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Partnership Law

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I. INTRODUCTION

During an unprecedented Survey period defined by disruption, uncertainty, and adaptation, Texas courts remained committed to precedent. Despite necessary adjustments to court procedure in connection with the ongoing COVID-19 pandemic, the Texas judiciary continued to issue decisions that emphasize freedom of contract, the importance of maintaining good standing with the Texas Secretary of State, and that contributions to a formal partnership may come in the form of not only cash or physical assets but also services. If there is one collective takeaway from Texas partnership cases during the Survey period, it is that the actual words in joint venture agreements and other legal documents

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are given tremendous deference. Courts stressed the continued importance of careful drafting, acute regard for the minutia in service of process, and scrupulous adherence to fiduciary duties. This Article is divided into six sections that discuss cases concerning: (1) partnership formation; (2) the powers of a limited partner; (3) personal jurisdiction; (4) forfeiture and involuntary termination; (5) indemnification; and (6) transfer of a partnership interest.

II. PARTNERSHIP FORMATION

A. Freedom of Contract

The question presented in *Energy Transfer Partners v. Enterprise Products Partners*[1] is whether conditions precedent to the formation of a partnership may be enforced, even where the parties act as if they were in a partnership. Ultimately, the Texas Supreme Court was guided by the principle of freedom of contract in holding that Texas law may permit an arrangement where no partnership exists unless and until certain conditions precedent have been satisfied.[2]

The parties in dispute, Enterprise Products Partners, LP and Enterprise Products Operating LLC as one group of parties (collectively, Enterprise), and Energy Transfer Partners, LP and Energy Transfer Fuel, LP as the other group of parties (collectively, Energy Transfer), entered into several written contracts under which the parties agreed that neither Enterprise nor Energy Transfer would be committed to proceed in the proposed venture until each of their respective board of directors formally approved the contract.[3] Over the next several months, Enterprise and Energy Transfer pursued a pipeline project together, marketing such project to potential customers as a "50/50" joint venture.[4] Given that Enterprise and Energy Transfer were among the ten largest energy companies in the United States at the time of the proposal, the project instilled expectations of considerable potential revenue.[5] Ultimately, Enterprise decided to end its relationship with Energy Transfer.[6] Soon after, Enterprise entered into another pipeline project with a new partner.[7] Energy Transfer sued, claiming Enterprise breached its duty of loyalty in connection with a partnership the two formed to pursue the pipeline project.[8] After the jury sided with Energy Transfer, the Fifth Dallas Court of Appeals

1. 593 S.W.3d 732, 733 (Tex. 2020).
2. *Id.* at 734, 742.
3. *Id.*
4. *Id.* at 735.
5. *See id.* at 734. Due to the emergence of new technologies, substantial oil production in Canada and the northern United States created a glut of oil reserves with no efficient route to refineries further south. *See id.* Enterprise and Energy Transfer sought to capitalize on the situation by joining forces to convert an existing natural gas pipeline to transport the oil, promising substantial returns for both. *See id.*
6. *Id.* at 736.
7. *Id.*
8. *Id.*

reversed and Energy Transfer appealed.[9]

In its review of the case at issue, the supreme court applied the five-factor statutory test to determinate the existence of a partnership as codified by the Texas Business Organizations Code and further laid out in *Ingram v. Deere*.[10] Pursuant to the *Ingram* doctrine, the following five factors indicate the existence of a partnership: (1) the "right to receive a share of profits"; (2) intent to become a partnership; (3) the "right to participate in control"; (4) an agreement to share losses or liability for third-party claims; and (5) "contributing or agreeing to contribute money or property to the alleged partnership."[11] To supplement its analysis, the supreme court further reflected on *Ingram*, in which it doubted the legislature "intended to spring surprise or accidental partnerships on independent business persons."[12] However, unlike *Ingram*, the case at hand presented the question of whether the parties could negate the five-factor test laid out above by intentionally agreeing not to form a partnership unless certain conditions are met.[13]

Energy Transfer argued that the parties' intent to form a legal partnership is just one factor to be considered within the five-factor test, and that the other factors demonstrated that a partnership had been formed.[14] Conversely, Enterprise stressed the fundamental principles of freedom of contract and law and equity—that if the parties did not intend to form a partnership, then such intent should have significant sway as to the issue of whether a partnership had been formed.[15] The supreme court was favorable to Enterprise's public policy argument.[16] The supreme court further supported its stance by noting that Texas courts remain true to the principle of freedom of contract by regularly "reject[ing] legal claims that are artfully pleaded to skirt unambiguous contract language."[17]

The supreme court's holding in *Energy Transfer* should serve as an opportunity for counsel to carefully draft contracts to express the intent of the parties, especially where the parties seek to avoid the unintentional

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9. *Id.* at 736–37.

10. *Id.* at 737.

