virani and Sunesara offered Manisch Sohani (a supplier of Zig Zag) an ownership interest in the business. The three men each owned one third of MNA Corporation, and profits of Zig Zag were distributed in cash each month. Sunesara and Virani both took positions with Sohani's company, and Sunesara transitioned out of the day-to-day business of Zig Zag while Virani continued to manage Zig Zag's day-to-day operations as well as working for Sohani's company. Zig Zag did well, and in 2012, Virani and Sunesara started a second retail location, which they called "Burn Smoke Shop" ("Burn I"). Sunesara testified that he contributed \$10,000 cash to the start up of Burn I. He stated that he gave the money to Virani and did not request any receipt or documentation of his contribution. SSV Corporation, which was incorporated by Sunesara in 2007, owned the assets of both Zig Zag and Burn I. Sunesara and Virani each owned 50% of SSV Corporation, but records showed that Sohani shared equally with Sunesara and Virani in profit distributions, and Sunesara testified that Sohani was considered a partner even though he was not a formal owner.

Toward the end of 2012, Sunesara, Virani, and Sohani agreed to buy an existing retail smoke shop, whose name they changed to "Burn Smoke Shop Two" ("Burn II"). Sunesara testified that he contributed \$10,000 cash to the start up of Burn II, again giving the money to Virani without obtaining any receipt or documentation of his contribution. Before the purchase of Burn II was finalized, Sohani and Virani asked Sunesara to file paperwork with the Texas Secretary of State to form three LLCs to run the three smoke shops. Each certificate of formation, which was signed by Sunesara but not the other two men, listed Sohani, Virani, and Sunesara as governing persons. Signature cards and depository resolutions for the bank accounts for the three LLCs listed all three men as members and were signed by all three men. Virani and Sohani claimed that Sunesara handled the paperwork for forming the LLCs and opening the bank accounts, and Virani and Sohani claimed that they should have been listed as the only two members of the LLCs. The franchise tax public information report for 2013 listed all three men as members of the LLCs, but the franchise tax report for 2014 as well as federal income tax returns for 2013 and 2014 only listed Virani and Sohani as members or owners of the LLCs.

Sohani and Virani testified that Sunesara did not contribute anything to the three shops. They also testified that they never received any profit distributions from the LLCs because the profits went to Sohani's company to pay back inventory Sohani contributed and to pay other vendors and creditors of the LLCs.

After federal law enforcement officers began targeting sellers of synthetic marijuana and raiding retailers, wholesalers, and distributors in the smoke shop industry, Sunesara became concerned because Sohani's company and the three retail shops sold synthetic marijuana. Sunesara wanted Sohani's company and the shops to stop selling the product. Sohani's company was raided in 2013, and Sunesara took a leave of absence from the company and did not return. After the raid, Sohani and Virani realized that they lacked important documentation for the LLCs,

such as operating agreements, and (after conducting internet research) the two men drafted and signed form operating agreements listing them as members and stating that they each made 50% of contributions and owned 50% of profits and assets. Sunesara's name did not appear in any of the three agreements, and he was not involved in the drafting of the agreements. Sunesara testified that he received monthly profit distributions for the first five months of 2013 and inquired regularly "what the situation was with profit distributions" after the raid but was given excuses why there were no distributions until October of 2013, when the parties ceased communicating. The parties disagreed over whether Sunesara had a share of the business, and Sohani and Virani were unable to open new bank accounts or obtain loans for the LLCs without Sunesara's authorization and signature. In 2015, Virani and Sohani sued Sunesara in Harris County Civil Court at Law, asserting various causes of action, including a claim for a declaratory judgment that Sunesara was not a member of the LLCs. Sunesara asserted several counterclaims, including a claim for a declaratory judgment that he was a member of the LLCs and was entitled to one-third of the profits. Eventually, Sunesara dropped all his claims other than his claims for a declaration that he was a member of the LLCs, was entitled to one-third of the profits of the LLCs, and was entitled to examine the LLCs' books and records.

The jury answered "yes" to three questions inquiring whether Sunesara was a member entitled to a one-third profit distribution of each of the LLCs at the time they were formed. No definitions or instructions accompanied these questions. The jury also found that Sohani and Virani were estopped to deny Sunesara was a member of the LLCs and that Sunesara did not commit fraud against Virani and Sohani. After the verdict, Virani and Sohani moved to dismiss the action for lack of subject-matter jurisdiction based on documentation that they argued demonstrated the combined total of one-third profit distributions from the three LLCs exceeded \$200,000, the upper limit of the county court's jurisdictional limits. Sohani and Virani also argued that Sunesara presented only his self-serving testimony that he was a member and had made contributions to the LLCs but presented no evidence of an oral or written operating agreement entitling him to membership and one-third of the profits of the LLCs. Virani and Sohani relied on Tex. Bus. Orgs. Code § 101.201, which provides that profits and losses of an LLC shall be allocated on the basis of the agreed value of the contributions made by each member, as stated in the company's records. The trial court entered judgment in favor of Sunesara declaring that he was a member of the LLCs and entitled to one-third of the profits from the LLCs.

The court first addressed a challenge to the trial court's subject-matter jurisdiction. Sohani and Virani argued that the trial court lacked jurisdiction because Sunesara sought damages in the form of one-third of the LLCs' net profits in an amount that exceeded the jurisdictional limits of the county civil court at law. The Texas Government Code provides in general that a statutory county court has jurisdiction over all matters prescribed by law for county courts and has concurrent jurisdiction with the district court in cases in which the matter in controversy exceeds \$500 but does not exceed \$200,000 as alleged on the face of the petition. Provisions of the Government Code specific to Harris County Civil Courts at Law provide that the Harris County Civil Courts at Law have jurisdiction to decide the issue of title to real or personal property without regard to the amount in controversy. All of the parties sought a declaratory judgment concerning Sunesara's status as a member of the LLCs, and Sunesara sought a declaration that he was the rightful owner of a membership interest and was entitled to one-third of the profits of the LLCs. The court of appeals pointed out that Section 101.106(a) of the Texas Business Organizations Code characterizes a membership interest in an LLC as personal property and Section 1.002(54) provides that a membership interest includes a member's share of profits and losses and the right to receive distributions. Thus, the court of appeals held that the Harris County Civil Court at Law had subject-matter jurisdiction to determine whether Sunesara was a member and was entitled to profits from the LLCs based on the county court's jurisdiction to determine issues relating to title to real and personal property.

The court of appeals next analyzed the contention of Sohani and Virani that the trial court's judgment, which declared that Sunesara was a member of each of the LLCs and was entitled to one-third of the profits from each of the LLCs, conflicted with Section 101.201 of the Business Organizations Code, which states that an LLC's allocation of profits and losses are to be made "on the basis of the agreed value of the contributions made by each member, as stated in the company's records." Sohani and Virani argued that there was no written record reflecting Sunesara's contributions to the LLCs or demonstrating that he was entitled to one-third of the profits. The court reviewed the definitions of a "member," "membership interest," "governing documents," "company agreement," and "contribution," and pointed out that the Business Organizations Code does not require a person to make a contribution in order to be admitted as a member or acquire a membership interest. The court also pointed out that the statutory provisions addressing allocation of profits and losses and the sharing of distributions provide that such

matters are based on the agreed value of each member's contributions as stated in the company's records required to be kept under the statute. Tex. Bus. Orgs. Code §§ 101.201, 101.203. Section 3.151 of the Business Organizations Code contains general recordkeeping requirements for filing entities, and Section 101.501 has specific requirements for LLCs that include maintaining a record of "the amount of a cash contribution and a description and statement of the agreed value of any other contribution made or agreed to be made by each member." Tex. Bus. Orgs. Code § 101.501(a)(7).

The court's analysis of Sohani's and Virani's contention focused on the "plain meaning" of Sections 101.201 and 101.501 of the Business Organizations Code. At trial, Sunesara testified that he made contributions to the LLCs in the form of \$10,000 cash contributions and "deferred profits" to the startup of Burn I and the acquisition of Burn II. Sunesara did not, however, offer any documentary evidence reflecting those contributions. The record contained no writing setting out the specific contributions made by any of the three members or stating that Sunesara was entitled to one-third of the profits from the LLCs. The company agreements for each of the LLCs were admitted into evidence, but they listed only Sohani and Virani as members and stated, under each of their names, "Made 50% of contributions, Owns 50% of profits and assets." The court construed Section 101.501 of the Business Organizations Code to require an LLC to include a statement of the amount of cash contributions made by each member and a statement of the agreed value of any other contribution made by each member in the written records of the company and construed Section 101.201 to provide that these records establish the allocation of a member's share of the profits and losses of the company. Because Sunesara did not introduce any records of the LLCs reflecting the contributions that he made to the LLCs, the court concluded that he presented no evidence that he is entitled to one-third of the profits of the LLCs under Section 101.201.

Sunesara argued that his testimony that he made contributions to the LLCs sufficed to demonstrate his entitlement to one-third of the profits of the LLCs, but the court stated that the plain language of Section 101.201 requires profits and losses to be allocated on the basis of the agreed value of the contributions made by each member, as stated in the company's records required under Section 101.501, and the plain language of Section 101.501 requires an LLC to maintain a written record of the amount of a cash contribution and a description and statement of the agreed value of any other contribution made or agreed to be made by each member.

Sunesara pointed to the 2008 tax return of MNA Corporation (which stated that Sunesara, Virani, and Sohani were each allocated one-third of the profits for that corporation) and the records of SSV Corporation (which stated that Sunesara and Virani each owned fifty percent of that corporation) and argued that, when the LLCs were created and took over operation of the smoke shops, these records became a part of the records for the LLCs and satisfied the writing requirement of Section 101.201. But the court stated that the corporations and LLCs were all separate and distinct entities, and Sunesara cited no law supporting the proposition that the records from the earlier-formed entities became records of the new LLCs when they began operating the smoke shops. The court stated that the documentary evidence reflecting that Sunesara had a one-third ownership interest in MNA Corporation and a one-half interest in SSV Corporation established only that he was entitled to distributions from MNA Corporation and SSV Corporation, not that he made contributions to the LLCs or that he was entitled to one-third of the profits from the LLCs. Thus, the court held that the trial court erred to the extent that it ruled that Sunesara was entitled to one-third of the profits from each of the LLCs. "Because Sunesara was not assigned a share of profits in the company agreements and presented no evidence that he was entitled to a one-third share of profits in the LLCs, he was not entitled to a share in profits as a matter of law."

2. Voting and Consent by Members and Managers

Pak v. AD Villarai, LLC, No. 05-14-01312-CV, 2018 WL 2077602 (Tex. App.—Dallas May 4, 2018, no pet. h.) (mem. op.).

The court of appeals held that the removal of an individual as co-manager of an LLC was effective where half of the members signed a written consent voting to remove the individual as manager, and the remaining members (one of whom was the individual who was being removed) did not object after receiving written notice of the written consent. The court also held that the subsequent expulsion of the individual as a member from a related LLC was valid under the terms of the company agreement of that LLC.

Pak was the majority member of Villas on Raiford Carrollton Senior Housing, LLC ("Villas CSH") and Villas on Raiford, LLC ("Villas Manager"), the ownership and management entities of a low-income senior housing project. Pak and AD Villarai, LLC, an entity controlled by Anderson, were co-managers of Villas Manager. After

various acts of mismanagement by Pak came to light, the Villas entities sued Pak. Certain members of Villas Manager took action to remove Pak as a manager and member of that entity, and members of Villas CSH subsequently took action to expel Pak as a member from that entity. The issues were tried in a bench trial, and the trial court concluded that Pak was validly removed as co-manager of Villas Manager and that Pak breached his fiduciary duties to Villas CSH and Villas Manager and materially breached the company agreements of each entity. However, the trial court found that the member consent expelling Pak as a member of Villas CSH did not comply with the company agreement and was not effective. Both sides appealed.

On appeal, Pak argued that his removal as co-manager of Villas Manager was not effective because he did not vote as a member in favor of his removal as a manager. The company agreement provided for the removal of a manager with the vote of a majority of the members and defined a majority as more than 50% of the number of members. At the time, Villas Manager had four members, and two of them signed a written consent removing Pak as a manager and member and appointing AD Villarai, LLC as sole manager of Villas Manager. The company agreement of Villas Manager contained a provision authorizing action by the members without a meeting as follows:

Any action required by the BOC [Business Organizations Code] to be taken at a meeting of the Members, or any action which may be taken at a meeting of the Members, may be taken without a meeting, without prior notice, and without a vote if a written consent or consents in writing, setting forth the action so taken, shall have been signed by the Members entitled to vote with respect to the action which is the subject matter of the consent, and such consent shall have the same force and effect as a unanimous vote of the Members.

This provision additionally required that a written consent be signed, dated, and delivered as required by the BOC. Finally, the provision stated that “prompt notice” of any action taken by members without a meeting by less than unanimous consent must be given to those members who did not consent in writing to the action. The court stated that the provision thus contemplated situations in which members would take action without a meeting and without unanimous written consent. In such cases, the agreement required that “prompt notice” be given to those who did not consent, but the agreement did not address the effect of giving such notice. The court then discussed Section 101.359 of the Texas Business Organizations Code, which governs an LLC unless the LLC’s company agreement provides otherwise. Section 101.359 provides that members and managers may take action without a meeting in various ways, and Section 101.359(2)(A) provides that an action is effective if it is taken with the consent of each member, “which may be established by: (A) the member’s failure to object to the action in a timely manner, if the member has full knowledge of the action.” Because nothing in the company agreement of Villas Manager provided that consent could not be established by failure to object as provided by the statute, and the plain wording of the company agreement did not conflict with applying the statute to the member actions in this case, the court concluded that a member’s failure to object after being given written notice of the written consent was deemed consent to the action taken by the written consent such that the action became effective. The evidence showed that Pak and the other member who did not sign the written consent were given written notice three days after the action removing Pak as co-manager, and neither of them objected. Pak argued that the written consent was signed while the two sides were in litigation, and the trial court could not have reasonably concluded that Pak would have consented to his removal, but the court of appeals stated that the statute did not require the trial court to guess at Pak’s reasons for failing to object. Thus, the court of appeals concluded that Pak was validly removed as co-manager of Villas Manager.

The court of appeals also addressed the trial court’s conclusion that Pak’s expulsion as a member of Villas CSH failed to comply with the terms of the company agreement, and the court of appeals held that the evidence conclusively established that Pak was properly expelled. The company agreement of Villas CSH contained the following expulsion provision:

If a Member willfully violated any term of provision of this Agreement and fails or cannot cure such violation within ten (10) business days after having been given notice of the violation by the Company, then the Managers shall have the right, but not the obligation, to expel such Member as a Member of Company, provided, however, that the remaining Members unanimously vote to expel such Member.

The undisputed evidence showed that Pak was given notice of specified violations of the company agreement and that sixteen days later, after Pak failed to cure all the violations, a written consent expelling Pak as a member of Villas CSH was signed by AD Villarai, LLC—the remaining manager of Villas Manager (the manager of Villas CSH)—and the three other members of Villas CSH. The court of appeals explained that the trial court had erroneously concluded that Pak’s vote as well as that of AD Villarai, LLC was required for Villas Manager to act. Although Pak and AD Villarai, LLC had been co-managers of Villas Manager, Pak was validly removed as co-manager of Villas Manager several months before the execution of the written consent expelling Pak as a member from Villas CSH. Thus, at the time of Pak’s expulsion, AD Villarai, LLC was the sole manager with authority to act for Villas Manager. Once AD Villarai, LLC, as sole manager of Villas Manager, voted to expel Pak, the company agreement required the “remaining” members to vote unanimously to expel Pak. The court stated that it was clear in this context that “remaining” members meant members other than Pak. The consent was signed by the three members other than Pak as well as Villas Manager as the manager of Villas CSH. Thus, the court held that the written consent properly expelled Pak as a member.

3. Restrictions on Transfer; Buy-Sell Provisions

Abdullatif v. Choudhri, 2018 WL 1559995, __ S.W.3d __ (Tex. App.—Houston [14th Dist.] 2018, no pet. h.).

In a dispute regarding the ownership of a limited partnership and its general partner, the court of appeals concluded that: (1) the trial court erred in submitting a jury question inquiring whether the parties to written assignments of interests in the limited partnership and its LLC general partner agreed to an alleged oral condition because the alleged condition contradicted the unambiguous terms of the assignments and was thus precluded by the parol evidence rule; (2) the language of certain assignments did not transfer any interest in the LLC general partner of the limited partnership; (3) certain purported transfers of interest in the LLC general partner were null and void ab initio because they were prohibited under the company agreement, and subsequent consent or ratification could not operate to give life to an attempted transfer that was null and void; (4) certain purported transfers of interests in the limited partnership were valid even if the transfers were prohibited by the partnership agreement because the partnership agreement allowed the general partner to recognize a transfer that would otherwise be null and void under the terms of the agreement.