11. Ingram v. Deere, 288 S.W.3d 886, 895 (Tex. 2009) (stating that, under the Texas Revised Partnership Act, courts should evaluate the totality of the circumstances, "with no single factor being either necessary or sufficient to prove the existence of a partnership").

12. *Energy Transfer Partners*, 593 S.W.3d at 738 (quoting *Ingram*, 288 S.W.3d at 898).

13. *Id.*

14. *Id.* at 740.

15. *See id.*

16. *Id.* The supreme court underscored the primacy of this public policy rationale throughout its jurisprudence by quoting the nineteenth century British judge, Sir George Jessel,

> [i]f there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract.

Id. at 738 (citing Wood Motor Co. v. Nebel, 238 S.W.2d 181, 185 (Tex. 1951)).

17. *Id.*

formation of a partnership. Counsel would be wise to pay special attention to clauses involving waiver or modification of such conditions precedent to partnership formation, in order to ensure no accidental waiver of the no-partnership clause occurs.

B. Sweat Equity

GR Fabrication, LLC v. Swan is a reminder of the core purpose of partnerships—to bring two spheres of expertise or contribution together to create a stronger business entity.[18] Longtime associates, Grant Swartzwelder and Randy Swan, came to a disagreement as to the nature of their business arrangement when Swan claimed the two were acting as a partnership, and Swartzwelder insisted Swan was merely an employee. To Swartzwelder's point, Swan was employed and salaried by OTA Compression, LLC, a limited liability company majority owned by Swartzwelder.[19] However, after considerable conflicting testimony from the parties, the trial court jury found that Swartzwelder was in breach of a de jure partnership with Swan, awarding Swan damages and attorney's fees.[20] Swartzwelder filed the instant appeal, contending among other things that there was insufficient evidence at trial to support the jury's findings.[21] In reviewing Swan's claim that a partnership had been formed (and therefore breached), the Second Fort Worth Court of Appeals applied the facts to the five-factor test set forth in § 152.052(a) of the Texas Business Organizations Code and the *Ingram* doctrine, as delineated in this article's discussion of *Energy Transfer* above.[22]

Of the five factors, profit sharing and participation in control have proven to be the most dominant in determining whether a partnership exists.[23] With respect to profit sharing, Swan presented evidence that it was his and Swartzwelder's practice to split profits for each transaction.[24] In response, Swartzwelder presented a far different version of the arrangement, maintaining that no profits were ever split and that Swan was fairly compensated as a salaried employee.[25] Notably, the court emphasized that the mere fact that Swan was an employee did not preclude him from also being in a partnership with his employer.[26] As such, the court determined the jury could have reasonably believed that such a profit-

18. *See* GR Fabrication, L.L.C. v. Swan, No. 02-19-00242-CV, 2020 WL 2202325, at *1, *8 (Tex. App.—Fort Worth May 7, 2020, no pet.) (mem. op., not designated for publication).

19. *Id.* at *1–2.

20. *Id.* at *3.

21. *Id.*

22. *Id.* at *4–8.

23. *Id.* at *4, *7.

24. *Id.* at *1. Swan's testimony centered around a series of "handshake" agreements and a repeated course of conduct in which Swartzwelder would purchase used oil and gas equipment, Swan would refurbish it, and the equipment would be resold for a profit with the proceeds split equally between the two men. *Id.*

25. *Id.* at *2.

26. *Id.* at *4.

sharing arrangement did exist.[27]

As to participation in control and contributions to the business, Swartzwelder argued that each transaction was routed through GR Fabrication, LLC (GR Fabrication), a limited liability company wholly owned by Swartzwelder.[28] Although Swartzwelder's sole control of GR Fabrication contributed to the appellate court's decision, it was not dispositive. The appellate court explained that the division of control (or control in separate spheres of authority) "does not necessarily indicate" there is a lack of joint control.[29] While Swartzwelder contributed financially to the partnership, Swan contributed significant "sweat equity" (or services) "in buying, refurbishing, and marketing the equipment" that was the subject of the partnership.[30] In this case, the lack of a written contract between the parties did not diminish the possibility that the business associates intended to create a partnership whereby Swartzwelder would contribute the funds and Swan would manage the day-to-day operations of the venture.[31]

After examining the totality of the circumstances, the appellate court concluded the majority of the five factors favored the existence of a partnership between Swartzwelder and Swan.[32] This case demonstrates that Texas courts are conscious of the importance of services (sweat equity) contributed to a partnership, as opposed to merely valuing financial contributions, and that the ambiguity created by informal "handshake" agreements underscores the gravity of not committing such arrangements to writing.

III. POWERS OF LIMITED PARTNERS

During a Survey period in which domestic and international travel were heavily restricted, the circumstances leading to the dispute in *Great Southwest Regional Center, LLC v. ACSWD, LP*[33] remind practitioners that while foreign investment through government sponsorship programs can provide much needed influx of seemingly easy capital, the rudimentary rules of thoughtful drafting still apply.