Osama Abdullatif (“Latif”) and Ali Mokaram entered into a real estate investment venture by forming Mokaram Latif West Loop, L.P. (“ML Partnership”) in which Mokaram and Latif were each 49.5% limited partners and Mokaram-Latif General, LLC (“ML General”) was the 1% general partner. Mokaram and Latif were the managers and equal members of ML General. Mokaram and Ali Choudhri became friends and engaged in business transactions together, including transactions in 2008 and 2010 involving ML Partnership and ML General.

The 2008 transaction included an agreement in which Mokaram purported to transfer to Choudhri a limited partnership interest in ML Partnership, and the 2010 transaction included purported assignments by Mokaram to Choudhri of interests in ML Partnership and ML General. Disputes regarding these transactions arose, and eventually Latif purchased all of Mokaram’s interests in ML Partnership and ML General along with all of Mokaram’s claims against Choudhri relating to interests in the entities. Mokaram agreed to continue to pursue his claims against Choudhri in this lawsuit in which Mokaram, Latif, Choudhri, and ML Partnership were parties. The trial court entered a declaratory judgment regarding the ownership of the entities, and Mokaram and Latif appealed.

The first issue the court of appeals addressed was whether the trial court erred in submitting a jury question inquiring whether Mokaram and Choudhri agreed that the 2010 assignment was not effective and that Mokaram would return the money paid by Choudhri to Mokaram. Because the unambiguous language of the assignment provided that it was effective immediately and did not indicate that it was contingent on any condition, the court of appeals concluded that the testimony regarding an alleged oral condition was precluded by the parol-evidence rule from contradicting the unambiguous language of the assignment. Thus, the trial court should not have submitted any question inquiring into the enforceability of the oral condition. The court stated that the parol-evidence rule would not have precluded the trial court from submitting a question about an alleged subsequent agreement to rescind, but the jury question that was submitted did not ask about a subsequent agreement to rescind. The court also stated that the evidence did not raise a genuine fact issue as to whether Mokaram and Choudhri agreed to rescind the assignment after they executed it.

The court next addressed the argument that the trial court lacked jurisdiction over the declaratory judgment claims regarding Choudhri's ownership and management rights in ML General because ML General was not a party. The court of appeals held that the trial court did not lack jurisdiction over the claims. Although the declaratory judgment did not bind ML General, it was binding on the parties in this action.

Next the court of appeals discussed whether the trial court erred in declaring that Choudhri had owned an interest in ML General since the date of the 2008 assignment. Based on the language of the documents executed in 2008, which purported to transfer to Choudhri an interest in ML Partnership and certain real property, the court concluded that Mokaram did not purport to transfer any interest in ML General. The documents indicated that Mokaram and Choudhri thought that ML Partnership owned the real property referred to in the assignments and that they intended to transfer an indirect interest in the real property by transferring an interest in ML Partnership. However, assuming that ML Partnership owned the real property referred to in the assignments, that would not mean that ML General had any ownership in the property, and the court concluded that the evidence did not show that Mokaram transferred any interest in ML General to Choudhri by virtue of the 2008 assignments.

The 2010 assignments purported to transfer from Mokaram to Choudhri interests in both ML General and ML Partnership. Both the company agreement of ML General and the partnership agreement of ML Partnership contained restrictions on transfer, and the court discussed the effect of the purported transfers by Mokaram.

The ML General company agreement prohibited a member from transferring any of its membership interest except in limited circumstances, such as with the approval of members having more than 66.67% of the interests of all members. The company agreement stated that a transfer in violation of its provisions was "null and void ab initio." Assuming Mokaram's execution of the assignments represented his approval of the transfers, there was no evidence that Latif, the other 50% member at the time, approved the assignments before Mokaram purported to assign his interest, and there was no evidence that any of the other circumstances under which a transfer was permitted were present. Choudhri relied on a 2011 consent signed by Latif as manager and member of ML General in which Latif consented to any prior transfers by Mokaram to Choudhri of a membership interest in ML General. The court concluded that the purported assignments were null and void from the outset under the unambiguous language of the company agreement, and as such the purported transfers could not be ratified or validated after the fact. Thus, the trial court erred in declaring that Choudhri had owned 50% of ML General and had been a manager of ML General from and after the 2010 assignments.

The ML Partnership agreement also contained prohibitions on transfer, and the court next addressed the effect of purported assignments in 2010 by Mokaram to Choudhri of a limited partnership interest in ML Partnership. Section 10.1 of the partnership agreement prohibited a limited partner from transferring all or any portion of the limited partner's interest without the prior written consent of the general partner. Section 10.2 of the partnership agreement contained a right-of-first-refusal provision in favor of the other partners in the event a limited partner received a bona fide offer to purchase all or any portion of the limited partner's interest. Section 10.3 provided for certain "Permitted Transfers" (to a trust for the benefit of the limited partner, the guardian or estate of a limited partner, or a person approved by all the partners) notwithstanding the consent otherwise required by Section 10.1. Section 10.6 provided that a transfer that was not permitted under the partnership agreement "shall be null and void and of no effect whatever; provided that if the Partnership is required to recognize a Transfer that is not permitted (or if the Partnership, in its sole discretion, elects to recognize a Transfer that is not permitted)," the transferred interest was limited to the transferor's rights to allocations and distributions. Finally, Section 10.10 provided that the partnership was not required to recognize the interest of any transferee who obtained a purported transferred interest pursuant to a transfer that was not authorized by the partnership agreement, and such a transfer was "null and void for all purposes."

The court stated that the plain meaning of "null and void and of no effect whatever" would preclude a transfer that was not permitted by the partnership agreement from being subject to ratification, confirmation, or waiver, but the court concluded that the phrase "null and void and of no effect whatever" was not used in its ordinary sense given that the agreement unambiguously provided that the partnership could elect to recognize a transfer that was not permitted and thus was or would have been "null and void and of no effect whatever." The court noted the difference between the ML General company agreement (which the court had held did not permit ratification of a null and void transfer) and the ML Partnership agreement and concluded that the two agreements were separate and independent agreements that should not be construed together as one. Further, assuming the agreements should be construed as a single contract, the provisions unambiguously allowed the recognition of an

otherwise void transfer of a partnership interest but did not allow the recognition of a void transfer of a membership interest.

Because Mokaram signed the assignment of his interests to Choudhri not only as assignor, but in his capacity as manager of ML General, the general partner of ML Partnership, under a legend stating that the transfer was consented to by the general partner, the court concluded that ML Partnership recognized the transfer of the interests. Relying on the language of the ML General company agreement (which provided that the managers shall have the sole and exclusive control of the management of ML General and shall make all decisions not otherwise provided for in the company agreement) and Section 101.254 of the Business Organizations Code (which provides that each governing person is an agent of the LLC for the purpose of its business), the court stated that Mokaram's signature as manager was binding on ML General, and ML Partnership thus recognized the transfer as valid and effective as provided by Section 10.6 of the partnership agreement. The court concluded that an earlier purported transfer in 2008 by Mokaram to Choudhri of a limited partnership interest was not effective because there was no evidence that the transfer was permitted under any of the provisions of the partnership agreement nor was there any evidence that the partnership was required to recognize the transfer or exercised its discretion to recognize the transfer.

Finally, the court concluded that the trial court did not err in refusing to clarify what rights Choudhri had as a result of his ownership of an interest in ML Partnership. The trial court declared that Choudhri owned 49.5% of ML Partnership from and after the 2010 assignments and that he had "all beneficial rights and interests" that flowed from his ownership of an interest in ML Partnership. The court stated that the interests transferred to Choudhri were limited to rights to allocations and distributions under the unambiguous language of Section 10.6 of the partnership agreement, and neither Section 10.2 nor 10.6 gave Choudhri the right to become a limited partner under the assignments. The trial court did not declare that Choudhri was a limited partner, and although the "beneficial rights and interests" were significantly limited by the agreement, the trial court did not inaccurately characterize them. Thus, the court of appeals concluded that the trial court did not err in making the declaration and in refusing to clarify it.

Sinclair Grp., Ltd. v. Haggblom, 2018 WL 1747355, __ S.W.3d __ (Tex. App.—Beaumont 2018, no pet. h.).

The court interpreted an arbitration clause and a valuation provision in a company agreement that contained a buyout provision under which an interest would be valued by an appraiser pursuant to a specified method. The agreement provided that the appraiser's determination "shall be binding on the parties." The arbitration clause required the parties to arbitrate "[a]ny and all disputes, controversies, or claims arising out of or relating to this Agreement, including without limitation, claims based on contract, tort, or statute[.]" The court held that a dispute as to whether the appraiser followed the method established by the parties was subject to arbitration notwithstanding the "binding" nature of the appraiser's valuation.

Bernal v. DK8 LLC (In re HBT JV, LLC), 571 B.R. 729 (Bankr. N.D. Tex. 2017).

A 48% LLC member did not properly exercise his right of first refusal to purchase the other member's 52% interest, and the majority member's subsequent conduct (even assuming the majority member's conduct constituted a waiver of the minority member's noncompliance with the terms of the right of first refusal, which the court found was not the case) could not operate to revive the lapsed option right. Further, assuming the minority member properly exercised the right of first refusal, his subsequent conduct indicating he did not intend to match the third-party offer constituted a repudiation of the contract and waiver of his right to specific performance. Finally, the right of first refusal was phrased solely in terms of a right to purchase the membership interest of the other member and thus did not entitle the minority member to purchase land owned by a related company on which the business of the LLC was located.

Bernal purchased a 48% membership interest in an LLC that owned a car dealership and entered into an amended and restated company agreement and a transfer agreement with the 52% member. The transfer agreement provided each member the right to purchase the other member's interest under certain circumstances, including a third-party offer to purchase all or substantially all of the assets of the LLC that one member wants the LLC to accept and the other member does not want the LLC to accept. In such a case, the non-consenting member was permitted to withhold consent and purchase the interest of the member who was in favor of the sale to the third party pursuant to a formula set forth in the transfer agreement. The LLC received a third-party offer to purchase

its assets, and the LLC accepted the offer subject to Bernal's rights under the transfer agreement. Notice of the offer was sent to Bernal, and after Bernal analyzed financial information and had communications with the third party, Bernal responded to the notice stating that he did not consent to the sale of the LLC's assets and was exercising his right to purchase the majority member's interest on terms set forth in his response.

The court examined the terms of the transfer agreement and the terms of Bernal's exercise of his preferential purchase right, and the court concluded that Bernal did not properly exercise his preferential right because his acceptance was not "positive, unequivocal, unambiguous, and unconditional." Instead of accepting the fluctuating price that was specified in the third-party offer, Bernal specified a fixed price for the majority member's interest, and Bernal also included an adjustment to the fixed price pursuant to a "forensic audit" to determine the "effective repayment amount" of a note that Bernal executed in connection with the purchase of his membership interest in the LLC. The court said that Bernal's terms were either (1) an unambiguous rejection and counteroffer or (2) an ambiguous acceptance. In either event, Bernal's terms did not satisfy the requirements for proper exercise of the preferential right to purchase. Bernal argued that the majority member waived its right to argue that Bernal's exercise of his purchase right was ineffective, but the court stated that "applicable case law makes clear . . . that a lapsed option contract cannot be revived by a subsequent purported waiver." In any event, the court concluded that there was no waiver by the majority member. Furthermore, even if Bernal properly exercised his preferential right, the court concluded that his subsequent conduct repudiated the contract by proposing a membership interest purchase agreement that demonstrated Bernal did not intend to match the third-party offer and comply with the transfer agreement. Among the aspects of the membership interest purchase agreement relied on by the court to reach this conclusion were fixed-price and offset provisions and "stunningly broad 'Due Diligence Materials' and 'Representations and Warranties,' and related indemnities [that] might be expected in a dealership asset sale by [the LLC] but not in a sale of a membership interest by [the majority member]." The court pointed out that the transfer agreement described the transfer documents only as "'a legally sufficient assignment of the Membership Interest being sold free and clear of any and all liens and other encumbrances other than those imposed by the LLC Agreement or this [Transfer] Agreement together with covenants of special warranty.'"

Finally, although the third-party offer included land leased to the car dealership LLC by a related company, the court held that Bernal's preferential right to purchase was limited by the terms of the transfer agreement to the majority member's interest in the car dealership LLC. The court said that no Texas case has allowed the holder of a preferential right to compel the sale of property not encompassed by the preferential right. Even assuming Bernal somehow had a preferential right to the real estate at issue, the court said that the best Bernal could do would be to accept all the conditions of the third-party offer and step into the shoes of the third party and attempt to negotiate a definitive agreement.

4. Contractual Modification of Fiduciary Duties

Super Starr Int'l, LLC v. Fresh Tex Produce, LLC, 531 S.W.3d 829 (Tex. App.—Corpus Christi 2017, no pet.).

The court addressed claims for breach of fiduciary duty in the context of an operating agreement that contained an expired exclusivity provision, a provision allowing members access to books and records, and a provision allowing members to compete. The court concluded that the claims for breach of fiduciary duty failed, but the provisions did not permit the unauthorized use of the LLC's trade secrets.

Fresh Tex Produce, LLC (the "Distributor") filed suit individually and derivatively on behalf of Tex Starr Distributing, LLC. The defendants were Super Starr International, LLC (the "Importer"); Lance Peterson, the President of the Importer; Red Starr, SPR de R.L. de C.V. (the "Grower"); and Kemal Mert Gumus, an employee of the Importer.

In December 2010, Kenneth Alford, president of the Distributor, and Lance and David Peterson, on behalf of the Importer, created Tex Starr Distributing, LLC (the "LLC"). Under the Tex Starr operating agreement, the Distributor and the Importer were the LLC's only members, Alford and David Peterson were the only managers, and Alford was the president. The operating agreement also included an exclusivity provision mandating that the LLC serve as the "sole and exclusive distributor of papayas exported into the United States by [the Importer] and/or other existing or future companies of Lance Peterson and/or David Peterson pertaining in whole or in part to the growing, production, shipping or packaging of papayas." The provision lasted until the end of 2013. In January

2014, a nearly identical operating agreement took effect. The exclusivity provision in the revised operating agreement lasted until the end of 2015.

At the end of December 2015, the exclusivity provision under the revised operating agreement expired. Alford testified that he and Lance Peterson attempted to negotiate a new term of exclusive distributorship, but the two sides were unable to reach an agreement. From January 2016 through March 2016, the Distributor and the Importer continued working together under the same terms as the revised operating agreement. In March 2016, Lance Peterson told Alford that beginning in July 2016, the Importer would no longer supply the LLC with papayas. Instead, the Importer would distribute and market the papayas to customers in the United States on its own.

In October 2016, the Distributor filed an original petition and application for injunctive relief. After a hearing, the trial court signed a temporary injunction order finding that the Distributor had demonstrated a probable right to relief through its claims against the defendants. It granted injunctive relief mandating that the Importer, Lance Peterson, and the Grower (collectively “appellants”) continue the exclusive business relationship with the LLC and prohibiting conduct deemed competitive against the LLC.

The temporary injunction order also imposed non-competition restrictions against the appellants, premised in part on the Distributor’s claims for breach of fiduciary duty. The court observed that the elements of a breach of fiduciary duty claim are (1) the existence of a fiduciary duty, (2) breach of the duty, (3) causation, and (4) damages. The court concluded that the order’s non-competition restrictions could not be premised on the Distributor’s breach of fiduciary duty claim because the exclusivity provision in the revised operating agreement expired on December 31, 2015. Even if that were not the case, the Distributor failed to reference any evidence that supported the breach element of the claim. Finally, the court noted that the gravamen of the Distributor’s breach of fiduciary duty action duplicated its claim based on the Texas Uniform Trade Secrets Act (“TUTSA”). Because TUTSA generally “displaces conflicting tort, restitutionary, and other law of this state providing civil remedies for misappropriation of a trade secret,” the court concluded that the preemption provision in TUTSA precluded the Distributor’s breach of fiduciary duty claim from serving as a basis for temporary injunctive relief.

In discussing the claim based on TUTSA, the court concluded that § 6.4 of the operating agreement (which stated that the LLC’s books and records shall be open to inspection and copying at all reasonable times) did not give the Importer the absolute right to take all of the LLC’s confidential information without regard to any trade secret protection. Section 3.4(a) of the operating agreement mandated that “[e]ach Member shall keep confidential” the “private, secret, and confidential information.” According to the court, read in conjunction, § 6.4 allowed inspection, but § 3.4(a) mandated confidentiality. Furthermore, there was no indication that § 6.4 undercut the confidentiality requirement of § 3.4(a).