Under the U.S. Citizen and Immigration Services (USCIS) EB-5 program, foreign investors may obtain a permanent resident card (often referred to colloquially as a "green card") by making a certain capital investment in a U.S. business that creates at least ten jobs.[34] Great Southwest Regional Center, LLC (Great Southwest) sponsored one such project involving salt water disposal wells and formed a new entity

27. *Id.* at *5.
28. *Id.* at *7.
29. *Id.*
30. *Id.* at *8.
31. *See id.* at *6–7.
32. *Id.* at *8.
33. No. 14-18-00679-CV, 2020 WL 205993, at*1 (Tex. App.—Houston [14th Dist.] Jan. 14, 2020, no pet.) (mem. op.).
34. *Id.*

(ACSWD) that would offer a limited partnership interest in exchange for such a monetary investment.[35]

Lu Jun, a foreign citizen seeking to participate in USCIS's EB-5 program, agreed to invest in ACSWD.[36] After signing ACSWD's partnership agreement and wiring the appropriate funds to Great Southwest, Jun became the sole limited partner in the partnership, holding a 99% interest.[37] Pursuant to the ACSWD partnership agreement and an accompanying private placement offering memorandum, all of the EB-5 program investments would be loaned to 3:16 Disposal Systems, Series LLC (3:16) for the purpose of funding 3:16's management of the salt water disposal facilities.[38] At least some of the EB-5 funds were instead loaned to Frost Rains Holdings, LLC (Frost), which was the sole member of Great Southwest, ACSWD's general partner.[39] In January 2015, Jun requested a refund of the amounts she had wired to ACSWD, which was subsequently denied.[40]

At the time, Great Southwest was involved in an underlying dispute with the company it had used to locate foreign investors for the salt water disposal wells project.[41] Jun filed a plea in intervention, seeking a return of her investment in ACSWD.[42] The opposing parties involved in the underlying dispute, including Great Southwest, filed a motion to dismiss Jun's claim on the grounds that she lacked standing pursuant to an assignment of claims she had executed.[43] In response, Jun asserted that, in her capacity as the sole limited partner of ACSWD, she had removed Great Southwest as ACSWD's general partner and had appointed SWD Investment Recovery Fund, LLC (SWD Investment) as the replacement general partner.[44] The trial court entered a judgment affirming Jun's actions.[45] Having thus gained court approved control over ACSWD, Jun nonsuited her claims against ACSWD, thereafter causing ACSWD to file its own intervention asserting claims of "breach of contract, breach of fiduciary duties, and fraudulent transfer" against each of Great Southwest, Frost, and Frost's primary principles, Robert Frost and Kenneth Frost.[46] The trial court thereafter granted an order agreeing to realign the

35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *See id.* at *2. The opinion of the appellate court did not specify Jun's reason for requesting the refund, although it was presumably related to the EB-5 funds being loaned to Frost and used to pay down car loans and credit card bills instead of being loaned to 3:16 for the purpose of investing in salt water disposal wells as specified in the limited partnership agreement and private placement offering memorandum. *See id.* at *5.
41. *Id.* at *2.
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.* at *2–3.
46. *Id.* at *2.

case with ACSWD as the sole plaintiff.[47]

In its appeal, Great Southwest contended, *inter alia*, that the trial court had misinterpreted ACSWD's partnership agreement by approving Jun's removal of Great Southwest as general partner of ACSWD and the appointment of SWD Investment to that role.[48] Great Southwest relied on isolated portions of the partnership agreement that stated the admission of another entity as a new general partner required the consent of a majority interest of the current limited partners and that of the current general partner.[49] Given that no general partner existed at the time of the appointment, Great Southwest argued no valid admission could have been made.[50]

The Fourteenth Houston Court of Appeals disagreed with Great Southwest's contention, instead construing the partnership agreement as a whole.[51] The court reasoned that the partnership agreement undeniably stated that "limited partners owning at least 75% of the limited partners' interest can . . . remove the general partner with or without cause" and can appoint a successor general partner.[52] As Jun's limited partnership interest exceeded this threshold, her actions were valid under the partnership agreement.[53] The court of appeals supported this interpretation by noting that specific provisions (including the threshold amount of interests described above) should control over broad concepts in the agreement.[54] As in *Energy Transfer*, mindful counsel will take away a drafting lesson from *Great Southwest* and be careful to ensure the client can rely on specific clauses of a partnership agreement, especially where such clauses may conflict with more general provisions.