The court also noted that § 3.5 of the operating agreement, which allowed each Manager and Member to engage in any activity whatsoever, whether or not such activity competed with the LLC, did not allow members to use the LLC’s trade secrets. To the contrary, § 3.5 began with the phrase “except as prohibited by [§] 3.4”—a provision obligating the members to maintain the confidentiality of the LLC’s information. Moreover, the court stated that appellants’ interpretation of § 3.5 did not comport with another provision that “[a]ll property owned by [the LLC], tangible or intangible, shall be deemed to be owned by [the LLC] as an entity, and no Member shall have any ownership of such property individually.” Similarly, the Business Organizations Code provides that the member of an LLC or an assignee of a membership interest in an LLC does not have an interest in any specific property of the company. Thus, according to the court, any trade secrets belonged to the LLC.

5. Indemnification and Advancement

Sandt v. Energy Maint. Servs. Group I, LLC, 534 S.W.3d 626 (Tex. App.—Houston [1st Dist.] 2017, pet. denied).

The court of appeals affirmed the judgment of the trial court that a Delaware LLC owed indemnity to its officer and that a settlement agreement precluded further collection of the judgment against the officer.

Jim Sandt, a former officer and member of Energy Maintenance (a Delaware LLC), sued Energy Maintenance, Timothy Nesler (the company’s CEO), and other officers claiming that the defendants had committed fraud and breach of fiduciary duty by wrongfully diluting his ownership interest. While Sandt’s suit was pending, the Energy Maintenance board agreed in a company resolution to indemnify Nesler for any liability arising out of or related to the Sandt litigation. The board resolution stated that the board agreed to indemnify Nesler after reviewing the Sandt litigation and discussing it with the company’s officers and attorneys. The resolution also stated

that the board had determined that Nesler acted in good faith and in a manner that he reasonably believed was in the company's best interest.

A jury found in favor of Sandt and against Energy Maintenance and Nesler. While an appeal was pending, the company's primary creditor took control and terminated Nesler from his position as CEO. The new board of directors then voted to revoke the prior indemnification as of the date it was purportedly granted. The rationale for the revocation was, in part, that Nesler had misrepresented to the board the facts related to the Sandt matter. After the company refused to provide indemnification, it filed suit against Nesler seeking a declaration that it did not owe him indemnity and claiming that the jury's findings of fraud and breach of fiduciary duty against him alleviated the company's indemnification obligation. Nesler counterclaimed for breach of contract.

The trial court ruled that Nesler was entitled to indemnification and that the company's failure to provide it was a breach of contract. Because a settlement agreement between the company and Sandt stated that Sandt could not recover any further, directly or indirectly, from the company, the trial court further declared that Sandt could not pursue Nesler for any amounts that the company had to indemnify. Both the company and Sandt appealed.

On appeal, the court noted that Energy Maintenance was a Delaware LLC; thus, Delaware law controlled the interpretation of the company's formation agreement. The court cited a number of Delaware law propositions, including (1) "[u]nder Delaware law, a limited liability company may indemnify any member, manager, or another 'against any and all claims and demands whatsoever,' subject to whatever standards or restrictions are included in its company agreement"; (2) "[f]or limited liability companies, Delaware law 'defers completely to the contracting parties to create and delimit rights and obligations with respect to indemnification'"; (3) "[w]hen interpreting the provisions of a limited liability company agreement, ordinary contract interpretation rules apply; the court's role is to effect the parties' intent based on the plain meaning of the agreement's terms"; and (4) "[a] court cannot rewrite or add omitted provisions in the guise of interpreting a contract."

The court noted that Article VIII of the Energy Maintenance company agreement contained provisions for indemnification and advancement of expenses. Although the provisions obligated Energy Maintenance to indemnify persons who acted in good faith, it vested the board with the authority to decide if they did act in good faith. The agreement expressly specified that an adverse judgment did not create a presumption of bad faith, and it stated a company policy of indemnifying corporate officers to the fullest extent legally possible. According to the court, "Energy Maintenance's company agreement does not, in express and affirmative terms, make members and directors ineligible for indemnification previously granted simply because a jury finds that they did not act in good faith, and we cannot rewrite its company agreement to say something it does not." In addition, the court concluded that unless Energy Maintenance had a contractual right to reconsider its decision to indemnify Nesler, it could not rescind its earlier determination. Because "[n]either its company agreement nor the board's 2007 indemnity resolution reserved a right to revisit Nesler's right to indemnity," the court concluded that the company "could not rescind its agreement to indemnify him."

Despite the company agreement provisions that vested the board with the authority to determine whether the conditions for authorizing indemnification had been met, Energy Maintenance contended that the jury's unfavorable verdict and the judgment against Nesler for fraud disproved his good faith and thereby provided a basis for the board to revoke its earlier grant of indemnity. The company relied on Delaware decisions construing that state's corporate indemnification statute, 8 Del. Code § 145, for the proposition that a jury's finding of fraud negates good faith as a matter of public policy. The court disagreed, noting that the statutes governing Delaware corporations and Delaware limited liability companies were different. Unlike Section 145, which applied to corporations, the statute governing limited liability companies allowed indemnity "against any and all claims and demands whatsoever," subject only to the express terms of the company agreement. This statute did not purport to adopt or incorporate Delaware's public policy regarding indemnity in the corporate context, and it deferred instead to the contracting parties to place limits on indemnification.

Although the court decided that the company was obligated to indemnify Nesler from liability in the Sandt litigation, it also concluded that Sandt, in a settlement agreement, agreed to forego any collection of the judgment against Nesler for which the company would be liable. The settlement agreement provided that Sandt "will not seek to execute and will not accept recovery, in each case whether directly or indirectly, against" Energy Maintenance for any remaining liability arising from the suit. The trial court reasoned that Energy Maintenance owed indemnity to Nesler, and thus an attempt to collect the remaining money that Nesler owed under the Sandt judgment would violate the settlement agreement's clause barring Sandt from recovering any additional sum from Energy Maintenance "directly or indirectly." In light of this clause and others, the court of appeals concluded that the trial

court correctly interpreted the settlement agreement: “In sum, the settlement agreement bars Sandt from recovering from Nesler because it would result in an indirect recovery from Energy Maintenance, which is obligated to indemnify Nesler for the Sandt judgment.”

6. Arbitration

Sinclair Grp., Ltd. v. Haggblom, 2018 WL 1747355, ___ S.W.3d ___ (Tex. App.—Beaumont 2018, no pet. h.).

The court interpreted an arbitration clause and a valuation provision in a company agreement that contained a buyout provision under which an interest would be valued by an appraiser pursuant to a specified method. The valuation provision provided that the appraiser’s determination “shall be binding on the parties.” The arbitration clause required the parties to arbitrate “[a]ny and all disputes, controversies, or claims arising out of or relating to this Agreement, including without limitation, claims based on contract, tort, or statute[.]” The court held that a dispute as to whether the appraiser followed the method established by the parties was subject to arbitration notwithstanding the “binding” nature of the appraiser’s valuation.

Super Starr Int’l, LLC v. Fresh Tex Produce, LLC, 13–17–00184–CV, 2017 WL 4054395 (Tex. App.—Corpus Christi Sept. 14, 2017, no pet.) (mem. op.).

Interpreting a broad arbitration clause in an LLC agreement that incorporated the AAA Rules, the court of appeals held that the clear and unmistakable intent of the parties was that the arbitrator should determine the issue of arbitrability.

Appellants Lance Peterson and his two companies Super Starr International, LLC (the “Importer”) and Red Starr, SPR de RL de CV (the “Grower”) collaborated with appellee Fresh Tex Produce, LLC (“Fresh Tex”) to distribute papayas in the United States. Together, appellants and Fresh Tex formed a separate company for distribution: Tex Starr Distributing, LLC (the “LLC”). The relationship between the parties soured, and Fresh Tex filed suit, individually and derivatively on behalf of the LLC. The crux of Fresh Tex’s suit was that the appellants committed various torts when they started a competing produce-distribution operation and took customers away from Fresh Tex and the LLC. The appellants moved to compel arbitration.

Both the original LLC agreement entered into in 2011 and a second LLC agreement entered into in 2013 contained the following arbitration clause:

14.7 Arbitration. Any claim, controversy, or dispute arising out of or relating to this Agreement shall, except as set forth herein, be settled by arbitration in the State of Texas in accordance with the rules of the American Arbitration Association. This agreement to arbitrate shall survive the termination of this Agreement. Any arbitration shall be undertaken pursuant to the Federal Arbitration Act, where applicable, and the decision of the arbitrators shall be final, binding, and enforceable in any court of competent jurisdiction. In any dispute in which a party seeks in excess of \$50,000 in damages, three arbitrators shall be employed. Otherwise, a single arbitrator shall be employed. All costs relating to the arbitration shall be borne equally by the parties, other than their own attorneys’ fees. The arbitrators shall not award punitive damages. Discovery depositions shall not be taken in the arbitration proceedings. Any Member may pursue remedies for emergency or preliminary injunctive relief in any court of competent jurisdiction. However, immediately following the issuance or denial of any such emergency or injunctive relief, the Members party to such a proceeding shall consent to the stay of such judicial proceedings on the merits of both this Agreement and the related transaction pending arbitration of all underlying claims between the Members.

The court first addressed whether the trial court or the arbitrator should decide the threshold issue of arbitrability. The agreement provided that “[a]ny claim, controversy, or dispute arising out of or relating to this Agreement shall, except as set forth herein, be settled by arbitration in the State of Texas in accordance with the rules of the American Arbitration Association.” The broad arbitration clause and the incorporation of the AAA rules together served as “clear and unmistakable evidence of the parties’ intent to delegate the question of arbitrability to the arbitrator.” Fresh Tex argued that there was uncertainty as to which version of the AAA rules applied in this

case—the 2009 version of the rules in effect when the first LLC agreement was executed or the 2013 version in effect when the second agreement was executed. Fresh Tex argued that this uncertainty prevented the appellants from demonstrating a clear and unmistakable agreement to arbitrate the question of arbitrability. The court concluded that, even assuming some uncertainty as to which version of the rules applied here, both versions of the rules provide the arbitrator with the power to determine his or her own jurisdiction. Because there was unmistakable evidence that the parties agreed to arbitrate questions of arbitrability, it was for the arbitrator to decide whether Fresh Tex must arbitrate its claims.

Brittingham v. Mirabent, No. 04-17-00028-CV, 2017 WL 2852627 (Tex. App.—San Antonio July 5, 2017, no pet.) (mem. op.).

The court of appeals affirmed a trial court order denying Brittingham’s motion to compel arbitration of the direct claims asserted against him by Mirabent. The court concluded that an arbitration clause in the LLC’s company agreement did not cover the direct claims asserted by Mirabent.

The sole issue presented on Brittingham’s appeal was whether Mirabent’s direct claims were within the scope of an arbitration clause contained in the company agreement governing the ownership and management of Beyond Contact Centers, LLC (“Beyond Contact”), a Texas limited liability company. The arbitration clause stated:

- (a) This Article 11 shall apply to any of the following types of disputes (each a “Dispute”):
 - (i) any dispute as to fair market value under Sec. 3.03(c)(ii)(B) or 11.04;
 - (ii) any dispute as to any accounting or tax issue under this Agreement; or
 - (iii) except for disputes described in the foregoing paragraphs (i) and (ii), (A) any dispute regarding the construction, interpretation, performance, validity, or enforceability of any provision of the Certificate or this Agreement, or whether any Person is in compliance with, or [in] breach of, any provisions of the Certificate or this Agreement; or (B) any other dispute of a legal nature arising under the Certificate or this Agreement, it being intended that this Sec. 11.01(a)(i) shall not include any disputes of a purely business nature, such as disputes as to business strategy.

Mirabent alleged that he was induced into signing a Restructuring Agreement and a Consulting and Nonsolicitation Agreement by Brittingham’s misrepresentations that Mirabent would be retained as a paid consultant and that Mirabent’s liability to American Express would be released or satisfied. After the restructuring, Mirabent alleged that that he was not paid under the terms of the consulting agreement and that his liability to American Express was not released or satisfied. Brittingham asserted that Mirabent’s claims were disputes covered by section (a)(iii) of the arbitration clause.

The court concluded that, “although the restructuring involved Beyond Contact, the factual allegations regarding the execution of and terms of the Restructuring Agreement and the Consulting and Nonsolicitation Agreement are completely independent of the Company Agreement.” It noted that none of Mirabent’s claims required any reference to the company agreement. In addition, the restructuring was not limited to Beyond Contact but involved three other entities, and the terms of the Company Agreement did not need to be reviewed to finalize the restructuring. Finally, “the misrepresentations regarding the consulting agreement and the American Express debt stand totally apart from and are completely independent of the Company Agreement.” According to the court, therefore, “Mirabent’s claims stand alone and are not within the scope of the arbitration provision in the Company Agreement.”

The court distinguished an earlier San Antonio Court of Appeals decision on the grounds that, unlike the earlier decision, “the terms of the Company Agreement do not have to be reviewed in resolving Mirabent’s direct claims in the instant case because Mirabent’s claims are exclusively based on the terms of the Restructuring Agreement and the Consulting and Nonsolicitation Agreement and the misrepresentations made to induce Mirabent into signing those agreements.” The court also distinguished a Beaumont Court of Appeals decision by noting that “[t]he phrase ‘arising out of or relating to’ an agreement which was examined in [the Beaumont opinion] is much broader than the phrase ‘arising under’ an agreement which is the language contained in the arbitration provision in the instant case.”

K. Withdrawal or Expulsion of Member; Removal of Manager

Pak v. AD Villarai, LLC, No. 05–14–01312–CV, 2018 WL 2077602 (Tex. App.—Dallas May 4, 2018, no pet. h.) (mem. op.).

The court of appeals held that the removal of an individual as co-manager of an LLC was effective where half of the members signed a written consent voting to remove the individual as manager, and the remaining members (one of whom was the individual who was being removed) did not object after receiving written notice of the written consent. The court also held that the subsequent expulsion of the individual as a member from a related LLC was valid under the terms of the company agreement of that LLC.

Pak was the majority member of Villas on Raiford Carrollton Senior Housing, LLC (“Villas CSH”) and Villas on Raiford, LLC (“Villas Manager”), the ownership and management entities of a low-income senior housing project. Pak and AD Villarai, LLC, an entity controlled by Anderson, were co-managers of Villas Manager. After various acts of mismanagement by Pak came to light, the Villas entities sued Pak. Certain members of Villas Manager took action to remove Pak as a manager and member of that entity, and members of Villas CSH subsequently took action to expel Pak as a member from that entity. The issues were tried in a bench trial, and the trial court concluded that Pak was validly removed as co-manager of Villas Manager and that Pak breached his fiduciary duties to Villas CSH and Villas Manager and materially breached the company agreements of each entity. However, the trial court found that the member consent expelling Pak as a member of Villas CSH did not comply with the company agreement and was not effective. Both sides appealed.

On appeal, Pak argued that his removal as co-manager of Villas Manager was not effective because he did not vote as a member in favor of his removal as a manager. The company agreement provided for the removal of a manager with the vote of a majority of the members and defined a majority as more than 50% of the number of members. At the time, Villas Manager had four members, and two of them signed a written consent removing Pak as a manager and member and appointing AD Villarai, LLC as sole manager of Villas Manager. The company agreement of Villas Manager contained a provision authorizing action by the members without a meeting as follows:

Any action required by the BOC [Business Organizations Code] to be taken at a meeting of the Members, or any action which may be taken at a meeting of the Members, may be taken without a meeting, without prior notice, and without a vote if a written consent or consents in writing, setting forth the action so taken, shall have been signed by the Members entitled to vote with respect to the action which is the subject matter of the consent, and such consent shall have the same force and effect as a unanimous vote of the Members.

This provision additionally required that a written consent be signed, dated, and delivered as required by the BOC. Finally, the provision stated that “prompt notice” of any action taken by members without a meeting by less than unanimous consent must be given to those members who did not consent in writing to the action. The court stated that the provision thus contemplated situations in which members would take action without a meeting and without unanimous written consent. In such cases, the agreement required that “prompt notice” be given to those who did not consent, but the agreement did not address the effect of giving such notice. The court then discussed Section 101.359 of the Texas Business Organizations Code, which governs an LLC unless the LLC’s company agreement provides otherwise. Section 101.359 provides that members and managers may take action without a meeting in various ways, and Section 101.359(2)(A) provides that an action is effective if it is taken with the consent of each member, “which may be established by: (A) the member’s failure to object to the action in a timely manner, if the member has full knowledge of the action.” Because nothing in the company agreement of Villas Manager provided that consent could not be established by failure to object as provided by the statute, and the plain wording of the company agreement did not conflict with applying the statute to the member actions in this case, the court concluded that a member’s failure to object after being given written notice of the written consent was deemed consent to the action taken by the written consent such that the action became effective. The evidence showed that Pak and the other member who did not sign the written consent were given written notice three days after the action removing Pak as co-manager, and neither of them objected. Pak argued that the written consent was signed while the two sides were in litigation, and the trial court could not have reasonably concluded that Pak would have consented to his removal, but the court of appeals stated that the statute did not require the trial court to guess

at Pak’s reasons for failing to object. Thus, the court of appeals concluded that Pak was validly removed as co-manager of Villas Manager.

The court of appeals also addressed the trial court’s conclusion that Pak’s expulsion as a member of Villas CSH failed to comply with the terms of the company agreement, and the court of appeals held that the evidence conclusively established that Pak was properly expelled. The company agreement of Villas CSH contained the following expulsion provision:

If a Member willfully violated any term of provision of this Agreement and fails or cannot cure such violation within ten (10) business days after having been given notice of the violation by the Company, then the Managers shall have the right, but not the obligation, to expel such Member as a Member of Company, provided, however, that the remaining Members unanimously vote to expel such Member.

The undisputed evidence showed that Pak was given notice of specified violations of the company agreement and that sixteen days later, after Pak failed to cure all the violations, a written consent expelling Pak as a member of Villas CSH was signed by AD Villarai, LLC—the remaining manager of Villas Manager (the manager of Villas CSH)—and the three other members of Villas CSH. The court of appeals explained that the trial court had erroneously concluded that Pak’s vote as well as that of AD Villarai, LLC was required for Villas Manager to act. Although Pak and AD Villarai, LLC had been co-managers of Villas Manager, Pak was validly removed as co-manager of Villas Manager several months before the execution of the written consent expelling Pak as a member from Villas CSH. Thus, at the time of Pak’s expulsion, AD Villarai, LLC was the sole manager with authority to act for Villas Manager. Once AD Villarai, LLC, as sole manager of Villas Manager, voted to expel Pak, the company agreement required the “remaining” members to vote unanimously to expel Pak. The court stated that it was clear in this context that “remaining” members meant members other than Pak. The consent was signed by the three members other than Pak as well as Villas Manager as the manager of Villas CSH. Thus, the court held that the written consent properly expelled Pak as a member.

L. Record Keeping Requirements and Access to Books and Records

Sohani v. Sunesara, 546 S.W.3d 393 (Tex. App.—Houston [1st Dist.] 2018, no pet. h.).

The court of appeals held that the trial court erred in entering a judgment that a member of three LLCs was entitled to one-third of the profits of each of the LLCs because the Texas Business Organizations Code provides that profits and losses are allocated to the members based on the agreed value of the members’ contributions as stated in the company’s records, and none of the LLCs had a record of the member’s alleged contribution. Although the member testified that he contributed cash to the LLCs, and the jury found that the member was entitled to a one-third profit distribution from each LLC, the court of appeals stated that allowing the member’s oral testimony to establish his entitlement to one-third of the profits of the LLCs in the absence of any written records of his contributions would be contrary to the plain language of the LLC statute.

Nizar Sunesara and Anis Virani started selling smoking accessories and devices in flea markets on the weekends in 2002, and the next year they established a brick-and-mortar retail shop called “Zig Zag Smoke Shop.” Sunesara created MNA Corporation to operate Zig Zag, and Virani and Sunesara offered Manisch Sohani (a supplier of Zig Zag) an ownership interest in the business. The three men each owned one third of MNA Corporation, and profits of Zig Zag were distributed in cash each month. Sunesara and Virani both took positions with Sohani’s company, and Sunesara transitioned out of the day-to-day business of Zig Zag while Virani continued to manage Zig Zag’s day-to-day operations as well as working for Sohani’s company. Zig Zag did well, and in 2012, Virani and Sunesara started a second retail location, which they called “Burn Smoke Shop” (“Burn I”). Sunesara testified that he contributed \$10,000 cash to the start up of Burn I. He stated that he gave the money to Virani and did not request any receipt or documentation of his contribution. SSV Corporation, which was incorporated by Sunesara in 2007, owned the assets of both Zig Zag and Burn I. Sunesara and Virani each owned 50% of SSV Corporation, but records showed that Sohani shared equally with Sunesara and Virani in profit distributions, and Sunesara testified that Sohani was considered a partner even though he was not a formal owner.

Toward the end of 2012, Sunesara, Virani, and Sohani agreed to buy an existing retail smoke shop, whose name they changed to “Burn Smoke Shop Two” (“Burn II”). Sunesara testified that he contributed \$10,000 cash

to the start up of Burn II, again giving the money to Virani without obtaining any receipt or documentation of his contribution. Before the purchase of Burn II was finalized, Sohani and Virani asked Sunesara to file paperwork with the Texas Secretary of State to form three LLCs to run the three smoke shops. Each certificate of formation, which was signed by Sunesara but not the other two men, listed Sohani, Virani, and Sunesara as governing persons. Signature cards and depository resolutions for the bank accounts for the three LLCs listed all three men as members and were signed by all three men. Virani and Sohani claimed that Sunesara handled the paperwork for forming the LLCs and opening the bank accounts, and Virani and Sohani claimed that they should have been listed as the only two members of the LLCs. The franchise tax public information report for 2013 listed all three men as members of the LLCs, but the franchise tax report for 2014 as well as federal income tax returns for 2013 and 2014 only listed Virani and Sohani as members or owners of the LLCs.

Sohani and Virani testified that Sunesara did not contribute anything to the three shops. They also testified that they never received any profit distributions from the LLCs because the profits went to Sohani's company to pay back inventory Sohani contributed and to pay other vendors and creditors of the LLCs.

After federal law enforcement officers began targeting sellers of synthetic marijuana and raiding retailers, wholesalers, and distributors in the smoke shop industry, Sunesara became concerned because Sohani's company and the three retail shops sold synthetic marijuana. Sunesara wanted Sohani's company and the shops to stop selling the product. Sohani's company was raided in 2013, and Sunesara took a leave of absence from the company and did not return. After the raid, Sohani and Virani realized that they lacked important documentation for the LLCs, such as operating agreements, and (after conducting internet research) the two men drafted and signed form operating agreements listing them as members and stating that they each made 50% of contributions and owned 50% of profits and assets. Sunesara's name did not appear in any of the three agreements, and he was not involved in the drafting of the agreements. Sunesara testified that he received monthly profit distributions for the first five months of 2013 and inquired regularly "what the situation was with profit distributions" after the raid but was given excuses why there were no distributions until October of 2013, when the parties ceased communicating. The parties disagreed over whether Sunesara had a share of the business, and Sohani and Virani were unable to open new bank accounts or obtain loans for the LLCs without Sunesara's authorization and signature. In 2015, Virani and Sohani sued Sunesara in Harris County Civil Court at Law, asserting various causes of action, including a claim for a declaratory judgment that Sunesara was not a member of the LLCs. Sunesara asserted several counterclaims, including a claim for a declaratory judgment that he was a member of the LLCs and was entitled to one-third of the profits. Eventually, Sunesara dropped all his claims other than his claims for a declaration that he was a member of the LLCs, was entitled to one-third of the profits of the LLCs, and was entitled to examine the LLCs' books and records.

The jury answered "yes" to three questions inquiring whether Sunesara was a member entitled to a one-third profit distribution of each of the LLCs at the time they were formed. No definitions or instructions accompanied these questions. The jury also found that Sohani and Virani were estopped to deny Sunesara was a member of the LLCs and that Sunesara did not commit fraud against Virani and Sohani. After the verdict, Virani and Sohani moved to dismiss the action for lack of subject-matter jurisdiction based on documentation that they argued demonstrated the combined total of one-third profit distributions from the three LLCs exceeded \$200,000, the upper limit of the county court's jurisdictional limits. Sohani and Virani also argued that Sunesara presented only his self-serving testimony that he was a member and had made contributions to the LLCs but presented no evidence of an oral or written operating agreement entitling him to membership and one-third of the profits of the LLCs. Virani and Sohani relied on Tex. Bus. Orgs. Code § 101.201, which provides that profits and losses of an LLC shall be allocated on the basis of the agreed value of the contributions made by each member, as stated in the company's records. The trial court entered judgment in favor of Sunesara declaring that he was a member of the LLCs and entitled to one-third of the profits from the LLCs.

The court first addressed a challenge to the trial court's subject-matter jurisdiction. Sohani and Virani argued that the trial court lacked jurisdiction because Sunesara sought damages in the form of one-third of the LLCs' net profits in an amount that exceeded the jurisdictional limits of the county civil court at law. The Texas Government Code provides in general that a statutory county court has jurisdiction over all matters prescribed by law for county courts and has concurrent jurisdiction with the district court in cases in which the matter in controversy exceeds \$500 but does not exceed \$200,000 as alleged on the face of the petition. Provisions of the Government Code specific to Harris County Civil Courts at Law provide that the Harris County Civil Courts at Law have jurisdiction to decide the issue of title to real or personal property without regard to the amount in controversy.

All of the parties sought a declaratory judgment concerning Sunesara's status as a member of the LLCs, and Sunesara sought a declaration that he was the rightful owner of a membership interest and was entitled to one-third of the profits of the LLCs. The court of appeals pointed out that Section 101.106(a) of the Texas Business Organizations Code characterizes a membership interest in an LLC as personal property and Section 1.002(54) provides that a membership interest includes a member's share of profits and losses and the right to receive distributions. Thus, the court of appeals held that the Harris County Civil Court at Law had subject-matter jurisdiction to determine whether Sunesara was a member and was entitled to profits from the LLCs based on the county court's jurisdiction to determine issues relating to title to real and personal property.

The court of appeals next analyzed the contention of Sohani and Virani that the trial court's judgment, which declared that Sunesara was a member of each of the LLCs and was entitled to one-third of the profits from each of the LLCs, conflicted with Section 101.201 of the Business Organizations Code, which states that an LLC's allocation of profits and losses are to be made "on the basis of the agreed value of the contributions made by each member, as stated in the company's records." Sohani and Virani argued that there was no written record reflecting Sunesara's contributions to the LLCs or demonstrating that he was entitled to one-third of the profits. The court reviewed the definitions of a "member," "membership interest," "governing documents," "company agreement," and "contribution," and pointed out that the Business Organizations Code does not require a person to make a contribution in order to be admitted as a member or acquire a membership interest. The court also pointed out that the statutory provisions addressing allocation of profits and losses and the sharing of distributions provide that such matters are based on the agreed value of each member's contributions as stated in the company's records required to be kept under the statute. Tex. Bus. Orgs. Code §§ 101.201, 101.203. Section 3.151 of the Business Organizations Code contains general recordkeeping requirements for filing entities, and Section 101.501 has specific requirements for LLCs that include maintaining a record of "the amount of a cash contribution and a description and statement of the agreed value of any other contribution made or agreed to be made by each member." Tex. Bus. Orgs. Code § 101.501(a)(7).

The court's analysis of Sohani's and Virani's contention focused on the "plain meaning" of Sections 101.201 and 101.501 of the Business Organizations Code. At trial, Sunesara testified that he made contributions to the LLCs in the form of \$10,000 cash contributions and "deferred profits" to the startup of Burn I and the acquisition of Burn II. Sunesara did not, however, offer any documentary evidence reflecting those contributions. The record contained no writing setting out the specific contributions made by any of the three members or stating that Sunesara was entitled to one-third of the profits from the LLCs. The company agreements for each of the LLCs were admitted into evidence, but they listed only Sohani and Virani as members and stated, under each of their names, "Made 50% of contributions, Owns 50% of profits and assets." The court construed Section 101.501 of the Business Organizations Code to require an LLC to include a statement of the amount of cash contributions made by each member and a statement of the agreed value of any other contribution made by each member in the written records of the company and construed Section 101.201 to provide that these records establish the allocation of a member's share of the profits and losses of the company. Because Sunesara did not introduce any records of the LLCs reflecting the contributions that he made to the LLCs, the court concluded that he presented no evidence that he is entitled to one-third of the profits of the LLCs under Section 101.201.

Sunesara argued that his testimony that he made contributions to the LLCs sufficed to demonstrate his entitlement to one-third of the profits of the LLCs, but the court stated that the plain language of Section 101.201 requires profits and losses to be allocated on the basis of the agreed value of the contributions made by each member, as stated in the company's records required under Section 101.501, and the plain language of Section 101.501 requires an LLC to maintain a written record of the amount of a cash contribution and a description and statement of the agreed value of any other contribution made or agreed to be made by each member.

Sunesara pointed to the 2008 tax return of MNA Corporation (which stated that Sunesara, Virani, and Sohani were each allocated one-third of the profits for that corporation) and the records of SSV Corporation (which stated that Sunesara and Virani each owned fifty percent of that corporation) and argued that, when the LLCs were created and took over operation of the smoke shops, these records became a part of the records for the LLCs and satisfied the writing requirement of Section 101.201. But the court stated that the corporations and LLCs were all separate and distinct entities, and Sunesara cited no law supporting the proposition that the records from the earlier-formed entities became records of the new LLCs when they began operating the smoke shops. The court stated that the documentary evidence reflecting that Sunesara had a one-third ownership interest in MNA Corporation and a one-half interest in SSV Corporation established only that he was entitled to distributions from

MNA Corporation and SSV Corporation, not that he made contributions to the LLCs or that he was entitled to one-third of the profits from the LLCs. Thus, the court held that the trial court erred to the extent that it ruled that Sunesara was entitled to one-third of the profits from each of the LLCs. “Because Sunesara was not assigned a share of profits in the company agreements and presented no evidence that he was entitled to a one-third share of profits in the LLCs, he was not entitled to a share in profits as a matter of law.”

Super Starr Int’l, LLC v. Fresh Tex Produce, LLC, 531 S.W.3d 829 (Tex. App.—Corpus Christi 2017, no pet.).

A provision of an LLC’s operating agreement did not give a member the absolute right to take all of the LLC’s confidential information without regard to any trade secret protection where the agreement also mandated that the members maintain the confidentiality of confidential information.

In discussing a claim by one member of an LLC against another member based on the Texas Uniform Trade Secrets Act, the court concluded that § 6.4 of the operating agreement, which stated that the LLC’s books and records shall be open to inspection and copying at all reasonable times, did not give a member the absolute right to take all of the LLC’s confidential information without regard to any trade secret protection. Section 3.4(a) of the operating agreement mandated that “[e]ach Member shall keep confidential” the “private, secret, and confidential information.” According to the court, read in conjunction, § 6.4 allowed inspection, but § 3.4(a) mandated confidentiality. Furthermore, there was no indication that § 6.4 undercut the confidentiality requirement of § 3.4(a).

M. Dissolution/Winding Up

Surrey Oaks LLC v. Evanston Ins. Co., No. 4:16-CV-516-A, 2017 WL 3085861 (N.D. Tex. July 19, 2017), aff’d, ___ Fed. App’x ___ (5th Cir. 2018) (per curiam).

The court held that the plaintiff, a Washington LLC, lacked capacity to sue because it had previously filed a certificate of cancellation in 2009. The plaintiff argued that it had the ability to sue based on a 2016 amendment to the Washington LLC statute, which allows a dissolved LLC to prosecute actions as part of its winding up activities, but the court held that the change was not retroactive.

N. Forfeiture and Involuntary Termination

Haynes v. Gay, No. 05-17-00136-CV, 2018 WL 774334 (Tex. App.—Dallas Feb. 8, 2018, no pet. h.) (mem. op.).

The court of appeals concluded that an LLC’s members were not individually liable for a debt of the LLC created or incurred before tax forfeiture of the LLC’s charter.

An LLC breached a property management agreement in 2013 and 2014. In 2015, the LLC’s charter was forfeited under the Texas Tax Code, and a judgment against the LLC for breach of the property management agreement was rendered in 2016. The plaintiff sought to hold the members of the LLC liable for the LLC’s liability on the property management agreement based on Section 171.255(a) of the Texas Tax Code. Section 171.255(a) provides that an officer or director of a corporation is personally liable for a debt of a forfeited corporation if the debt is created or incurred after the date on which the report, tax, or penalty is due and before the corporation’s privileges are revived. The LLC members in this case did not dispute that the liability of officers and directors of a corporation under the statute extended to them as members of an LLC if the debt at issue was “created or incurred” after the forfeiture. If the debt was not created or incurred until the judgment against the LLC was rendered, the members would be liable for the debt, but the court of appeals stated that a debt arising out the performance of a contract is created or incurred when the contract is entered into by the parties. Although the date of the contract was not apparent in the record, the dates of the breaches and forfeiture were clear in the record, and those dates established that the debt was created or incurred prior to the forfeiture. Thus, the members were not personally liable under Section 171.255 of the Tax Code.

Thompson v. Flintrock Feeders, Ltd., No. 2:09-CV-0010-J, 2010 WL 11561929 (N.D. Tex. May 10, 2010). (Although the court issued this opinion in 2010, it is included in this year’s update because it did not appear in the Westlaw database until recently.)