IV. PERSONAL JURISDICTION

Hanschen v. Hanschen[55] is a cautionary tale regarding the necessity of careful wording—not only in a petition, but also in the accompanying citation of service. James Hanschen served as trustee of the Vier Sohne Progeny Trust (the Trust), which served as manager of NBR-C2, LLC and NBR-C3, LLC (collectively, NBR-C), and as general partner of NBR-Needham 2 Partnership (NBR-N, and collectively with NBR-C, the Companies).[56] James's relatives, David Hanschen, Michael Hanschen, and

47. *Id.* Having been rebuffed in the attempt to regain her initial $500,000 investment, Jun, as the 99% interest holder and sole limited partner of ACSWD, wrested control of the organization from Great Southwest and pressed on with the lawsuit in ACSWD's capacity after bowing out as a litigant in her personal capacity. *See id.*
48. *Id.* at *6.
49. *Id.* at *8.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.* at *9.
55. No. 05-19-01134-CV, 2020 WL 2764629, at *1 (Tex. App.—Dallas May 28, 2020, no pet.) (mem. op.).
56. *See id.*

Ryan Hanschen (collectively, the Family), brought suit against James for misapplication of funds and failure to provide an accounting in regards to both the Trust and the Companies.[57] The Family also sought punitive damages against James for breach of fiduciary duties in each of the above-referenced actions.[58]

On March 29, 2019, while attending a meeting in Texas related to the Trust, James was personally served with the Family's petition and citation.[59] The petition was comprehensively styled "James Hanschen, individually and in his capacity as the trustee of the Vier Sohne Progeny Trust, former manager of NBR-C2, LLC and NBR-C3 LLC, and former general partner of NBR-Needham 2 Partnership."[60] However, the accompanying citation of service merely stated it was directed towards "James Hanschen wherever he may be found."[61]

After being served with the petition and citation, James failed to respond by the answer deadline as required by Texas Rule of Civil Procedure 99(b).[62] On May 24, 2019, the trial court granted the Family's motion for default judgment, entered against James in both his individual capacity and in his capacity as a representative of the Trust and the Companies, respectively.[63] Nearly a month after the entry of default, James made a special appearance to request the default be set aside and a new trial be granted.[64] The trial court granted James's special appearance and the Family appealed.[65]

In evaluating the Family's appeal to reverse the trial court's decision to grant James's special appearance, the Fifth Dallas Court of Appeals looked first to the adequacy of service on James in his individual capacity and then to the adequacy of service on him in his representative capacities.[66]

Citing the U.S. Supreme Court, the appellate court referenced the nation's time-honored tradition of recognizing a defendant's physical presence as a sole basis for personal jurisdiction.[67] James did not contest the fact that he was personally served, preferring to sidestep the issue entirely by asserting that no cause of action was brought against him in his personal capacity.[68] The court was not persuaded—choosing instead to view

57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.* at *3 n.4.
61. *Id.* at *3.
62. *Id.* at *1 Texas Rule of Civil Procedure 99(b) requires a "defendant to file a written answer to the plaintiff's petition on or before 10:00 a.m. on the Monday next after the expiration of twenty days after the date of service thereof." Tex. R. Civ. P. 99(b).
63. *Hanschen*, 2020 WL 2764629, at *1.
64. *See id.* A special appearance is an initial filing by a defendant challenging the court's jurisdiction and is required to be made before any other pleadings or motions. Tex. R. Civ. P. 120(a)(1).
65. *See Hanschen*, 2020 WL 2764629, at *1.
66. *Id.* at *2–3.
67. *Id.* at *2 (citing Burnham v. Super. Ct. of Cal., 495 U.S. 604, 619 (1990)).
68. *Id.*

the allegations for breach of fiduciary duty through the lens of tort law, it posited "Texas' longstanding rule that a corporate agent is personally liable for his own fraudulent or tortious acts."[69]

Having made short work of the first issue, the court next turned to the issue of representative capacity, where it took a more nuanced approach. Acknowledging the adequacy of the petition, the court demurred as to the citation, taking aim at both its substance and the return of service memorializing its delivery.[70] First, the court reasoned that the petition and citation require direct parity—if the petition is styled against an individual in his personal capacity and his representative capacity, then the citation should reflect the same.[71] Second, the court took issue with the return of service that mirrored the citation in stating simply that service was accomplished on "James Hanschen" without regard to his representative capacities on behalf of the Trust and the Companies.[72] The court was exacting in its application of the Texas Rules of Civil Procedure regarding such service, logically concluding that any fault in service of process defeats a court's personal jurisdiction and thus voids any subsequent default judgment.[73] In justifying this harsh result, the court cited long-settled Texas precedent that "actions taken by an individual in a representative capacity are separate and distinct from actions taken in an individual's personal capacity."[74]

Proper service of process is a crucial element to "traditional notions of fair play and substantial justice."[75] The rules governing this element of due process are succinct, and Texas courts are unforgiving of even the slightest deviations. Practitioners would be well advised to pay careful attention during the opening salvo of litigation and be fastidious in their drafting of both the petition and the citation of service.