The court held that an individual sole member of an LLC general partner of a limited partnership was personally liable for the limited partnership’s debts after the LLC’s charter was forfeited for failure of the LLC to pay franchise taxes. As general partner of the limited partnership, the LLC was liable for the limited partnership’s debts, and as the sole member of the member-managed LLC, the member “was liable for the debts during the time the [LLC’s] charter was suspended.” Further, the LLC’s member was also a limited partner in the limited partnership, and he personally authorized the actions of the limited partnership’s employee who dealt with the plaintiffs in connection with the events underlying the lawsuit. The court said that “[p]ersonal liability attaches to a limited partner when he takes part in the control and management of the business.”

O. Veil Piercing

Clement v. Blackwood, No. 11-16-00087-CV, 2018 WL 826856 (Tex. App.—Eastland Feb. 8, 2018, pet. denied) (mem. op.).

The court held that an LLC was the alter ego of its members and was liable under reverse veil-piercing principles for the fraudulent actions of its members.

David and Sharon Blackwood and Kyle and Valerie Clement agreed to enter into a cow-calf venture pursuant to which the Blackwoods would provide the capital and the Clements would provide the expertise and labor. The venture was to be conducted through Rimrock Land & Cattle Co., LLC (“Rimrock”), an existing LLC owned by the Clements in which the Blackwoods were to become 50% owners. The Blackwoods contributed more than \$650,000 to the venture, and the Clements used some of the funds for personal purposes and were not able to substantiate the legitimacy of many expenses for which the funds were used. In addition to their investment in Rimrock, the Blackwoods lent \$240,000 to the Clements to pay the mortgage on the Clements’ family ranch after Kyle Clement informed David Blackwood that the ranch, which was owned by Clement Cattle Company, LLC (“Clement Cattle LLC”) was in immediate danger of foreclosure. Kyle Clement represented that the liquidation of Rimrock would yield between \$900,000 and \$1 million and that he could sell all the cattle in sixty to ninety days. Relying on this representation, David Blackwood agreed to provide the funds to pay the Clements’ mortgage and to be repaid from the liquidation of Rimrock’s assets. When the last of Rimrock’s cattle was finally sold seven months later, the Clements produced a check to the Blackwoods for less than \$100,000 and informed the Blackwoods that the Clements could not pay back the \$240,000 loan. When the business between the Blackwoods and the Clements ended, the Blackwoods had suffered a \$747,505 loss on their investment and the loan that they had extended to the Clements to stop foreclosure of the Clements’ ranch.

The Blackwoods sued the Clements, Rimrock, and Clement Cattle LLC for breach of fiduciary duty, fraud, theft, and other causes of action. A jury found that the defendants owed a fiduciary duty to the Blackwoods due to a “relationship of trust and confidence” and that each defendant breached this duty. The jury also found that the Clements committed fraud against the Blackwoods and were responsible for the conduct of both Rimrock and Clement Cattle LLC under the theory of alter ego. Finally, the jury determined that the defendants stole the Blackwoods’ property. The jury assessed damages of \$747,505, and the trial court entered judgment against the defendants accordingly.

On appeal, the court concluded that the evidence was sufficient to support a finding that the Clements committed fraud by making promises that they did not intend to perform when they induced the Blackwoods to invest in Rimrock without intending to use the Blackwoods’ funds to operate a profitable cow-calf operation as promised. The court also held that the evidence was sufficient to support a finding that the Clements obtained the \$240,000 loan from the Blackwoods through fraudulent misrepresentations.

The Clements did not challenge the jury’s findings that Rimrock was the alter ego of the Clements, but argued that the evidence was insufficient to support a finding that Clement Cattle LLC was the alter ego of the Clements. The court described alter ego as a legal basis to disregard the corporate fiction where there is unity between the entity and the individual such that the entity’s separate existence has ceased. The court explained that the doctrine has traditionally been applied to hold an individual liable for the debts of a corporation but that Texas also allows the alter-ego doctrine to be applied in reverse so that a corporation’s assets can be used to satisfy the liabilities of an individual who treated the corporation as the individual’s alter ego. The court stated that courts look

to the total dealings of the entity and the individual (listing a number of factors) to determine whether the individual is operating the entity as the individual's alter ego or "shadow of his personality." The court also cited Tex. Bus. Orgs. Code § 21.223 for the proposition that there must be evidence that the Clements perpetrated actual fraud for their direct personal benefit in order to pierce the veil of Clement Cattle LLC. The court held that the evidence supported the finding that the \$240,000 loan was the product of actual fraud and that the loan was for the Clements' direct personal benefit. The defendants cited cases involving LLCs to support their argument that only Clement Cattle LLC received a direct benefit when the Clements paid off its loan. The defendants contended that the fact that they could continue living on the ranch was merely an "incidental benefit," akin to a shareholder receiving property or a corporation reducing its debt. However, the court stated that the defendants ignored the fact "that Clement Cattle LLC's sole purpose was to own the Clements family ranch. It was formed for 'estate planning' purposes, not to operate a business" and "it existed exclusively to directly benefit the Clements." The Clements directly benefitted when the Blackwoods satisfied Clement Cattle LLC's mortgage because the Clements continued to have a place to live. Because Clement Cattle LLC was an alter ego of the Clements, it was also liable for the Clements' fraudulent actions.

Tomlinson v. Clem (In re Clem), 583 B.R. 329 (Bankr. N.D. Tex. 2017).

In this adversary proceeding to determine the dischargeability of a debt arising out of a contract between the plaintiffs and an LLC of which the debtor defendant was the manager and a member, the court concluded that an arbitration award imposed personal liability on the debtor based on the Texas Deceptive Trade Practices Act. Thus, it was not necessary to pierce the veil of the LLC in order to consider the debt to be that of the debtor.

The plaintiffs, LaDainian and LaTorsha Tomlinson, objected to the discharge of a debt of the debtor, and the court first analyzed whether the debt that was the subject of the proceeding was a debt of the debtor since the debt stemmed from a contract between the plaintiffs and an LLC home-builder rather than the individual debtor, who was the manager and a member of the LLC. The plaintiffs had previously sued the LLC and the debtor in state court for breach of contract and violations of the Texas Deceptive Trade Practices Act, and the parties were required to arbitrate the dispute, which resulted in a final arbitration award against the LLC and the debtor. Citing Tex. Bus. Orgs. Code §§ 21.223, 101.002, 101.114, the bankruptcy court stated that the Texas Business Organizations Code provides that a member or manager of an LLC generally is not liable for a contractual debt, or a debt related to a contractual debt, of the LLC unless the manager or member used the LLC to perpetrate an actual fraud on the claimant for the direct personal benefit of the manager or member. However, the court pointed out that it was not necessary to pierce the veil of an LLC if a member is "otherwise liable" under an "other applicable statute," Tex. Bus. Orgs. Code § 21.225(2). The Texas Supreme Court has determined that officers and agents of an entity may be held personally liable under the DTPA, even though they are acting on behalf of the entity. Thus, if the arbitration award imposed liability on the debtor based on the Texas Deceptive Trade Practices Act, an "otherwise applicable statute" under Section 21.225(2), there would be no need to engage in a veil-piercing analysis. The court struggled, however, to discern the precise meaning of the arbitration award, which the court stated was "not a model of clarity." Ultimately, the court concluded that the arbitration award, which imposed personal liability on the debtor pursuant to some unspecified provision of the DTPA, caused the situation at issue to fall within the ambit of Section 21.225 of the Texas Business Organizations Code, and there was thus an "applicable statute" under which the debtor was liable on a debt of the LLC. Thus, the court proceeded to analyze whether the grounds for an exception to discharge were met, and the court concluded that they were.

TecLogistics, Inc. v. Dresser-Rand Group, Inc., 527 S.W.3d 589 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

Citing § 101.002 of the Business Organizations Code, the court noted that "the legislature expanded the reach of sections 21.223–.225 [of the Business Organizations Code] in 2011, so that they now protect not only corporations and their affiliates, but also limited liability companies and their members, owners, assignees, affiliates, and subscribers."

In re Primera Energy, LLC, Case No. 15-51396-CAG, 2017 WL 6760640 (Bankr. W.D. Tex. Dec. 29, 2017).

"Section 21.223 of the Texas Business Organizations Code pertaining to corporations applies to limited liability companies."

Luppino v. York, No. SA-16-CV-00409-RCL, 2017 WL 8161008 (W.D. Tex. Nov. 27, 2017).

An individual sued two members of an oil-and-gas LLC in which the individual invested hundreds of thousands of dollars. The individual claimed that the LLC made fraudulent statements in the subscription agreements entered into with the individual. Assuming the individual's allegations against the LLC's members were sufficient to raise a veil-piercing claim, the claim failed because a claimant asserting a veil-piercing claimant is required to demonstrate that the business entity's owner used the entity to perpetrate an actual fraud for the owner's direct personal benefit, and the claimant in this case failed to plead the fraud he believed to justify veil piercing with particularity.

Wormald v. Villarina, 543 S.W.3d 315 (Tex. App.—Houston [14th Dist.] 2017, no pet. h.).

The record did not contain sufficient evidence to impute the contacts of a Texas LLC under the alter-ego doctrine to three non-resident individuals who were managers of and owned an interest in an out-of-state LLC that managed and owned an interest in the Texas LLC.

A Texas LLC sued the guarantors of a note held by the Texas LLC, and the guarantors counterclaimed against the Texas LLC and asserted claims against various others, including three non-resident individuals who managed the LLC that was the sole manager of the Texas LLC. The guarantors relied on the alter-ego doctrine as well as direct contacts of the individuals to establish personal jurisdiction over the individuals. In support of their special appearance, the individuals asserted "that they are partners, living in California, with fractional interests in a non-Texas entity that owns a fractional interest in another non-Texas entity that before the suit owned a fractional interest in the out-of-state entity that manages [the Texas LLC]." The guarantors relied on a cash-flow summary of cash flows to and from the Texas LLC and certain email communications in support of their argument that the Texas LLC was the alter ego of the individuals. The court set forth the test for jurisdictional veil piercing (which differs from veil piercing for liability purposes) as follows:

'To 'fuse' a parent company and its subsidiary for jurisdictional purposes, the plaintiffs must prove the parent controls the internal business operations and affairs of the subsidiary.' *PHC-Minden*, 235 S.W.3d at 175 (quotation omitted). 'The rationale for exercising jurisdiction is that the parent corporation exerts such domination and control over its subsidiary that they do not in reality constitute separate and distinct corporate entities but are one and the same corporation for purposes of jurisdiction.' *Id.* at 173. This court has used the standard for jurisdictional veil-piercing of the corporate veil between a parent company and a subsidiary company to assess jurisdictional veil-piercing as between an individual and a corporation. [citation omitted].

The court concluded that the documents in the record did not suggest that the Texas LLC was not maintained as a distinct entity or that any of the three individuals directed the business and affairs of the Texas LLC "any more than normally is associated with ownership and directorship."

Northern Frac Proppants, II, LLC v. 2011 NF Holdings, LLC, No. 05-16-00319-CV, 2017 WL 3275896 (Tex. App.—Dallas July 27, 2017, no pet.) (mem. op.).

The plaintiff relied on the alter-ego doctrine for purposes of imputing contacts of several LLCs to an individual Louisiana resident, but the court concluded that the individual did not exercise "more than the normal investor and director control" over the LLCs and thus did not exercise enough control to permit jurisdictional veil piercing.

Tech Pharmacy Servs., LLC v. Alixa RX, LLC, No. 4:15-CV-766, 2017 WL 3167654 (E.D. Tex. July 25, 2017).

The plaintiff sought to hold two affiliated Delaware LLCs liable for claims against another Delaware LLC on the basis of the alter-ego theory under Delaware law. Despite summary judgment evidence showing little distinction between the entities, the court dismissed the claims against the affiliated LLCs because operation as a single entity was insufficient to establish liability under the alter-ego theory. In the absence of a showing of "lack of corporate formalities or other equitable factors that might support disregarding" the affiliated LLCs as separate entities, the alter-ego argument failed.

Fort Apache Energy, Inc. v. Huddleston (In re Huddleston), No. 16-31488-sgj-7, Adv. No. 16-03130-sgj, 2017 WL 1207522 (Bankr. N.D. Tex. Mar. 31, 2017), aff'd, 2018 WL 1182902 (N.D. Tex. Mar. 6, 2018).

Applying Nevada law to the plaintiff's veil-piercing claim, the court held that the sole member and manager of a Nevada LLC was personally liable for all amounts the LLC was obligated to pay the plaintiff under a joint operating agreement between the plaintiff and the LLC.

The plaintiff in this adversary proceeding sought to hold Billy Dean Huddleston, Jr., the sole member and manager of a Nevada LLC, liable for all amounts owed by the LLC to the plaintiff under a joint operating agreement. Because the LLC was organized and existing under the laws of Nevada, the court looked to Nevada rather than Texas law to determine whether veil piercing was permissible. The court acknowledged that Nevada law generally protects LLC members and managers from liability for the debts and liabilities of the LLC, but Nevada courts have extended corporate veil-piercing principles to LLCs, applying a three-part test that was initially set forth by the Nevada Supreme Court and later codified in the Nevada corporate statute. Because there was no evidence that anyone other than Huddleston served in a decision-making role or exercised any control over the LLC, the court stated that the first requirement—that the “corporation is influenced and governed by the stockholder, director or officer”—was easily met. The second requirement—that “there is such unity of interest and ownership that the corporation and the stockholder, director or officer are inseparable from each other”—was also met based on evidence of commingling of the bank accounts of Huddleston and the LLC, diversion of investor funds meant for the plaintiff to Huddleston, treatment of investor funds as Huddleston's own, and failure to recognize the LLC as a separate business entity. Finally, the third prong (which the court characterized as arguably most important)—that “adherence to the corporate fiction of a separate entity would sanction fraud or promote a manifest injustice”—was met based on Huddleston's use of the LLC's operating accounts as his personal piggy bank at the same time he was urging the plaintiff to move ahead on the transaction and reassuring the plaintiff that he would be able to come up with the funds needed to cover his share of the expenses. The court noted that actual fraud is not required under Nevada law; it is enough if recognition of the separate entity would result in an injustice.

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

Clark v. Clark, 546 S.W.3d 268 (Tex. App.—El Paso 2017, no pet.).

The court mentioned that Section 101.112 of the Texas Business Organizations Code allows for a charging order against the LLC for the owner's distributions and cited Tex. Bus. Orgs. Code § 101.112(f) (providing that a member's creditor does not have the right to obtain possession of property of the LLC) and Tex. Bus. Orgs. Code § 101.112(d) (providing that the charging order is the exclusive remedy by which a judgment creditor may satisfy a judgment out of a judgment debtor's membership interest) in the course of reviewing an award of costs in connection with a motion to compel that involved discovery requests for records of a judgment debtor's business entities (which were referred to in the opinion as “limited liability corporations”).

Heckert v. Heckert, No. 02-16-00213-CV, 2017 WL 5184840 (Tex. App.—Fort Worth Nov. 9, 2017, no pet. h.) (mem. op.).

The court of appeals held that the trial court did not abuse its discretion in ordering the turnover of a judgment debtor's interest in a limited partnership and an LLC.

In a personal injury action that Teresa Heckert brought against her ex-husband Clyde Heckert, a jury awarded Teresa \$381,342.27. Teresa filed a motion seeking the turnover of any of Clyde's nonexempt assets, including his interest in a limited partnership (A2R, Ltd.) and a single-member LLC (Averse 2 Risk, LLC). Both entities were formed after the divorce while Teresa's personal injury suit was pending against Clyde. The LLC was the general partner of the limited partnership, and Clyde was the sole limited partner. Clyde was also the sole member of the LLC. The limited partnership owned stock that was awarded to Clyde in the divorce.

The court determined that Clyde's ownership interests in the entities were nonexempt. Nevertheless, Clyde argued that the interests were not susceptible to turnover because, according to Clyde, “sections 101.112 and 153.256 of the Business Organizations Code provide that the exclusive remedy by which a judgment creditor of a limited partnership or limited liability company may satisfy a judgment out of the judgment debtor's interest in that limited partnership or limited liability company is a charging order.”

The court agreed that “[t]he plain language of sections 101.112(d) and 153.256(d) provides that a charging order is generally the exclusive remedy by which to satisfy a judgment out of the judgment debtor’s interest in a limited partnership or limited liability company.” Nevertheless, the court noted that “courts have held that there are some exceptions to this rule.” For example, the Dallas Court of Appeals held that the sections do not preclude turnover of a person’s distributions from an LLC or limited partnership. In addition, the Houston (14th) Court of Appeals held that “turnover of a member’s interest in a limited liability company was not precluded by section 101.112 ‘when the judgment creditor seeking the membership interest is the entity from which the membership interest derives,’ and when the turnover order ‘involves an explicit award of the membership interest itself from one party to the other as part of the judgment.’” According to the *Heckert* court, “[t]his is because in these types of situations, the purpose of a charging order has not come into play: the charging order was developed to prevent a judgment creditor’s disruption of an entity’s business by forcing an execution sale of the partner’s or member’s entity interest to satisfy a debt of the individual partner or member.”