V. FORFEITURE AND INVOLUNTARY TERMINATION

Breakwater Advanced Manufacturing, LLC v. East Texas Machine Works, Inc.[76] ruminates on the varying personal liability implications for members of a limited liability company whose charter is forfeited in various jurisdictions—and on the importance of clearly and conclusively establishing the date of such forfeiture for the Twelfth Tyler Court of Appeals's benefit.

This case centers on a payment dispute for machining services provided by East Texas Machine Works, Inc. (ETM) to Breakwater Advanced

69. *Id.* (citing Miller v. Keyser, 90 S.W.3d 712, 717 (Tex. 2002)).
70. *Id.* at *3.
71. *See id.*
72. *Id.*
73. *Id.*; *see* Tex. R. Civ. P. 106(a); Lytle v. Cunningham, 261 S.W.3d 837, 840 (Tex. App.—Dallas 2008, no pet.).
74. *Hanschen*, 2020 WL 2764629, at *3 (citing Stauffer v. Nicholson, 438 S.W.3d 205, 212 (Tex. App.—Dallas 2014, no pet.)).
75. *See id.* at *2 (quoting Burnham v. Super. Ct. of Cal., 495 U.S. 604, 619 (1990)).
76. No. 12-19-00013-CV, 2020 WL 827139, at *1 (Tex. App.—Tyler Feb. 19, 2020, pet. denied) (mem. op.).

Manufacturing, LLC (Breakwater).[77] The key facts of the case are: (1) ETM provided machining services to Breakwater in December 2015 and January 2016;[78] (2) invoices for those services, totaling $31,800.00, were timely sent by ETM to Breakwater and clearly set forth payment terms of net thirty days, subject to accrual of interest at the maximum legal rate if not timely paid within that time;[79] (3) Breakwater eventually paid the $31,800.00 during the pendency of the suit, but not the accrued interest;[80] (4) Breakwater's corporate charter was forfeited in January 2017;[81] and (5) at the time of such forfeiture, Mark Leach, Bryan Benoit, and Greg David were each shareholders of Breakwater.[82]

ETM brought suit on an account[83] and for breach of contract to which Breakwater filed a general denial and sought reimbursement for attorney's fees and litigation costs.[84] Among ETM's allegations were that Leach, Benoit, and David were each individually liable for damages pursuant to § 171.255 of the Texas Tax Code, "based upon [Breakwater's] continued failure to file a franchise tax return in May 2016 and pay taxes which were incurred and due for the tax year 2015."[85] In support of this assertion, ETM attached a notice of forfeiture from the Texas secretary of state effective as of January 27, 2017, setting forth the following findings:

> 1. The [s]ecretary has received certification from the [c]omptroller of [p]ublic [a]ccounts under Section 171.302 of the Texas Tax Code indicating that there are grounds for the forfeiture of the taxable entity's charter, certificate or registration; and
> 2. The comptroller of [p]ublic [a]ccounts has determined that the taxable entity has not revived its forfeited privileges within 120 days after the date that the privileges were forfeited.[86]

Lastly, ETM also included a public information report showing each of Leach, Benoit, and David as members of Breakwater for the 2015 reporting year.[87]

After the parties were unsuccessful in reaching a settlement agreement, Breakwater filed both traditional and no evidence motions for summary judgment.[88] ETM responded to the motions and subsequently filed its own motion for summary judgment which the trial court granted, award-

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77. *Id.*
78. *Id.*
79. *Id.* at *1–2. (noting that appellants "failed to file a verified denial pursuant to Rule 93 of the rules of civil procedure as required to dispute the receipt of the services or correctness of the charges in a suit on a sworn account.").
80. *Id.* at *1.
81. *Id.* at *2.
82. *See id.*
83. Sometimes referred to as a "suit on sworn account," this is a procedural tool under Texas Rule of Civil Procedure 185 for establishing a plaintiff's prima facie right of recovery on certain types of accounts, such as the one in this case. Tex. R. Civ. P. 185.
84. *Breakwater*, 2020 WL 827139, at *1.
85. *Id.* at *7.
86. *Id.* at *7–8.
87. *Id.* at *8.
88. *Id.* at *1.

ing $1,895.63 in interest and $12,000.00 in attorney's fees jointly and severally against Breakwater and each of its shareholders.[89] The instant appeal followed, contesting, among other things, the individual liability of Leach, Benoit, and David as shareholders on the premise that there was a genuine issue of material fact as to whether Breakwater was in forfeiture status at the time the cause of action accrued.[90]

The court began its analysis with a citation to the actual words of the statute in question:

> Section 171.255 states as follows:
>
> (a) If the corporate privileges of a corporation are forfeited for the failure to file a report or pay a tax or penalty, each director or officer of the corporation is liable for each debt of the corporation that is created or incurred in this state after the date on which the report, tax, or penalty is due and before the corporate privileges are revived. The liability includes liability for any tax or penalty imposed by this chapter on the corporation that becomes due and payable after the date of the forfeiture.
>
> (b) The liability of a director or officer is in the same manner and to the same extent as if the director or officer were a partner and the corporation were a partnership.[91]

The court of appeals then noted that its sister courts are split as to the exact moment personal liability attaches in relation to the date of the forfeiture.[92] Some Texas appellate courts have held that personal liability does not attach for obligations entered into before the forfeiture actually occurs,[93] whereas others have held that such personal liability attaches at any point after the failure to file a report, or pay a tax or penalty that led to the forfeiture, but before corporate privileges are restored.[94]

Hewing closely to the literal words of the statute, the appellate court concluded that after a forfeiture occurs, personal liability becomes retroactively effective from the moment the underlying tax, report, or penalty becomes past due.[95] Despite this interpretation, the appellate court was still unwilling to uphold the trial court's summary judgment imparting personal liability because the evidence submitted by ETM did not specify the date upon which Breakwater became delinquent under its Chapter 171 obligations.[96] Because there was no such date in the record to which such personal liability could relate back to, the court concluded that a

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89. *Id.*
90. *Id.* at *7.
91. *Id.* (citing TEX. TAX CODE ANN. § 171.255(a)–(b)).
92. *See id.* at *8.
93. *Id.*; *see* Serna v. State, 877 S.W.2d 516, 519 (Tex. App.—Austin 1994, writ denied).
94. *Breakwater*, 2020 WL 827139, at *8; *see In re* Trammell, 246 S.W.3d 815, 822 (Tex. App.—Dallas 2008, no pet.); *see also* Dae Won Choe v. Chancellor, Inc., 823 S.W.2d 740, 743 (Tex. App.—Dallas 1992, no writ).
95. *Breakwater*, 2020 WL 827139, at *8 (citing TEX. TAX CODE ANN. § 171.255). In other words, while it may take the secretary of state several months to effectuate the forfeiture, it will still relate back to the underlying cause for purposes of creating personal liability of the organization's principals.
96. *Id.* at *9.

genuine issue of material fact existed on this point, and thus remanded the case back to the trial court for further consideration.[97]

Lawyers and clients alike should always be vigilant in maintaining corporate filing and tax obligations. However, lawyers also need to be aware that a failure to do so can impart personal liability to vastly different degrees based solely on the jurisdiction in which a subsequent action is brought. Depending on which side of the petition the parties sit, a careful choice of venue could create a substantial difference in any eventual recovery based on a corporate charter's forfeiture and the resultant shareholder's personal liability. Frankly, an even more important guideline is to caution clients not to allow their entities to lose their corporate charter and risk personal liability in the first place.

VI. INDEMNIFICATION

Equine Holdings, LLC v. Jacoby[98] stresses the importance of careful drafting of indemnity provisions and serves as a stark reminder that Texas courts give maximum effect to parties' freedom of contract while strictly enforcing the plain meaning of the language employed.

In December 2016, Michael Jacoby and his wife obtained a 10% interest in eQuine Holdings, LLC (eQuine), in exchange for a $100,000.00 loan to Brent Atwood, a member of eQuine.[99] The remaining interests were owned 70% by Atwood and 20% by John C. Cooley III.[100] To effectuate the transfer of such 10% interest in eQuine by Atwood to Jacoby, the members of eQuine amended its Limited Liability Company Articles of Organization, to include the following provision related to indemnification:

> The Company shall indemnify any person who was or is a party defendant or is threatened to be made a party defendant, pending or completed action, suit or proceeding, whether civil, criminal, administrative, or investigation (other than an action by or in the right of the Company) by reason of the fact that he is or was a Member of the Company, Manager, employee or agent of the Company, or is or was serving at the request of the Company, for *instant* expenses (*including attorney's fees*), judgments, fines, and amounts paid in settlement actually and reasonably incurred in connection with such action, suit or proceeding if the Members representing 81% or more of the capital interest in the Company as described in Exhibit 2 determine that he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interest of the Company . . . .[101]

97. *Id.*
98. No. 05-19-00758-CV, 2020 WL 2079183, at 1* (Tex. App.—Dallas Apr. 30, 2020, pet. denied) (mem. op.).
99. *Id.*
100. *Id.* at *5.
101. *Id.* at *2 (first emphasis added).