The *Heckert* court determined that “the same reasoning applies here because neither A2R, Ltd. nor Averse 2 Risk, LLC is an operating business; both entities appear to have been formed by Clyde for the sole purpose of taking ownership of nonexempt assets awarded to him in the divorce.” The court noted that “[n]o other party’s interest will be disrupted by the turnover of those interests and the stock owned by A2R, Ltd.,” and it observed that “Clyde has already assigned his interests and the [stock] to the receiver, subject to his right of appeal.” As a result of this analysis, the court held that the trial court did not abuse its discretion in ordering the turnover of Clyde’s interest in the limited partnership and the LLC.

Q. Attorney’s Fees

TEC Olmos, LLC v. ConocoPhillips Co., 2018 WL 2437449, __ S.W.3d __ (Tex. App.—Houston [1st Dist.] 2018, no pet. h.).

The trial court erred in rendering judgment against an LLC for attorney’s fees under Section 38.001 of the Texas Civil Practice and Remedies Code because an LLC is not an individual or a corporation.

PEG Bandwith TX, LLC v. Texhoma Fiber, LLC, No. 4:16-CV-00815, 2018 WL 1184581 (E.D. Tex. Mar. 7, 2018).

The court dismissed the plaintiff’s claim for attorney’s fees under Section 38.001 of the Texas Civil Practice and Remedies Code because the defendant was an LLC, and the statute only allows recovery of attorney’s fees from an individual or corporation.

Sky Group, LLC v. Vega Street 1, LLC, No. 05-17-00161-CV, 2018 WL 1149787 (Tex. App.—Mar. 5, 2018, no pet. h.) (mem. op.).

The court reversed an award of attorney’s fees against a limited liability company because Section 38.001 of the Texas Civil Practice and Remedies Code allows recovery against an individual or corporation, thus precluding a court from ordering recovery against limited liability partnerships, limited liability companies, or limited partnerships.

First Cash, Ltd. v. JQ-Parkdale, LLC, No. 13-16-00099-CV, 2018 WL 360252 (Tex. App.—Corpus Christi Jan. 11, 2018, no pet. h.) (mem. op.).

First Cash sued for breach of a lease contract. A jury awarded damages as well as attorney’s fees against various LLC defendants under § 38.001 of the Texas Civil Practice and Remedies Code (the “CPRC”). The trial court granted a JNOV denying the award of fees, and the court of appeals affirmed.

The court of appeals stated that “[a]ll Texas and federal courts which have interpreted section 38.001 have held that LLCs cannot be held liable for attorney’s fees under the plain meaning of the terms ‘individual or corporation.’” According to the court, First Cash repeated many of the arguments that Texas courts had already rejected. The court rejected them again for the reasons stated in *Alta Mesa Holdings, LP v. Ives*, 488 S.W.3d 438 (Tex. App.—Houston [14th Dist.] 2016, pet. denied).

Nevertheless, First Cash offered other arguments that, according to the court, had not previously been addressed by Texas courts. First Cash asserted that article 2226 of the Texas Revised Civil Statutes (the predecessor

statute to CPRC § 38.001) allowed attorney’s fees to be recovered against any “person or corporation,” and “person” was given the broad definition in the code construction act (essentially any legal entity). During the 1985 recodification, the phrase “person or corporation” was changed to “individual or corporation” with the sole purpose, according to First Cash, of preventing governmental units from being liable for attorney’s fees. Thus, First Cash reasoned that the phrase “individual or corporation” in § 38.001 refers to all legal entities as defined by the code construction act with the exception of governmental entities.

The court of appeals disagreed. First, after discussing the legislative history of the attorney’s fees statute from article 2226 to CPRC § 38.001, the court stated that the broad definition of “person” under the code construction act did not control article 2226. “Person or corporation” under that statute referred to a natural human being or an actual corporation, and a reviser’s note to the 1985 recodification explained that § 38.001 was intended to embody the same substantive meaning as the predecessor statute.

Second, the court noted that First Cash’s position was inconsistent with the plain language of both the current and former statutes. Article 2226 made attorney’s fees available to “[a]ny person, corporation, partnership, or other legal entity,” but made attorney’s fees available from a “person or corporation.” If, as First Cash argued, “person or corporation” means roughly any legal entity, why would the legislature have spelled out “other legal entity” in the same statute? Similarly, § 38.001 makes attorney’s fees available *to* a “person,” as that term is broadly defined under the code construction act, but makes such fees available *from* an “individual or corporation.” As the court observed, “[t]he Legislature clearly knew how to make attorney’s fees available *to* all legal entities, but intentionally chose not to make them available *from* all legal entities.”

Third, the court determined that First Cash’s reasoning was incompatible with the state of organizational law in 1985. The phrase “individual or corporation,” according to the court, “could not have served as a generic reference to all domestic entities in 1985 because the phrase did not account for partnerships, which had long been recognized as legal entities with an identity distinct from their partners.”

Finally, the court noted that other comparable uses of the phrase “individual or corporation” undercut First Cash’s interpretation. Around the same time as the recodification of the attorney’s fees statute, the legislature revised another statute related to contract formation by replacing the terms “corporation or individual” with the term “person.” As the court observed, “[t]his reinforces our presumption that the Legislature chooses each word in a statute for a purpose: just as the Legislature intentionally substituted ‘person’ into this section of the property code to ensure that it would reach all legal entities, the Legislature deliberately replaced ‘person’ in the predecessor statute with ‘individual or corporation’ to ensure that only those specified legal entities would be liable for attorney’s fees.”

The court ultimately concluded that the recodified § 38.001 did not present a direct and unambiguous departure from the predecessor article 2226: “When interpreted according to its plain language, section 38.001 can readily be reconciled with cases construing the predecessor statute to have the same plain meaning: in a breach of contract case, attorney’s fees may only be assessed against a natural person or an actual corporation.”

Cypress Engine Accessories, LLC v. HDMS Ltd. Co., 283 F.Supp.3d 580 (S.D. Tex. 2017).

The court declined to award attorney’s fees against an LLC under Section 38.001 of the Texas Civil Practice and Remedies Code, which provides for recovery of reasonable attorney’s fees against “an individual or corporation,” because the cases in which courts have awarded attorney’s fees against an LLC assumed without discussing the statute that it applied, and courts that have considered and analyzed the question make clear that the statute does not support recovery of attorney’s fees from an LLC.

5G Studio Collaborative, LLC v. Dallas Uptown Hospitality, LLC, Civ. A. No. 3:15-CV-2719-L, 2017 WL 4750697 (N.D. Tex. Oct. 20, 2017).

The court cited § 38.001 of the Texas Civil Practice and Remedies Code for the proposition that a party that prevails on a breach of contract claim is permitted to recover its reasonable attorney’s fees from an individual or a corporation. The defendant, however, was an LLC and not a corporation. As a result, the court determined that the plaintiff was not entitled to recover its attorney’s fees under the statute, and it cited a number of cases that reached the same conclusion.

HostingXtreme Ventures, LLC v. Bespoke Group, LLC, Civ. A. No. 3:14-CV-1471-M, 2017 WL 4012922 (N.D. Tex. Aug. 23, 2017), report and recommendation adopted, 2017 WL 3980628 (N.D. Tex. Sep. 11, 2017).

In a footnote, the court noted that a “claim for attorneys’ fees against Bespoke also fails as a matter of law because § 38.001 only applies to corporations and not to limited liability companies such as Bespoke.” The court cited other authorities for the proposition that attorneys’ fees are not recoverable under § 38.001 against an LLC or an unincorporated association.

Vast Constr., LLC v. CTC Contractors, LLC, 526 S.W.3d 709 (Tex. App.—Houston [14th Dist.] 2017, no pet. h.).

“We agree with Vast that the trial court erred by awarding attorneys’ fees against it under Civil Practice and Remedies Code section 38.001 because that statute authorizes an award of reasonable attorneys’ fees against only individuals and corporations, and Vast, a limited liability company, is neither an individual nor a corporation. We therefore modify the trial court’s judgment to remove all portions awarding attorneys’ fees to CTC.

....

Section 38.001 provides that ‘[a] person may recover reasonable attorney’s fees from an individual or corporation . . . if that claim is for . . . an oral or written contract.’ This court has determined that section 38.001 ‘does not authorize the recovery of attorney’s fees in a breach of contract action against an LLC [limited liability company].’ See *Alta Mesa Holdings, L.P. v. Ives*, 488 S.W.3d 438 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) (analyzing section 38.001 and concluding that ‘corporation’ as used in this statute does not include limited liability companies). Thus, CTC may not recover attorneys’ fees under section 38.001 against Vast, a limited liability company, as a matter of law.”

8305 Broadway Inc. v. J & J Martindale Ventures, LLC, No. 04-16-00447-CV, 2017 WL 2791322 (Tex. App.—San Antonio June 28, 2017, no pet.).

“Based on the plain meaning of the terms ‘individual’ and ‘corporation,’ our sister courts have held the plain language of section 38.001(a)(8) does not provide for an award of attorney’s fees against limited liability companies . . . We agree with the analysis of our sister courts and similarly hold 8035 Broadway was not entitled to recover attorney’s fees against Martindale because it is a limited liability company.”

BHL Boresight, Inc. v. Geo-Steering Solutions, Inc., Civ. A. No. 4:15-CV-00627, 2017 WL 2730739 (S.D. Tex. June 26, 2017).

The court cited previous cases addressing the question and stated: “For the reasons already articulated by these courts, this Court likewise concludes that § 38.001 does not support a claim for attorney’s fees against an LLC for breach of contract.”

Windmill Invs., LLC v. Redhill Realty Inv’rs, LP, No. 5:16-cv-345-OLG, 2017 WL 3713471 (W.D. Tex. June 13, 2017).

The plaintiff was unable to recover attorney’s fees from the defendants, a limited partnership and LLC, under Section 38.001 of the Texas Civil Practice and Remedies Code because the statute only provides for the recovery of attorney’s fees in breach of contract claims “from an individual or corporation.” However, the court concluded that attorney’s fees were recoverable under Section 27.01 of the Texas Business and Commerce Code, which provides that the prevailing party in a statutory fraud claim may recover attorney’s fees in connection with a claim of fraud “in a transaction involving real estate or stock”

The defendants argued that the plaintiff was not entitled to attorney’s fees under Section 27.01 of the Texas Business and Commerce Code because the transaction giving rise to the plaintiff’s statutory fraud claim did not relate to a real estate or stock transaction but rather from a transaction in which the plaintiff sought to acquire an interest in an LLC. The purpose of forming the LLC was to enter into a real estate transaction, i.e., the purchase of an apartment complex, but the defendants argued that the formation of a joint venture partnership in anticipation of entering into a real estate transaction does not fall within the scope of Section 27.01. The court cited a case in which the court reasoned that “Section 27.01 did not apply to a transaction in which the plaintiffs purchased interests in a limited partnership whose purpose was real estate acquisition and development, because ‘[a] limited partnership interest is personal property.’” See *Marshall v. Quinn–L Equities, Inc.*, 704 F. Supp. 1384, 1392 (N.D.

Tex. 1988). The court in *Marshall* gathered other cases in which other Texas courts found that Section 27.01 or its predecessor statute were inapplicable to transactions that related to real estate transactions, such as the purchase of real estate notes, the purchase of title insurance for real property, a guaranty secured by real estate, or a loan of money for the purchase of real estate. In this case, however, the plaintiff alleged not only that the purpose of the LLC as stated in its operating agreement was the purchase of real estate, but that the plaintiff provided funds to the defendants to be used for the purchase of the real estate. The court thus distinguished the case before it from *Marshall*, “in which the funds that were the subject of the alleged fraud were exchanged as part of a partnership interest transaction that was distinct from any real estate transaction.” Here the funds that were the subject of the alleged fraud were remitted as part of the real estate purchase price.

Taylor's Int'l Servs., Inc. v. Cuero Oilfield Housing, LLC, No. A-16-CA-512-SS, 2016 WL 8674349 (W.D. Tex. Oct. 31, 2016). (Although the court issued this opinion in 2016, it is included in this year's update because it did not appear in the Westlaw database until recently.)

The court agreed with the defendant that attorney's fees were not recoverable against the defendant under Section 38.001 of the Texas Civil Practice and Remedies Code because the defendant was a limited liability company rather than an individual or a corporation. The court observed that “[t]here is no logic to the law eliminating attorney's fees that would be owed by individuals or corporations, but that is exactly what Texas has done.”

R. Standing or Capacity to Sue

Cty. of El Paso v. Navar, 2018 WL 2715298, __ S.W.3d __ (Tex. App.—El Paso 2018, no pet. h.).

The court reversed a judgment in favor of an individual against the County of El Paso on a takings claim because there was a fact issue as to whether the property involved in the takings claim was owned by the individual or an LLC, thus giving rise to a question about standing.

The trial court granted summary judgment in favor of Navar on a takings claim involving property purchased and operated by Navar. While the appeal was pending, the county discovered a deed showing that Navar had transferred the property to an LLC before the events giving rise to the lawsuit. The county thus asserted for the first time on appeal that Navar lacked standing to bring the suit. The court recited the rule that an individual stakeholder in a legal entity does not have standing to recover personally for harms done to the entity. Thus, just as a limited partner does not have standing to assert claims individually for injuries to the partnership that merely diminish the value of the partnership interests, an LLC member does not have standing to sue for injuries to the LLC that diminish the value of the member's interest. In this case, however, the court concluded that there was a fact issue as to whether Navar or the LLC owned the property at all times relevant to the lawsuit. While the county pointed to a recorded deed from Navar to the LLC, Navar pointed to a declaratory judgment, also recorded in the deed records, declaring the deed void. The county, however, pointed to court records suggesting that the judgment might be void for failure to properly serve the LLC. Taking judicial notice of the public records, which minimally corroborated the county's assertions, the court concluded that a fact issue existed as to whether Navar lacked standing to bring the instant suit, and the court reversed and remanded for further proceedings.

Pelletier v. Victoria Air Conditioning, Ltd., Nos. 6:17-CV-006, 6:17-CV-062, 2018 WL 1523694 (S.D. Tex. Mar. 28, 2018).

The individual who was the primary actor in three LLCs that owned and operated a hotel did not have standing to assert claims for damages caused by faulty plumbing installed in the hotel by the defendant since the individual was not the owner of the hotel.

The plaintiff was a member or manager of three LLCs that owned and operated a hotel in Texas, and the plaintiff asserted claims pro se in this case for damages caused by faulty plumbing installed in the hotel by the defendant. The court stated that it was apparent that the plaintiff was the primary actor in each of the LLCs, but the deed records and appraisal records showed that one of the LLCs was the owner of the land on which the hotel was located. Furthermore, deeds of trust securing loans for the hotel's construction declared that the LLC was owner of the property including any improvements. In addition, the other two LLCs had previously brought a lawsuit in state court claiming the same damages for the same events, and the LLCs claimed in that lawsuit to be the owners of the hotel. The plaintiff offered only one document in this lawsuit to support his claim that he was the owner of

the hotel. That document was a land lease agreement in which the LLC landowner granted the plaintiff a thirty-year lease on the site to build and operate a hotel. The court did not interpret the lease to clearly convey real property or any improvements. The court found it significant that the plaintiff did not offer any other documentary evidence that would ordinarily be involved in the construction of a hotel, such as construction contracts, a management agreement with the LLC management company, building permits, insurance policies, or invoices and purchase orders. The court characterized the plaintiff's testimony as showing that the plaintiff "was often merging himself and his own interests in a limited liability company with the limited liability company itself." The court concluded that the plaintiff failed to prove by a preponderance of the evidence that he owned the hotel structure or the hotel business and thus did not have standing to sue for lost revenues from the delay in opening the hotel and costs of repair to the building, citing Tex. Bus. Orgs. Code §§ 101.113 ("A member of a limited liability company may be named as a party in an action by or against the limited liability company only if the action is brought to enforce the member's right against or liability to the company") and 101.106(b) ("A member of a limited liability company . . . does not have an interest in any specific property of the company").

Surrey Oaks LLC v. Evanston Ins. Co., No. 4:16-CV-516-A, 2017 WL 3085861 (N.D. Tex. July 19, 2017), aff'd, ___ Fed. App'x ___ (5th Cir. 2018) (per curiam).

The court held that the plaintiff, a Washington LLC, lacked capacity to sue because it had previously filed a certificate of cancellation in 2009. The plaintiff argued that it had the ability to sue based on a 2016 amendment to the Washington LLC statute, which allows a dissolved LLC to prosecute actions as part of its winding up activities, but the court held that the change was not retroactive.