Jacoby thereafter served as eQuine's chief operating officer "evaluating private-equity opportunities and soliciting new investors for the company."[102]

Within a year, eQuine, Atwood, and Jacoby became defendants in a suit by Thomas Schmidt for, *inter alia*, defamation and misappropriation of trade secrets.[103] Of particular import, the action against Jacoby was styled in his capacity "as an employee, affiliate, or partner of eQuine."[104] EQuine's members approved and subsequently paid Atwood's and Jacoby's attorney fees from October 2017 to April 2018.[105] The payments came to a halt in 2018 when Atwood, on behalf of eQuine, refused to continue paying Jacoby's attorney fees.[106] Thereafter, Jacoby provided for his own legal defense and brought an action for breach of the indemnification agreement.[107] EQuine responded with a challenge under the Texas Citizens Participation Act, an Anti-Strategic Lawsuits Against Public Participation (SLAPP) statute, but failed to deny Jacoby's pleading that he had performed all conditions precedent to the suit.[108] The trial court eventually ruled in Jacoby's favor, awarding him attorney's fees and costs.[109]

In the instant appeal, Atwood raised for the first time a challenge to the trial court's subject matter jurisdiction, arguing that Jacoby's indemnity claims were premature.[110] Taking up the issue of ripeness de novo, the Fifth Dallas Court of Appeals took note of eQuine's failure to attack Jacoby's averment that he had performed all conditions precedent to bringing suit and moved to consider the matter of jurisdiction in this light—i.e., that Jacoby had hired counsel, incurred legal expenses, and sought reimbursement.[111] Citing the Texas Supreme Court in *Ingersoll-Rand Co. v. Valero Energy Corp.*,[112] the appellate court expounded on the differences between an indemnity for liabilities versus a claim for attorney's fees.[113]

In *Ingersoll-Rand*, the supreme court explained that ordinarily "[a]n indemnification claim does not accrue until all of the indemnitee's liabili-

102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *See id.* The Anti-SLAPP statute provides a cause of action against baseless claims meant to harass or intimidate. *See id.* at *6. The Fifth Dallas Court of Appeals did not address the Anti-SLAPP statute claim here because Jacoby presented a prima facie case for each element of the breach of contract claim with clear and specific evidence which eQuine failed to contest—thus proving a valid basis for Jacoby's suit and undercutting any assertion it was brought to harass or intimidate. *See id.*
109. *Id.* at *3.
110. *Id.* Because no judgment can stand if a court does not have authority to issue it, subject matter jurisdiction can always be raised on appeal, even if the issue was not raised in a lower court. *Id.*
111. *Id.*
112. 997 S.W.2d 203, 210 (Tex. 1999) (per curiam).
113. *Equine Holdings, LLC*, 2020 WL 2079183, at *3.

ties become fixed and certain" and therefore may never come to fruition depending on the outcome of a case.[114] By comparison, attorney's fees are a foregone conclusion at the instant legal representation is retained.[115] Applying *Ingersoll-Rand*, the appellate court reasoned that the plain language of the indemnity provision provided that payment of attorney's fees was not contingent upon a specific outcome of the suit, but was instead predicated upon immediate accrual of the fees as "*instant* expenses."[116] Because Jacoby established he incurred attorney's fees, made demand for payment of such fees from eQuine, and was subsequently denied, his claim for indemnification did not rest upon a final judgment and was ripe for the court's consideration.[117]

Indemnification provisions are especially deserving of careful thought and scrupulous attention to word choice. Lawyers and their clients should be mindful of phrasing in crafting such provisions—the difference between a valid indemnity and no indemnity at all is often decided by just a few select words.

VII. TRANSFER OF A PARTNERSHIP INTEREST

Metromarke Multifamily Development Fund I, LP v. RRAC Development GP, LLC[118] further emphasizes Texas's public policy of strict interpretation of contract terms and the grave and unintended consequences that can follow from broadly drafted indemnity provisions. The dispute in this case arose over a buy-sell provision in a limited partnership agreement (the Partnership Agreement) among RRAC Development GP, LLC (RRAC) which held a one-tenth percent interest as general partner, Metromarke Multifamily Development Fund I, LP (Metromarke), which held a ninety percent interest as a limited partner, and GFD Market Rate Group I, LLC (GFD), holding the remaining interest as a limited partner.[119]

Section 13.1 of the Partnership Agreement contained the buy-sell provision at issue. The provision specified that any partner could issue a "Buy-Out Notice" to any other partner, essentially forcing that partner to choose between selling their own interest in the partnership or buying the issuing partner's interest.[120] The buy-sell provision further provided that "[t]he interest being conveyed shall be transferred free and clear [of] any and all Claims, and shall include an indemnity from the Partner conveying its interest in a form acceptable to the Partner acquiring such interest."[121]

114. *Ingersoll-Rand*, 997 S.W.2d at 210.
115. *Id.*
116. *Equine Holdings, LLC*, 2020 WL 2079183, at *3.
117. *Id.*
118. No. 05-18-00900-CV, 2019 WL 6522181, at *1 (Tex. App.—Dallas Dec. 4, 2019, no pet.) (mem. op.).
119. *Id.*
120. *Id.*
121. *Id.*

In July 2016, Metromarke filed suit against RRAC over an alleged breach of the Partnership Agreement in an attempt to remove RRAC as the general partner.[122] During the pendency of the lawsuit, Metromarke delivered a Buy-Out Notice to RRAC, and RRAC elected to purchase Metromarke's interest in the Partnership and delivered to Metromarke a proposed buy-out agreement containing an indemnity.[123] Metromarke responded to RRAC with a modified indemnity provision carving out any claims related to the lawsuit.[124] In response, RRAC and GFD filed counterclaims for breach of contract and declaratory judgment over the modified form of the indemnity agreement.[125]

After a lengthy four-day bench trial, the trial court found in favor of RRAC, awarding RRAC and GFD $2,764,555.00 in damages, ordering Metromarke to sell its interest in the partnership to RRAC for $3,311,468.01 (less any offsets from the award of damages), and requiring Metromarke to provide an accompanying indemnity to RRAC in an acceptable form.[126] Adding to the stinging judgment, the trial court further provided for a future award of attorney's fees should Metromarke file a subsequent unsuccessful appeal.[127] Despite the looming threat of increased liability, Metromarke appealed.[128]

At the trial court, RRAC argued that the Partnership Agreement's terms, when taken literally, necessitated the lawsuit being swept into the scope of the buy-sell provision's indemnity agreement.[129] On appeal, Metromarke responded by characterizing RRAC's position as a "get-out-of-jail-free card" and stressed that the intent of the disputed indemnity provision was to provide protection from competing claims of ownership in relation to "the interest being conveyed—not legal claims having nothing to do with ownership of that interest."[130]

In evaluating the parties' arguments, the Fifth Dallas Court of Appeals acknowledged a court's duty to construe contract provisions in such a way so as to effectuate the parties' intent.[131] However, it also stressed the importance of reaching that intent by looking only to the plain language and generally accepted meaning of the words those parties chose to use in crafting their agreement.[132] The court further cited precedent specific to indemnity agreements, saying that they ought to be "strictly construed,

122. *Id.*
123. *Id.*
124. *Id.* Despite the disagreement over the indemnity language, the parties did agree that the price for Metromarke's ownership interest would be $3,311,468.01. *Id.* at *2.
125. *Id.*
126. *Id.*
127. *Id.*
128. *See id.* at *1.
129. *Id.* at *2.
130. *Id.* at *3.
131. *Id.* at *2 (citing Pathfinder Oil & Gas, Inc. v. Great W. Drilling, Ltd., 574 S.W.3d 882, 888 (Tex. 2019)).
132. *Id.*

pursuant to the usual principles of contract interpretation."[133] Armed with these principles, the court turned to the four corners of the Partnership Agreement itself, pointing to the expansive definition of a "claim" which included "any and all claims, . . . suits, proceedings, actions or causes of action of any kind or character whatsoever, whether at law, in equity, by statute or otherwise, whether known, unknown, suspected or unsuspected."[134]

Thus, the court reasoned that the claims contained in the lawsuit were precisely the kind contemplated by the buy-sell provision and were directly related to the ownership interest at issue.[135] The court concluded that by the Partnership Agreement's straightforward terms, Metromarke had agreed to indemnify RRAC against every claim brought in the original lawsuit and accordingly affirmed the trial court's judgment.[136]

Just as a careful selection of words can mean the difference between a valid indemnity and no indemnity at all, the well-meaning use of over inclusive definitions can have painful ramifications. The intense fallout from the loose language used in the Partnership Agreement should be a clarion call for practitioners to be mindful of using "catch-all" boilerplate language when judicious wordsmithing would be better suited to crucial provisions like indemnities.

VIII. CONCLUSION

The body of law represented by these cases continues to articulate the basic truth of the legal profession—attention to detail remains a subtle but indispensable skill in practicing the craft. Whether applied to crucial risk-shifting agreements, foundational operating documents, or the simplest service of process citations, lawyers and clients alike cannot afford to fall victim to drowsy drafting. Texas's public policies emphasizing freedom of contract and the parties' bargained-for exchange can exact a heavy toll on careless practitioners and their clients. The world-wide events over the course of the Survey period highlight the importance of safety, carefulness, and precaution. Texas courts over the Survey period followed suit with these lessons by presenting cautionary tales in connection with careless drafting. Moving forward, counsel should continue to monitor developments in Texas partnership law to keep their edge honed.

133. *Id.* (citing E.I. Du Pont De Nemours & Co. v. Shell Oil Co., 259 S.W.3d 800, 805 (Tex. App.—Houston [1st Dist.] 2007, pet. denied)).
134. *Id.* at *3, *5 n.2.
135. *Id.* at *3.
136. *Id.* at *3, *5.