Senger Creek Dev., LLC v. Fuqua, No. 01-15-01098-CV, 2017 WL 2376529 (Tex. App.—Houston [1st Dist.] June 1, 2017, no pet.) (mem. op.).

"Senger Creek is a limited liability company and, as such, is a legal entity separate from Gilbert, Moore, and Torregrossa. Gilbert, Moore, and Torregrossa, as members of Senger Creek, do not have an interest in any property of the company. See TEX. BUS. ORGS. CODE ANN. § 101.106(b) (West 2012). 'A member of a limited liability company lacks standing to assert claims individually where the cause of action belongs to the company.' But, a limited liability company member may have an individual action against a defendant for a claim that the defendant has breached a contractual duty owed directly to the [member], individually. The nature of the alleged wrong indicates whether the individual or solely the company has standing.

Senger Creek's amended petition states that Gilbert, Moore, and Torregrossa each own a 16 2/3% membership interest in Senger Creek It is clear that Senger Creek, as a limited liability company, asserts a wrongful foreclosure claim against the Fuqua Defendants. However, it is not entirely clear whether the individual plaintiffs are also asserting a wrongful foreclosure claim. To the extent that the individual plaintiffs assert a claim for wrongful foreclosure, we agree with the Fuqua Defendants that Gilbert, Moore, and Torregrossa lack standing to assert claims individually when the wrongful foreclosure claim belongs to the company. We therefore conclude that Gilbert, Moore, and Torregrossa lack standing to bring a wrongful foreclosure claim against the Fuqua Defendants and we dismiss them from this portion of the suit." (citations omitted).

Vernon Feeders, LLC v. Cabaniss Dairy, LLC, No. 7:13-cv-00069-O, 2013 WL 12137768 (N.D. Tex. July 9, 2013). (Although the court issued this opinion in 2013, it is included in this year's update because it did not appear in the Westlaw database until recently.)

The court concluded that an LLC had the legal capacity to maintain this action where the LLC was forfeited for failure to pay taxes before filing suit but was reinstated after filing suit within three years after the forfeiture. The court relied on a provision of the Texas Business Organizations Code that provides that an involuntarily terminated entity's status is deemed to have continued uninterrupted when it is reinstated within three years after the termination.

The defendant moved to dismiss the plaintiff LLC's lawsuit against it, which was filed in April of 2013, on the basis of lack of capacity because the Secretary of State's records reflected that the LLC had been forfeited for failure to pay taxes in 2011. The defendant filed its motion to dismiss in June of 2013, and the plaintiff filed its application for reinstatement and was reinstated about a week later. The court relied on Section 11.253(d) of the Texas Business Organizations Code, which provides that an involuntarily terminated filing entity is deemed to have

continued its existence uninterrupted from the date of termination if the entity is reinstated before the third anniversary of its termination. Because the LLC was reinstated within three years of its involuntary termination, the court found that the LLC was deemed to have continued uninterrupted and had the legal capacity to maintain the action. The court thus denied the motion to dismiss. [The court assumed that Tex. Bus. Orgs. Code § 11.253(d) applied to the reinstatement in this case although the other provisions of Section 11.253 address the reinstatement procedure of an entity involuntarily terminated by the Secretary of State under the Business Organizations Code for reasons other than failure to pay taxes. The reinstatement of an entity that is terminated for failure to pay taxes is governed by the Texas Tax Code. Tex. Bus. Orgs. Code § 11.254.]

Schoen v. Underwood, No. W-11-CA-00016, 2012 WL 13029591 (W.D. Tex. May 15, 2012). (Although the court issued this opinion in 2012, it is included in this year's update because it did not appear in the Westlaw database until recently.)

The court held that the shareholder-standing rule that applies in the corporate context applies to LLCs and that the member of an LLC thus did not have standing to assert claims for injuries suffered by the LLC even though the member may have been indirectly injured by the decrease in value of her membership interest. The court also held that any fiduciary duties owed by an officer of an LLC were owed to the company rather than to the members, and members generally do not owe other members a fiduciary duty.

Anita Underwood contracted to sell 100% of the membership interest in her LLC to four other individuals pursuant to a Membership Purchase Agreement that provided the sale would be executed in a series of steps over several months. The parties also executed an Interim Management Services Agreement. After disagreements arose and Underwood refused to go through with the purchase, one of the purchasers who was providing the financing for the purchase, Schoen, sued Underwood, and Underwood asserted counterclaims. Schoen moved for summary judgment on Underwood's counterclaims.

The first issue addressed by the court was whether Underwood had standing to assert the claims she was asserting or whether the claims must be brought by the LLC. The court discussed the shareholder-standing rule, under which the Fifth Circuit requires a court to look to state law to determine whether a shareholder is prohibited from initiating actions to enforce the rights of a corporation. Although Texas courts follow the shareholder-standing rule that precludes a shareholder from recovering on claims that belong to the corporation, the court pointed out that the entity in this case was a limited liability company rather than a corporation, but the court predicted that Texas courts would apply the shareholder-standing rule to LLCs for several reasons. First, an LLC is an entity separate and distinct from its members like a corporation. In addition, harms suffered by an LLC do not directly injure the members. A membership interest in the LLC is the personal property of the member, but a member does not have an interest in specific LLC property. Without ownership in the LLC's assets, a member cannot be directly injured when the company is deprived of its assets. Further, the availability of a derivative action indicates that a member cannot sue and recover personally for harm to the LLC. Finally, the court stated that the policies supporting the shareholder-standing rule apply equally to LLCs. When the LLC is harmed, each member is harmed in relation to the member's interest, and recovery by the LLC will make all members whole. Allowing only the LLC to sue avoids a multiplicity of suits and ensures that damages recovered will be available to pay LLC creditors and for such other purposes as the managers and members determine.

Applying the shareholder-standing rule to the claims asserted by Underwood in this case, the court concluded that Underwood did not have standing to assert claims for misappropriation of the LLC's name and likeness and breach of fiduciary duty by Schoen as an officer of the LLC, but Underwood had standing to sue for breach of fiduciary duty to her as a member, tortious interference with prospective contractual relations, and business disparagement.

On the question of whether Schoen was entitled to summary judgment against Underwood on her remaining claims, the court concluded that Schoen was entitled to summary judgment on the claims except for a claim by Underwood for breach of contract. With respect to her claim for tortious interference with prospective contractual relations, Underwood failed to present any evidence that would allow a reasonable and fair-minded jury to conclude that she likely would have contracted with another prospective buyer of her membership interest. With respect to her business disparagement claim, Underwood presented no evidence that she suffered special damages from any disparaging communication made by Schoen. With respect to Underwood's claim for breach of fiduciary duty, Underwood argued that Schoen owed her fiduciary duties based on two sources: (1) Schoen's position as an officer of the LLC and (2) Schoen's and Underwood's relationship as co-members of the LLC. As the court discussed

previously in this opinion, any duties owed by Schoen as an officer of the LLC were owed to the LLC, and Underwood lacked standing to raise a claim based on breach of fiduciary duty as an officer. As for the claim that Schoen owed her a duty as a fellow member of the LLC, the court stated that Texas courts have indicated that members owe fiduciary duties to the LLC itself but not to other members. The court acknowledged that one court has recognized a fiduciary relationship between members when a member controls the LLC and purchases another member's interest or causes the company to redeem the interest, a situation that was not present in this case. Thus, because Schoen did not owe Underwood fiduciary duties based merely on their relationship as members, Schoen was entitled to summary judgment on the claim for breach of fiduciary duties. The court held that Schoen had not met his summary judgment burden with respect to Underwood's claim for breach of contract since Underwood was a party to the Membership Purchase Agreement. Schoen's claim that Underwood failed to present any evidence that Schoen breached the contract was raised for the first time in Schoen's reply brief and thus was not considered by the court.

S. Direct and Derivative Claims

In re LoneStar Logo & Signs, LLC, 2018 WL 2437601, __ S.W.3d __ (Tex. App.—Austin 2018, no pet. h.).

The court of appeals held that the trial court abused its discretion in holding that a former member of a closely held LLC had standing to pursue derivative claims. The court rejected the former member's argument that the Legislature in Subchapter J of Chapter 101 of the Texas Business Organizations Code intended to eliminate any requirement of present member status with respect to a "derivative proceeding" on behalf of a closely held LLC.

Dunster Live, LLC ("Dunster"), the plaintiff in the action underlying this mandamus action, sued individually and derivatively complaining that the defendant members of LoneStar Logo & Signs, LLC ("LoneStar 1") acted wrongfully in forming a new LLC, which did not include the plaintiff as a member, to perform a new contract that essentially continued the business in which LoneStar 1 was previously engaged. The defendants acknowledged that the majority owners of LoneStar 1 deliberately sought to exclude Dunster from their dealings relating to the new contract but maintained that they possessed the legal right and good reason to do so. The immediate focus of this mandamus proceeding was the threshold question of Dunster's standing to pursue its derivative claims.

The defendants in the underlying proceeding sought summary judgment on the basis that Dunster's interest in LoneStar 1 had been redeemed due to failure to pay a capital call before Dunster filed its lawsuit and that Dunster thus did not have standing to pursue its derivative claims. Dunster disputed the effectiveness of the redemption based on the terms of the company agreement and alleged breaches of fiduciary duty and lack of a valid business purpose, but the trial court ruled that Dunster's membership interest in LoneStar 1 was validly redeemed and that Dunster ceased being a member of LoneStar 1 before the lawsuit was filed. The trial court declined to dismiss Dunster's derivative claims, however, concluding that Dunster had standing because Dunster was a member at the time its derivative claims accrued.

The court of appeals began its analysis by noting that "the legal principles governing derivative claims brought on behalf of LLCs are, at least with respect to this case, materially identical extensions or analogues of those that have developed in regard to shareholder-derivative actions on behalf of corporations." The court reviewed the historical roots, purposes, and requirements of a derivative action, including "the rule, recognized in Texas as elsewhere, that a corporate shareholder (and, by logical extension, an LLC member) must have and maintain that ownership status in order to have standing to prosecute derivative claims on the entity's behalf." The court acknowledged that "Texas courts have recognized an equitable exception to this ownership requirement where a shareholder's interest is 'destroyed' involuntarily without a valid business purpose," but the court stated that "the district court has determined that this exception is not applicable here by granting partial summary judgment recognizing that the redemption had been effective in causing Dunster to 'cease[] being a member of LoneStar Logo & Signs, LLC . . .'"

The court generally reviewed the matters covered by Subchapter J of Chapter 101 of the Texas Business Organizations Code (Sections 101.451 through 101.463), which addresses derivative proceedings in the LLC context and parallels the statutes governing derivative proceedings involving for-profit corporations in Subchapter L of Chapter 21 of the Texas Business Organizations Code. The court called attention to the standing requirements of Section 101.452, which include the so-called "contemporaneous ownership" requirement. Section 101.463,

however, contains provisions specifically applicable to LoneStar 1 as a “closely held LLC” (an LLC with fewer than 35 members and no membership interests listed on a national securities exchange or regularly quoted in an over-the counter market). Section 101.463 provides that Sections 101.452-101.459 do not apply to closely held LLCs. The court explained that the Texas Supreme Court has determined that the analogous provisions in the corporate context codified a version of the shareholder-derivative action that permits a shareholder of a closely held corporation to bring an action on behalf of the corporation free of the statutory standing, demand, and mandatory-dismissal requirements that would otherwise apply.

The court explained that “[t]he gravamen of Dunster’s standing theory is that Sections 101.463 and 101.451, as the Texas Supreme Court has construed this same language in regard to shareholder-derivative suits, codifies a version of the derivative action that also eliminates any requirement that a claimant presently possess member status in order to assert derivative claims on behalf of a closely held LLC.” Dunster argued that it satisfied the contemporaneous-ownership requirement in Section 101.452 because it still had member status when the derivative claims accrued, and the district court relied on this rationale in denying summary judgment on the standing issue. Dunster’s arguments rested upon the premise that the Legislature in Subchapter J intended to eliminate any requirement of present member status from the “derivative proceeding” it codified, but the court of appeals concluded that “[t]he statutory language does not go that far, nor has the Texas Supreme Court so held.”

In explaining its rejection of Dunster’s standing theory, the court of appeals initially observed that the implications of Dunster’s theory should give some pause in that its theory seemed to imply that a litigant need not meet standing requirements of any kind in order to bring a derivative suit on behalf of a closely held LLC. The court rejected Dunster’s argument that the import of Section 101.463’s provision allowing a court to treat a derivative action brought by a member of a closely held LLC as a direct action for the member’s own benefit is that a plaintiff’s standing to bring a derivative claim is contingent on its standing to bring a direct claim. The court pointed out that the Texas Supreme Court has held that “the proceeding still must be derivative” under the parallel language governing closely held corporations, and the court of appeals presumed that the Legislature codified its statutory versions of “derivative actions” with awareness that a fundamental feature of such an action is the claimant’s possession of an interest in the entity on whose behalf it sues such that the plaintiff has a stake in the outcome. The court said the text of Subchapter J contemplated rather than abrogated this fundamental feature as reflected by its text, including references in Section 101.463 to “‘a derivative proceeding brought *by a member* of a closely held limited liability company’ and ‘a recovery in a direct or derivative proceeding *by a member*,’” and additional prerequisites to standing that apply under Section 101.452 to one who is presently a “member.” The court pointed out that sister courts of appeals have held that the parallel corporate provisions require that shareholder status be maintained throughout the suit, and recent decisions of the Texas Supreme Court addressing derivative suits brought on behalf of closely held corporations “have uniformly presumed a plaintiff who is presently a shareholder.”

In conclusion, the court held that (1) the trial court abused its discretion in holding that Dunster had standing as a former member to pursue derivative claims on LoneStar 1’s behalf and (2) the relators lacked an adequate remedy by appeal after final judgment. Thus, mandamus relief was appropriate, and the court conditionally granted the writ and directed the trial court to vacate its previous order and dismiss Dunster’s derivative claims for want of standing.

See also Senger Creek Dev., LLC v. Fuqua, No. 01-15-01098-CV, 2017 WL 2376529 (Tex. App.—Houston [1st Dist.] June 1, 2017, no pet.) (mem. op.) and *Schoen v. Underwood*, No. W-11-CA-00016, 2012 WL 13029591 (W.D. Tex. May 15, 2012), summarized above under “Standing or Capacity to Sue.”

T. Divorce of Member

In re Marriage of Armstrong, No. 12-15-00300-CV, 2017 WL 3225053 (Tex. App.—Tyler July 31, 2017, no pet.) (mem. op.).

The court of appeals affirmed a final decree of divorce and rejected Ronald Armstrong’s claim that real estate was owned by his LLC.

The trial court granted a divorce and divided the property of Ronald and Stephanie Armstrong. Ronald argued that the trial court abused its discretion by awarding the Warehouse real estate (the “Warehouse Property”) to Stephanie. More specifically, he contended that the Warehouse Property was not part of the marital estate

because it was deeded to his LLC or, alternatively, was held in a partnership between him and his mother-in-law, Dotie Adams. The evidence showed that Ronald and Dotie bought the Warehouse Property and both of their names were listed on the general warranty deed. Dotie paid the entire purchase price of \$30,000.

Ronald argued that he deeded the Warehouse Property to Warehouse Enterprises, an LLC that he formed two years before trial. The court of appeals disagreed, noting that Ronald testified that he deeded the hardware store (a store that operated on the Warehouse Property), and not the Warehouse Property itself, to the LLC. The court further noted that there was no trial exhibit or evidence showing the assets of Warehouse Enterprises, or any paperwork showing its formation. The court concluded that “there is no evidence that Ronald deeded the ‘Warehouse Property’ to Warehouse Enterprises.”

Ishee v. Ishee, No. 09-15-00197-CV, 2017 WL 2293150 (Tex. App.—Beaumont May 25, 2017, no pet.).

The court held that an LLC member did not owe his ex-wife, as an assignee of 50% of his interest pursuant to their divorce decree, any fiduciary duty under the Texas Business Organizations Code, but the member owed her a fiduciary duty under the Family Code to remit her share of distributions actually received.

Janice and Michael Ishee divorced in 2010, and the divorce decree awarded Janice a percentage of Michael’s interests in the closely held businesses in which he was an owner at the time of the divorce. In 2013, Janice sued Michael, World Environmental, LLC (“World Environmental”), Charles Hall (who held a majority interest in World Environmental when Michael and Janice divorced), and the other businesses identified in the divorce decree. Janice alleged that Michael never paid her the money she was entitled to receive based on her assigned interest in the businesses identified in the decree. Additionally, Janice requested that the court declare her rights under the assignment she acquired in Michael’s interest in the businesses identified in the decree when she and Michael divorced.

Michael claimed that he never sent Janice any money after they divorced because the businesses identified in the decree never distributed any income, gains, losses, deductions, credits, distributions, or similar items. In large part, the parties’ dispute centered on whether the rights Janice obtained in the businesses in which Michael held memberships required Michael to remit any of the amounts that he had received in guaranteed payments from the businesses after he and Janice divorced. World Environmental’s accountant testified that the guaranteed payments Michael received from World Environmental were reported on the K1s Michael received from the company, and the tax forms that the accountant generated for the company reflected the company’s income, loss, distributions, and business activities of the company. Janice did not call an accountant to dispute this testimony, so there was no testimony showing that the activities reflected in Michael’s K1s were fraudulent, that World Environmental improperly accounted for its income or its expenses, or that Michael’s K1s failed to properly reflect the monetary benefits that he received from World Environmental after he and Janice divorced. In final argument, Janice’s attorney asked the jury to ignore the testimony and evidence about the manner in which World Environmental accounted for its activities and suggested to the jury that Janice was entitled to receive a percentage of all of the benefits Michael received from World Environmental based on the assigned interest she held in the business following the divorce, including a percentage of the guaranteed payments Michael received as well as a percentage of the cash value of his fringe benefits, such as a company car, company cell phone, and health insurance. The jury found that Michael breached a fiduciary duty to Janice and awarded actual and exemplary damages and disgorgement.

On appeal, Michael argued that he did not owe Janice a fiduciary duty following their divorce because the decree did not make Janice a member of the businesses in which he held memberships upon their divorce. The court observed that any fiduciary duty that might exist between spouses generally terminates when they divorce if the spouses are independently represented by separate attorneys. In this case, however, Janice was awarded a percentage of Michael’s interests in several LLCs and became an assignee of Michael’s interests pursuant to Tex. Bus. Orgs. Code § 101.1115(a) (which provides that “on the divorce of a member, the member’s spouse, to the extent of the spouse’s membership interest, if any, is an assignee of the membership interest”). The court explained that, as an assignee, Janice did not have the same rights that Michael had as a member. For example, as an assignee whose membership was not approved by the members of the LLCs, she did not have the right to participate in the management and affairs of the LLCs or to become a member. Tex. Bus. Orgs. Code § 101.108(b). As an assignee, Janice was, however, entitled to be allocated a percentage of the LLC’s income, gain, loss, deduction, credit or similar items allocated to Michael. Notwithstanding these rights as assignee, the court stated that “nothing in Chapter 101 of the Business Organizations Code creates a statutory fiduciary duty between the members of a limited

company and those who become assignees of a member's rights upon a member's divorce. *See id.* §§ 101.101–.114 (West 2012). We agree with Michael's argument that the fiduciary duty he owed to Janice is not a duty imposed on him under the provisions of Chapter 101 of the Business Organizations Code."

Janice argued that Michael's fiduciary duty to turn over the portion she was entitled to receive in the benefits he received from the businesses identified in the decree arose under Tex. Fam. Code § 9.011(b). Section 9.011(b) provides that "[t]he subsequent actual receipt by the non-owning party of property awarded to the owner in a decree of divorce or annulment creates a fiduciary obligation in favor of the owner and imposes a constructive trust on the property for the benefit of the owner." The court held that this provision imposed on Michael a fiduciary duty to remit to Janice, as his assignee, Janice's percentage of the amount of income, loss, or distributions he actually received from the businesses identified in the decree. There was evidence that Michael received some distributions from World Environmental and another LLC identified in the divorce decree and that Michael did not remit Janice's share to her; therefore, the evidence supported the jury's finding that Michael failed to comply with his fiduciary duty to Janice after the divorce.

Michael next argued that the evidence did not support the amount of the jury's damage and disgorgement awards. The jury awarded Janice \$111,520 in compensatory damages, \$130,00 in exemplary damages, and \$111,520 for disgorgement. The court stated that it appeared that the bulk of the \$111,520 awarded by the jury consisted of income Michael received in the form of guaranteed payments for services. Although Janice's attorney asked the jury to award Janice damages based on the value of all of the benefits Michael received from the businesses identified in the decree, the court said the decree did not assign Janice a right to every benefit Michael received from these businesses, and there was no evidence that any of the businesses identified in the decree distributed any income, gains, losses, deductions, or credits to their members. Capital accounts were adjusted annually to reflect profits and losses, but distributions were not made. The evidence showed that the amounts of the guaranteed payments were consistent with the amounts paid as guaranteed payments before the divorce and were based on the market for individuals with similar expertise. Based on the court's review of the evidence, the court concluded that Michael only received distributions of approximately \$5,000 from the businesses after the divorce. Based on the decree, Janice was entitled to 50% of that amount, approximately \$2,500. In concluding that the damage award was excessive the court stated: "Importantly, the decree in Janice and Michael's divorce did not give Janice a percentage interest in the [guaranteed] payments, representing Michael's salary after the divorce from his work as an environmental consultant. In our opinion, the guaranteed payments World Environmental paid Michael, standing alone, is but one part of World Environmental's operations so it was not individually an item that World Environmental allocated to its members, nor were the payments distributions allocated by World Environmental to its members. *See Tex. Bus. Orgs. Code Ann. § 101.109(1), (2).*" Because the exemplary damage award was unliquidated, the court was unable to suggest a remittur, and the disgorgement award appeared to the court to constitute a double recovery since the jury awarded the same amount it awarded as compensatory damages and there was no showing Michael used the \$2,500 withheld from Janice to obtain additional benefits that should, in fairness, be disgorged. Under the circumstances, the court remanded Janice's claims for retrial.

The court disagreed with Janice that her recovery could be sustained on a breach-of-contract theory, stating that the jury's breach-of-contract award of \$111,331 suffered from the same flaws that resulted in reversal of the breach-of-fiduciary duty award.

World Environmental argued that the trial court's declaratory judgment that Janice "owned" an interest in World Environmental should be reformed, but the court of appeals found no error in the trial court's declaration that Janice "owned" a percentage interest where the phrase was qualified by the following language: "with the rights and duties of an assignee of a membership interest as set forth in Section 101.109" of the Texas Business Organizations Code. The court of appeals stated that "the qualifying phrase makes it clear that Janice is not an owner of the company, but instead that she has an interest in World Environmental allowing her to participate in the organization as an assignee." After reviewing the rights given and restrictions placed on an assignee under Section 101.109, the court stated: "Based on the language the trial court used in granting Janice's claim for declaratory relief, the judgment is clear that Janice's rights are those of an assignee under the Business Organizations Act, and the language in the judgment does not grant Janice full ownership in the business with the same rights that are held by World Environmental's approved members."

U. Bankruptcy

Mackenzie Leigh, LLC v. Nardos Imam (In re Imam), No. 16–33362–hdh7, Adv. No. 16–03156–hdh, 2018 WL 614937 (Bankr. N.D. Tex. Jan. 29, 2018).

The debt resulting from an LLC member’s failure to contribute intellectual property as represented in the LLC agreement was not a debt that was nondischargeable based on false pretenses, false representations, or actual fraud because the evidence indicated that the member did not understand that she was making the representation that was made in the LLC agreement.

V. 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.

W. Service of Process

Paselk v. Bayview Loan Servicing LLC, No. 6:16CV77-MHS-JDL, 2016 WL 7799628 (E.D. Tex. June 8, 2016). (Although the court issued this opinion in 2016, it is included in this year’s update because it did not appear in the Westlaw database until recently.)

The court denied a pro se plaintiff’s motion for default judgment against a Delaware LLC because the plaintiff did not follow the federal or state rules for service of process. Under Fed. R. Civ. P. 4, a plaintiff can effectuate service of process on an entity by “delivering a copy of the summons and complaint to an officer, an authorized managing general agent, or any other agent authorized by statute or law to receive service of process, and by also mailing a copy to defendant.” A plaintiff can also serve a defendant by following the state law for serving summons. Under Texas law, “each manager of a manager-managed domestic or foreign limited liability company and each member of a member-managed domestic or foreign limited liability company is an agent of that limited liability company” for purposes of service of process. Tex. Bus. Orgs. Code § 5.255. Here, the plaintiff mailed her complaint to an attorney that once represented the defendant LLC in a lawsuit and mailed a copy of her complaint to a business address for the defendant LLC in Florida. The court found neither of these were proper forms of service under federal or Texas law. The court stated the plaintiff could have served the LLC by serving its Texas “registered agent, a manager of [the LLC] since it was a manager-managed limited liability company, an officer, or a managing or general agent” of the LLC. Thus, the court found the plaintiff did not properly serve the defendant LLC.

X. Personal Jurisdiction

OZO Capital, Inc. v. Syphers, No. 02-17-00131-CV, 2018 WL 1531444 (Tex. App.—Fort Worth Mar. 29, 2018, no pet. h.) (mem. op.).

A nonresident individual’s status as manager of a Texas LLC was not sufficient by itself to establish general jurisdiction over the individual in Texas.

Wormald v. Villarina, 543 S.W.3d 315 (Tex. App.—Houston [14th Dist.] 2017, no pet. h.).

The record did not contain sufficient evidence to impute the contacts of a Texas LLC under the alter-ego doctrine to three non-resident individuals who were managers and owned an interest in an out-of-state LLC that managed and owned an interest in the Texas LLC. The direct contacts of the individuals, including the fact that one of them was mistakenly designated as registered agent for two Texas LLCs, were also insufficient to subject any of the individuals to personal jurisdiction.

A Texas LLC sued the guarantors of a note held by the Texas LLC, and the guarantors counterclaimed against the Texas LLC and asserted claims against various others, including three non-resident individuals who managed the LLC that was the sole manager of the Texas LLC. The guarantors relied on the alter-ego doctrine as well as direct contacts of the individuals to establish personal jurisdiction over the individuals. In support of their

special appearance, the individuals asserted that “that they are partners, living in California, with fractional interests in a non-Texas entity that owns a fractional interest in another non-Texas entity that before the suit owned a fractional interest in the out-of-state entity that manages [the Texas LLC plaintiff].” The guarantors relied on a cash-flow summary of cash flows to and from the Texas LLC and some email communications in support of its argument that the Texas LLC was the alter ego of the individuals. The court set forth the test for jurisdictional veil piercing (which differs from veil piercing for liability purposes) as follows:

‘To ‘fuse’ a parent company and its subsidiary for jurisdictional purposes, the plaintiffs must prove the parent controls the internal business operations and affairs of the subsidiary.’ *PHC-Minden*, 235 S.W.3d at 175 (quotation omitted). ‘The rationale for exercising jurisdiction is that the parent corporation exerts such domination and control over its subsidiary that they do not in reality constitute separate and distinct corporate entities but are one and the same corporation for purposes of jurisdiction.’ *Id.* at 173. This court has used the standard for jurisdictional veil-piercing of the corporate veil between a parent company and a subsidiary company to assess jurisdictional veil-piercing as between an individual and a corporation. [citation omitted].

The court concluded that the documents in the record did not suggest that the Texas LLC was not maintained as a distinct entity or that any of the three individuals directed the business and affairs of the Texas LLC “any more than normally is associated with ownership and directorship.”

Having concluded that the Texas LLC’s contacts could not be imputed to the three individuals, the court turned to the question of whether the trial court had personal jurisdiction over them based on their own contacts. Other than the argument that one of the individuals held himself out as a Texas resident and sent emails calling one of the guarantors a crook, the court concluded that the guarantors did not brief any argument that the record evidence showed a substantial connection between the individuals’ contacts with Texas and the operative facts of the suit, and any such argument was thus waived due to inadequate briefing. The argument that one of the individuals held himself out as a Texas resident was based on his having listed himself as the registered agent for two Texas LLCs. In an affidavit, he stated that he did not realize that he was required to be a Texas resident to serve as registered agent and that listing himself as registered agent was a mistake because he was not a Texas resident. He averred that he amended the filings with the Texas Secretary of State once he realized the mistake. The court stated that even if the individual’s “act of listing himself as a registered agent of service for Texas corporations is sufficient to show contact with Texas, there is no substantial connection between this Texas contact and the operative facts of the litigation, so this contact does not support specific jurisdiction.” Based on the evidence that the individual lived in California for the past twelve years, the trial court was entitled to credit the individual’s assertion that he made a mistake when he filled out the form.

IPVX Patent Holdings, Inc. v. Broadvox Holding Co., LLC, No. 6:11-cv-575, 2012 WL 13012617 (E.D. Tex. Sept. 26, 2012). (Although the court issued this opinion in 2012, it is included in this year’s update because it did not appear in the Westlaw database until recently.)

Although a Delaware LLC and its LLC subsidiary shared common officers and directors, and the subsidiary was wholly owned and managed by the Delaware parent LLC, there was no evidence that the amount of control exercised by the parent was sufficient to impute the contacts of the subsidiary to the parent under the alter-ego doctrine for purposes of personal jurisdiction.

The plaintiff sought to impute the contacts of a wholly owned LLC to its parent for purposes of personal jurisdiction and in order to establish venue in the Eastern District of Texas. To overcome the presumption that a subsidiary, even a wholly owned subsidiary, is independent of its parent for purposes of personal jurisdiction, a plaintiff must demonstrate that the subsidiary is the alter ego of the parent. The court listed the following factors considered by the Fifth Circuit when deciding whether a subsidiary should be deemed the alter ego of its parent: (1) does the parent own stock in the subsidiary and if so how much; (2) do the two corporations have separate headquarters; (3) do they have common officers and directors; (4) do they observe corporate formalities; (5) do they maintain separate accounting systems; (6) does the parent exercise complete authority over the subsidiary’s general policy; and (7) does the subsidiary exercise complete authority over daily operations. The plaintiff failed to establish that the LLC subsidiary in this case was the alter ego of the parent. The court stated that 100% ownership of the “stock” of the subsidiary LLC and common officers and directors were insufficient to prove that the two

LLCs were one and the same entity. While the plaintiff contended that the parent LLC must control the subsidiary LLC because the parent managed its subsidiary, there was no evidence that the control exerted by the parent was “greater than that ‘normally associated with common ownership and directorship.’”

Y. Pro Se Representation

Moore v. Vednor, No. 3:17-CV-1436-G-BH, 2017 WL 3616444 (N.D. Tex. July 27, 2017), report and recommendation adopted, 2017 WL 3601887 (N.D. Tex. Aug. 22, 2017).

The court stated that “[i]t is well-established that although individuals have the right to represent themselves or proceed pro se under this statute [28 U.S.C. § 1654], corporations are fictional legal persons who can only be represented by licensed counsel.” Further, “[t]he rationale for this long-standing rule applies equally to ‘all artificial entities,’ such as partnerships and associations.” Moreover, according to the court, “[a]s a cross between a corporation and a partnership, a limited liability company is also an artificial entity that may only appear in federal court through licensed counsel.”

See also *Doe v. Compact Info. Sys., Inc.*, Civ. A. No. 3:13-CV-5013-M, 2017 WL 3394584 (N.D. Tex. July 14, 2017), report and recommendation adopted, 2017 WL 3405522 (N.D. Tex., Aug. 7, 2017) (citing the same statute and recommending that a defendant LLC should be found in default and have its defenses struck for not having licensed counsel appear on the LLC’s behalf); *United States v. Rafiq*, Civ. A. No. 4:16-cr-00243-O, 2017 WL 2992540 (N.D. Tex. June 26, 2017), report and recommendation adopted, 2017 WL 2984079 (N.D. Tex. July 13, 2017) (recommending dismissal because “a business entity may only appear in federal court proceedings when represented by a licensed attorney,” and it was clear from the pleadings that an individual who was not a licensed attorney was seeking relief for an LLC and a corporation); *Shields v. Conkling*, No. 14-16-00508-CV, 2017 WL 2382536 (Tex. App.—Houston [14th Dist.] June 1, 2017, pet. denied) (mem. op.) (“A limited liability company cannot represent itself in a lawsuit, but must be represented by a licensed attorney.”).

Z. Governing Law

Sandt v. Energy Maint. Servs. Group I, LLC, 534 S.W.3d 626 (Tex. App.—Houston [1st Dist.] 2017, pet. denied).

Applying Delaware statutory and common law to the interpretation of the operating agreement of an LLC formed under Delaware law, the court concluded that the LLC’s CEO was entitled to be indemnified under the terms of the LLC operating agreement and action taken by the LLC’s board.

Fort Apache Energy, Inc. v. Huddleston (In re Huddleston), No. 16-31488-sgj-7, Adv. No. 16-03130-sgj, 2017 WL 1207522 (Bankr. N.D. Tex. Mar. 31, 2017), aff’d, 2018 WL 1182902 (N.D. Tex. Mar. 6, 2018).

Applying Nevada statutory and common law to the plaintiff’s veil-piercing claim, the court held that the sole member and manager of a Nevada LLC was personally liable for all amounts the LLC was obligated to pay the plaintiff under a joint operating agreement between the plaintiff and the LLC.